

VOLUME ONE OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

RECEIVED

JUL 26 2013

S.C. Supreme Court

JAMES IVAN AIKEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000083

A P P E N D I X

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

State of South Carolina,)
Plaintiff,)
vs.) 10-GS-10-03117
James Ivan Aiken,)
Defendant.)

TRANSCRIPT OF JURY TRIAL

The within Jury Trial was held on January 18-19, 2011, before The Honorable R. Markley Dennis, Jr. in Courtroom 3B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by counsel, as follows:

APPEARANCES:

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1 JANUARY 18, 2011 9:30 A.M.

2

3 (STATUTORY JURY QUALIFICATION)

4 (DEFENDANT PRESENT)

5 THE COURT: Before the jury comes in,
6 was there any offer? Any matters that we need
7 to resolve before we bring the jury up?

8 SOLICITOR SIMPSON: Yes, sir. We
9 discussed -- there wasn't an agreement but I
10 discussed with Ms. Mulvaney, offering fifteen,
11 on a first before we put it on the plea docket
12 and had the defendant transported for that. Ms.
13 Mulvaney communicated to me that that would not
14 be an acceptable offer.

15 MS. MULVANEY: I just wonder --
16 they offered it as burglary first.

17 THE COURT: I understand that. As
18 long as he understands that the State was
19 talking about a 15-year, which is the minimum
20 sentence if he's convicted, and that I can
21 sentence him up to life - just as long as he
22 understands that he's rolling the dice for that,
23 it's fine with me. I don't care, it's fine with
24 me.

25 I just believe in putting that on the

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1 record so we don't have somebody coming back
2 saying "nobody told me that I could minimize it
3 by getting fifteen years." As long as that's
4 been discussed with him, I'm fine. This is his
5 day in court, I'm great with that. That's no
6 problem.

7 DEFENDANT JAMES AIKEN: May I address
8 the court?

9 THE COURT: No, sir, you -- I'm just
10 putting this on. You can address the court on
11 any matter through your lawyer. I'd be
12 delighted for you to do that.

13 But I just want to make sure, because
14 in seventeen years, from time and time -- and
15 the lawyers that I'm looking at, I know this
16 isn't the case here but I've had people say
17 "Well, I didn't know that that was a
18 possibility."

19 And, frankly, you know, as long as they
20 understand that a burg first, fifteen is the
21 minimum, life is the maximum. The minimum is --
22 they're saying fifteen. That's a nice help. I
23 just want that to be known.

24 MS. MULVANEY: We're ready.

25 THE COURT: You're ready? Go ahead.

26 Thank you very much.

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1 We need to get word to Mike.

2 BAILIFF: Do you want the jury?

3 Want me to go down?

4 THE COURT: If you would, Mr.

5 Williams, thank you very much. We're ready
6 for them when they're ready.

7 Are there statements?

8 SOLICITOR SIMPSON: Yes, Your Honor.

9 THE COURT: Do we have a *Jackson v.*
10 *Denno* hearing?

11 SOLICITOR SIMPSON: I believe that
12 the defense will be asking for it.

13 THE COURT: All right.

14 SOLICITOR SIMPSON: I don't have any
15 objection if they want to pick the jury first.

16 THE COURT: Well, I understand that.
17 I would have been happy to come in here and hear
18 those things yesterday or last week. I could
19 have come down and heard it on Friday. Just in
20 the future, how about -- just keep that in mind.
21 I'm not talking about anybody.

22 SOLICITOR SIMPSON: Sure, I
23 understand.

24 THE COURT: But just let me do that,
25 and I can get those things out of the way and

1 get the case ready for trial.

2 SOLICITOR SIMPSON: We'll do it next
3 time.

4 THE COURT: Thank you. I appreciate
5 it. And I'm not complaining and I'm not
6 grumbling.

7 MS. MULVANEY: It could have been
8 my fault. I'm sorry.

9 THE COURT: It's no problem. It's my
10 fault, I should have asked. We'll take care of
11 it. Are the witnesses necessary for that
12 present?

13 SOLICITOR SIMPSON: Yes.

14 THE COURT: What we'll do is select
15 the jury, excuse them and we'll go ahead and
16 have that. Thank you so much. How many are we
17 bringing?

18 THE BAILIFF: Fifty.

19 THE COURT: That's good. Strikes
20 will be ten and five.

21 MS. MULVANEY: May I approach?

22 THE COURT: Sure.

23 MS. MULVANEY: Could we hold off on
24 reading the indictment until I'm going to make a
25 motion about the jury hearing about prior
26 burglaries?

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1 THE COURT: No, ma'am. That's the
2 law. You can make the motion. I'll be happy to
3 hear from you right now.

4 MS. MULVANEY: Okay.

5 THE COURT: And I agree with you.
6 Unfortunately, the Court doesn't agree with us.

7 MS. MULVANEY: Your Honor, first,
8 my client is charged with a burg first under the
9 theory he has prior burglaries. I would like to
10 offer at this point to stipulate that if a
11 burglary occurred, that it would be a burg first
12 and is not allowed.

13 THE COURT: And that's been offered
14 and is specifically on point. I agree with you.
15 It's done in DUI cases all the time.
16 Unfortunately, the Court doesn't agree with us.
17 And they've gone into great length about it
18 because of the elements that have to be
19 established. We can't force it. So I thank
20 you. Unless you've got something - unless you
21 have a case that I -- I certainly confess that
22 I don't know them all. But unless you have one
23 that's changed that, that's pretty well defined.

24 MS. MULVANEY: Okay. Your Honor,
25 the one point that I would like to make on the
26 record is that the cases that the Solicitor

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1 cited in his motion, *James, Benton and Hamilton*,
2 the State does not offer the prior conviction as
3 proof in those cases of motive, intent,
4 identify, a common scheme or plan are absent.

5 THE COURT: It doesn't have to, I
6 don't think. It's just -- in a burg first,
7 that's one of the circumstances that justifies
8 a burglary and makes it a burg first. It is a
9 material element of the crime.

10 And what it says, I understand it. And
11 people have wanted to do it. I've wanted to do
12 it. I tell you now, I'd want to do it. I'd be
13 happy to do what you offer. I think that's
14 fair. I think it's one of the areas that I
15 really think, unfortunately, it's a bad thing
16 for the defendant -- persons who are presumed
17 to be innocent. But the bottom line is it's the
18 law in this state. And as I told that jury,
19 notwithstanding my personal opinions about it, I
20 will to do it. I think it's the law.

21 I'm sure Mr. Simpson, he's an officer
22 of the Court, he's cited it. I'm not aware of
23 any decision that's changed it. It's well
24 defined in the case law. It's not confusing.
25 It's not ambiguous. It's specific, as I
26 understand it.

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1 Mr. Simpson?

2 SOLICITOR SIMPSON: That's what we
3 understand as well. I just want to point out
4 that there are, of course, some limitations.
5 That's stepping over the line, and that's not
6 talking about any of the details of the prior
7 and not making any closing arguments that would
8 imply anything improper.

9 THE COURT: You have to prove --
10 I would assume in your closing argument, 'we
11 gave established two prior convictions.'

12 That's all they can say. I mean,
13 that's what they can say.

14 MS. MULVANEY: In this case my
15 understanding is that he didn't go into the
16 house with the intent to commit a crime.

17 THE COURT: That's fine. That goes
18 to the element of this crime itself. The Court
19 -- no question, I'll instruct it as to the law
20 in that respect.

21 MS. MULVANEY: And at the proper
22 time I may ask for a more inclusive instruction
23 on that because of my defense, because I feel
24 that allowing priors in is simply the State is
25 bootstrapping Lyle and allowing it in to show
26 acts. I wanted to put that in for the record.

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1 THE COURT: No problem. Thank you.
2 Again, I can't speak for the State and how they
3 intend to use it. But what you've just said is
4 all we're using it for is to establish the
5 elements of this crime. Therefore, it's not a
6 Lyle issue of prior bad acts. So he's not using
7 that. And I would agree with you.

8 But I just caution everybody -- I'll
9 consider any charge you want. But, you know, a
10 lot of times we think because we're thinking
11 technically that these persons who are being
12 empaneled, I'm not so sure that they necessarily
13 jump into Lyle and Allison. But you do it a lot
14 more than I and know a heck of a lot more than I
15 do about it.

16 But sometimes when we suggest 'don't
17 think about that for that reason' that creates
18 the thought in somebody's mind. I know it does
19 in children. Adults, I have said before, in
20 talking about myself, we're just sophisticated
21 children. But be that as it may, I hear you.
22 I understand what you're saying, and I'll be
23 delighted to consider any charge you want me to
24 consider. And we'll put it in -- either charge
25 it or we'll make it a part of the record.

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1 MS. MULVANEY: Thank you, Your
2 Honor.

3 THE COURT: Thank you so much. Do
4 you need me?

5 THE BAILIFF: Yes, sir.

6 (BENCH CONFERENCE WITH CLERK)

7 THE COURT: We're still working the
8 kinks out. They have to redo something. It's
9 going to be about 11:30 before they come up.

10 If you need further argument, Ms.
11 Mulvaney, please feel free to do so. Thank you.

12 MARY BETH MULVANEY: Thank you.

13 THE COURT: How long will the *Jackson*
14 *v. Denno* hearing take?

15 SOLICITOR SIMPSON: It should be
16 rather brief direct testimony, Your Honor.

17 THE COURT: Can we do it now?

18 SOLICITOR SIMPSON: Yes, sir.

19 THE COURT: Let's get started with
20 that. That'll be super.

21 You made a motion to sequester. Is
22 that correct? Any problem with that?

23 SOLICITOR SIMPSON: No objection.

24 THE COURT: Very well. All witnesses
25 will be sequestered. Of course, you're entitled

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1 to identify your chief investigator who can
2 remain; the victim, obviously has the right to
3 be present.

4 SOLICITOR SIMPSON: Thank you, Your
5 Honor. The State calls Sergeant Daquigan.

6 We'd like to identify Officer Larry
7 Duren as our chief investigator.

8 THE COURT: Thank you. That's fine.

9 MS. MULVANEY: Judge, can I just
10 ask my client's mom to step in?

11 THE COURT: Sure. Is she going to
12 testify?

13 MS. MULVANEY: No, sir.

14 THE COURT: She's welcome to stay.

15 (WITNESS TAKES STAND)

16 DONALD DAQUIGAN, being duly sworn to
17 tell the truth, the whole truth and nothing but
18 the truth, testified, as follows:

19 DIRECT EXAMINATION

20 BY SOLICITOR SIMPSON:

21 Q. Sergeant Daquigan, you work with the
22 Charleston Police Department?

23 A. Yes, sir.

24 Q. In that capacity do you recall becoming
25 involved in an investigation on January 16th,

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1 2010?

2 A. Yes, sir.

3 Q. Can you explain to the Court a little bit
4 about how you became involved and your role in
5 that investigation once you arrived on the
6 scene?

7 A. I received a call. I worked out of the
8 detective office. I received a call to go to
9 in reference to a burglary that
10 had just occurred.

11 On my way to they had
12 already stopped a suspect. I then proceeded to
13 go to the museum on John Street, which is in the
14 City of Charleston.

15 When I got there I spoke to Sergeant Smith
16 and asked him what he had and what was going on.
17 At this point he showed me a driver's license of
18 the defendant.

19 Q. I'm sorry to interrupt, Officer. But when
20 you arrived on the scene there at

21 did they already have a suspect in
22 custody?

23 A. They had a suspect in custody already on
24 John Street where the victim had pursued him
25 and on John Street is where they stopped him.

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1 Q. Okay. Was that suspect pointed out to you?

2 A. Yes.

3 Q. Was it your role to interview that suspect?

4 A. Yes, sir.

5 Q. I believe you just testified you had been
6 given the background of the case?

7 A. Yes.

8 Q. At that point?

9 A. Yes.

10 Q. What is the first thing that you discussed
11 -- first of all, is the suspect that you spoke
12 to that day present in the courtroom today?

13 A. Yes.

14 Q. And what is his name?

15 A. James Aiken. James Ivan Aiken.

16 Q. And what is the first thing you discussed
17 with Mr. Aiken prior to discussing anything
18 having to do with this case?

19 A. At first I asked him, "are you James
20 Aiken." He responded "yes."

21 I introduced myself as Sergeant Donald
22 Daquigan of the Charleston Police Department.
23 I showed him my badge and I.D. card, and at
24 that point I advised him of his *Miranda* rights.

25 Q. What rights did you advise him?

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1 A. I told him he had the right to remain
2 silent. Anything he said could be used against
3 him in a court of law. He had a right to a
4 lawyer. If you can't afford one, one will be
5 appointed for you before any questions are
6 asked, if you so desired. If he decided to
7 answer any questions at any time he could stop
8 answering questions at any time.

9 Q. You pointed out to him that he could stop
10 the interview at any time?

11 A. Yes, sir.

12 Q. You mentioned taking a look at Mr. Aiken's
13 I.D.?

14 A. Yes, sir.

15 Q. What's his date of birth?

16 A. .

17 Q. So he is a mature adult?

18 A. Yes, sir.

19 Q. Did you notice any apparent mental defect
20 when you conducted this interview?

21 A. No, sir.

22 Q. Did he appear to understand these rights as
23 you explained them to him?

24 A. Yes, sir.

25 Q. Did he decide to waive those rights and

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1 speak with you about the incident of that
2 morning?

3 A. Yes, he did.

4 Q. Any signs of intoxication at that point?

5 A. No.

6 Q. What was his attitude about speaking with
7 you at the time? Was he hesitant?

8 A. No, sir.

9 Q. Did he seem eager to speak to you about
10 what had happened that morning?

11 A. I don't know if he was eager, but he
12 responded when I asked if he wanted to tell me
13 what was going on.

14 Q. Did you make any threats to him to get him
15 to speak to you?

16 A. No, sir.

17 Q. Did you make any promises of leniency if he
18 would tell you about what happened that morning?

19 A. No, sir.

20 Q. This interview took place on the scene,
21 correct?

22 A. It took place where they had stopped him.

23 Q. In the area?

24 A. Yes.

25 Q. And what was the approximate length of the

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1 interview?

2 A. Fifteen minutes, maybe, if that long.

3 Q. Did you have to -- I know sometimes law
4 enforcement has to sort of, for lack of a better
5 term, soften up the defendant to get him to
6 talk, maybe establish rapport? It seems like a
7 pretty brief interview.

8 A. Right.

9 Q. Did you have to initially, you know, try to
10 cajole the defendant into telling you what had
11 happened that morning?

12 A. No, sir. He responded when I asked him if
13 he wanted to talk to me.

14 Q. His responses, did they strike you as -- I
15 don't know if the right word is "articulate",
16 but were they cognitive responses where he
17 seemed to understand what you were saying and
18 responding?

19 A. Yes, sir.

20 Q. Was he detailed in a vehicle or handcuffed
21 while you were speaking with him?

22 A. He was in the back of a police vehicle, and
23 he was handcuffed.

24 Q. And the approximate length of this entire
25 interview was about fifteen minutes, you said?

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1 A. Yeah, fifteen or even shorter.

2 Q. And after waiving his *Miranda* rights did
3 the defendant tell you -- admit to going into
4 the apartment of the victim?

5 A. Yes.

6 Q. Did he give you a story as to why he went
7 into that apartment?

8 A. He said he found a shoe outside the
9 residence and was going to return it.

10 Q. You asked some specific questions about his
11 version of that story, correct?

12 A. Yes, sir.

13 Q. Do you recall what those were?

14 A. I asked him before went into the house did
15 he acknowledge or try and get someone to respond
16 to him? And his answer was no.

17 I asked at that point had anybody invited
18 him into the house? And he said no.

19 At that point the questioning stopped and
20 I asked him had he ever been charged with any
21 other crimes before, and he responded yes. I
22 asked him what kind of crime, and he said
23 burglary.

24 Q. Again, his responses to your questions,
25 including your questions about waiving his

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1 Miranda rights, were lucid?

2 A. Yes, sir.

3 Q. And understandable?

4 A. Yes, sir.

5 SOLICITOR SIMPSON: The Court's
6 indulgence.

7 THE COURT: Certainly.

8 SOLICITOR SIMPSON: I have no
9 further questions of this witness.

10 THE COURT: Very well. You may cross
11 examine,

12 CROSS EXAMINATION

13 BY MS. MULVANEY:

14 Q. Investigator, please pronounce your name
15 for me.

16 A. Daquagin, Donald Daquagin.

17 Q. Daquagin.

18 A. Yes.

19 Q. Investigator Daquagin, at the time that you
20 were questioning my client, he clearly was in
21 custody, correct?

22 A. Yes.

23 Q. He was handcuffed?

24 A. Yes.

25 Q. And he was in the back of a patrol car?

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1 A. Yes, ma'am.

2 Q. He was not free to leave?

3 A. No, ma'am.

4 Q. And you read him -- you orally read him his
5 rights, correct?

6 A. Yes.

7 Q. You didn't have a *Miranda* form with you?

8 A. I did not have a written, where a suspect
9 would write a statement following the *Miranda*
10 warnings. I didn't have that.

11 Q. And you didn't have him initial after each
12 warning that he had heard it and understood it,
13 correct?

14 A. No, ma'am.

15 Q. You read him the rights, and then you
16 immediately began to question him, correct?

17 A. Yes.

18 Q. You asked him why he went in the house and
19 he responded, correct?

20 A. Yes.

21 Q. And you asked him if he had ever been
22 charged with any crimes before?

23 A. Yes.

24 MS. MULVANEY: Beg the Court's
25 indulgence.

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1 THE COURT: Certainly.

2 CROSS EXAMINATION CONTINUED

3 BY MS. MULVANEY:

4 Q. Thank you.

5 THE COURT: Redirect?

6 SOLICITOR SIMPSON: Just briefly,
7 Your Honor.

8 REDIRECT EXAMINATION

9 BY SOLICITOR SIMPSON:

10 Q. I want to ask you a question. You read him
11 his rights and immediately started questioning
12 of the defendant. Did you ask him after reading
13 the rights, "do you wish to waive those rights?"

14 A. Yes.

15 Q. And what was his response to that?

16 A. He started talking and telling me what took
17 place.

18 SOLICITOR SIMPSON: No further
19 questions.

20 THE COURT: Recross?

21 MS. MULVANEY: None.

22 THE COURT: Thank you. You may step
23 down.

24 (WITNESS EXCUSED)

25 THE COURT: Call your next witness,

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24

1 please.

2 SOLICITOR SIMPSON: The State has no
3 further witnesses relevant to the *Jackson v.*
4 *Denno* hearing.

5 THE COURT: Thank you very much, Mr.
6 Simpson. Does the defendant wish to present any
7 testimony.

8 MS. MULVANEY: He may. Could I
9 have just a minute to talk to him?

10 THE COURT: Absolutely.

11 MS. MULVANEY: (Sidebar with
12 Defendant) -- Your Honor, the defense will call
13 James Aiken.

14 THE COURT: Very well.

15 (WITNESS TAKES STAND)

16 JAMES IVAN AIKEN, being duly sworn to
17 tell the truth, the whole truth and nothing but
18 the truth, testified, as follows:

19 DIRECT EXAMINATION

20 BY MS. MULVANEY:

21 Q. Mr. Aiken, you heard the investigator who
22 just testified; correct?

23 A. Yes, ma'am.

24 Q. He testified that he read you your rights.

25 A. Yes, ma'am.

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1 Q. Did he read you your rights?

2 A. No, ma'am.

3 Q. What happened? What did he say?

4 A. While I was sitting in the back of the
5 squad car with the responding officer who
6 actually put me under arrest, he came up to the
7 car, asked me my name and say, uh, "Will you
8 talk to me for a minute?" And he asked me what
9 happened. And I told him I found a leopard shoe
10 and went attempting to turn it in to the owner.
11 And that was it. And it wasn't nowhere near
12 fifteen minutes. It wasn't even five minutes.
13 It was nowhere near fifteen minutes. That's a
14 long time.

15 Q. Did he asked you if you'd been charged with
16 other crimes before?

17 A. I cannot really say for certain. He may
18 have. He actually may have.

19 Q. And what did you respond?

20 A. I didn't tell him I had been arrested for
21 burglary. I didn't tell him that.

22 Q. So he didn't read you your rights. He just
23 simply said, "Will you talk to me?"

24 A. Yes. He came and introduced himself as an
25 investigator. I didn't remember, you know, the

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1 name that he stated but -- yeah.

2 Q. Mr. Aiken, did the investigator talk to you
3 in the car or when you were out of the car?

4 A. I was sitting in the back of the car.

5 Q. And was there another police officer
6 sitting in the front seat of the car?

7 A. I believe so. Maybe -- maybe not, because
8 at some point I was transferred from the initial
9 car I was in to the other car. And the officer
10 who had initially arrested me had left and went
11 back to the residence. So, you know, just
12 looking back now -- you know, from then to now,
13 it's hard for me to say that another officer was
14 actually in the car at that point.

15 Q. You don't remember if during the
16 questioning another officer was in the car?

17 A. I cannot say for sure because he was
18 moving, you know, back and forth.

19 Q. Do you remember if another officer was with
20 the investigator while he was questioning you?

21 A. I cannot say for sure. I really can't.
22 And I don't want to say something that's, you
23 know, untrue. I'm not here for that. But -- I
24 cannot really say for sure.

25 Q. So did the officer talk to you through the

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1 window or did he get in the back seat with you?

2 A. He stood at the window and, you know, bent
3 down and spoke to me through the window that was
4 cracked.

5 Q. And you were sitting in the back seat with
6 your hands cuffed?

7 A. Yes.

8 Q. And you spoke to him. And was the window
9 all the way down or was the window cracked?

10 A. It was just cracked.

11 Q. Thank you, Mr. Aiken.

12 A. You're welcome.

13 THE COURT: Cross examine.

14 SOLICITOR SIMPSON: Thank you, Your
15 Honor.

16 CROSS EXAMINATION

17 BY SOLICITOR SIMPSON:

18 Q. Mr. Aiken, what's your full name?

19 A. James Ivan Aiken.

20 Q. And your date of birth?

21 A.

22 Q. Forgive me. I'm not very good at math.

23 But what's your age?

24 A. Forty-five (45).

25 Q. You seem like a fairly articulate guy.

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1 What's your level of education?

2 A. I haven't been in school through past the
3 eighth grade. I have a GED.

4 Q. You have your GED?

5 A. Yes, sir.

6 Q. You said in fact the interview was not
7 fifteen minutes; it was closer to five.

8 A. Right.

9 Q. So it was a brief interview?

10 A. Yes.

11 Q. But you contend today that Sergeant
12 Daquigan did not read you your *Miranda* rights.

13 A. No, I don't recall him reading me no
14 *Mirandas*.

15 Q. Have you ever heard the *Miranda* rights
16 before?

17 A. Yes.

18 Q. Have you ever had those *Miranda* rights
19 directed toward you before?

20 A. Yes.

21 Q. Approximately how many times?

22 A. I cannot answer that question. I can give
23 you an approximation.

24 Q. Okay. No further questions.

25 THE COURT: Redirect.

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1 MS. MULVANEY: No questions.

2 THE COURT: Thank you. You may come
3 down.

4 (WITNESS STEPS DOWN)

5 THE COURT: Anything further from
6 -- Ms. Mulvaney? Anything further from the
7 defendant?

8 MS. MULVANEY: No further
9 testimony. I do have an argument.

10 THE COURT: All right. Anything in
11 reply testimony?

12 SOLICITOR SIMPSON: No, Your Honor.

13 THE COURT: Very well. I'll be happy
14 to hear from you Ms. Mulvaney.

15 MS. MULVANEY: Yes, sir. In a
16 *Jackson v. Denno* hearing, Your Honor, the burden
17 is on the State to prove by the preponderance of
18 the evidence that his rights were voluntary
19 waived. I don't think that they've proved that
20 here. *State v. Pendergrass* has held that even
21 the signing of a waiver form alone is not
22 conclusive evidence that the State has met their
23 burden. There was no waiver form. And usually
24 we have a waiver form where they sign and
25 initial and check by each right, saying that

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1 they understand it and that they've waived it.

2 In this case -- a Supreme Court case, *North*
3 *Carolina v. Butler*, 441 U.S. 369, the Supreme
4 Court has held that the waiver must be an
5 explicit waiver. And in this case it's very
6 similar -- the *Butler* case is very similar to
7 the testimony here, where there was no waiver
8 one way or the other. There was just silence
9 and then the defendant began talking.

10 And the Supreme Court held that there
11 has to be an explicit waiver of the rights. I
12 don't think that that's been established here by
13 the preponderance of the evidence, and I would
14 ask you to leave those statements out.

15 THE COURT: Okay. Solicitor.

16 SOLICITOR SIMPSON: Thank you, Your
17 Honor. *State v. Parker*, 381 S.C. 68, addresses
18 the issue of a written waiver, specifically
19 while a written waiver -- in my opinion, well
20 best practice is it's not a necessary aspect of
21 *Jackson v. Denno*.

22 What is necessary is that the State
23 proves -- and, again, I stress the standard of
24 the preponderance of the evidence, that you do
25 have some conflict of factual testimony from the

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1 officer and the defendant. But I believe the
2 testimony of the officer does certainly rise to
3 the preponderance standard for admissibility to
4 the jury.

5 Case law in South Carolina puts the
6 factors as to whether or not the statement is
7 voluntary as age and maturity. You heard from
8 Mr. Aiken he's a mature adult and a rather
9 articulate gentleman. The education of a person
10 -- and he has a GED. Any apparent mental
11 defects or intoxication at the time and the
12 officer testimony that he noted neither. No
13 physical defects are mentioned in this
14 particular case. And the officer also testified
15 that he made no threats of violence or promises
16 of leniency or cajoled the statement in any way.

17 We believe we have met our standard by
18 the preponderance of the evidence that these
19 statements that Mr. Aiken gave were free and
20 voluntary and ask that they be admitted at
21 trial, Your Honor.

22 THE COURT: Anything in reply?

23 MS. MULVANEY: No, sir.

24 THE COURT: Voluntariness, that's the
25 simple one. This is a case where the Court

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1 -- the Court has to make the determination
2 regarding *Miranda*. That's a matter of law.
3 I think clearly it's voluntary. The *Miranda*
4 warnings obviously were given based on the
5 testimony, because, in fairness to the
6 defendant, he said first he didn't and then he
7 said "I don't recall," which is not denying it.
8 He simply said "I don't remember him doing
9 that."

10 But you're talking about the totality
11 of the circumstances. You're talking about not
12 somebody who's first connection or involvement
13 with the criminal process. He clearly has two
14 prior convictions. He stated that earlier. And
15 he, by his own admission, stated he had been
16 given the *Miranda*. He knew. He wasn't in any
17 threatening situation. He was sitting in the
18 car. He could have just said nothing. There
19 was no reason for him to do that other than he
20 chose to do it.

21 It's clearly the totality. It was --
22 he understood his rights. They were given to
23 him. He understood them. He chose to make the
24 comments.

25 I think it's freely and voluntarily

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1 given. Certainly by the preponderance of the
2 evidence, I think the *Miranda* warnings were
3 given. So thank you.

4 LORI PROCTOR: Your Honor, one
5 second -- (sidebar with Ms. Mulvaney).

6 THE COURT: Sure.

7 MS. MULVANEY: Your Honor, I would
8 just ask with regards to the statements where
9 they asked my client if he had prior charges, I
10 think that that statement or that admission is
11 more prejudicial than probative, and clearly the
12 question of did he have prior charges, not prior
13 convictions. I would ask that that statement
14 not be allowed in the case in chief.

15 THE COURT: What's your position
16 that?

17 SOLICITOR SIMPSON: Unless --
18 we won't elicit that statement unless some
19 challenge might come to the prior ---

20 THE COURT: I agree with you. But
21 let's do something here. You also -- the jury
22 has to determine beyond a reasonable doubt the
23 voluntariness of it. If I hear, 'Well, he
24 didn't understand what he was doing,' then
25 that's opening -- you can't have it both ways.

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1 You can't be claiming 'I didn't know I had the
2 right to remain silent.' I agree with you, as
3 long as we don't hear any of that.

4 MS. MULVANEY: Yes, sir.

5 THE COURT: Okay?

6 SOLICITOR SIMPSON: The State is
7 fine with that.

8 THE COURT: So tell your witness not
9 to discuss anything about the prior -- I think
10 the statement issue that you really are
11 interested in is why he went in the house,
12 obviously.

13 SOLICITOR SIMPSON: Absolutely.

14 THE COURT: I mean, that's the
15 essence and that's the crux of it. And that
16 ought to be the focal point of his testimony.
17 That he examined him, gave him *Miranda* warnings
18 -- and you ought to say, "Why did he tell you
19 he went in the house?" Okay?

20 SOLICITOR SIMPSON: Understood.

21 THE COURT: Thank you. I agree with
22 you, Ms. Mulvaney.

23 MS. MULVANEY: Thank you.

24 THE COURT: With that caveat.

25 MS. MULVANEY: Yes, sir.

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1 SOLICITOR SIMPSON: We will instruct
2 our witnesses.

3 THE COURT: Very good. Thank you so
4 much.

5 MS. MULVANEY: Judge, can I put my
6 client's mother's name on the witness list, just
7 in case?

8 THE COURT: Sure.

9 MS. MULVANEY: I don't think ---

10 THE COURT: What is her name?

11 MS. MULVANEY: Cora Aiken. I don't
12 think we're going to be calling her, but just in
13 case.

14 THE COURT: Okay, Cora Aiken. Thank
15 you. Mr. Simpson, how many do you have -- prior
16 convictions, prior burglary convictions?

17 SOLICITOR SIMPSON: I'm only going
18 to use two.

19 THE COURT: That's fine. I just want
20 the case where there were seven and, no, you
21 can't do that.

22 SOLICITOR SIMPSON: It's a similar
23 situation here, but I plan on abiding by that.

24 THE COURT: Two is it. That's fine.
25 Two is the requirement.

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1 SOLICITOR SIMPSON: Yes, sir.

2 THE COURT: We're on the same page.

3 (JURY PANEL IN @ 11:55 A.M.)

4 THE COURT: Thank you so much, ladies
5 and gentlemen. I appreciate your patience. I
6 failed to mention this to you when we were
7 qualifying, but if you do have to come back for
8 any reason in the other Courts, you won't be
9 here as long as you've been here today. We
10 don't go through this qualification process but
11 once. The case specific qualification will
12 probably be less than an hour, I would think.
13 So this will be the longest that you will have
14 to endure, and I think you for your patience
15 with us.

16 The dispute that we have in which we
17 need your assistance is the dispute that's
18 framed by this document that I'm holding in my
19 hand. It's called an indictment. It's really
20 the formal charging or the charging document.
21 It is not evidence. It bring the parties here
22 and frames the dispute.

23 By this document Mr. James Ivan Aiken
24 has been accused of the crime of burglary in the
25 first degree. First, let me introduce to you

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1 Mr. Aiken. Mr. Aiken is seated at the table to
2 my left. Mr. Aiken, good morning still. Mr.
3 Aiken is standing in the middle. Thank you, Mr.
4 Aiken. You may be seated.

5 Are there any members of the jury panel
6 related by blood or marriage, have any business
7 dealings with, socially or casually acquainted
8 with, have any connection with Mr. Aiken? If
9 so, please stand. (No response).

10 Thank you. There are none.

11 Mr. Aiken is represent in this matter
12 by Ms. Mulvaney. If you will identify yourself
13 and anyone that will be assisting you, please.

14 MS. MULVANEY: Good morning. My name
15 is Mary Beth Mulvaney. Assisting me in trial
16 will be my colleague, Lori Proctor.

17 THE COURT: Thank you. Are there
18 any members of the jury panel related by blood
19 or marriage, have any business dealings with,
20 socially or casually acquainted with, ever been
21 represented by Ms. Mulvaney or Ms. Proctor? If
22 so, please stand. (No response).

23 Thank you. There are none.

24 Are there any members of the jury
25 panel related by blood or marriage, have any

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1 business dealings with, socially or casually
2 acquainted with, ever been represented by Mr.
3 Ashley Pennington? If so, please stand. Mr.
4 Pennington is the public defender for the Ninth
5 Judicial Circuit. He has offices in Berkeley
6 and in Charleston Counties. (No response).

7 Are there any members of the jury
8 panel related by blood or marriage, have any
9 business dealings with, socially or casually
10 acquainted with anyone employed with the Public
11 Defender's Office? If so, please stand. (No
12 response). Thank you. There are none.

13 The State of South Carolina, of
14 course, is represented by our Solicitor
15 Scarlett Wilson. Are there any members of the
16 jury panel related by blood or marriage, have
17 any business dealings with, socially or
18 casually acquainted with or ever been
19 represented by Ms. Wilson? If so, please
20 stand. (No response). Thank you.

21 Ms. Wilson has as one of her Assistant
22 Solicitors Mr. Simpson who will be representing
23 the State in this case. Mr. Simpson, if you
24 will identify yourself and anyone who will be
25 assisting you, sir.

1 SOLICITOR SIMPSON: Thank you, Your
2 Honor. My name is Chad Simpson. I'm an
3 Assistant Solicitor for the Ninth Judicial
4 Circuit. Assisting me in this case will be
5 Michael Nelson, also an Assistant Solicitor.

6 THE COURT: Thank you. Are there
7 any members of the jury panel related by blood
8 or marriage, have any business dealings with,
9 socially or casually acquainted with, ever been
10 represented by Mr. Simpson or Mr. Nelson? If
11 so, please stand. (No response). Thank you.
12 There are none.

13 Is there any member of the jury panel
14 related by blood or marriage, have any business
15 dealings with, socially or casually acquainted
16 with anyone who is employed with the
17 Solicitor's Office? And she has offices in
18 Berkeley and in Charleston Counties. If so,
19 please stand. (No response).

20 Thank you. There are none.

21 I'm going to identify a number of persons,
22 ladies and gentlemen, and if you are related by
23 blood or marriage to any of these persons, have
24 any business dealings with, socially or
25 casually acquainted with any of them you need

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1 to stand and share that information, please,
2 with the Court:

3 Michael Morrison.

4 Officer Larry Duren with the
5 Charleston Police Department.

6 Investigator Donald S. Daquigan also
7 with the Charleston Police Department.

8 Sarah Lippe with the Charleston County
9 Clerk of Court, or
10 Cora Aiken?

11 Any of those persons? If so, please
12 stand. Yes?

13 JUROR NUMBER 11: Juror number 11.

14 Michael Morrison is a coworker of mine at the
15 College of Charleston.

16 THE COURT: Mr. Morrison is involved
17 in this case. You presently work with him now?

18 JUROR NUMBER 11: As needed. I'm the
19 safety officer for the college.

20 THE COURT: I understand.

21 JUROR NUMBER 11: I interact with
22 him.

23 THE COURT: Out of an abundance
24 of caution, I'm going to excuse you from
25 participation in this dispute. What is your

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1 number, please?

2 JUROR NUMBER 11: Eleven.

3 THE COURT: Number 11. You are free
4 to leave. If you will call the number, please,
5 after 6:00 tonight and follow that instruction.
6 Thank you very much.

7 (JUROR NUMBER 11 EXCUSED)

8 THE COURT: Are there others? (No
9 response). Thank you. There appear to be
10 none.

11 Let me share with you, ladies and
12 gentlemen, what brings us here. Again, I
13 mention to you this is a document that's not
14 evidence. It is what it appears to be, it's a
15 piece of paper. But on this document it sets
16 forth what Mr. Aiken is accused of doing. And
17 it accuses him that in Charleston County on or
18 about January the 16th, 2010, that he did enter
19 the dwelling of Michael Morrison, located at
20 , without consent and with
21 the intent to commit a crime therein. And that
22 furthermore, in addition, the defendant had
23 been previously convicted of two burglaries in
24 violation of the Section 16-11-311 of our Code
25 of Laws which sets forth the crime of burglary

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1 in the first degree.

2 I share that with you as -- again,
3 it's not evidence -- but to ask you if any
4 member of the jury panel has heard anything,
5 read anything? Do you have any prior knowledge
6 of this dispute? If so, please stand. (No
7 response). Thank you. There appear to be
8 none.

9 Are there any members of the jury
10 panel presently or formerly involved in law
11 enforcement in any connection? If so, please
12 stand.

13 JUROR NUMBER 37: My brother-in-law
14 is Al Cannon.

15 THE COURT: Would that affect or
16 influence you in this matter?

17 JUROR NUMBER 37: No, sir.

18 THE COURT: Will you base your
19 decision on the evidence and the law, and will
20 your decision be fair to both sides?

21 JUROR NUMBER 37: Yes, sir.

22 THE COURT: Thank you. Your name
23 and number, please?

24 JUROR NUMBER 37: It's 37, Sheryl
25 Cannon.

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1 THE COURT: Thank you. Yes, ma'am?

2 JUROR NUMBER 104: My number is
3 104. My name is Diane Gilcrest. I'm employed
4 with the Charleston County Sheriff's Office as
5 a corrections officer.

6 THE COURT: Right. Out of an
7 abundance of caution, I'm going to excuse you
8 from participation in this dispute. I
9 appreciate it. Maybe they'll call you on a
10 civil case. But I'm going to excuse you from
11 this. And your number again?

12 JUROR NUMBER 104: My number is 104.

13 THE COURT: Number 104. If you'll
14 call the number after 6:00 tonight, please.

15 JUROR: Thank you, sir.

16 THE COURT: Thank you.

17 (JUROR NUMBER 104 EXCUSED)

18 THE COURT: Yes, sir?

19 JUROR NUMBER 189: I'm with the U. S.
20 Customs Service.

21 THE COURT: Would that affect or
22 influence you in this dispute, sir?

23 JUROR NUMBER 189: No, sir.

24 THE COURT: Will you apply your
25 knowledge and life experience fairly and

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1 impartially in analyzing the evidence?

2 JUROR NUMBER 189: Yes, sir.

3 THE COURT: Will your decision be
4 based on the evidence and the law, and will it
5 be fair to both sides?

6 JUROR NUMBER 189: Yes, sir.

7 THE COURT: And your number again?

8 JUROR NUMBER 189: 189.

9 THE COURT: Thank you, sir. You may
10 be seated. Are there others? (No response).
11 Thank you. There appear to be none.

12 Is there anything about the nature of
13 this dispute, ladies and gentlemen -- someone
14 being accused of burglary first, that you,
15 because of something that may have happened to
16 you or a close family member or personal friend
17 or some philosophy you have, some strong
18 feelings you have, that would affect in any way
19 your ability to fairly and impartially analyze
20 the evidence, decide what you believe to be the
21 true facts and then take the law and apply that
22 law fairly and impartially to those facts? If
23 you feel there is something, please stand. (No
24 response). Thank you. There appear to be none.

25 Are there any members of the jury

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1 panel or members of your immediate family that
2 have ever been involved in any way as a victim,
3 alleged victim, a witness or accused of
4 committing a crime involving entering a home,
5 home invasion, burglary or any similar crime?
6 If so, please stand. (Jurors Stand)

7 I would ask those persons to come
8 forward. The attorneys may approach as well.

9 BAILIFF: Juror number 242, Your
10 Honor.

11 THE COURT: 242.

12 SIDEBAR:

13 THE COURT: Good morning. Your
14 name, please?

15 JUROR NUMBER 242: Charlene
16 Smalls.

17 THE COURT: What was your
18 involvement, Ms. Smalls?

19 JUROR NUMBER 242: I have had
20 my home burglarized by a neighbor.

21 THE COURT: Would that affect
22 you in this dispute?

23 JUROR NUMBER 242: Probably
24 not.

25 THE COURT: Well, will you be

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1 able to make a commitment to the State and to
2 Mr. Aiken that it would not influence you in
3 any way?

4 JUROR NUMBER 242: I can.

5 THE COURT: And you would base
6 your decision on the evidence and the law?

7 JUROR NUMBER 242: Yes.

8 THE COURT: And that decision
9 would be fair to both sides?

10 JUROR NUMBER 242: Yes.

11 THE COURT: Were you involved
12 -- was that case prosecuted by this solicitor's
13 office?

14 THE COURT: It was not. So you
15 had no involvement with this solicitor's
16 office?

17 JUROR NUMBER 242: No.

18 THE COURT: Okay. Any
19 additional questions from the State?

20 SOLICITOR SIMPSON: No, sir.

21 THE COURT: Any additional
22 questions from the defense?

23 MARY BETH MULVANEY: No, sir.

24 THE COURT: Thank you, ma'am.

25 . (SIDEBAR CONCLUDED)

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1 THE COURT: Number 242 may take her
2 seat. She will remain.

3 BAILIFF: Juror number 223, Your
4 Honor.

5 SIDEBAR:

6 THE COURT: Hi. Your name,
7 please?

8 JUROR NUMBER 223: Paula
9 Richnafsky. It was a home invasion, about two
10 years ago, where we were robbed.

11 THE COURT: Would that affect
12 you in any way in this dispute?

13 JUROR NUMBER 223: No.

14 THE COURT: Will you be able to
15 make the commitment that you would not be
16 influenced by that one way or the other, to
17 both sides?

18 JUROR NUMBER 223: Yes.

19 THE COURT: And you will base
20 your decision on the evidence and the law and
21 be fair to both sides?

22 JUROR NUMBER 223: Yes.

23 THE COURT: Any additional
24 questions?

25 MARY BETH MULVANEY: No, sir.

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1 SOLICITOR SIMPSON: No, Your
2 Honor.
3 THE COURT: Thank you.
4 (SIDEBAR CONCLUDED)
5 THE COURT: Number 223 will remain.
6 BAILIFF: Juror Number 1, Your Honor.
7 SIDEBAR:
8 THE COURT: Good morning. Your
9 name, please?
10 JUROR NUMBER 1: Oneil
11 Abercrombie.
12 THE COURT: Yes, Ms.
13 Abercrombie. What is your situation?
14 JUROR NUMBER 1: My house was
15 burglarized twice and my grandmother's house
16 was burglarized.
17 THE COURT: Would that affect
18 or influence you in any way in this dispute?
19 JUROR NUMBER 1: No.
20 THE COURT: Will you be able to
21 make a commitment to both sides that it would
22 not influence your decision in any way?
23 JUROR NUMBER 1: Yes.
24 THE COURT: And that you would
25 base your decision on the evidence and the law,

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1 and that it would be fair to both sides?

2 JUROR NUMBER 1: Yes.

3 THE COURT: Has the solicitor's
4 office been involved in either of those
5 incidents that you have alluded?

6 JUROR NUMBER 1: No.

7 THE COURT: Any additional
8 questions, Mr. Simpson?

9 SOLICITOR SIMPSON: No, sir.

10 THE COURT: Ms. Mulvaney?

11 MARY BETH MULVANEY: No, sir.

12 THE COURT: Thank you, ma'am.

13 (SIDEBAR CONCLUDED)

14 THE COURT: Thank you, ma'am.

15 Number 1 will remain.

16 BAILIFF: Juror number 261, Your

17 Honor.

18 SIDEBAR:

19 THE COURT: Good morning.

20 JUROR NUMBER 261: Good

21 morning.

22 THE COURT: Your name?

23 JUROR NUMBER 261: Deborah

24 Taylor.

25 THE COURT: Ms. Taylor, your

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1 situation?

2 JUROR NUMBER 261: My house
3 was burglarized in 1984.

4 THE COURT: Would that affect
5 you in any way in this dispute?

6 JUROR NUMBER 261: I don't
7 believe so.

8 THE COURT: Can you make the
9 commitment to both sides that it would not
10 influence your decision in any way?

11 JUROR NUMBER 261: Yes.

12 THE COURT: And you would base
13 your decision on the evidence and the law and
14 it would be fair to both sides?

15 JUROR NUMBER 261: Yes.

16 THE COURT: In that situation,
17 was that case prosecuted by the 9th Circuit
18 Solicitor?

19 JUROR NUMBER 261: No, they
20 never found anybody?

21 THE COURT: Thank you, ma'am.
22 Any additional questions, Mr. Simpson?

23 SOLICITOR SIMPSON: No, sir.

24 THE COURT: Any additional ---

25 MARY BETH MULVANEY: No, sir.

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1 THE COURT: Thank you, ma'am,
2 you may take your seat.

3 (SIDEBAR CONCLUDED)

4 THE COURT: You may take your seat.
5 261 will remain.

6 BAILIFF: Juror number 224, Your
7 Honor.

8 SIDEBAR:

9 THE COURT: Your name, please?
10 JUROR NUMBER 224: John
11 Robertson.

12 THE COURT: Yes, sir, Mr.
13 Robertson.

14 JUROR NUMBER 224: I was
15 robbed when I was in college, with a buddy of
16 mine. I can't imagine that it would have any
17 influence on my judgment.

18 THE COURT: And you could make
19 a commitment to both sides that that would in
20 no way affect your decision?

21 JUROR NUMBER 224:
22 Absolutely.

23 THE COURT: And you would base
24 your decision on the evidence and the law and
25 would it fair to both sides?

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1 JUROR NUMBER 224: Yes, sir.

2 THE COURT: Was anybody ever
3 prosecuted for that?

4 JUROR NUMBER 224: Yes, sir.

5 THE COURT: Was that prosecuted
6 by the 9th Circuit Solicitor's Office?

7 JUROR NUMBER 224: No, it was
8 in Virginia.

9 THE COURT: Very well. Thank
10 you, sir. Any additional questions?

11 SOLICITOR SIMPSON: No, Your
12 Honor.

13 THE COURT: Any additional
14 questions?

15 MARY BETH MULVANEY: No, sir.

16 THE COURT: Thank you.

17 (SIDEBAR CONCLUDED)

18 THE COURT: Juror Number 224 will
19 remain.

20 BAILIFF: Juror Number 84, Your Honor.

21 SIDEBAR:

22 THE COURT: Good morning. Your
23 name?

24 JUROR NUMBER 84: Thomas Dupree.

25 THE COURT: Mr. Dupree, what is

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1 your situation?

2 JUROR NUMBER 84: My brother's
3 house in Mount Pleasant was broken into twenty,
4 twenty-five years ago.

5 THE COURT: Would that affect
6 you in any way?

7 JUROR NUMBER 84: No.

8 THE COURT: Were you involved
9 in the prosecution -- was there any prosecution
10 of that?

11 JUROR NUMBER 84: No, it was an
12 insurance recovery. Never caught them.

13 THE COURT: And that would not
14 influence you in any way?

15 JUROR NUMBER 84: (Negative
16 gesture).

17 THE COURT: And you would base
18 your decision on the evidence and the law and
19 be fair to both sides?

20 JUROR NUMBER 84: Absolutely.

21 THE COURT: Thank you, sir.

22 (SIDEBAR CONCLUDED)

23 THE COURT: Number 84 will remain.

24 BAILIFF: Juror Number 107, Your

25 Honor.

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1 SIDEBAR:

2 THE COURT: Your name, please?

3 JUROR NUMBER 107: Charsetta

4 Graham.

5 THE COURT: Ms. Graham, what is
6 your situation?

7 JUROR NUMBER 107: Somebody
8 broke in our house.

9 THE COURT: Has that person
10 been prosecuted?

11 JUROR NUMBER 107: Yes.

12 THE COURT: Was that prosecuted
13 by the solicitor's office here?

14 JUROR NUMBER 107: No, sir.

15 THE COURT: It was not?

16 JUROR NUMBER 107: (Negative
17 gesture).

18 THE COURT: Would that affect
19 you in any way in this dispute?

20 JUROR NUMBER 107: No, sir.

21 THE COURT: You would not be
22 influence that in any way?

23 JUROR NUMBER 107: No, sir.

24 THE COURT: You could make a
25 commitment to both sides that you would decide

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1 this case based on the evidence and the law and
2 would be fair to both sides?

3 JUROR NUMBER 107: Yes, sir.

4 THE COURT: Any additional
5 questions from the State?

6 SOLICITOR SIMPSON: No, Your
7 Honor.

8 THE COURT: From the defense?

9 MARY BETH MULVANEY: No, sir.

10 THE COURT: Thank you, ma'am.

11 (SIDEBAR CONCLUDED)

12 THE COURT: Number 107 will remain.

13 BAILIFF: Juror number 288, Your

14 Honor.

15 SIDEBAR:

16 THE COURT: What is your name?

17 JUROR NUMBER 288: George

18 Wilkins, 288.

19 THE COURT: What is your
20 situation?

21 JUROR NUMBER 288: Six years
22 old, living at my parents' house, we had some
23 people break in and steal some things, among
24 which was a dirt bike.

25 THE COURT: Would that affect

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1 you in any way in this dispute, sir?

2 JUROR NUMBER 288: No, sir.

3 THE COURT: Will you base your
4 decision on the evidence and will that decision
5 be fair to both sides?

6 JUROR NUMBER 288: Yes, sir.

7 THE COURT: And it would not be
8 influenced in any way by that situation?

9 JUROR NUMBER 288: No, sir.

10 THE COURT: Thank you, sir, you
11 may take your seat.

12 (SIDEBAR CONCLUDED)

13 THE COURT: Number 288 will remain.

14 BAILIFF: (Motions Juror forward)

15 SIDEBAR:

16 JUROR NUMBER 216: 216.

17 THE COURT: Yes, sir.

18 JUROR NUMBER 216: Gene

19 Plyler.

20 THE COURT: Yes, sir?

21 JUROR NUMBER 216: I had a
22 home burglary in 1980.

23 THE COURT: Would that -- was
24 it here?

25 JUROR NUMBER 216: In

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1 Charleston, yes.

2 THE COURT: Was it prosecuted
3 by the ---

4 JUROR NUMBER 216: No, it was
5 petty miscellaneous items.

6 THE COURT: Would that affect
7 you in any way in this dispute, sir?

8 JUROR NUMBER 216: No, sir.

9 THE COURT: And you can make a
10 commitment to both sides that it would not
11 influence your decision?

12 JUROR NUMBER 216: Yes, Your
13 Honor.

14 THE COURT: Would you base your
15 decision based on the evidence and the law, and
16 would it be fair to both sides?

17 JUROR NUMBER 216: Yes, sir.

18 THE COURT: Thank you so much,
19 you may take your seat.

20 (SIDEBAR CONCLUDED)

21 THE COURT: Number 216 will remain.

22 BAILIFF: Juror Number 117 (sic).

23 SIDEBAR:

24 JUROR NUMBER 217: Harold

25 Pratt-Thomas.

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1 THE COURT: Yes, sir.

2 JUROR NUMBER 217: I just had
3 some robberies on our street and have had
4 some cars stolen, things like that.

5 THE COURT: Would that affect
6 you in any way?

7 JUROR NUMBER 217: No.

8 THE COURT: Would you base your
9 decision based on the evidence and the law
10 in this case?

11 JUROR NUMBER 217: Yes.

12 THE COURT: Have any of those
13 been prosecuted by this office?

14 JUROR NUMBER 217: No, they
15 have not.

16 THE COURT: Thank you, sir.
17 Your number is?

18 JUROR NUMBER 217: 117.

19 COURT REPORTER: 217.

20 THE COURT: 217. Thank you.

21 (SIDEBAR CONCLUDED)

22 THE COURT: Number 217 will
23 remain. Are there any others? (No
24 response). Thank you very much.

25 Are there any members of the jury

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1 panel or members of your family that are
2 members or associated with any group, civil
3 group or other group, that is involved with any
4 part of the criminal process, such as:

5 Mothers Against Drunk Drivers, MADD,
6 People Against Rape, PAR,
7 or similar organizations. If so, please stand.
8 (No response). Thank you. There appear to be
9 none.

10 Other than those persons that have
11 just addressed the discussion about home
12 invasion, burglaries and the type and if you've
13 already spoken concerning those situations, you
14 don't have to stand again. Any other members
15 of the jury panel been a victim or been
16 involved in or accused of a crime of violence?
17 If so, please stand -- that has not already
18 addressed that? (No response). Thank you.
19 There are none.

20 Any other specific questions from the
21 State?

22 SOLICITOR SIMPSON: No, Your Honor.

23 THE COURT: Any other specific
24 questions for Mr. Aiken?

25 MS. MS. MULVANEY: No, sir.

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1 THE COURT: Thank you. Let me talk
2 with you about some basic principles of law.

3 As I mentioned to you, you will be
4 expected to take the law and apply that law
5 fairly and impartially, notwithstanding your
6 personal opinions.

7 Part of the law that I would charge
8 you would be if persons, such as Mr. Aiken here
9 today, anyone accused of committing a criminal
10 offense has absolutely no responsibility to
11 prove or disprove anything at all. Because the
12 law in this state and every state says that the
13 burden rests upon the State. They make the
14 charge. They have to prove it. And they have
15 to prove it by establishing each element of the
16 crime charged to the standard known as beyond a
17 reasonable doubt. I'll define that standard
18 for you.

19 If they fail to meet that standard as
20 to any element, then you must return a verdict
21 of not guilty.

22 On the other hand, if they convince
23 you beyond a reasonable doubt of that standard,
24 that is of each element, then you must return a
25 verdict of guilty. Why? Because the State

1 will have proven the elements of each charge.

2 Again, throughout this entire process

3 Mr. Aiken doesn't have to prove anything at

4 all, because the law places that responsibility

5 on the State, and because persons who are

6 accused of committing criminal offenses such as

7 Mr. Aiken are presumed innocent until a person

8 sitting on a jury is convinced by the evidence

9 otherwise. So you have to maintain that. It's
10 an active presumption.

11 Having said that and shared that with

12 you, is there anything about your philosophies

13 or your life experiences that would give you

14 any concern about your ability to apply that

15 law and any other principle of law that I give

16 you fairly and impartially in analyzing the

17 evidence? If so, please stand. (No response).

18 Thank you.

19 The last question is this. As I

20 mentioned to you, you will take an oath similar

21 to the oath that I take. We both promise as

22 judges that we will, at the appropriate time,

23 apply our knowledge and life experience and our

24 common sense fairly and impartially in

25 performing the task that we're assigned. Based

1 on what you've heard here today is there
2 anything that would give you any concern about
3 your ability to make that commitment to both
4 sides; that is that you would, at the
5 appropriate time, consider the evidence and the
6 testimony in this case and decide from that
7 evidence what you believe to be the true facts.
8 And once deciding those facts, taking the law
9 as I give it to you and applying that law
10 fairly and impartially to those facts.

11 If you think there's anything you've
12 heard today that would give you any concern
13 about your ability to make that commitment to
14 the Court, to the State or to Mr. Aiken, please
15 stand. (Juror stands). Thank you so much.
16 I'm sorry. I'll ask you to come forward.
17 Thank you so much. Just come on forward. The
18 attorneys may approach. Thank you.

19 SIDEBAR:

20 THE COURT: Give me your name
21 and number?

22 JUROR NUMBER 283: I am Lauri
23 White, 283. This is not a problem for me but
24 Lori Proctor is a friend and my husband is her
25 dentist, I thought maybe I should say that.

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1 THE COURT: Would that affect
2 you in any way?

3 JUROR NUMBER 283: No, sir.
4 It wouldn't affect my judgment. I was just
5 thinking that I needed to mention it.

6 THE COURT: You know what? I
7 am not trying to embarrass you but -- and I
8 won't share this with everyone, but one of the
9 reasons that I believe so strongly in this
10 system is what you've just did. It's a
11 beautiful system. Thank you for doing what
12 you've done. You've again made me feel good
13 about what I am doing. Thank you. Appreciate
14 it.

15 (SIDEBAR CONCLUDED)

16 SIDEBAR:

17 SOLICITOR SIMPSON: Your
18 Honor, I think I see someone in the panel who
19 is friends is Stephanie Lindler of our office.
20 I've never met them but -- I just thought that
21 I have a duty to tell you.

22 THE COURT: Do you know their
23 number?

24 SOLICITOR SIMPSON: No, I
25 don't know them.

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1 (SIDEBAR CONCLUDED)

2 THE COURT: Is any member of the
3 jury panel related by blood or marriage, have
4 any business dealings with, socially or
5 casually acquainted with Assistant Solicitor
6 Stephanie Lindler? If so, please stand. (No
7 response). Thank you, there are none.

8 Thank you all. I won't share with you
9 but this juror that came forward did something
10 that I really have to share, because it points
11 out why I believe so strongly in the system.
12 She had a concern and she wanted to make that
13 known to all of us. Now, I see that happen a
14 lot and I credit you. Because that's exactly
15 what jurors do. They take this job seriously.
16 I thank you for it. That's why I say it's an
17 honor to serve with each of you. I mean that
18 sincerely.

19 What's going to happen now is your
20 names are going to be called one at a time and
21 you'll need to bring with you your personal
22 effects. Mr. Callahan will tell you that you
23 can come and talk at the podium here. One day
24 y'all can explain to me, those of you that were
25 involved in the design, tell me why you would

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1 put something stationary here when the witness
2 chair is there. I haven't figured that one
3 out.

4 But you'll need to come stand at this
5 podium and face as I'm facing. First, the
6 State will have an opportunity and they will
7 say -- each side can excuse persons, and that's
8 the process. The State can excuse five and Mr.
9 Aiken can excuse ten. And in this case we'll
10 go through the process until we seat twelve
11 jurors and one alternate.

12 And if the State says "seat the juror
13 or swear the juror," then we'll go to Mr.
14 Aiken. If Ms. Mulvaney will say "seat the
15 juror or swear the juror." And we'll do that
16 until we get our jury box filled.

17 So bear with them. Understand that if
18 somebody excuses you, don't read anything into
19 that. That's just the process. It doesn't
20 mean anything, just that they are excusing you
21 and you may be seated.

22 Thank you very much. Mr. Callahan, I
23 turn it over to you.

24 CLERK: Ladies and gentlemen of the
25 jury panel, like Judge Dennis, if I call your

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1 name if you would gather your belongings and
2 come up to the podium and turn and face the
3 parties:

4 Juror Number 84, Thomas Dupree.

5 (JUROR BEFORE COUNSEL)

6 CLERK: What say you for the State?

7 SOLICITOR SIMPSON: Please seat the
8 juror.

9 CLERK: What say you for the
10 defendant?

11 MS. MS. MULVANEY: Please excuse
12 the juror.

13 CLERK: Mr. Dupree, please have a
14 seat back in the audience. You have been
15 excused from the trial of this case.

16 (JUROR NUMBER 84 EXCUSED)

17 CLERK: Juror Number 24, Michael
18 Brown. Twenty-four.

19 (JUROR BEFORE COUNSEL)

20 CLERK: What say you for the State?

21 SOLICITOR SIMPSON: Please excuse
22 this juror.

23 CLERK: Mr. Brown, please have a
24 seat back in the audience. You have been
25 excused from the trial of this case.

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1 (JUROR NUMBER 24 EXCUSED)

2 CLERK: Juror Number 14, Wallis

3 Berry.

4 (JUROR BEFORE COUNSEL)

5 CLERK: What say you for the State?

6 SOLICITOR SIMPSON: Please seat

7 this juror.

8 CLERK: What say you for the

9 defendant?

10 MS. MULVANEY: Beg the Court's

11 indulgence, (sidebar with defendant and co-

12 counsel).

13 THE COURT: Take your time.

14 MS. MULVANEY: Please excuse Mr.

15 Berry.

16 CLERK: Please have a seat back in

17 the audience. You have been excused from the

18 trial in this case.

19 (JUROR NUMBER 14 EXCUSED)

20 CLERK: Juror Number 135, David

21 Impson.

22 (JUROR BEFORE COUNSEL)

23 CLERK: What say you for the State?

24 SOLICITOR SIMPSON: Excuse this

25 juror.

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1 CLERK: Mr. Impson, please have a
2 seat back in the audience. You have been
3 excused from the trial in this case.

4 (JUROR NUMBER 135 EXCUSED)

5 CLERK: Juror number 294, Jonathan
6 Windmuller.

7 (JUROR BEFORE COUNSEL)

8 CLERK: What say you for the State?

9 SOLICITOR SIMPSON: Seat this
10 juror.

11 CLERK: What say you for the
12 defendant?

13 MS. MULVANEY: Please seat the
14 juror.

15 CLERK: Mr. Windmuller, please have
16 a seat in the jury box. You have been selected
17 as a juror in this case.

18 (JUROR NUMBER 294 SEATED)

19 CLERK: Juror Number 27, Jane
20 Bryant.

21 (JUROR BEFORE COUNSEL)

22 CLERK: What say you for the State?

23 SOLICITOR SIMPSON: Please seat the
24 juror.

25 CLERK: What say you for the

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1 defendant?

2 MS. MULVANEY: Please seat Ms.
3 Bryant.

4 CLERK: Ms. Bryant, please have a
5 seat in the jury box. You have been selected
6 as a juror in this case.

7 (JUROR NUMBER 27 SEATED)

8 CLERK: Juror number 70, Garland
9 Denson.

10 (JUROR BEFORE COUNSEL)

11 CLERK: What say you for the State?

12 SOLICITOR SIMPSON: Please seat the
13 juror.

14 CLERK: What say you for the
15 defendant?

16 MS. MULVANEY: Please seat Mr.
17 Denson.

18 CLERK: Mr. Denson, please have a
19 seat in the jury box. You have been selected
20 as a juror in this case.

21 (JUROR NUMBER 70 SEATED)

22 CLERK: Juror number 272, Elbert
23 Waden.

24 (JUROR BEFORE COUNSEL)

25 CLERK: What say you for the State?

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1 SOLICITOR SIMPSON: Beg the Court's
2 indulgence.

3 THE COURT: Take your time.

4 SOLICITOR SIMPSON: Please seat the
5 juror.

6 CLERK: What say you for the
7 defendant?

8 MS. MULVANEY: Please seat Mr.
9 Waden.

10 CLERK: Mr. Waden, please have a
11 seat in the jury box. You have been selected..
12 as a juror in this case.

13 (JUROR NUMBER 272 SEATED)

14 CLERK: Juror number 181, Katherine
15 Miller.

16 (JUROR BEFORE COUNSEL)

17 CLERK: What say you for the State?

18 SOLICITOR SIMPSON: Seat the juror.

19 CLERK: What say you for the
20 defendant?

21 MS. MULVANEY: One moment, please,
22 (sidebar with defendant and co-counsel).

23 THE COURT: Yes.

24 MS. MULVANEY: Please excuse Ms.
25 Miller.

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1 CLERK: Ms. Miller, please have a
2 seat back in the audience. You have been
3 excused from the trial in this case.

4 (JUROR NUMBER 181 EXCUSED)

5 CLERK: Juror Number 167, Phillip
6 Macchia.

7 (JUROR BEFORE COUNSEL)

8 CLERK: What say you for the State?

9 SOLICITOR SIMPSON: Please seat
10 this juror.

11 CLERK: What say you for the
12 defendant?

13 MS. MULVANEY: Please seat Mr.
14 Macchia.

15 CLERK: Mr. Macchia, please have a
16 seat in the jury box. You have been selected
17 as a juror in this case.

18 (JUROR NUMBER 167 SEATED)

19 CLERK: Juror Number 261, Deborah
20 Taylor.

21 (JUROR BEFORE COUNSEL)

22 CLERK: What say you for the State?

23 SOLICITOR SIMPSON: Please seat
24 this juror.

25 CLERK: What say you for the

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1 defendant?

2 MS. MULVANEY: Please excuse the
3 juror.

4 CLERK: Ms. Taylor, please have a
5 seat back in the audience. You have been
6 excused from the trial in this case.

7 (JUROR NUMBER 261 EXCUSED)

8 CLERK: Juror number 119, Erica
9 Hanesworth.

10 (JUROR BEFORE COUNSEL)

11 CLERK: What say you for the State?

12 SOLICITOR SIMPSON: Please seat the
13 juror.

14 CLERK: What say you for the
15 defendant?

16 MS. MULVANEY: Please seat Ms.
17 Hanesworth.

18 CLERK: Ms. Hanesworth, please have
19 a seat in the jury box. You have been selected
20 as a juror in this case.

21 (JUROR NUMBER 119 SEATED)

22 CLERK: Juror Number 206, Victor
23 Hall.

24 (JUROR BEFORE COUNSEL)

25 CLERK: What say you for the State?

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1 SOLICITOR SIMPSON: Seat the juror.

2 CLERK: What say you for the

3 defendant?

4 MS. MULVANEY: Court's indulgence.

5 THE COURT: Take your time.

6 MS. MULVANEY: Please seat the

7 juror.

8 CLERK: Mr. Hall, please have a seat

9 in the jury box. You have been selected as a

10 juror in the trial of this case.

11 (JUROR NUMBER 206 SEATED)

12 CLERK: Juror Number 218, Jamelle

13 Reeves.

14 (JUROR BEFORE COUNSEL)

15 CLERK: What say you for the State?

16 SOLICITOR SIMPSON: Excuse this

17 juror.

18 CLERK: Ms. Reeves, please have a

19 seat back in the audience. You've been excused

20 from the trial of this case.

21 (JUROR NUMBER 218 EXCUSED)

22 CLERK: That is two strikes for the

23 State.

24 JUROR NUMBER 283, Laurie White.

25 (JUROR BEFORE COUNSEL)

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1 CLERK: What say you for the State?

2 SOLICITOR SIMPSON: Please seat the
3 juror.

4 CLERK: What say you for the
5 defendant?

6 MS. MULVANEY: Beg the court's
7 indulgence, (sidebar with defendant co-
8 counsel).

9 THE COURT: Take your time.

10 MARY BETH MULVANEY: Please seat Ms.
11 White.

12 CLERK: Ms. White, please have a
13 seat in the jury box. You have been selected
14 as juror in the trial of this case.

15 (JUROR NUMBER 283 SEATED)

16 CLERK: Juror Number 101, Connor
17 Gantt.

18 (JUROR BEFORE COUNSEL)

19 CLERK: What say you for the State?

20 SOLICITOR SIMPSON: Please seat the
21 juror.

22 CLERK: What say you for the
23 defendant?

24 MS. MULVANEY: Beg the Court's
25 indulgence, (sidebar with defendant and co-

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1 counsel).

2 THE COURT: Okay.

3 MS. MULVANEY: Please excuse the
4 juror.

5 CLERK: Please take your seat back
6 in the audience. You have been excused from
7 the trial of this case.

8 (JUROR NUMBER 101 EXCUSED)

9 CLERK: Juror Number 217, Harold
10 Pratt-Thomas.

11 (JUROR BEFORE COUNSEL)

12 CLERK: What say you for the State?

13 SOLICITOR SIMPSON: Seat this
14 juror.

15 CLERK: What say you for the
16 defendant?

17 MS. MULVANEY: Please excuse Mr.
18 Pratt-Thomas.

19 CLERK: Mr. Pratt-Thomas, please
20 have a seat back in the audience. You have
21 been excused from the trial in this case.

22 (JUROR NUMBER 217 EXCUSED)

23 CLERK: That's six strikes for the
24 defendant. Juror number 273, Adron Waites.

25 (JUROR BEFORE COUNSEL)

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1 CLERK: What say you for the State?

2 SOLICITOR SIMPSON: Please seat
3 this juror.

4 CLERK: What say you for the
5 defendant?

6 MS. MULVANEY: Seat Mr. Waites.

7 CLERK: Mr. Waites, please have a
8 seat in the jury box. You have been selected
9 as a juror in this case.

10 (JUROR NUMBER 273 SEATED)

11 CLERK: Juror Number 65, Christopher
12 Davis.

13 (JUROR BEFORE COUNSEL)

14 CLERK: What say you for the State?

15 SOLICITOR SIMPSON: Please excuse
16 the juror.

17 CLERK: Mr. Davis, please have a
18 seat back in the audience. You have been
19 excused from the trial in this case.

20 (JUROR NUMBER 65 EXCUSED)

21 CLERK: That's four strikes for the
22 State. Juror number 183, Sandra Mitchum.

23 (JUROR BEFORE COUNSEL)

24 CLERK: What say you for the State?

25 SOLICITOR SIMPSON: Please seat the

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1 juror.

2 CLERK: What say you for the
3 defendant?

4 MS. MULVANEY: Just one moment,
5 (sidebar with defendant and co-counsel) --
6 Please seat the juror.

7 CLERK: Please have a seat in the
8 jury box. You have been selected as a juror in
9 the trial of this case.

10 (JUROR NUMBER 183 SEATED)

11 CLERK: Juror Number 37, Sheryl
12 Cannon.

13 (JUROR BEFORE COUNSEL)

14 CLERK: What say you for the State?

15 SOLICITOR SIMPSON: Please seat
16 this juror.

17 CLERK: What say you for the
18 defendant?

19 MS. MULVANEY: Just one moment.

20 CLERK: Sure.

21 MARY BETH MULVANEY: (Sidebar with
22 defendant and co-counsel) -- please seat the
23 juror.

24 CLERK: Please have a seat in the
25 jury box. You have been selected as a juror in

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1 the trial of this case.

2 (JUROR NUMBER 37 SEATED)

3 CLERK: Juror number 270, Jeffrey
4 Toohey.

5 (JUROR BEFORE COUNSEL)

6 CLERK: What say you for the State?

7 SOLICITOR SIMPSON: Seat the juror.

8 CLERK: What say you for the
9 defendant?

10 MS. MULVANEY: One moment,
11 (sidebar with defendant and co-counsel).
12 Please seat Mr. Toohey.

13 CLERK: Please have a seat in the
14 jury box. You have been selected as a juror in
15 the trial of this case.

16 (JUROR NUMBER 270 SEATED)

17 THE COURT: One alternate. Strikes
18 will be one and two.

19 CLERK: Juror Number 184, Matthew
20 Montgomery.

21 (JUROR BEFORE COUNSEL)

22 CLERK: What says the State?

23 SOLICITOR SIMPSON: Please seat the
24 juror.

25 CLERK: What say you for the

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1 defendant?

2 MARY BETH MULVANEY: Please seat Mr.
3 Montgomery.

4 CLERK: Mr. Montgomery, please have
5 a seat in the jury box. You've been selected
6 as a juror in this seat.

7 (JUROR NUMBER 184 SEATED)

8 CLERK: Your Honor, the jury has
9 been seated and are seated.

10 THE COURT: Thank you so much.
11 Are there any Motions from the State regarding
12 the selection process?

13 SOLICITOR SIMPSON: None from the
14 State.

15 THE COURT: Any Motions from Mr.
16 Aiken regarding the selection process?

17 MARY BETH MULVANEY: If I could have
18 just one moment?

19 THE COURT: Certainly.

20 MARY BETH MULVANEY: {Sidebar with
21 defendant and co-counsel}, -- no, sir. No
22 Motions.

23 THE COURT: Thank you very much.
24 Ladies and Gentlemen, those of you that were
25 not selected, Thank you for your patience. You

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1 are now free to leave. Please call the number
2 after 6:00 and just follow that instruction.

3 As I mentioned to you, this will be
4 the only case that I will be trying, so I won't
5 have an opportunity to see you again. Thank
6 you for your assistance. It's been a pleasure
7 to work with you. Good luck to each one of
8 you. You are free to leave.

9 (JURY PANEL EXCUSED)

10 THE COURT: Ladies and Gentlemen,
11 those of you that were selected, thank you very
12 much. It's been a pleasure to work with you.
13 We are going to work a little bit more
14 together.

15 It's now lunchtime. Rather than go
16 ahead and start, I think we will take our break
17 for lunch.

18 Please understand that you've of
19 course heard no evidence in this process. When
20 you come back, return, you will make a
21 commitment to the court, to the parties and
22 their attorneys that you will base your
23 decision, as I have stated, on the evidence.
24 Of course, that's what you hear in this
25 courtroom. It is therefore very important that

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1 you now discuss this case with anyone outside
2 of this courtroom or permit anyone to talk with
3 you about this case.

4 You also are not at liberty to conduct
5 any independent investigation on your own
6 behalf. One of things that we have found out -
7 - and I love it, it's a great information age
8 in which we live. We have phones now that can
9 get on the internet, we can do all sorts of
10 things.

11 And I often wonder whether telling
12 someone not to do something -- I know with my
13 children, and maybe you've raised children,
14 too. You kind of debate whether to tell them
15 not to do something, because that generally is
16 just what they want to do.

17 But I must caution you not to do any
18 independent research on your own, either while
19 at lunch or tonight. Because if you do, it
20 will basically negate what we do. And there's
21 nothing wrong with finding out anything. After
22 you complete this case you can do whatever
23 research you want and choose. And that's fine.
24 But while you're here you've got to decide this
25 case based on what happens in this courtroom.

1 Therefore, you can't do anything outside.

2 Thank you for your patience, and thank you for
3 observing that restriction.

4 Please don't talk among yourselves.

5 I ask you to return to your jury room,
6 please, by 2:00 o'clock. They will show you --
7 when you exit, you will exit through the door
8 here to your left and they will show you where
9 you need to come. Come directly to that jury
10 room by 2:00 o'clock and we'll return you here
11 to the courtroom to resume the trial.

12 Let's talk for a moment about seating:

13 At present, Mr. Hall is seated in the chair
14 that will be occupied by someone, one of the
15 first twelve of you. The key is that any of
16 the first twelve are eligible to serve as what
17 I call the presiding juror, foreperson,
18 foreman, forelady. The statute allows me to
19 select that person or you can select the
20 presiding juror. I prefer that the jurors
21 select the presiding juror. At some point I
22 would ask that you do that. It does not have
23 to be done right away. But once you have
24 identified them, that person will occupy the
25 first chair on the first row. But until that

1 is done, any of you are free to occupy any of
2 the seats that are there, except for the two
3 seats on the end. Those seats belong to Mr.
4 Montgomery. He's the alternate.

5 And, Mr. Montgomery, that term really
6 has no meaning at this point other than the
7 fact that it eliminates you from being selected
8 as the presiding juror, and it give you two
9 seats. But at the conclusion if the first
10 twelve able to continue into the deliberative
11 process, then you will not participate in that
12 process. But since neither you nor I know the
13 status of all the jurors, please know that you
14 are very much a part of the jury while you are
15 an alternate. While you are that alternate,
16 you may occupy either of those seats.

17 The rest may occupy any seat that you
18 want. Have a great lunch. See you at 2:00.
19 Thank you.

20 (JURY OUT @ 12:45 P.M.)

21 THE COURT: Anything from the State?

22 SOLICITOR SIMPSON: No, Your Honor.

23 THE COURT: Anything from the
24 defendant before we break for lunch?

25 MS. MULVANEY: No, Your Honor.

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1 (LUNCH RECESS)

2 (DEFENDANT PRESENT)

3 SOLICITOR SIMPSON: We have agreed
4 to enter State's Exhibits 1 through 5, which is
5 photographs, without objection.

6 THE COURT: They're admitted without
7 objection?

8 MS. MULVANEY: Yes, sir.

9 (SO ENTERED AS STATE'S EXHIBITS 1 THRU 5)

10 THE COURT: Anything else?

11 SOLICITOR SIMPSON: No, sir.

12 BAILIFF: All the jury is present.

13 THE COURT: Thank you, Mr. Williams.
14 Is the State ready to proceed?

15 SOLICITOR SIMPSON: We are, Your
16 Honor.

17 THE COURT: Is the defendant ready
18 to proceed?

19 MS. MULVANEY: Yes, sir.

20 THE COURT: Thank you. Let the
21 record reflect that Mr. Aiken is present.
22 Let's bring in our jury, please.

23 (JURY IN @ 2:05 P.M.)

24 BAILIFF: The jury is present,
25 Your Honor.

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1 THE COURT: Thank you, Mr. Williams.
2 And thank you, ladies and gentlemen. I hope
3 you had a good lunch.

4 I have to ask you now to give your
5 attention, please, to Mr. Callahan as he
6 administers the juror oath.

7 CLERK: Ladies and gentlemen of the
8 jury, please stand and raise your right hands.
9 After I've given you this oath, if you accept
10 it please respond by saying "I do." Do you
11 swear or affirm that you shall well and truly
12 try and a true deliberance make between The
13 State of South Carolina and the defendant at
14 the Bar who is charged and a true verdict
15 render according to the evidence and the law,
16 so help you God?

17 (JURORS RESPOND AFFIRMATIVELY)

18 CLERK: If you have accepted this
19 oath, please have a seat.

20 (JURORS ASSUME SEATS)

21 THE COURT: Thank you, Mr. Callahan.
22 Thank you, ladies and gentlemen, very much.
23 You've now become a judge with me and now you
24 and I will resolve this dispute.

25 As we talked this morning, you, and

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1 you alone, have accepted the responsibility of
2 deciding the true facts of this dispute. And
3 by that promise you have said that you will
4 make and render your decision based on the
5 evidence and the law. You, and you alone, will
6 evaluate that evidence at the appropriate time
7 and decide what you believe.

8 And then once you decide that, you
9 will take the law as I give it to you and apply
10 it to those facts and you will honor your
11 commitment.

12 I'm confident that each one of you
13 will do that, as instructed. And please
14 remember something I said this morning.
15 There's nobody more qualified than you are.
16 You -- at the time that I tell you to begin
17 your deliberations -- and I'll tell you now as
18 I will tell you when you look at the evidence
19 and the law -- the last instruction that I give
20 to you before you leave this court room to
21 begin those deliberations is when you may
22 start. So until then please remember that you
23 are not liberty to decide this until then.

24 That's important to this process.
25 Because when you walked in just a few moments

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1 ago, I told you you were the most qualified --
2 you brought everything you were going to need.
3 You brought your common sense, your sense of
4 logic and reason. Certainly everyone expects
5 you to use that, and your life's experiences.

6 And you brought something else, if you
7 think about it -- all the questions that we
8 asked -- in fact, the last question that I
9 asked you was there anything about which
10 occurred that gives you any concern about your
11 ability to make a commitment. And each one of
12 you, by not responding, said that there was
13 nothing.

14 What did you say in addition to that?
15 You said, 'I have an open mind, that I haven't
16 decided anything about dispute. I don't know
17 anything about it, haven't made any decisions.
18 And there's nothing about what's alleged that
19 would give me any concern about my ability to
20 maintain that oath.'

21 Please understand that that's very
22 critical to performing the task which you've
23 accepted. Because, obviously, if you start
24 deciding something before we complete the
25 process, one, of course, you've violated the

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1 instruction in the law. But, two, you've
2 violated the essence of the entire process.
3 Each part is very important to the ultimate
4 goal of deciding this case and giving a fair,
5 just and reasonable verdict based on the
6 evidence and the law.

7 In just a moment the attorneys will
8 have their first opportunity to speak to you.
9 They'll speak to you twice, once before you
10 hear the evidence and then after the evidence,
11 they will come back and speak again.

12 When they speak to you the first time,
13 obviously you haven't heard any evidence but
14 they will discuss with you a broad overview of
15 the case. They may talk about some of the
16 evidence that they expect you will hear. They
17 may even discuss some legal principles with
18 you.

19 Then following those opening state-
20 ments we will move into the evidentiary
21 portion. And then after we complete the
22 evidentiary portion, they address -- they come
23 back again. And this time, unlike the first,
24 you've heard the evidence. They will discuss
25 with you the evidence that was presented and

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1 suggest reasonable inferences that you may draw
2 from that evidence.

3 I'm very confident that you will find
4 those remarks helpful and very beneficial to
5 you. And -- so give them your attention. And
6 please remember, as I've said throughout,
7 evidence consists of the testimony of witnesses
8 and exhibits that are introduced. Nothing
9 else. Their remarks, my remarks should never
10 be considered as evidence. All the evidence
11 will come from the testimony and the exhibits.
12 It is that evidence that you ultimately rely in
13 reaching your decision.

14 When we start the evidentiary portion,
15 the State will go first. There's a logical
16 reason for that. As I told you when we
17 started, you have to remember that this process
18 or this dispute is a criminal dispute. It
19 arises with the State making the accusation.
20 Because they make the accusation they, and they
21 alone, have the burden of proving the case
22 against the defendant, Mr. Aiken.

23 They have to prove all the elements
24 required of them for Burglary First to that
25 level that I mentioned, beyond a reasonable

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1 doubt.

2 We'll talk about that more when I give
3 you the charge, which is the last portion of
4 this process. But I will tell you that a
5 reasonable doubt is that doubt that would make
6 an honest, sincere, conscientious juror
7 searching for the truth in the case to hesitate
8 to act or take some action. And that's the
9 standard that you'll apply.

10 So when you get to the process of
11 deciding this case, when you get to the point
12 when I will have instructed you to begin your
13 deliberations, you will be analyzing that
14 evidence and simply asking yourself as to each
15 of those elements 'am I convinced of that
16 standard that the State has met its burden of
17 proof?'

18 If your answer is yes, then you move
19 on to the next one until you've covered all of
20 them.

21 If at any point you say, 'no, I'm not
22 convinced to that standard, it's possible or it
23 could be,' that wouldn't be enough. It would
24 have to be more than possible. It has to be
25 more than 'could be', it has to be beyond a

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1 reasonable doubt. If that is your conclusion,
2 if you're not convinced as to one or more
3 elements, then you must return a verdict of not
4 guilty. Why? Because the State will have
5 failed to meet its burden of proof.

6 In fact, that's what the verdict means
7 in this criminal dispute. Guilty means simply
8 the State met its burden of proof. Not Guilty
9 means the State did not meet its burden of
10 proof.

11 Now, throughout this entire process
12 please remember Mr. Aiken, as I told you when
13 we started, has absolutely no responsibility,
14 none, to prove, disprove or explain anything at
15 all. Because the law says that burden rests
16 with the State. And so you will never look to
17 him -- he doesn't have to prove any evidence or
18 testimony for your consideration.

19 Now, while he has no responsibility
20 to prove or disprove anything, if he does
21 choose to present some testimony for your
22 consideration you won't hear that until you've
23 heard the State's case. That's for another
24 very obvious reason. We don't want to
25 prematurely decide the case, because you need

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1 to hear all the evidence before you begin that
2 process. Please remember that throughout.

3 After the attorneys make their closing
4 arguments to you, I will then give you the
5 instruction on the law. At that time we'll
6 talk about the basic principles of law that
7 apply to this type of dispute.

8 I'll define for you the various
9 elements of burglary first. Then you will then
10 retire to consider the evidence and decide
11 whether or not the State has met its burden of
12 proof.

13 It's an honor to serve with you as
14 judges in this case. Thank you for your
15 attention to my remarks. I ask you, please,
16 to give that same attention to the attorneys
17 who will give their opening statements on
18 behalf of the parties.

19 Mr. Simpson.

20 SOLICITOR SIMPSON: Thank you, Your
21 Honor.

22 Ladies and gentlemen of the jury, good
23 afternoon. We met briefly before, I am Chad
24 Simpson. I am an assistant solicitor with the
25 9th Circuit Solicitor's Office and I represent

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1 the State of South Carolina in this trial.

2 I'd like to start by thanking you. I
3 know that probably not the first thing on your
4 list to do this week was to serve on a jury.
5 We do appreciate your personal sacrifice and
6 the inconvenience to you to decide this very
7 important matter in the courtroom.

8 Along that vein, I'll start with the
9 good news. As Judge Dennis already told you
10 during the jury qualification, and that's that
11 this will be, at least relative to some of the
12 trials that happen in this courtroom, a fairly
13 short trial. But I want to kind of caution you
14 that because it's a short trial does not mean
15 that it is not a very important trial. It is.

16 It's an important trial because the
17 law recognizes the safety and sanctity of the
18 home as a special place. When someone chooses
19 to violate that sanctity, that privacy, that
20 safety of the home it's an important matter
21 and one that deserves your attention.

22 It's important, but short. It's short
23 because the defendant, James Aiken, was caught
24 in the act of this burglary. And as we review
25 kind of the testimony that you will hear I want

1 you to remember this is not a mystery or a who-
2 done-it. Mr. Aiken was caught in the act.

3 The first person you're going to meet
4 here today is a gentleman by the name of
5 Michael Morrison. He's a professor at the
6 College of Charleston, an artist. He lives
7 over on . For those of you who
8 are familiar with downtown it is close to
9 Calhoun. He lives in a Charleston home, the
10 style of which, and you'll see pictures, is
11 common downtown. It's an old home that's been
12 converted from a house to several smaller
13 apartments, and he lives in one of those
14 apartments.

15 Went to bed on the night of January
16 15th, just like any other night. Went to sleep
17 in his bedroom. Again, you will see the
18 pictures. The bed is positioned here in the
19 room, and the dresser is right next to the bed.

20 He was awoken about 8:00 a.m. in the
21 morning by what every person fears, which was
22 the sound of someone in his room.

23 He looked up and saw James Aiken going
24 through the things on top of and the top row of
25 his dresser right by his bed -- James Aiken, a

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1 man he will tell you he had never met before,
2 a man who was a total stranger to him.

3 When Mr. Morrison woke up and
4 confronted this stranger in his bedroom, Mr.
5 Aiken caught, as the expression goes, red-
6 handed, right in the middle of an act, did
7 something kind of odd -- did the first thing
8 that popped in his head. He dropped a shoe on
9 the ground he had found outside and said, "Oh,
10 I was just bringing your shoe back," and fled.

11 'I was just bringing your shoe back.
12 That's why I was in your room.'

13 Mr. Morrison bravely, and perhaps
14 unwisely, -- I certainly wouldn't recommend
15 people do this but he pursued the defendant,
16 James Aiken, out of the bedroom. Mr.
17 Morrison's apartment is on the second floor,
18 and he pursued him down an internal stairway to
19 the ground level. When he got about to the top
20 of the stairs, he decided he would run quickly
21 back and grab his cell phone. He got his cell
22 phone, which was a very smart move. Got his
23 cell phone, called 9-1-1 and was very quickly
24 on the phone with police dispatch -- comes out
25 of his apartment. James Aiken is still in

1 eyesight and he follows him on foot until a
2 policeman arrives. And, thankfully, in this
3 case, the police arrived very quickly.

4 Mr. Aiken had taken somewhat of a
5 wrong turn and got kind of corralled into a
6 parking lot behind the Charleston Museum. And
7 that's where the officers will tell you they
8 pulled up and found the victim on his phone,
9 with Mr. Aiken right there.

10 Shortly after arriving and questioning
11 Mr. Aiken, Mr. Aiken committed to this story
12 that he was just bringing the shoe back. The
13 shoe on the floor and it was not Mr. Morrison's
14 shoe. It was a leopard print high-heeled shoe
15 that he had found outside.

16 Mr. Aiken admitted, "yes, I went in
17 that room."

18 Did you ask if anyone was home?

19 Did you holler into the house?

20 He admitted, "no, I didn't do that.

21 I went up to the room," and sticks to his story
22 of just doing that, oddly, to return the shoe.
23 The facts of the case are going to show
24 otherwise.

25 Briefly, after Mr. Aiken was charged,

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1 you're going to hear from Mr. Morrison that he
2 noticed that his wallet was gone, his wallet
3 that he will tell you that he's certain he put
4 the night before right on top of that dresser
5 where Mr. Aiken was riffling at. The wallet
6 wasn't found on Mr. Aiken. We will talk at the
7 conclusion of the trial about meeting the
8 elements of the crime, about he could have
9 ditched it at some point during his flight from
10 the apartment. Mr. Morrison will tell you that
11 his wallet was gone.

12 Judge Dennis has explained to you that
13 we carry the burden of proof in this case, and
14 we can meet that burden of proof in this case.
15 When you've heard all the testimony and the
16 evidence, I'm confident that you'll return a
17 just and fair verdict of Guilty.

18 Thank you.

19 THE COURT: Thank you very much.
20 Ms. Mulvaney.

21 MS. MULVANEY: Thank you.

22 Just walking into someone's home
23 without consent is not burglary in the first
24 degree. I'm going to say that again, because
25 it's important: Just entering someone's home

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1 without consent is not a burglary in the first
2 degree.

3 You must enter with the intent to
4 commit a crime. The State must prove that Mr.
5 Aiken entered with the intent to commit a
6 crime. That's the problem with this case
7 because the State cannot prove that.

8 Truth is stranger than fiction. And
9 that is certainly what happened on this day.
10 It was a Saturday morning in January, January
11 the 16th at 8:00 o'clock in the morning. And
12 Mr. Aiken was leaving his mom's house and he
13 was walking down to the market where he sells
14 greeting cards at the market.

15 As he was walking on
16 in front of a residence he saw a shoe, a
17 woman's shoe. It was a fancy shoe. It was a
18 woman's high-heeled leopard print shoe in front
19 of a residence. And he picked it up. And then
20 he noticed that the door was slightly ajar.
21 Mr. Aiken picked up the shoe and walked up the
22 stairs and walked into the living room. He
23 walked into the bedroom where the homeowner was
24 sleeping and he said, "I brought you your shoe,
25 and your front door is open."

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1 Well, the homeowner, of course, got in
2 a huff, startled and said, "Get out of here!"

3 Mr. Aiken dropped the shoe and left.

4 And the homeowner grabbed his cell
5 phone and followed behind.

6 Mr. Aiken was arrested within minutes.

7 That's this case in a nutshell.

8 And you'll hear that there was no
9 property of the homeowner recovered on Mr.
10 Aiken. You'll hear that the door to the home
11 was unlocked. And you will see a picture of
12 a woman's shoe that was dropped in the home-
13 owner's bedroom.

14 Now, Mr. Aiken did it. It was
15 stupid, it was dumb. He didn't think it
16 through. And, yes, he is guilty of trespass.
17 But he is not guilty of burglary in the first
18 degree; which is one of the most serious
19 charges that exists in this State.

20 At the end of this case, I am going to
21 ask you to find him not guilty of burglary in
22 the first degree and not to judge him on his
23 past. But to judge him on his actions that
24 day, on the evidence and on the lack of
25 evidence and to find him Not Guilty of this

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1 very serious crime. Thank you.

2 THE COURT: Thank you. Solicitor,
3 you may call your first witness.

4 SOLICITOR SIMPSON: Thank you, Your
5 Honor. The State calls Michael Morrison.

6 (WITNESS TAKES STAND)

7 MICHAEL CARVER MORRISON, being duly
8 sworn to tell the truth, the whole truth and
9 nothing but the truth, testified, as follows:

10 DIRECT EXAMINATION

11 BY SOLICITOR SIMPSON:

12 Q. Good afternoon, Mr. Morrison. A little
13 nervous today?

14 A. (Affirmative nod).

15 Q. You'll need to answer out loud.

16 A. Oh, yeah.

17 Q. How old are you?

18 A. Forty-two (42).

19 Q. And where do you currently live?

20 A.

21 Q. Is that where you lived in January of
22 2010?

23 A. Yes.

24 Q. How long have you lived in that location?

25 A. Four years, maybe five years. And I lived

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1 there for nine years in the nineties.

2 Q. In the same apartment?

3 A. Downstairs apartment then.

4 Q. Can you tell the jury a little bit about
5 what it is you do here in Charleston?

6 A. I'm an artist. I like to pour bronze. I
7 work with metal. I teach over at the College
8 of Charleston, I teach sculpture and foundry
9 and I'm a studio manager. I take care of the
10 tools and equipment and teach the kids how to
11 properly use the tools.

12 Q. Mr. Morrison, we'll get right to the point
13 of us being here. I'd like for you to explain
14 to the jury a little bit about what happened,
15 what you did on the evening of January 15th,
16 carrying over, more importantly, to the morning
17 of January 16th.

18 A. Okay. I teach at the college. I have a
19 tendency to dig through garbage. I'm walking
20 home from having taught. My class gets out at
21 9:45 -- so about 10:00 o'clock. I'm talking to
22 my mom. The college kids who live in the
23 neighborhood leave a good pile of garbage.

24 As I'm walking home I'm like, "Mom,
25 there's this leopard skin shoe." She's like,

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1 "Leave it alone, Michael. Leave it alone."

2 I'm like, "Can't," because I figured I could
3 take it and put it at the front of her house.
4 There's a little wall out front -- and I set it
5 up there. Because, to me, it was hilarious.

6 I do that, go inside, obviously go to bed.
7 Now, do I say what happened next?

8 Q. Yes.

9 A. It's cold, so I had like lots of blankets
10 and I think that he probably just didn't see me
11 in there or something.

12 But I'm in my room and I hear my keys. I
13 don't know why I heard my keys there, but I
14 heard my keys and that's what woke me up.

15 Q. Let me interrupt you briefly. Where did
16 you leave your keys the night before?

17 A. On my dresser.

18 Q. Okay.

19 A. Here's my bed. I'm laying in the bed.
20 Here's my dresser so that I can get my water,
21 glass of water on my dresser.

22 Q.... Let me interrupt you for a second. I want
23 to direct you to a photograph on the screen
24 behind you. I'm going to show you first -- and
25 if you could just describe for the jury what

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1 we're seeing here on State's Exhibit 1. Can
2 you see it from where you are?

3 A. Yeah, yeah. That's the front door. You
4 go up six or eight steps.

5 Q. This is . Is that
6 where you live?

7 A. Yes. This right here is probably four or
8 four and a half foot before you get to the
9 door.

10 Q. I'm showing you now State's Exhibit 2.

11 A. So the front door's over here, and then
12 there's steps: steps, front door, a little
13 landing and then steps, next landing and steps.
14 Right here is the landing and then my door.

15 Q. I show you State's Exhibit 3.

16 A. Don't tell my mother I left my room like
17 this. Yeah, so -- anyway, there's my bed and
18 there's the dresser. I can lay there and grab
19 the water.

20 Q. So this is pretty close to your bed?

21 A. Oh, yeah, there's not much footage in
22 through here: bicycle, bed, dresser.

23 Q. I'm showing you State's Exhibit 4. What
24 are we looking at there?

25 A. Keys, medicine, saline. My eyes get dry

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1 in the winter. Vaseline, deodorant.

2 Q. Okay. That's the dresser?

3 A. That's the top drawer. Oh! I had just
4 come back from a trip, so that was money from a
5 different country.

6 Q. Foreign currency?

7 A. Yeah.

8 Q. And that's the dresser positioned right by
9 your bed?

10 A. Yes.

11 Q. The reason I interrupted you, you said
12 that you were awoken by the sound of keys
13 jingling?

14 A. Yes.

15 Q. Did you carry a wallet, Mr. Morrison?

16 A. Yes.

17 Q. Is there anything about that wallet you
18 remember from the night of January 15th?

19 A. Six dollars.

20 Q. It had six dollars in it?

21 A. It had six dollars in it, yeah.

22 Q. When was the last time you saw that
23 wallet?

24 A. It had six dollars. It had a little
25 medallion coin, and it had a little saying I

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1 had taped over so that it would stay good.

2 Q. When was the last time you saw that
3 wallet?

4 A. That night when I put it on the dresser.
5 That's the last I've seen of that wallet.

6 Q. By the keys that you heard jingling?

7 A. Yes.

8 Q. So you said -- I'm sorry to interrupt --
9 that you were awakened by the sound of things
10 being moved around on your dresser?

11 A. Well, specifically, the keys. I don't
12 know why that sound did it.

13 Q. And what did you do? Did you wake up?

14 A. Well, yeah. I turned around. Understand
15 I'm under all these blankets and I don't know
16 if he could see me. And I'm like, *I don't know*
17 *this guy*.

18 Q. When you say "this guy," did you get a
19 good look at the individual that was in your
20 room?

21 A. Yeah, he was just kind of standing there.
22 And on that particular weekend there were two
23 women of over 55 staying in the house. He was
24 not a woman over 55. So I was like, *I don't*
25 *know this person. Who is this dude?*

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1 I didn't say anything at first, trying to
2 focus, I'm like, *What am I supposed to do?*
3 Q. What was he doing during those moments?
4 A. Like going through stuff.
5 Q. Going through stuff on your dresser?
6 A. Yes.
7 Q. Did there come a point when you made
8 yourself known?
9 A. Oh, yeah. Oh, yeah.
10 Q. In what way?
11 A. "Hey. What are you doing? You need to
12 get out of here."
13 Q. And how did he respond to that?
14 A. "I was bringing your shoe back." He
15 stepped back. He stepped back.
16 Q. Now, at the time you said that, though,
17 was he going through the items on your dresser?
18 A. I couldn't tell you. I'd just say he's
19 going through the stuff on the dresser.
20 "Hey, what are you doing?"
21 He steps back.
22 I'm like, "You need to get out of here."
23 But I was trying to be quiet because there's
24 another bedroom right next to my bedroom, and
25 that's where one of the women was sleeping. I

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1 didn't want to wake her up because I didn't
2 want her to be scared. Make sense?

3 Q. Sure. And after he steps back, what did
4 he say after that?

5 A. Just, "I was bringing your shoe back."
6 I don't know what he's talking about. I had
7 no idea. I didn't see the shoe until the
8 detective person came back into the house
9 later. I didn't even know he had a shoe with
10 him.

11 Q. Okay. Did he leave at that point?

12 A. He was kind of backing up slowly. He was
13 talking to me. I don't know what he was
14 saying, but I just knew he needed to get out.
15 All I had in my mind was, "you need to get
16 out."

17 Q. Okay. Were you afraid?

18 A. Yeah.

19 Q. And did he leave once confronted by you?

20 A. Slowly. He was like pretty hesitant to
21 leave. It was odd. I was like, 'you need to
22 leave the room, you need to get down the
23 stairs, you need to go outside.'

24 So he goes slowly down the stairs.

25 That's when I ran up to get my cell phone.

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1 Q. So he's going down the stairs here in

2 State's 2?

3 A. Yeah.

4 Q. You went back up to your room to get your
5 cell phone?

6 A. Yeah. He had already gone. Because he
7 was hesitant going down the stairs, and I don't
8 know why. Then going down those stairs, once
9 he made that turn, man, I was, like "oh, I've
10 got to go get my phone."

11 Q. So there was a moment here that you did
12 not have sight?

13 A. Yes.

14 Q. And what did you do then?

15 A. I went back upstairs and got my phone,
16 came back down and he was on the cement steps.

17 I was like, "Dude, you've got to go."
18 Because I was thought by now he'd be leaving
19 and I'd have a hard time finding him. I didn't
20 know he was still on the cement steps.

21 Q. Was the person you first saw outside, was
22 it obvious to you that the same person you had
23 just seen inside?

24 A. Oh, yeah, same guy.

25 Q. What did you do then?

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1 A. I told him he needed to leave and he just
2 kind of started walking. That's when I called
3 911.

4 Q. And what did you report to 911?

5 A. That a man had just been in my house. Get
6 the police.

7 Q. Okay.

8 A. I just remember calling them, that I was
9 on the phone and that I was chasing him.

10 Q. You did that (arms moving back and forth).
11 Were you running?

12 A. Yes.

13 Q. Was he running?

14 A. He was walking, so I was walking. Because
15 I didn't want to get near him, near.

16 Q. Okay.

17 A. Then he started jogging, so I started
18 jogging. Then he started running, so I started
19 running.

20 Q. Where did this chase, for lack of a better
21 word, lead?

22 A. Over to Elizabeth Street, behind the
23 flower shop that is on the corner of Elizabeth
24 and Chapel, through that parking lot and where
25 the Charleston Museum is, there's a parking lot

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1 beside the Charleston Museum. So when he was
2 running through the bushes he fell, and he just
3 laid there for a minute. And I just waited for
4 him to get back up. He got back up and he kept
5 running. Went around the bushes and I kept
6 running. And then there's an 18-wheeler
7 container truck back there and a fenced-in area
8 and a large air conditioning unit or heating
9 unit for the museum. So he went back behind
10 there. And I was just kind of waiting. I'm
11 thinking, 'Oh, I don't want to have to climb
12 that fence' because I'm barefoot. But he
13 didn't go over the fence, so that was good for
14 me. He came back around. So I guess I lost
15 sight of him back there for a second, too, I
16 didn't think about that. Then when he came
17 back around, that's when the cops pulled up.
18 And I am, like, 'Oh, good.'

19 Q. Were you still on the phone with dispatch
20 when the police arrived?

21 A. When the cops pulled up, yeah.

22 Q. You mentioned then two times that you lost
23 sight of the defendant, correct?

24 A. Yeah.

25 Q. Is there any doubt in your mind that once

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1 you saw him again that that was the same guy
2 that you had seen in your house?

3 A. No, no, no. Not a single doubt.

4 Q. What happened once the police arrived?

5 A. I was just so glad. They put him on the
6 ground.

7 Q. Okay.

8 A. He had a bag -- he had a grocery bag like
9 you get from the Piggly Wiggly or something.
10 It was brown and white, a think plastic bag,
11 and it had something in it that looked like
12 Christmas cards or something.

13 Q. Did the police show you the contents of
14 that bag?

15 A. Yeah.

16 Q. And did it contain any items belonging to
17 you?

18 A. Not that I know of.

19 Q. After the police had apprehended Mr. Aiken
20 did you go back to your apartment?

21 A. Yes, the police gave me a ride home.

22 Q. At that time -- I think you testified
23 earlier that you noticed the shoe at that
24 point?

25 A. Yeah.

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1 Q. I show you State's 5 (photograph). Did
2 that shoe belong to you?

3 A. No. But I did pick it up out of the
4 garbage.

5 Q. But you had kept it outside.

6 A. I kept it outside. I had seen that shoe
7 before, (affirmative nod).

8 Q. Getting back -- did you notice, once you
9 had time to kind of cool down and was back at
10 the apartment did you notice any of your
11 possessions missing from your apartment?

12 A. The policeman gave me a card and said if
13 I think of anything or whatever to call later.
14 Yes, when I was getting ready to leave the
15 house that day I go to grab my stuff and
16 there's no wallet there. What the heck? I
17 look around because stuff had been moved
18 because he threw a bottle at me.

19 Q. Let's back up to that. What do you mean
20 when you say he threw a bottle at you?

21 A. Whenever I went, 'Hey, what are you
22 doing', he picked up a bottle off the counter
23 and threw it. It was just a pill bottle.

24 Q. And ---

25 A. I guess it was to distract me or

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1 something. But, anyway, I went to get my
2 wallet and it wasn't there. And I called the
3 policeman and said, "Hey, I can't find it
4 anywhere."

5 Q. You testified earlier that you put your
6 wallet on your dresser the night before?

7 A. Yeah, I usually -- the wallet and the
8 keys.

9 Q. Are you certain that the wallet was next
10 to your keys on the dresser when you went to
11 bed?

12 A. (Affirmative nod), under my keys.

13 Q. Under your keys?

14 A. Yeah.

15 Q. I show you State's 4. Can you show the
16 jury where your wallet would have been on that
17 dresser the night before?

18 A. On the dresser. In this little blank
19 spot. The keys would have been on top of it.

20 Q. At the time when you realized your wallet
21 was missing what did you do?

22 A. Like, I made the phone call. I actually
23 asked my roommate if she had seen it. She
24 asked me if maybe I'd misplaced it somewhere.
25 I said no. We looked through the house,

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1 couldn't find it.

2 Q. Did you retrace the path that you had
3 chased the man?

4 A. Yeah, I took the dog and we went down. I
5 got to where -- I didn't see the guy as he was
6 coming down the stairs, so I looked in all the
7 plants out front. I went over to Charleston
8 Place and went behind the container and looked
9 back there.

10 Q. Did you ever find your wallet?

11 A. No.

12 Q. Have you seen your wallet since January
13 16th?

14 A. (Negative gesture).

15 THE COURT: Is that a "no"?

16 THE WITNESS: That's a "no".

17 SOLICITOR SIMPSON: Mr. Morrison,
18 please answer any questions that Ms. Mulvaney
19 has for you.

20 THE COURT: Cross examine.

21 CROSS EXAMINATION

22 BY MS. MULVANEY:

23 Q. Hello, Mr. Morrison. How are you?

24 A. Nervous. I'm all right.

25 Q. Okay. I'm going to just ask you a few

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1 questions. Okay? Mr. Morrison, the day that
2 this happened was a Saturday, correct?

3 A. To the best of my knowledge, yeah.

4 Q. And it was early in the morning?

5 A. Yes.

6 Q. And you were home?

7 A. (Affirmative nod).

8 Q. And you also have a roommate, correct?

9 A. Yes.

10 Q. And your roommate was home also?

11 A. Yeah.

12 Q. And your roommate had a visitor, had
13 company?

14 A. Yes.

15 Q. And so that person was there also?

16 A. Yes, she was there and she had a little
17 dog.

18 Q. And so there was three people and two dogs
19 in the house?

20 A. One dog.

21 Q. One dog, okay?

22 A. The dog that usually stays there went
23 somewhere else that weekend.

24 Q. And your car was parked in the driveway,
25 correct?

1 A. I don't know about that. I drive a truck,
2 and it's usually on the street.

3 Q. But you have a driveway that goes up to
4 your front door?

5 A. It's beside the house. Yeah, there's a
6 driveway beside the house.

7 Q. So right here where my finger is --
8 (indicating in photograph) ---

9 A. Is a vehicle.

10 Q. Right, is the driveway.

11 A. Right.

12 Q. And that's where your driveway comes, and
13 that's a vehicle right there?

14 A. Yes.

15 Q. And if you know is that your vehicle or is
16 that the vehicle of your company that was
17 staying with y'all?

18 A. It's not mine. It could have been the
19 company's.

20 Q. Okay.

21 A. There's also people who live downstairs
22 and in the basement and everybody has vehicles.

23 Q. And it's a long driveway, and there were
24 cars in the driveway.

25 A. It goes all the way to the back.

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1 Q. And on that particular morning your door
2 was unlocked?

3 A. At that hour. One of my roommates had
4 gone down at 7:30 to get the newspaper, which I
5 found out later. When she had got the
6 newspaper she hadn't locked it when she came
7 in.

8 Q. Do you know if she had closed the door
9 fully?

10 A. No, because I was asleep.

11 Q. And the way that your apartment is
12 designed, Mr. Morrison, when you go in that
13 door, you walk up a flight of stairs; correct?

14 A. It's about four or five-foot platform
15 before you go up the stairs.

16 Q. And then when you go up, you enter into
17 your living room. This area right there, was
18 that ---

19 A. No. Back here there is a -- what do you
20 call that place? Come on, now. Vocabulary.

21 JUROR: Landing.

22 THE WITNESS: Yeah, landing. So
23 there is a landing here, stairs, a landing,
24 stairs, landing. My bedroom is here. My
25 roommate's bedroom is right here. This is a

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1 hallway. You have to go through another door
2 to get to the living room.

3 EXAMINATION CONTINUED

4 BY MARY BETH MULVANEY:

5 Q. And is the living area right in front of
6 where the stairs are, when you come up the
7 stairs? Would this be the living area or your
8 sitting area, where your couch ---

9 A. No, that's right where I am is my bedroom.

10 Q. That's your bedroom?

11 A. Yes. Boom, my bedroom.

12 Q. And what about your bathroom? Where is
13 your bathroom?

14 A. You go through the living room, through
15 the dining room, take a right and there is a
16 hallway that connects two more rooms. So it
17 would have been added onto the house in the
18 early 1900's. So that's one bathroom. The
19 other bathroom is through my roommate's room,
20 through another room. So actually the other
21 bathroom is right above that little picture.
22 Let me turn it around here.

23 Q. And when Mr. Aiken entered your room that
24 morning you were asleep?

25 A. Yes.

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1 Q. And is it fair to say -- I will withdraw
2 that. Sorry.

3 When he came in, he said to you, "I
4 brought you your shoe." And you told him --
5 did you see the shoe then, the shoe that you
6 had taken from the garbage last night?

7 A. (Negative gesture).

8 Q. You didn't notice it, did you?

9 A. No, I just saw ---

10 Q. A man in your room, right?

11 A. Yes. First thing.

12 Q. But you did hear him say, "I brought you
13 your shoe."

14 A. Yes.

15 Q. And did you also hear him say, "Your front
16 door was open."

17 A. No.

18 Q. And, of course, you told him to leave,
19 right?

20 A. Yes.

21 Q. And at that point he dropped the shoe.

22 Did you see him drop the shoe? Do you
23 remember?

24 A. No, I just saw him backing up. That's
25 what I remember is him backing up.

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1 Q. He backed up. And then he went down the
2 stairs?

3 A. (Affirmative nod).

4 Q. Your testimony is he went slowly down the
5 stairs. He took his time. He didn't run.

6 A. (Affirmative nod).

7 THE COURT: Was that a "yes?"

8 THE WITNESS: "Yes."

9 CROSS EXAMINATION CONTINUED

10 BY MS. MULVANEY:

11 Q. And prior to that when he was in your room
12 did you see him take anything?

13 A. No. He did pick up that bottle and throw
14 it at me.

15 Q. When you say "pick up that bottle," what
16 are you referring to?

17 A. It was a small white plastic pill bottle
18 that I had on the dresser.

19 Q. Is this the bottle, in this picture? Is
20 that the bottle you're referring to?

21 A. Yes.

22 Q. So he picked that up and he threw it?

23 A. (Affirmative nod), threw it in my
24 direction. Missed.

25 Q. Now, and the pill bottle he threw was the

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1 pill bottle in this picture, right?

2 A. Yes.

3 Q. If you know?

4 A. Yes.

5 Q. So did you later pick up the pill bottle
6 and put it back before the officer took the
7 picture?

8 A. I showed the pill bottle -- I picked the
9 pill bottle up and somebody took a picture of
10 the pill bottle. Then put it back.

11 Q. And then put it back on your dresser?

12 A. Yes.

13 Q. Do you know where you picked the pill
14 bottle up from?

15 A. My guess my bed because that's the
16 direction in which he threw it. But I can't
17 say that for sure.

18 Q. Okay. As Mr. Aiken was going down the
19 stairs you, at some point, went to get your
20 cell phone, right?

21 A. Yes.

22 Q. And where was your cell phone, Mr.
23 Morrison.

24 A. It was plugged -- actually, beyond my bed,
25 next to the window.

1 Q. So your cell phone was in your bedroom.

2 Was it on your dresser?

3 A. No, no. See how there is -- this light?

4 There's an extension cord there and I have to

5 plug it into that.

6 Q. You had it plugged in to charge?

7 A. (Affirmative nod).

8 Q. So you went and you got it, and then you

9 followed Mr. Aiken.

10 A. (Affirmative nod).

11 Q. Now, where was it that you next saw Mr.

12 Aiken after you got your cell phone?

13 A. On the cement stairs and then on the

14 cement landing out in front of the house.

15 Q. So he was still -- when you saw him, he

16 was still on your front stoop?

17 A. Yeah.

18 Q. And then you followed him at that point?

19 A. (Affirmative nod).

20 Q. Then you called 911?

21 A. (Affirmative nod).

22 THE COURT: Hold on a second. You

23 need to answer.

24 THE WITNESS: Oh, -- "yes".

25 THE COURT: And the reason for it,

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1 we can all see, but the lady seated needs to

2 take it down, and it helps her dramatically.

3 Thank you.

4 MS. MULVANEY: I'm sorry, Judge.

5 I will slow down.

6 THE COURT: It's okay. No problem.

7 CROSS EXAMINATION CONTINUED

8 BY MS. MULVANEY:

9 Q. So, Mr. Morrison, you followed behind Mr.
10 Aiken?

11 A. Yes.

12 Q. And you were on your cell phone?

13 A. Yes.

14 Q. And you were talking to the dispatcher,
15 right?

16 A. Yes.

17 Q. And you were relaying to dispatch what was
18 happening?

19 A. Right, what he was wearing, where we were.

20 Q. Where you were walking?

21 A. Which direction we were going.

22 Q. And you never relayed to dispatch that you
23 lost sight of him?

24 A. No, because I had not lost sight of him

25 for the time I was on the phone, except for a

1 minute in that parking lot when he was behind
2 the container, in that fenced area.

3 Q. You were still on the phone with dispatch
4 and you lost sight of him, but you didn't tell
5 dispatch you lost sight of him. I don't
6 remember telling dispatch that I lost sight of
7 him.

8 A. Right.

9 Q. Then the police arrived?

10 A. Yes.

11 Q. And the police arrived pretty quickly, is
12 that fair to say?

13 A. Yes. I was very relieved.

14 Q. And when you were following Mr. Aiken you
15 got a pretty detailed description of him. He
16 never got real far out of your sight?

17 A. No.

18 Q. In fact, you were able to tell the
19 dispatcher that he had morning stubble.

20 A. Yes.

21 Q. And that he was a little bit gray?

22 A. Yes.

23 Q. Now, today, Mr. Morrison, you testified
24 and you said one of the things that stood out
25 in your memory of this was hearing the sound of

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- 1 your keys, correct?
- 2 A. Right.
- 3 Q. And that was pretty vivid?
- 4 A. Yes.
- 5 Q. After this occurred, you spoke with
- 6 several officers; right?
- 7 A. Sure.
- 8 Q. You spoke with Officer Daquigan, if I'm
- 9 pronouncing his name correctly, Investigator
- 10 Daquigan. Do you remember speaking with him?
- 11 You might have seen him out in the hallway?
- 12 A. The gentleman with the ---
- 13 Q. Glasses and gray hair.
- 14 A. Gray hair, right.
- 15 Q. And you spoke with him, right?
- 16 A. Yes, he was the one that took the
- 17 individual under arrest.
- 18 Q. And you spoke to him right after that?
- 19 A. Well, it was all very ---
- 20 Q. The same day?
- 21 A. The same day, yes.
- 22 Q. But you didn't tell him anything about the
- 23 keys, right?
- 24 A. I have no idea.
- 25 Q. And you also spoke with Officer Duren

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1 who's seated here.

2 A. Yes.

3 Q. And you didn't mention anything about the
4 keys to Officer Duren?

5 A. I don't know if did. I don't know that I
6 didn't.

7 Q. And you gave a written statement at about
8 -- I think at 8:55. You wrote out a written
9 statement about what happened and you didn't
10 mention the keys in that?

11 A. Okay.

12 MS. MULVANEY: If I could just
13 have one moment.

14 THE COURT: Sure.

15 MARY BETH MULVANEY: (Sidebar with
16 Defendant and co-counsel).

17 CROSS EXAMINATION CONTINUED

18 BY MS. MULVANEY:

19 Q. Okay, thank you, Mr. Morrison. That's all
20 the questions I have for you right now.

21 THE COURT: Redirect, Mr. Simpson?

22 SOLICITOR SIMPSON: Thank you, Your
23 Honor. May I approach the court reporter, Your
24 Honor?

25 THE COURT: You may.

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1 SOLICITOR SIMPSON: If we could
2 mark this as an exhibit.

3 COURT REPORTER: State's Exhibit 8
4 for identification.

5 REDIRECT EXAMINATION

6 BY SOLICITOR SIMPSON:

7 Q. Mr. Morrison, I'm handing you what's been
8 marked as State's Exhibit 8 for identification
9 only. Would you take a minute and look at it?

10 A. Okay.

11 Q. Do you recognize that?

12 A. Oh, yeah.

13 Q. And what is that?

14 A. That is my handwriting.

15 Q. What does it say?

16 A. (Reading): "I was awakened by the sound
17 of small things moving on my dresser."

18 Q. First of all, what is that? What is that
19 piece of paper?

20 A. Charleston Police Department Witness
21 Statement.

22 Q. Is that the statement you gave Officer
23 Daquigan as referenced by Ms. Mulvaney?

24 A. A copy of it, yes.

25 Q. And what is the first sentence on that

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1 statement?

2 A. (Reading): "I was awakened by the sound
3 of small things moving on my dresser."

4 Q. Thank you. Ms. Mulvanay, asked you about
5 your opportunity to view the defendant. And I
6 believe you testified that you had a very good
7 opportunity. Is that correct?

8 A. Yes.

9 Q. Is the person that you saw in your room
10 that morning and subsequently throughout the
11 chase in the courtroom today?

12 A. Yes.

13 Q. And who is that?

14 A. The fellow in the tan jacket.

15 Q. Just a couple more questions. State's
16 Exhibit 1. Mr. Morrison, what is this right
17 here?

18 A. That's the doorbell.

19 Q. Can you hear the doorbell when it rings,
20 from your room?

21 A. Yes.

22 Q. State's Exhibit 2. So your room, if I
23 understand you correctly, is right here?

24 A. Right.

25 Q. So were someone to knock on the door would

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1 you be able to hear it -- loudly?

2 A. Yeah, if they knocked loudly and woke me
3 up, sure.

4 Q. I'm showing you State's Exhibit 3. Is
5 there a door to your room, Mr. Morrison?

6 A. There is. It's right here (indicating).

7 Q. Is this picture taken from the vantage
8 point if I'm standing here.

9 A. In the door, (affirmative nod). It's a
10 small room.

11 Q. You share these apartments with a
12 roommate, correct?

13 A. Yes.

14 Q. Do you typically shut your door before you
15 go to sleep?

16 A. No.

17 Q. Was it open this morning?

18 A. Yes, it was.

19 Q. Can someone -- if they lean in, knock on
20 the door, even if it was open?

21 A. Oh, yes.

22 Q. On the morning of January 16th, were you
23 awoken by a doorbell?

24 A. No, I wasn't.

25 Q. Were you awoken by somebody knocking?

1 A. No.

2 Q. What about somebody knocking on the door
3 to your room?

4 A. No.

5 SOLICITOR SIMPSON: I have no other
6 questions, Your Honor.

7 THE COURT: Recross?

8 MS. MULVANEY: No questions.

9 Thank you, Your Honor.

10 THE COURT: You're welcome. You may
11 step down, Mr. Morrison.

12 (WITNESS STEPS DOWN)

13 THE COURT: Call your next witness,
14 please.

15 SOLICITOR SIMPSON: Your Honor, the
16 State calls Larry Duren, Officer Larry Duren.

17 (WITNESS TAKES STAND)

18 LARRY DUREN, being duly sworn to tell
19 the truth, the whole truth and nothing but the
20 truth, testified, as follows:

21 DIRECT EXAMINATION

22 BY SOLICITOR SIMPSON:

23 Q. Mr. Duren, what's your occupation?

24 A. Police officer with the City of Charleston
25 Police Department.

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1 Q. What are your duties -- what rank do you
2 hold?

3 A. Police officer.

4 Q. Responding to dispatch calls is one of
5 your duties?

6 A. It is.

7 Q. Do you recall becoming involved in an
8 investigation in the early morning of January
9 16th, 2010?

10 A. I do.

11 Q. Would you please describe for the jury how
12 you became involved and what took place that
13 morning?

14 A. Okay. On that morning of January 16th,
15 approximately 8:00 o'clock, we received a call
16 of a possible burglary that had occurred at
17 in the City of Charleston,
18 South Carolina.

19 I responded. We were being supplied
20 information from the dispatcher pertaining to
21 the victim who was in pursuit of the suspect.

22 I was to make contact with the victim and
23 the suspect in the parking lot at the
24 Charleston Museum. When I arrived on the scene
25 the suspect was at the back corner of the

1 parking lot, and Mr. Morrison, the victim was
2 on the phone with the dispatcher at that time
3 and was pointing to an individual, saying
4 'that's him.'

5 I exited my marked cruiser. I had the
6 suspect lay on the ground, then I detained him
7 and I put him in the back of my cruiser.

8 Q. When you say "the suspect," is that person
9 that you're referring to present in the court
10 room?

11 A. He is.

12 Q. And who is that?

13 A. James Ivan Aiken, the gentleman sitting
14 over there in the tan coat.

15 Q. Officer Duren, you said his name is James
16 Ivan Aiken. How did you determine that?

17 A. That was determined by his South Carolina
18 identification card which actually has his name
19 and date of birth on it and actually has a
20 photograph of him as well.

21 Q. And according to that identification card
22 what is his date of birth?

23 A. His date of birth was

24 Q. And his name is James Ivan Aiken?

25 A. Correct.

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1 Q. 12/11/65?

2 A. Correct.

3 Q. How far was the victim away from the
4 defendant when you arrived?

5 MS. MULVANEY: Your Honor, can we
6 approach for a minute.

7 THE COURT: Yes.

8 (OFF RECORD BENCH CONFERENCE -
9 DEFENDANT REQUESTED RESTROOM BREAK)

10 THE COURT: Ladies and gentlemen,
11 there's a matter of law that I have to take up
12 out of your presence. I'm going to ask you to
13 go to your jury room. Do not begin your
14 deliberations. Don't discuss the case. We'll
15 be with you very quickly. Thank you.

16 (JURY OUT @ 3:00 P.M.)

17 THE COURT: If you need to step
18 down, you may. Just don't have any conversa-
19 tion with the attorneys.

20 THE WITNESS: Thank you.

21 (BRIEF RECESS)

22 (DEFENDANT PRESENT)

23 THE COURT: Bring in the jury.

24 (JURY IN @ 3:08 P.M.)

25 BAILIFF: Jury present, Your

1 Honor.

2 THE COURT: Thank you very much, Mr.
3 Williams. Thank you, ladies and gentlemen.
4 We're ready to continue. You may resume your
5 examination.

6 SOLICITOR SIMPSON: Thank you, Your
7 Honor.

8 DIRECT EXAMINATION CONTINUED

9 BY SOLICITOR SIMPSON:

10 Q. Officer Duren, you just testified that you
11 responded to the area behind the Charleston
12 Museum?

13 A. Correct.

14 Q. Later did you also visit the residence of
15 Mr. Morrison?

16 A. I did.

17 Q. If you could approximate for the jury,
18 about how far are we talking here?

19 A. In terms of ---

20 Q. Distance between that location and the
21 Charleston Museum?

22 A. Very rough approximation, probably about a
23 quarter of a mile. Very rough.

24 Q. Later in the investigation, after the
25 suspect had been apprehended, did it come to

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1 your attention that something was missing from
2 the apartment?

3 A. Yes.

4 Q. What was that?

5 A. The wallet.

6 Q. Did you aid in any way in trying to locate
7 that wallet?

8 A. I did. What myself and other responding
9 officers did, we walked the path in which Mr.
10 Morrison had pursued the suspect and looked
11 closer at the area to try to locate the wallet.

12 Q. You're looking for a fairly small item,
13 correct?

14 A. Right.

15 Q. And this area is in downtown Charleston.

16 A. Right.

17 Q. That is in Charleston County?

18 A. Yes.

19 Q. It's a residential area?

20 A. Yes.

21 Q. Is it fair to say that there could have
22 been a lot of places one could have stashed
23 something the size of a wallet?

24 A. Yes.

25 Q. I should also make it clear that the

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1 wallet was not located on the person of the
2 defendant, correct?

3 A. Correct.

4 SOLICITOR SIMPSON: The Court's
5 indulgence.

6 THE COURT: Certainly.

7 DIRECT EXAMINATION CONTINUED

8 BY SOLICITOR SIMPSON:

9 Q. Officer, please answer any questions Ms.
10 Mulvaney has for you.

11 THE COURT: You may cross examine.

12 MARY BETH MULVANEY: If we could
13 mark this as an exhibit.

14 COURT REPORTER: Defendant's Exhibit
15 1 for identification.

16 THE COURT: A bag containing a
17 plastic bag.

18 CROSS EXAMINATION

19 BY MS. MULVANEY:

20 Q. Good afternoon, Officer Duren. Officer
21 Duren, when you saw Mr. Aiken that day in the
22 parking lot he was holding a plastic bag;
23 correct?

24 A. He was.

25 Q. It was a plastic bag that we've offered

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1 into evidence of his personal belongings.

2 A. Correct.

3 Q. Is that here with you today?

4 A. Yes.

5 Q. If you could just take the plastic bag out
6 and show the jury the bag and what was in the
7 bag.

8 A. This is the bag. It's got greeting card;
9 items of clothing.

10 Q. And that was all that was in the bag on
11 the day that Mr. Aiken was stopped, correct?

12 A. Correct.

13 Q. And you went through the bag that day that
14 you stopped Mr. Aiken, on January 16th, 2010?

15 A. Correct.

16 Q. And you also showed that bag to Mr.
17 Morrison to see if there was any of Mr.
18 Morrison's property?

19 A. I did, yes.

20 Q. And there wasn't, correct?

21 A. Yes. He looked and he did not have any
22 items in it.

23 Q. And, in fact, there wasn't any of Mr.
24 Morrison's property on Mr. Aiken.

25 A. Correct.

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1 Q. There wasn't a wallet on Mr. Aiken?

2 A. No.

3 Q. And there weren't pills on Mr. Aiken?

4 There weren't reports of missing prescription
5 pills. And you were notified of this by the
6 dispatcher, correct? And you were in the area.

7 A. Yes.

8 Q. And you arrived within less than a minute.
9 Is that fair to say?

10 A. Approximately.

11 Q. Pretty quick. And when you arrived you
12 saw Mr. Morrison pointing at Mr. Aiken in the
13 parking lot of the Charleston Museum.

14 A. Yes.

15 Q. Mr. Aiken was standing there holding a
16 plastic bag.

17 A. Correct.

18 Q. And when you got out of the car you
19 ordered Mr. Aiken to the ground, and he
20 complied.

21 A. Yes.

22 Q. And Mr. Aiken told you that he went into
23 the apartment to return a leopard print woman's
24 shoe. Is that correct?

25 A. That's right.

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1 Q. And after further investigation you, in
2 fact, saw the woman's leopard print shoe in Mr.
3 Morrison's bedroom.

4 A. Correct.

5 Q. And initially Mr. Morrison told you that
6 nothing was taken from his residence, correct?

7 A. Initially, he did, but he wanted to make
8 sure. And we asked him to call us back and he
9 did and told us his wallet was missing.

10 Q. Officer Duren, you filled out a police
11 report; correct?

12 A. I did.

13 Q. And you filled out this police report
14 shortly after the incident, right?

15 A. Correct.

16 Q. I'm going to show you the police report.

17 THE COURT: You need to mark it,
18 please.

19 COURT REPORTER: Defendant's Exhibit
20 2 for identification.

21 CROSS EXAMINATION CONTINUED

22 BY MS. MULVANEY:

23 Q. Just look at that report.

24 A. Okay, (reviewing).

25 Q. And just tell me if that refreshes your

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1 recollection as to whether or not Mr. Morrison
2 initially told you that nothing was taken from
3 his residence.

4 A. Okay. Yes. At the time that I wrote this
5 initial report, I stated that the victim stated
6 he did not take anything from his residence.

7 Q. And you were investigating a possible
8 burglary, correct?

9 A. Right.

10 Q. So, of course, you were going to ask if
11 anything was taken?

12 A. Right.

13 Q. And if he saw him take anything?

14 A. Right.

15 Q. And the answer to those questions at that
16 time was he told you nothing was taken.

17 A. Right, immediately after the incident,
18 after we responded.

19 Q. And then afterwards you gave Mr. Morrison
20 your card?

21 A. I did, yes.

22 Q. And when was it that Mr. Morrison
23 contacted you and said that it was possible
24 that his wallet was taken?

25 A. I can't recall the exact time. It was a

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1 relatively quick time frame, maybe an hour at
2 most. We were able to go back while we were
3 still on the scene and retrace the steps. So
4 maybe not even an hour. I can't recall
5 exactly.

6 Q. So you had left and you had come back?

7 A. No. I'm saying we had not left the scene
8 before he notified us about that.

9 Q. So he had said this before y'all had left?

10 A. Right, before the individual was
11 transported to the station.

12 Q. And when Mr. Morrison gave you this
13 information you, of course, looked for Mr.
14 Morrison's wallet.

15 A. Correct.

16 Q. And you weren't the only one that looked
17 for Mr. Morrison's wallet, correct?

18 A. Yes.

19 Q. It was also Officer Brown, I believe you
20 said.

21 A. Yes.

22 Q. And Mr. Morrison himself also looked?

23 A. Yes.

24 Q. And this was daylight, right?

25 A. Yes.

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1 Q. And Mr. Morrison was able to tell you the
2 steps and the path he had taken.

3 A. To the best of his ability.

4 Q. And y'all looked and you didn't find the
5 wallet.

6 A. Correct.

7 Q. And, in fact, you didn't charge Mr. Aiken
8 with the wallet because you weren't sure -- it
9 was possible Mr. Morrison had misplaced it.

10 A. Correct.

11 Q. Officer, Mr. Aiken was charged with
12 burglary in the first degree, a very serious
13 charge; correct?

14 A. Yes.

15 Q. And working with the police department you
16 also have access to the crime scene department,
17 correct?

18 A. Yes.

19 Q. If you're investigating a serious crime
20 and you need crime scene, you have the access
21 to call crime scene?

22 A. Yes, but my understanding was that there
23 was no question he was the individual.

24 Q. If you need to call crime scene, in other
25 words, crime scene will look for prints?

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1 A. Yes.

2 Q. They can look at the door handle and see
3 if the door had been opened, if there were
4 prints on the door handle.

5 A. They can. But again, I'm not a crime
6 scene technician.

7 Q. Right. But you know if -- you can call
8 crime scene if you need them.

9 A. Certainly.

10 Q. Crime scene could look for fingerprints on
11 pill bottles or various other items, household
12 items?

13 A. It depends on certain things. They don't
14 actually take a fingerprint from everything.

15 Q. Right, I know. Maybe not of every person.
16 I guess what I'm asking you is if the situation
17 calls for it, you can call ---

18 SOLICITOR SIMPSON: Objection, Your
19 Honor. Asked and answered.

20 THE COURT: You can ask him as much
21 as you need to. It's really not relevant. But
22 thank you.

23 CROSS EXAMINATION CONTINUED

24 BY MS. MULVANEY:

25 Q. But crime scene was not called in this

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1 situation.

2 A. They were called. Again this is from my
3 recollection but I believe they were called but
4 the bag was found at that time.

5 Q. So crime scene didn't come and investigate
6 this?

7 A. No.

8 MARY BETH MULVANEY: Nothing
9 further.

10 THE COURT: Redirect.

11 SOLICITOR SIMPSON: Thank you, Your
12 Honor.

13 REDIRECT EXAMINATION

14 BY SOLICITOR SIMPSON:

15 Q. Briefly, Officer Duren. You noted the
16 plastic bag that was found on the defendant,
17 correct?

18 A. Correct.

19 Q. It had some greeting cards in it, correct?

20 A. Correct.

21 Q. You're also familiar with having walked
22 and retraced in looking for the wallet the
23 route the defendant took from
24 correct?

25 A. Yes.

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1 Q. Was that a direction that would have led
2 you toward the market in Charleston?

3 A. No.

4 Q. Was it, in fact, have been in the exact
5 opposite direction of the market?

6 A. Yes.

7 Q. Mr. Morrison, you noted, did not note
8 anything missing from his apartment initially;
9 correct?

10 A. Initially, correct.

11 Q. Can you elaborate a little bit on what you
12 meant by "initially."

13 A. Initially, in terms of the fact that when
14 I initially retained the suspect for
15 questioning, placing him in the rear of the
16 vehicle. A multitude of things take place at
17 that time. More units coming on. A lot of
18 people were asking Mr. Morrison at the time,
19 "do you know what's missing?" There were a lot
20 of things going on. But shortly thereafter --
21 I can't remember the exact time -- but shortly
22 thereafter he called and said that he thought
23 his wallet had been taken.

24 Q. So "initially" you mean at the scene, at
25 the parking lot to where he had chased the

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1 defendant?

2 A. Correct.

3 Q. And he reported it was approximately
4 between thirty minutes and an hour?

5 A. Approximately.

6 Q. Was that after he had had an opportunity
7 to go back to his apartment and look around?

8 A. Right.

9 Q. Ms. Mulvaney pointed out that perhaps --
10 and you're not an expert -- that crime scene
11 could have come and fingerprinted Mr.
12 Morrison's room, had they been called?

13 A. Perhaps.

14 Q. Did the defendant, Mr. Aiken, already
15 admit to you that he was in the victim's room?

16 A. He did.

17 SOLICITOR SIMPSON: No further
18 questions.

19 THE COURT: Recross.

20 MS. MULVANEY: No questions, Your
21 Honor.

22 THE COURT: Very well. You may come
23 down. Thank you very much.

24 (WITNESS STEPS DOWN)

25 THE COURT: Call your next witness,

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1 please.

2 SOLICITOR SIMPSON: Thank you. The
3 State calls Sergeant Daquigan of the Charleston
4 Police Department.

5 (WITNESS TAKES STAND)

6 DONALD DAQUIGAN, being duly sworn to
7 tell the truth, the whole truth and nothing but
8 the truth, testified, as follows:

9 DIRECT EXAMINATION

10 BY SOLICITOR SIMPSON:

11 Q. Sergeant Daquigan, good afternoon. What
12 agency do you work with?

13 A. I work for the Charleston Police
14 Department.

15 Q. And in what capacity?

16 A. I am what is known as a central detective
17 where we handle most major crimes.

18 Q. Do you recall, in that capacity, being
19 sent to a location on January 16th, 2010?

20 A. Yes.

21 Q. Could you just describe for the jury how
22 you became involved in that investigation and
23 what your role in that investigation was?

24 A. Once a month I have what is known as
25 weekend duty, and I will be the on-call

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1 detective for that weekend. I received a call
2 from the dispatcher that there was a burglary
3 that had just occurred, that they needed a
4 detective to go out to the scene.

5 Q. And to what location were you dispatched?

6 A. The first location I went to was where
7 they had already had the defendant in custody,
8 which was at the Charleston Museum.

9 Q. And who did you first speak to when you
10 arrived on the scene?

11 A. I spoke to the sergeant on duty at the
12 time, Sergeant Metts.

13 Q. Did you have the opportunity at that time
14 to speak with the victim?

15 A. I had not spoke to the victim at that
16 point. The first one on the scene and I was
17 informed what was going on. Then I spoke to
18 the victim afterwards.

19 Q. Did you also have the opportunity to
20 interview the defendant on the scene?

21 A. Yes, I did.

22 Q. And is the person you interviewed present
23 in the courtroom?

24 A. Yes, he is.

25 Q. Where is that person seated?

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1 A. Seated right there at that table
2 (indicating defense table).

3 Q. When interviewing a person suspected of
4 committing a crime what's the first thing that
5 you do?

6 A. The first thing I did was look at his
7 driver's license. The sergeant handed it to me
8 when I spoke with him about the facts. I asked
9 him if he was James Aiken and he responded, I
10 believe, "yes." Then I identified myself as
11 Sergeant Donald Daquigan. I showed him my
12 badge. And moments after that I gave him his
13 *Miranda* rights.

14 Q. I imagine most of the jury, if they've
15 ever watched television in their entire life,
16 is familiar with these. But could you explain
17 to the jury what the *Miranda* rights are and
18 what that encompasses?

19 A. The *Miranda* rights are certain rights that
20 a defendant has. The first thing is they have
21 the right to remain silent. Anything you say
22 can and will be used against you in a court of
23 law. You have the right to a lawyer and if you
24 can't afford one, one will be appointed for
25 you. If you decide to answer any questions you

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1 can stop answering at any point.

2 Q. As you explained these to the defendant
3 did he appear to understand them?

4 A. Yes.

5 Q. Did he voluntarily waive those rights and
6 agree to talk to you about what had occurred
7 that morning?

8 A. Yes.

9 Q. Did you then question the defendant about
10 that morning?

11 A. Yes.

12 Q. What did he ---

13 MS. MULVANEY: Your Honor, I'd just
14 like to note my previous same objection for the
15 record.

16 THE COURT: The objection is noted
17 and the positions stated on the argument of
18 your positions are preserved. And the Court's
19 prior ruling will stand. You may continue.

20 SOLICITOR SIMPSON: Thank you, Your
21 Honor.

22 DIRECT EXAMINATION CONTINUED

23 BY SOLICITOR SIMPSON:

24 Q. Would you explain to the jury the details
25 of the conversation that occurred?

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1 A. Once I read him his rights I asked him if
2 he would talk to me and tell me what was going
3 on. At that time he told me that he had found
4 a shoe outside the house and that he was trying
5 to find the owner of it. The door was unlocked
6 and he tried going up the stairs.

7 I asked him then if the door was unlocked
8 and as he was going up the stairs did he call
9 out to see if anybody was home. His response
10 was no.

11 I then asked him were you ever invited
12 into the house? His answer was no.

13 Then he went on to tell me that he had
14 went upstairs and that's when there was
15 interaction with the victim.

16 Q. So he admitted to you being the individual
17 that was in Mr. Morrison's bedroom?

18 A. Yes.

19 Q. During the course of the conversation did
20 the defendant appear to you to understand
21 everything you were saying?

22 A. Yes.

23 Q. Did he appear intoxicated in any way?

24 A. No.

25 Q. Did he appear to have any obvious, in your

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1 opinion, mental deficiencies?

2 A. No, sir.

3 Q. Any odor of alcohol about his person?

4 A. No, sir.

5 Q. Did he respond to your questions as a
6 mature adult and someone who understood what
7 was going on?

8 A. Yes, sir.

9 SOLICITOR SIMPSON: The Court's
10 indulgence?

11 THE COURT: Certainly.

12 DIRECT EXAMINATION CONTINUED

13 BY SOLICITOR SIMPSON:

14 Q. Sergeant Daguigan, please answer any
15 questions Ms. Mulvaney has for you.

16 MS. MULVANEY: Just one moment.

17 THE COURT: Certainly.

18 MS. MULVANEY: I don't have any
19 questions at this time.

20 THE COURT: Very well. You may come
21 down, sir. Thank you.

22 (WITNESS STEPS DOWN)

23 THE COURT: Call your next witness,
24 please.

25 SOLICITOR SIMPSON: Thank you, Your

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1 Honor. The State calls Sarah Lippe.

2 (OFF RECORD BENCH CONFERENCE)

3 THE COURT: Do you have additional
4 objections? If you do, we can take care of
5 that while the jury is out.

6 LORI PROCTOR: Maybe.

7 THE COURT: Ladies and gentlemen, at
8 this point there's a matter of law I'm going to
9 take up out of your presence. We will also
10 take a break at this point. We didn't take a
11 long one. Generally, I try to go about an hour
12 and a half and then we take a break. So we'll
13 be with you in probably about fifteen minutes.
14 So you may retire to your jury room. Do not
15 begin your deliberations.

16 (JURY OUT @ 3:30 P.M.)

17 THE COURT: You intend to introduce
18 with this witness, the only thing, I assume,
19 are the certified copies of the sentencing
20 sheets?

21 SOLICITOR SIMPSON: Yes, Your
22 Honor.

23 THE COURT: State's 6 and 7. What
24 are your objections other than those previously
25 argued, that you are willing to stipulate there

1 are prior burglaries.

2 MS. PROCTOR: Your Honor, could
3 we have just one minute?

4 THE COURT: Yes.

5 MARY BETH MULVANEY: Judge, if I
6 may, with regards to this witness, I want to
7 under-stand exactly what he's putting in.

8 THE COURT: You've seen it. It's a
9 certified copy of what every case has. That's
10 exactly what it is.

11 MARY BETH MULVANEY: Yes, sir.

12 THE COURT: It's a certified copy.
13 She's a clerk. She's going to say this is a
14 certified copy of what's on the record. I
15 think that's what she's going to testify to.
16 That's why I need to know what the objection
17 is.

18 MS. PROCTOR: I think it's -- part of
19 this is totally my fault. I don't know how or
20 what they're going to ask about that.

21 THE COURT: I don't either.

22 MS. PROCTOR: And I didn't know
23 if we still have questions about what it was, a
24 sentencing sheet.

25 THE COURT: All she's going to --

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1 she can interpret any of those. All she's
2 going to do is say, "here's a copy of a record
3 that I have in my office." I assume.

4 I don't know how he's going to ask.

5 I'll be happy to entertain any
6 objections you want. I just want to know,
7 other than that -- you can object to anything
8 -- any questions you want. We don't need to do
9 that.

10 You looked at the documents and I want
11 to know what your challenge was to the
12 documents themselves. Because other than the
13 fact that you don't want them in, but you were
14 going to stipulate that these were some of his
15 convictions. So I don't understand what your
16 issue is, I guess. I'm trying to interpret.

17 MS. PROCTOR: No, Your Honor, I
18 guess, -- one of the sheets is just a sentence
19 sheet and I ---

20 THE COURT: Y'all have looked at
21 them. He knows what he has. We know what it
22 is. You guys said, "I'll admit to whatever you
23 want me to admit to." But now you're saying,
24 "Uh-uh, that's not in." I don't know what it
25 is either. It may not be insufficient.

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1 Y'all look at it.

2 And if it isn't, then you can object
3 to -- I don't think it has to do with an
4 objection. Because she can testify this is a
5 document -- all she's doing is saying, "I'm a
6 clerk. Here's a document I pulled from this
7 file. This is a certified copy of that
8 document."

9 What its purpose is, how good it is,
10 whether or not it carries the day, she sure
11 can't help it. I don't think. Let's take a
12 break.

13 MS. PROCTOR: I understand that. I
14 thought you were saying that after we did that
15 we couldn't make any other objections.

16 THE COURT: I didn't say that. I
17 just simply wanted -- because you looked at the
18 document and I was wondering what you were
19 going to challenge. Because -- never mind.
20 Y'all make your objections. I'll make a
21 ruling. How about that? I won't try to help.
22 We'll be at-ease.

23 (BRIEF RECESS)

24 (DEFENDANT PRESENT)

25 THE COURT: Bring in the jury.

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1 (JURY IN @ 3:45 P.M.)

2 BAILIFF: Jury is present.

3 THE COURT: Thank you very much.

4 Thank you, ladies and gentlemen. We're ready
5 to continue. Thank you.

6 (WITNESS TAKES STAND)

7 SARAH LIPPE, being duly sworn to tell
8 the truth, the whole truth and nothing but the
9 truth, testified, as follows:

10 THE COURT: You may proceed.

11 SOLICITOR SIMPSON: Thank you, Your
12 Honor.

13 DIRECT EXAMINATION

14 BY SOLICITOR SIMPSON:

15 Q. Ms. Lippe, good afternoon.. Where are you
16 employed?

17 A. Clerk's office.

18 Q. And by the clerk's office, you mean in
19 what county?

20 A. Charleston County.

21 Q. And what is the purpose or function of the
22 Clerk of Court's Office?

23 A. Records retention. We maintain records
24 that have to do with civil and criminal cases
25 in Charleston County.

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1 Q. So would one aspect of that duty be
2 maintaining the documents that indicate
3 criminal convictions that take place in
4 Charleston County?

5 A. Yes.

6 Q. Is your office the custodian and the
7 keeper of those records?

8 A. Yes.

9 Q. Ms. Lippe, what is a sentencing sheet?

10 A. It's the Order that a judge signs when a
11 person is convicted if they are found guilty.

12 Q. So the sentencing sheet is a document that
13 reflects a criminal conviction in Charleston
14 County?

15 A. Yes.

16 Q. Does that document reflect the
17 individual's name who was convicted?

18 A. Yes.

19 Q. Does it include their date of birth?

20 A. Yes.

21 Q. And does it include the charge that they
22 are convicted of?

23 A. Yes.

24 Q. Ms. Lippe, did you review two such
25 documents at the behest of my office last week?

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1 A. Yes.

2 SOLICITOR SIMPSON: May I have
3 permission to approach the witness?

4 THE COURT: You may.

5 DIRECT EXAMINATION CONTINUED

6 BY SOLICITOR SIMPSON:

7 Q. Ms. Lippe, I'm handing you what's been
8 previously marked for identification only as
9 State's Exhibit 6 and State's Exhibit 7. Do
10 you recognize those documents?

11 A. Yes.

12 Q. Are those, in fact, the documents you
13 reviewed at our behest last week?

14 A. Yes.

15 SOLICITOR SIMPSON: Your Honor, at
16 this point the State would move to enter
17 State's 6 and 7 with permission to publish
18 those documents to the jury.

19 THE COURT: Objection?

20 MS. PROCTOR: Subject to my
21 previous same objection.

22 THE COURT: The objections made on
23 this issue in limine that were argued fully and
24 discussed fully are now made and we will not
25 excuse the jury again. They are incorporated

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1 fully in the record verbatim and my ruling
2 remains. Subject to the objection of counsel
3 previously argued, State's 6 and 7 are
4 admitted. Thank you. And you may publish
5 them.

6 (SO ENTERED AS STATE'S EXHIBIT 6)

7 (SO ENTERED AS STATE'S EXHIBIT 7)

8 DIRECT EXAMINATION CONTINUED

9 BY SOLICITOR SIMPSON:

10 Q. Ms. Lippe, are those documents certified?

11 A. Yes.

12 Q. What does that mean to have a document
13 certified by your office?

14 A. It means that the person signing them and
15 attesting that it is a true copy of the
16 original.

17 Q. We went through some of the information
18 contained in those documents. I'm going to
19 ask you the same questions, but specifically
20 regarding State's 6 and 7. What is the
21 individual's name on those sentencing sheets?

22 A. James Aiken.

23 Q. Is there a middle name indicated on either
24 of them?

25 A. On one of them it's James Ivan Aiken.

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1 Q. Is there a date of birth indicated on
2 State's 6 and 7?

3 A. Yes.

4 Q. And what is that date of birth?

5 A.

6 Q. Is the same date of birth on both of those
7 documents?

8 A. On both.

9 Q. What are the offenses on those documents
10 that Mr. Aiken was convicted of?

11 A. They are both burglary second degree,
12 nonviolent.

13 Q. So, Ms. Lippe, State's Exhibits 6 and 7
14 are documents that would indicate James Ivan
15 Aiken has previously been convicted of at least
16 two burglaries?

17 A. Yes.

18 SOLICITOR SIMPSON: Nothing
19 further, Your Honor.

20 THE COURT: You may cross examine.

21 MS. MULVANEY: Yes, sir.

22 CROSS EXAMINATION

23 BY MS. MULVANEY:

24 Q. People can go through the system using
25 false names, correct?

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1 A. Yes.

2 Q. And they use different social security
3 numbers, correct, and different dates of birth?

4 A. Yes.

5 Q. And, in fact, there's a separate crime for
6 that called identity theft, correct?

7 A. Yes.

8 Q. And every time someone is arrested there
9 are fingerprints that prevent that from
10 occurring, right?

11 A. Yes.

12 THE COURT: Let's approach, please.

13 (OFF RECORD BENCH CONFERENCE)

14 MS. MULVANEY: No further questions.

15 THE COURT: Redirect.

16 SOLICITOR SIMPSON: Nothing, Your
17 Honor.

18 THE COURT: You may come down.

19 Thank you.

20 (WITNESS STEPS DOWN)

21 THE COURT: Call your next witness.

22 SOLICITOR SIMPSON: Your Honor, the
23 State rests.

24 THE COURT: Ladies and gentlemen, at
25 this moment there are some matters of law now

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1 that I have to take up. And I know you've been
2 excused several times, and that's the way it
3 works. Of course, when you begin your
4 deliberations, they're out of our presence.
5 And when we take up matters of law, most of the
6 time that's out of your presence.

7 There are occasions when you've heard
8 objections, and those are matters of law.
9 They're not for your concern or your
10 consideration.

11 But at this stage, I do have some
12 matters that I have to take up, and I'm going
13 to have to ask you to go back to your jury
14 room.

15 But do not begin your deliberations.
16 We'll be with you as quickly as we can.

17 (JURY OUT AT 3:50 P.M.)

18 THE COURT: Before we move into
19 motions, we had a sidebar concerning the
20 testimony of Ms. Lippe. My concern -- and none
21 of this was on the record -- was that prior to
22 this, the defendant, in an effort -- and I
23 understand the strategy behind that -- to avoid
24 having those admitted, stated that they would
25 stipulate that it's a burglary first and

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1 thereby eliminate the need for having to
2 introduce those two convictions.

3 Based on what I've heard thus far, and
4 then now that the State has rested, the only
5 basis that it could be a burg first -- because
6 it obviously happened in the daytime -- would
7 be that -- and there's no testimony of any
8 other aggravating circumstance -- would be that
9 they had at least two prior convictions.

10 While I understand counsel's right to
11 challenge, and I don't have a problem with
12 challenging any of these convictions if you
13 know these persons, the ones they've introduced
14 are not the ones. In other words, they aren't
15 his convictions, but somebody by his name.

16 But by virtue of your own stipulation
17 -- and I have restricted the State to offer
18 only two. That's where I came and said I think
19 you're basically borderline perpetrating a
20 fraud on the jury. Because he has at least
21 two, and there's no issue about that. So that
22 was the reason that I stopped.

23 But having said that, Ms. Mulvaney,
24 you certainly -- and I'll put the witness back,
25 if you wish to proffer any line for the record.

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1 But for those reasons, I think it would be
2 unfair. I think it perpetrates a fraud,
3 because it's challenging the correctness of
4 those, when, in fact, we all know they are --
5 I don't know whether they specifically are
6 but we know that he has at least two.
7 Everybody agrees to that. I don't think
8 there's any question of that.

9 And I don't think you can challenge
10 that to try to circumvent the two convictions
11 and say "well, those aren't his," is what I'm
12 saying.

13 MS. MULVANEY: Judge, may I?

14 THE COURT: Please. I'm offering
15 that.

16 MS. MULVANEY: Okay. And I --
17 at the beginning of the case, Your Honor, I
18 offered to stipulate that if a burglary was
19 committed that it was a burglary first. And
20 the State refused to accept that stipulation
21 because they wanted to provide and they wanted
22 the jury to hear about these prior burglaries.

23 So once they didn't accept my
24 stipulation, I believe that I'm entitled to
25 challenge the sufficiency of the evidence that

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1 they present, since it is an element of the
2 charge. And if I could just pass up to the
3 court and to the Solicitor the two cases that
4 I'm relying on.

5 THE COURT: Ms. Mulvaney, I don't
6 quarrel with that. What you're going to be
7 doing is saying that particular piece -- that
8 document is not him. What's going to happen,
9 though, is that I'm -- so that everybody's
10 clear, I'm going to then allow the State to
11 bring up every single indictment he has down
12 there and put them in. Because now you've
13 challenged that document. And I'm going to say
14 "well, then, prove all of them."

15 Just because exactly what -- Henry
16 Floyd, my former colleague was reversed, we
17 know, because he allowed seven. Because his
18 observation was if there's two, seven, what's
19 the difference? It's all detrimental. But his
20 situation was different. They were willing to
21 say only two.

22 But you're challenging the ones
23 they've picked. And that's fine if you want to
24 do it and challenge it, but just beware that it
25 opens Pandora's Box. You've opened it.

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1 MS. MULVANEY: Right. I certainly
2 don't want to open it.

3 THE COURT: Well, you will. Because
4 if I allow you to challenge it, then I have to
5 go and establish every single one.

6 And, another things we've got to do
7 too, -- thank goodness you didn't do it. I
8 don't know -- but we're talking about
9 publishing social security numbers. I don't
10 think that's a good idea, frankly. I think
11 that's a problem, personally. I don't think
12 the record ought to have his social security
13 number. But that's just -- I'm a little bit
14 alarmed about that in the society that we live.
15 But be that as it may, you go right ahead, if
16 that's what you want to do.

17 MS. MULVANEY: No, sir. What I
18 want to do is challenge that the State has not
19 proven the sufficiency.

20 THE COURT: Yeah. Well, you're
21 challenging based on your position -- what?
22 The only way you can challenge that is to say
23 'they only proved one.' That one of them is
24 not correct, or two of them aren't correct.
25 And that's precisely my point. Because you've

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1 limited them to two. How else is it
2 insufficient?

3 MS. MULVANEY: Your Honor, the
4 federal courts have held that the name alone,
5 without more information, is not sufficient
6 against ---

7 THE COURT: Ms. Mulvaney, you're
8 dealing in semantics. That's fine. If that's
9 what you want to base it on, that the name
10 alone -- then let's put all the data that we
11 know about him in. We'll be happy to do that.

12 MS. MULVANEY: No, Your Honor.
13 I guess what I'm saying is that they should
14 present more than just a name.

15 THE COURT: No, ma'am.

16 MS. MULVANEY: Fingerprints or a
17 photo or -- in fact, in these two documents the
18 social security numbers are wrong.

19 THE COURT: I appreciate that.
20 That's your position. I'll be happy, if that's
21 your position, then we'll put them all in.
22 Because you have to say "these aren't mine."

23 MS. MULVANEY: No, sir, I don't
24 want to.

25 THE COURT: And that's what you're

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1 arguing. Especially when you -- if you started
2 with the premise "I have no burglaries," then I
3 agree with you wholeheartedly. You got -- you
4 have fair game. "I have never committed a
5 burglary in my life," that's fair game.

6 But when you start with and say "I
7 don't want you to be able to introduce that
8 because it's prejudicial, so we'll stipulate
9 it's burglary first." And you would agree with
10 me -- let's clarify this. That's the only
11 basis under which it can be a burglary first,
12 is if he has two prior convictions, correct?

13 MS. MULVANEY: Yes, sir.

14 THE COURT: No question about that.

15 MS. MULVANEY: Right.

16 THE COURT: So to now allow you to
17 say "I will do that," but almost like "well, if
18 that's the way you're going to play, then I'll
19 play dirty." I'm not going to let you play
20 dirty. I think that's playing dirty, wrong and
21 perpetrating a fraud.

22 Now, there's a way around that. I'll
23 allow you full -- you can go ahead and do that.
24 Then I'm going to allow the State to do that as
25 well. And since we're going to have to now

1 prove that it's him, I guess you've opened the
2 door that we're going to have to bring in
3 testimony about who it was. And they're going
4 to come in here and identify him. Because
5 that's what we're doing. We're saying, "no,
6 no, this can't be him."

7 You can't have it both ways. You
8 can't have it restricted and say "now we're
9 just going to argue that." So, no, ma'am.
10 But you make the call.

11 MS. MULVANEY: No, sir. I
12 certainly do not want to bring in more.

13 THE COURT: So you choose not to
14 proffer any additional line of questions from
15 this witness?

16 MS. MULVANEY: That's correct.

17 THE COURT: Very good. Thank you
18 very much. Okay. Thank you.

19 All right. We do not need this
20 witness, then, anymore, Ms. Mulvaney?

21 MS. MULVANEY: That's correct,
22 Your Honor.

23 THE COURT: Very well. Thank you so
24 much for coming back. You're free to go.

25 I assume no Motions from the State?

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1 SOLICITOR SIMPSON: None, Your
2 Honor. Very briefly as to the points you just
3 made, for the record, it's the State's position
4 on the convictions ---

5 THE COURT: I knew there were more
6 than two. So I had restricted you.

7 SOLICITOR SIMPSON: Just noting
8 that for the record.

9 THE COURT: That's fine. And we've
10 restricted you any mention of it or any mention
11 of the circumstances of it. That's another way
12 we can prove who it is. We can't take these
13 things in a vacuum, I don't think.

14 Ms. Mulvaney, I'll be happy to hear
15 from you.

16 MS. MULVANEY: Yes, sir. I would
17 make a Motion at this time for a directed
18 verdict pursuant to Rule 19. I don't believe
19 that the State has presented any competent
20 evidence showing that the defendant entered the
21 dwelling without consent and with the intent to
22 commit a crime in the dwelling. So I would ask
23 that you direct a verdict on that basis.

24 THE COURT: The evidence considered
25 in the light most favorable to the State, which

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1 I'm required to do, obviously establishes, in
2 my opinion, that they basically established
3 everything. Because there's no question he
4 entered the residence. There is no question,
5 at least from the record today, there was no
6 consent for the entry. And the fact that he
7 didn't have to break a door or the fact that
8 the door was standing wide-open would have
9 nothing to do with the crime of burglary. The
10 minute that he walked through that door, he
11 entered for the purposes of burglary.

12 The only issue which is clearly, at
13 least at this point, based on his statement and
14 the statements that are in that "I'm returning
15 your shoe," is, as you know, the State has to
16 prove that he had the intent to commit a crime
17 prior to the entry. Because if, while he was
18 there, he decided that "I don't want to do this
19 crime. I'm not interested in robbing this
20 person," and left, the crime of burglary has
21 been committed.

22 Likewise, if he entered the building
23 without an intent and then later chose to
24 commit a crime, that would not be burglary
25 either. So it's up to the jury to decide.

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1 But there's an abundance of evidence that,
2 considering all of the evidence in the light
3 most favorable to the State, that clearly the
4 State has met its burden. I would respectfully
5 deny your Motion given all the circumstances
6 surrounding it.

7 Whether he took anything or not really
8 has nothing to do with the burglary. It has a
9 lot to do with larceny, but nothing to do with
10 burglary. He doesn't have to take anything
11 once he gets in there. So I think the State
12 has met the burden of proof fully, considering
13 it in the light most favorable.

14 Now, the next question that I have,
15 Ms. Mulvaney, have you discussed with Mr. Aiken
16 his right to testify or not to testify?

17 MS. MULVANEY: We have discussed
18 it but, Your Honor, I do need a little bit more
19 time to talk with my ----

20 THE COURT: I'll give you -- how
21 much more do you need?

22 MS. MULVANEY: Ten minutes, Your
23 Honor..

24 THE COURT: I'll give you ten.
25 Thank you very much. We'll be at-ease for ten

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1 minutes.

2 (BRIEF RECESS)

3 (DEFENDANT PRESENT)

4 THE COURT: Are you ready?

5 MS. MULVANEY: Yes, sir.

6 THE COURT: Mr. Aiken, I would ask
7 you -- he can remain seated, Ms. Mulvaney.
8 Thank you very much. If you would, raise your
9 right hand.

10 DEFENDANT: (Complies)

11 THE COURT: Do you solemnly swear or
12 affirm that your response to my questions will
13 be the truth and nothing but the truth, so help
14 you God?

15 DEFENDANT: Yes, sir.

16 THE COURT: Thank you, Mr. Aiken.
17 You can put your hand down.

18 DEFENDANT: (Complies)

19 THE COURT: Mr. Aiken, you've had an
20 opportunity to discuss your rights concerning
21 your right to testify or not to testify in this
22 matter. Is that correct, sir?

23 DEFENDANT: Yes, sir.

24 THE COURT: Are you today under the
25 influence of any alcohol or any medications?

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1 DEFENDANT: No, sir.

2 THE COURT: Have you had a
3 sufficient opportunity to reflect on what your
4 decision is?

5 DEFENDANT: Yes, sir.

6 THE COURT: And what is that
7 decision, sir.

8 DEFENDANT: To testify.

9 THE COURT: To testify.

10 DEFENDANT: Yes, sir.

11 THE COURT: And your lawyers have
12 explained to you that you have options, and
13 you've heard me tell that jury several times
14 that they can't look to you to prove or
15 disprove anything. And therefore -- and I
16 would further instruct them, if you chose not
17 to testify, that they couldn't use that against
18 you. And your lawyers have explained that to
19 you as well?

20 DEFENDANT: Yes, sir.

21 THE COURT: But if you do testify,
22 of course, you're subject to cross examination,
23 just as every witness who testifies. You
24 understand?

25 DEFENDANT: Yes, sir.

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1 THE COURT: And you're aware of
2 that?

3 DEFENDANT: Yes, sir.

4 THE COURT: And certainly it is your
5 right, as any person accused, to take the stand
6 if you choose to. But sometimes, as your
7 lawyers have explained to you, from a strategic
8 standpoint, that might not be advantageous, in
9 their opinion. And they've discussed that with
10 you. Is that correct?

11 DEFENDANT: Yes, sir.

12 THE COURT: Having considered that
13 and having the opportunity to discuss that and
14 exchange your difference of opinions, and I'm
15 not suggesting you have. But if you did have,
16 you've had an opportunity to express that.
17 You, nevertheless, have made a decision for
18 yourself. Is that correct?

19 DEFENDANT: Yes, sir.

20 THE COURT: And it is your decision
21 to take the stand and testify?

22 DEFENDANT: Yes, sir.

23 THE COURT: Very well. And are you
24 comfortable with your decision, sir?

25 DEFENDANT: Yes, sir.

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1 THE COURT: And it is what you want
2 to do?

3 DEFENDANT: Yes, sir.

4 THE COURT: And notwithstanding --
5 and I'm not asking you to tell me what your
6 lawyers -- but just for the sake of our
7 discussion, if your lawyers said "we don't
8 think that's a good idea because we think
9 there's some cross examination that may be
10 harmful to you," and because, as your lawyers
11 have expressed to you, I'm sure, that if you
12 don't offer any evidence then you have the
13 right to have the final say through your
14 lawyers. You understand that?

15 DEFENDANT: Okay.

16 THE COURT: And you've talked with
17 them about that also?

18 DEFENDANT: No, not that. No. That
19 wasn't explained to me. May I have a minute?

20 THE COURT: Sure. Absolutely.

21 DEFENDANT: (Sidebar with counsel).

22 SOLICITOR SIMPSON: Your Honor,
23 could we develop the prior conviction issue for
24 appeal?

25 THE COURT: Hold just a second.

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1 Let's take it one step at a time.

2 SOLICITOR SIMPSON: I'm sorry.

3 THE COURT: At this point there's no
4 need to resolve that. At this point.

5 SOLICITOR SIMPSON: Okay, thank
6 you.

7 THE COURT: I know of one. There's
8 2001. Obviously, that one would fall into that
9 category. Do you have others?

10 SOLICITOR SIMPSON: Yes, sir.

11 DEFENDANT: Your Honor?

12 THE COURT: Yes, sir.

13 DEFENDANT: May I approach? I mean
14 not approach, but address the Court?

15 THE COURT: Yes, sir.

16 DEFENDANT: I would like this for
17 the record.

18 THE COURT: It's on the record.

19 DEFENDANT: Thank you. When I came
20 in this morning you told me when we began the
21 hearing, I asked if I could address the court
22 and you said no.

23 THE COURT: Through your lawyer.
24 But right now we're talking about something
25 that I will allow you -- because we're in the

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1 middle of my inquiry about your rights to
2 testify or not to testify.

3 DEFENDANT: And the reason I had
4 asked that is because there was relevant
5 discovery that I hadn't gone over with counsel.
6 I mean, that it was ---

7 THE COURT: You're at another stage
8 now, Mr. Aiken.

9 DEFENDANT: I just want to ---

10 THE COURT: And you're well aware of
11 that or you wouldn't make that statement for
12 the record. Sir, because that's a different
13 standard altogether.

14 DEFENDANT: Okay.

15 THE COURT: Because you have
16 lawyers. If you were representing yourself, I
17 would entertain that maybe. But since you're
18 not, I can't entertain that. I assume you're
19 not a lawyer. You certainly are -- the Court
20 would like to observe that you've been very
21 active in participating with your trial. And
22 certainly that's exactly what you should do.

23 But insofar as relevant discovery,
24 that's not a matter that, at least at this
25 point -- I don't think you really need to go

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1 into really on the record fully. Because it
2 may be some things that you may want to say
3 later that it could be detrimental if you said
4 something now. I'll be happy to hear you fully
5 on that if you want to. That's up to you.
6 Okay?

7 DEFENDANT: Yes, sir.

8 THE COURT: Okay. Go ahead.

9 DEFENDANT: All I was saying to you,
10 Your Honor, when I mentioned the relevant
11 discovery, I've had certain parts of discovery
12 for six months and I haven't gone over or
13 reviewed with counsel. Counsel came to me
14 Friday and gave me some discovery that I saw on
15 Friday. We hadn't gone over it. Counsel has
16 met with me on several occasions, Your Honor,
17 and spoke with me five, ten minutes because she
18 called five or six people at the time. And
19 when she came Friday and said 'we have a trial
20 date Tuesday and I'll see you Tuesday,' I mean,
21 I hadn't even really discussed this.

22 THE COURT: Again, that's not
23 important at this stage because you have a
24 lawyer.

25 DEFENDANT: Okay.

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1 THE COURT: It may be important --
2 and you know it's called post-conviction
3 relief. And that's the stage where there'll be
4 testimony about all of that. That's a little
5 bit premature. Because as I told somebody --
6 in fact, oddly enough, I had a similar
7 discussion with a person who was accused just
8 as you were. He said, "My lawyers have done a
9 terrible job," -- but that was before we went
10 to the jury. I just made the observation, I
11 said, "Well, if they come back and find you not
12 guilty, I guess that means they did a pretty
13 good job for you." Well, the jury came back
14 not guilty. So I guess he wasn't as
15 dissatisfied with the lawyer's representation.
16 And sometimes that's the difference of being --
17 I assume you're not a lawyer by trade, sir?

18 DEFENDANT: No, sir, by a long shot.

19 THE COURT: Well, you testified, I
20 think you said you'd finished the eighth grade.

21 DEFENDANT: Yes, sir.

22 THE COURT: There's a lot to the law
23 that is really -- you can read a lot. But it's
24 not the things that you can read. It's those
25 subtleties. It's kind of what I told my wife -

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1 - my son was diagnosed with Bell's palsy this
2 weekend -- my grandson -- and my wife went
3 online and looked at some things and Sunday
4 morning she was commenting about her diagnosis
5 and her conclusion. And I said, 'Well, you
6 know, that's real good you've read all that,
7 but I think you have to be a physician to
8 really make that.' Because that's the
9 subtleties of our profession. And the same is
10 true with the practice of law. It's not the
11 specifics you read; it's the subtleties. And
12 you'll only glean that, unfortunately, Mr.
13 Aiken, through years of practice and doing it
14 and understanding. And it becomes something
15 that's almost intuitive. And that's the part
16 that's -- it's no disrespect to you. You can't
17 develop it, because you don't do it.

18 These two -- you've had, Ms. Mulvaney
19 I've had the pleasure of working with for a
20 number of years. Ms. Proctor, I think -- she's
21 been before me. But she's practiced criminal
22 law with me for the entire seventeen years I've
23 been on the Bench. So there's a lot -- and
24 she's handled everything under the sun that
25 I've seen. So I'm very familiar with that.

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1 So you've got two very capable attorneys.

2 And your positions and your
3 conclusions, you're entitled to them. But
4 that doesn't have anything to do at this stage
5 of the game.

6 We're back now to the question that I
7 asked you as to whether or not you had talked
8 with them. And you've been talking with them.
9 And you asked me to pause and you were reading
10 something else that your lawyer gave you. And
11 now you've had a chance to fully consider it.
12 You've discussed certain things. One of the
13 things that they've told you about, and I'm
14 going to hear that in just a minute, is Rule
15 609 which says that a prior conviction, under
16 certain circumstances, they're entitled to ask
17 you questions about those convictions. You're
18 familiar with that. It's called impeachment
19 testimony. Your lawyers discussed that with
20 you as well.

21 DEFENDANT: No.

22 THE COURT: Are you telling me --
23 now, you're under oath. I have to believe that
24 when you're answering my questions that you're
25 honoring the oath. Are you telling me your

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1 lawyers have not talked with you about prior
2 convictions and the purpose?

3 DEFENDANT: Yes, yes.

4 THE COURT: So don't -- just
5 remember you're under oath here.

6 DEFENDANT: Yes, I'm sorry. I
7 misunderstood what you said.

8 THE COURT: Thank you so much, sir.
9 So they've discussed that with you.

10 DEFENDANT: Yes.

11 THE COURT: Having had a full
12 opportunity to consider all of that, is it your
13 desire to testify?

14 DEFENDANT: Yes, sir.

15 THE COURT: Very well. Let the
16 record reflect that I have given Mr. Aiken a
17 full opportunity to talk with his lawyers.
18 He's demonstrated by his responses, in fact,
19 he's articulated his position very well here
20 today as to what he wants to do. He under-
21 stands fully the consequences. He understands
22 the prior convictions. He understands the fact
23 that if -- and I don't know what your plans
24 were about offering other testimony. But if
25 the defendant rests, then you get the closing

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1 argument. Your lawyers have talked with you
2 about that as well?

3 DEFENDANT: Yes.

4 THE COURT: So if you testify, of
5 course, you will not have that closing
6 argument. You understand that?

7 DEFENDANT: (Affirmative nod).

8 THE COURT: He's demonstrated a full
9 understanding. He's not under -- he has not
10 demonstrated any problems understanding or
11 fully comprehending. In fact, he corrected
12 himself on a question about whether or not his
13 lawyers had discussed the impeachment
14 testimony. So I find that his decision to
15 testify is one that he makes freely,
16 voluntarily, knowingly and intelligently.

17 He's indicated that he's not totally
18 satisfied with his attorneys, but he has
19 admitted that they have discussed with him his
20 rights.

21 And, Ms. Mulvaney and Ms. Proctor, you
22 have explored that with your client. Is that
23 correct?

24 MS. MULVANEY: Yes, sir.

25 THE COURT: Now, hold on a minute

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1 before we bring in our jury, we need to get
2 into the record. What charges do you intend to
3 offer if he testifies?

4 SOLICITOR SIMPSON: Your Honor, we
5 have a false report, a misdemeanor level, that
6 I will note. It's covered in the one year.

7 THE COURT: It comes under
8 dishonesty.

9 SOLICITOR SIMPSON: A petty larceny
10 from '02.

11 THE COURT: That's fairly a crime of
12 dishonesty.

13 SOLICITOR SIMPSON: I believe two
14 counts of strong arm robbery.

15 THE COURT: That would be
16 dishonesty.

17 SOLICITOR SIMPSON: And ---

18 THE COURT: And the reason I'm
19 saying that is, as I understand, anyone that's
20 not involved involving a crime of dishonesty of
21 false statements requires me to do a 403
22 analysis. But if they're not in that category,
23 then I do not do the 403 analysis. I merely
24 look at the crimes.

25 SOLICITOR SIMPSON: Just for the

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1 record, I point out that we have some
2 burglaries that fall within that time period.
3 I'm going to stay away from those.

4 THE COURT: I'll just tell you that
5 I would find that one, the probative value is
6 certainly outweighed by the prejudice because
7 of the similarity to the crime charged and
8 because you've had these others which go to his
9 credibility. So you don't need them. I think
10 it's really more than you need.

11 SOLICITOR SIMPSON: We agree, Your
12 Honor.

13 THE COURT: So the ones you just
14 mentioned are the ones you intend to ask?

15 SOLICITOR SIMPSON: It's appears to
16 be the two counts of strong arm robbery in 2001
17 and in 2002 a false report and the petty
18 larceny.

19 THE COURT: That's fine. I would
20 find that those are all crimes of dishonesty
21 and would allow those as being proper under
22 Rule 609(a)(1).

23 Now, Mr. Aiken, let me add one other
24 thing. Thank you for your comments and your
25 candor with the Court at this point. I've made

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1 my finding. If, at any point between the time
2 that they call you to take the stand and you
3 change your mind, you just tell your lawyer
4 that there's a matter of law that we need to
5 take up. I'll excuse the jury and we'll go
6 over this again. But if I don't hear from you
7 I'm going to assume you're still comfortable
8 with your decision to testify. And when you
9 take the stand, of course, that's done. Okay?
10 Is that fair with you, sir?

11 DEFENDANT: Yes, sir.

12 THE COURT: Thank you so much, Mr.
13 Aiken.

14 DEFENDANT: You're welcome, Judge.

15 THE COURT: I understand. But it's
16 your trial. And I want to give you a fair
17 opportunity to make that decision.

18 DEFENDANT: Thank you.

19 THE COURT: All right. Let's bring
20 in our jury.

21 DEFENDANT: (Sidebar with Counsel).

22 MS. MULVANEY: Your Honor, I'm
23 sorry. He's not going to testify.

24 THE COURT: Okay. Well, if he
25 changes his mind, -- well, hold on a second.

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1 Tell them (jury) to hold up -- you do not wish
2 to testify?

3 DEFENDANT: Yes, Your Honor.

4 THE COURT: Well, you just told me
5 that you wanted to testify. Now you don't want
6 to testify?

7 DEFENDANT: Your Honor?

8 THE COURT: Yes.

9 DEFENDANT: My mother's outside the
10 courtroom and she's just learned of my
11 decision. A lot of times I've made decisions
12 in my life that was against the things she said
13 and, you know, the way she brought me up. So I
14 figured that I'd leave the decision to her this
15 time because I never listened to her before
16 that, and that's the reason for my change.
17 Other than that I was adamant about testifying.

18 THE COURT: So it's your desire --
19 you've changed your mind, but that's what you
20 want to do?

21 DEFENDANT: Yes, sir. Yes, sir.

22 THE COURT: And you're comfortable
23 with your change?

24 DEFENDANT: Yes, sir.

25 THE COURT: At any point between the

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1. time that we rest your case, if you change your
2 mind, let me know. If not -- because I'm about
3 to ask do you wish to offer any testimony. And
4 I'm going to assume -- I don't know what your
5 lawyers are going to say, but they're going to
6 probably say "no." Once they do that, it's
7 over. Do you understand that?

8 DEFENDANT: Yes, sir.

9 THE COURT: And that's your
10 decision?

11 DEFENDANT: All right.

12 THE COURT: And I'll assume that
13 if they say "we do not wish to present any
14 testimony," then I will assume that that is
15 your decision not to testify. All right?
16 Is that correct?

17 DEFENDANT: Yes, sir.

18 THE COURT: All right. If you
19 change your mind we'll send the jury back out.
20 But I'm going to rest this case. I assume
21 you're not offering testimony, because that
22 would defeat the strategy. So I assume that's
23 not going to be done -- or a strategy.

24 LORI PROCTOR: Correct. When the
25 jury comes in are we going right into jury

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1 closings?

2 THE COURT: No, we're going to do
3 that tomorrow.

4 LORI PROCTOR: Thank you.

5 THE COURT: We're definitely not
6 going to do that. We're going to excuse them.
7 No problem. No, ma'am. Thank you, ma'am.

8 Let's bring them in now, I think.

9 (JURY IN @ 4:37 P.M.)

10 BAILIFF: Jury is present, Your
11 Honor.

12 THE COURT: Thank you so much. I
13 appreciate it, ladies and gentlemen. Your
14 patience is appreciated, and I will not, as I
15 mentioned to you when we started, the State has
16 rested its case.

17 And as I told you, Mr. Aiken has
18 absolutely no responsibility to prove or
19 disprove anything at all, nor does he have to
20 present any evidence for your consideration.
21 He doesn't have to do anything.

22 But, as I mentioned, he doesn't have
23 that opportunity to announce that until the
24 State is finished. The State is completed.

25 Ms. Mulvaney, does Mr. Aiken wish to

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1 present any additional testimony for the jury's
2 consideration?

3 MS. MULVANEY: No, sir. The
4 defense rests.

5 THE COURT: Very well. Thank you
6 very much. Ladies and gentlemen, that means
7 we've concluded the evidentiary portion of this
8 proceeding.

9 There still remains, however, two very
10 important parts of this process; one, of
11 course, the closing arguments and then, of
12 course, the charge on the law.

13 It's now twenty minutes to 5:00
14 o'clock. Those parts will probably take at
15 least an hour, if not longer. I don't think it
16 is good for you to start deliberating at almost
17 6:00 o'clock. And since you haven't begun that
18 process and we don't know how long it's going
19 to take, it's probably not advisable. And
20 that's been my experience and observation over
21 the years. So I'm going to take a recess at
22 this point. Because we wouldn't even be able
23 to get started probably until 6:00.

24 So there's some matters now that I
25 have to take up. Having concluded, I have to

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1 discuss my charge. I have to entertain some
2 further matters of law. So it's a good
3 breaking point for you all.

4 I'm assuming, since this is the second
5 time that you've occupied that seat, Ms. Canon,
6 that you've been selected as the presiding
7 juror. Is that correct?

8 JUROR NUMBER 37: Yes, sir.

9 THE COURT: Thank you very much.
10 And for the record, your juror number is ---

11 JUROR NUMBER 37: Thirty-seven.

12 THE COURT: Thank you. And thank
13 you, ladies and gentlemen, for taking care of
14 that.

15 When you come back in the morning -- and
16 no need to call the number tonight. That
17 message will not apply to you. Just come
18 directly to your jury room by 9:30. We will
19 bring you in at that time.

20 When you come back in, of course, you
21 will hear the closing arguments which will be
22 extremely helpful to you.

23 Then following the closing arguments,
24 I will give you a charge on the law.

25 I know as humans we will be tempted to

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1 start resolving certain things. Please know
2 that if you start that process tonight you will
3 have violated the oath that you took. Don't do
4 that, because you have to maintain that open
5 mind.

6 One thing that typically or probably
7 could happen is if there's someone when you
8 return home, I imagine the first question is
9 going to be 'What are you doing? What's the
10 case about?' There'll be a great tendency to
11 want to talk about it. If you do, you will
12 have, at that point, started your
13 deliberations. Do not do that. You will
14 finish this case tomorrow. Then if you want to
15 talk about it, you may. But until then, talk
16 about something else. Don't discuss this case
17 with anyone, including anyone at home. Don't
18 talk among yourselves.

19 And, again, I remind you do not do any
20 independent investigation or research on your
21 own behalf.

22 Have a restful evening and see you in
23 the morning at 9:30. Thank you so much, ladies
24 and gentlemen.

25 (JURY OUT AT 4:41 P.M.)

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1 THE COURT: Anything from the State,
2 Mr. Simpson?

3 SOLICITOR SIMPSON: Nothing, Your
4 Honor.

5 THE COURT: Ms. Mulvaney, from the
6 defendant?

7 MS. MULVANEY: Regarding the
8 charge? In general, no, sir.

9 THE COURT: Well, you do reiterate
10 your Motion for a directed verdict?

11 MS. MULVANEY: Yes.

12 THE COURT: I'm sorry.

13 MS. MULVANEY: Thank you.

14 THE COURT: That's all right. And
15 for the reasons previously stated, I would
16 respectfully deny that.

17 Now, charge -- I'm going to charge,
18 obviously, you can't use that against him.

19 I'm going to charge burglary and
20 charge two convictions of burglary.

21 That's it.

22 Now, do you want me -- let me read the
23 language that came out of the case with Judge
24 Rushing. And you may already have that.
25 Basically -- and I'll be happy to add that.

1 But he added this, (reading):

2 "The trial judge admonished the jury
3 not to consider the prior convictions as
4 evidence of the appellant's bad character or as
5 evidence that the appellant had acted in
6 accordance with prior conduct."

7 I'll be happy to do that. It's up to
8 you as to whether or not you want to call
9 attention to that.

10 But -- you reflect on that tomorrow.
11 Or if you have a charge, I'll be happy to
12 consider that. Just give me what you want.

13 MS. MULVANEY: Okay.

14 THE COURT: And then you think about
15 it overnight and y'all talk about it.

16 MS. MULVANEY: I have it. This is
17 the proposed charge I'm going to ask for.

18 THE COURT: No problem.

19 SOLICITOR SIMPSON: Your Honor, is
20 your standard intent element have that the jury
21 can't look inside the head of the person?

22 THE COURT: No, intent is just a
23 state of mind is what I talk about. But I'll
24 be happy -- if you've got something you want me
25 to consider. I'll be happy to consider it.

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1 SOLICITOR SIMPSON: I may give you
2 that tomorrow.

3 THE COURT: That'll be fine. Not a
4 problem. Anything else?

5 MS. MULVANEY: May I have a
6 moment?

7 THE COURT: Sure. Take your time.
8 No rush.

9 MS. MULVANEY: Your Honor, I just
10 wanted to -- I'm not arguing -- I just want to
11 put on the record and cite the cases that I
12 referred to earlier. And that's *United States*
13 *v. Aaron Jackson*. It's a 2nd Circuit case.
14 And it's 638 F.3d 59.

15 I also cited *United States v. Allen*,
16 which is 393 F.3d 644. I'm actually just going
17 to give you a copy.

18 THE COURT: I don't need them.

19 MS. MULVANEY: Okay.

20 THE COURT: That supports your
21 proposition concerning what? Your ability to
22 challenge the two prior convictions?

23 MS. MULVANEY: Yes, sir.

24 THE COURT: Okay.

25 MS. MULVANEY: To challenge the

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1 convictions for a person having the same name
2 as the defendant is not sufficient proof of
3 status beyond a reasonable doubt. And that
4 because all that was presented was the name,
5 that ---

6 THE COURT: And the reason for that
7 was -- in addition to limiting it, there was
8 one other very important one that you all
9 wanted me to do. And that is to restrict them
10 from offering only the convictions. That was
11 your move; not mine. Yours. You wanted to
12 make sure that this was limited as to what the
13 State could prove, correct?

14 MS. MULVANEY: Yes, sir.

15 THE COURT: Thank you. I want that
16 on the record, too. Because you can't have
17 that and then say, 'oh, by the way, you didn't
18 prove anything' because I honored your request.
19 Thank you. I appreciate it.

20 Anything else? We'll have some
21 opportunity in the morning. Let's come early.

22 MS. MULVANEY: And, Your Honor,
23 just to put on the record again, those cases ---
24 I was asking for a burg second charge, citing
25 those cases under the premise that it's an

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1 element of a crime and that they could reject
2 the clerk's ---

3 THE COURT: Yeah. And you know and
4 I know -- and I was glad to see this decision
5 because it took something -- and, you're right.
6 I don't have any problem with it. In fact, I'm
7 glad they're in Columbia and I'm here. Because
8 they're a lot smarter than I am. We have a
9 principle of law that we charge -- I charge it
10 in every single civil case. It's called he
11 *Black v. Hodge* charge.

12 And *Black v. Hodge* takes this
13 proposition -- that you're entitled -- that
14 just because evidence is uncontradicted does
15 not necessarily render it undisputed. And you
16 have the right to believe and disbelieve any
17 witness, all, parts, and you can believe none
18 of a witness's testimony.

19 Well, there was a recent decision. --
20 I think it was sometime last year -- where they
21 talked about that in the context of a criminal
22 case. Because, obviously, if they want to
23 choose to disbelieve anything, they can. But
24 you can't do that. That doesn't make any
25 sense. I mean, we can just say you've got to

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1 have some basis for it. And that's what we
2 charge, is that there's a basis.

3 What's the basis? And the basis is
4 it's not true. And that's where we run amok.
5 Because it was true. You know and I know. I
6 mean -- he didn't and he would have never done
7 that -- but we know, as lawyers, we can't stop
8 our clients from lying if they want to take the
9 stand. What we can't do -- we can put them on,
10 but we have to sit down. Why? Because we're
11 officers of this Court. We can't perpetrate a
12 fraud. We took an oath to do that. And when
13 you argue that that's not him, you're doing
14 that, in my humble opinion.

15 So you've got that other -- you've got
16 that that is floating around amongst all of
17 this. But the bottom line is you can't have
18 that -- you can't restrict the State on what
19 they can offer and prove and then say, "but,
20 jury, you can disregard this."

21 I agree they have to decide. But you
22 and I both know -- you said from the start --
23 this case isn't about whether he had two
24 burglaries. This case is about the fact that
25 he didn't have the requisite intent when he

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1 entered. That's what this case has been about
2 from day one. And he didn't have to testify to
3 establish that. Because we had, I think, two
4 different people testify to that. Well, three
5 people testified to it.

6 Because we have the victim who said
7 that. We have to first officer on the scene
8 and the person who puts the statements in. So
9 the question is -- and that's the argument.

10 I thank you. Your position's noted for
11 purposes of review. And if the Court wants to
12 use this as a case where they say in every
13 criminal case the jury, notwithstanding it's
14 uncontradicted, the jury can just ignore it.
15 And you can argue that they should ignore it.
16 I think you can argue that you have a right to
17 believe or disbelieve anybody. I don't have
18 any problem with that. But I don't think you
19 can argue to the jury that they just simply --
20 that it didn't -- I'm not going to allow you to
21 do that. So I don't think you can.

22 MS. PROCTOR: I have one
23 question. If they would stipulate, I don't
24 think this would have been an issue. Because
25 then they were saying -- and I think that's

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1 where Ms. Mulvaney was coming from. If they
2 would have stipulated at the beginning, then it
3 never would have happened.

4 THE COURT: You're trying to use --
5 and let's put it in the record. We're trying
6 to use a hammer to get back at the Court and
7 say "don't force us into this, but this is what
8 we're going to do."

9 I told you -- and we just excused
10 them. Y'all change your mind and you want to
11 put her back on, we'll open the case. I'll
12 allow that. But I'm going to also allow, so
13 the State can get prepared, to bring every
14 piece of evidence that points at him.

15 You can challenge anything you want
16 to. But once you do that, in fair game, in
17 fairness, I'll restrict it. I'll make it very
18 limited so that it's as unprejudicial as it can
19 be. They have to prove it. But you can't stop
20 them from what their proof is.

21 So understand that. If you want to do
22 it -- I'm not saying you can't do what you want
23 to do, I'm not saying that at all. I said it
24 on the record. I want the record to be clear.
25 I didn't stop it. You did. But if you want to

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1 do that, please feel free to do that.

2 But, Mr. Simpson, you better be
3 prepared in case they change their mind, to
4 bring in all the evidence that points to this
5 person as being the person. And all of that
6 becomes extremely relevant. Why? Because they
7 challenged that that is this person. You can
8 prove that that's the person with whatever you
9 have to present by way of witnesses, victims
10 who came in and said "that's the man." Feel
11 free to do it.

12 Go right ahead and challenge it, if
13 you want to. I'm open to that. I want you to
14 have a fair day. But I think that would not be
15 a prudent thing to do.

16 But, anyway, be that as it may, you're
17 arguing a semantics point, and I think and I
18 think you're losing the battle here.

19 But that's just my view. And y'all
20 are good lawyers and y'all are great advocates.
21 But I just want to make sure we understand
22 something. I'm not restricting you from doing
23 what you both just said. You've got the right
24 to do it. I want you to do it. But just
25 understand that there's a consequence that goes

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1 with that. It's not going to be "I get to do
2 that and they can't do anything more to prove
3 their case." Because they can.

4 Because one of the things that I've
5 often said, and you've heard me before, to some
6 of the Solicitors -- I get upset with the
7 Solicitors trying to try your case first when
8 they've got a chance to redirect. It's the
9 greatest tool in the world. Even more than
10 that, they've got the most wonderful
11 opportunity. It's called reply. So you don't
12 need to worry about that.

13 But once you go there and you've
14 created that situation, oh, yes, ma'am. Now,
15 I've got the basis to allow them to introduce
16 whatever they want to.

17 All right. We'll be in recess until
18 9:30 in the morning.

19 (COURT IN RECESS AT 5:00 P.M.)

20 (TRANSCRIPT CONTINUED NEXT PAGE)

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1 JANUARY 19, 2011 9:30 a.m.

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3 (DEFENDANT PRESENT)

4 THE COURT: All right, Ms. Mulvaney.

5 MS. MULVANEY: Judge, I don't want
6 to open Pandora's Box, so to speak, and allow
7 in these five priors or however many priors the
8 Solicitor seeks.

9 But I do think that I'm still entitled
10 to the burg second charge. Because it's an
11 element of the crime, and based on the
12 questions I did ask the clerk, it's my position
13 it's a matter of fact to the jury whether he
14 had these two prior convictions. And based on
15 that I'm entitled to the charge, and that's is
16 not a matter of law. So I'm still asking for
17 the burg second charge.

18 THE COURT: All right. I understand
19 that. And let me state -- because I read these
20 cases. First off, the *U.S. v. Allen* case, I
21 don't quarrel with that. But you're not
22 arguing that one is strong, because that was an
23 arrest warrant that they introduced. I would
24 agree that that absolutely would not go to the
25 level necessary.

1 But certainly the *U. S. v. Jackson*
2 case which you presented to me -- it's cited
3 at 388 F.3d 59, a 2004 case -- clearly is
4 exactly what we have here. They offered a
5 certified copy of a conviction, and the Court
6 felt that that conclusion was not sufficient.
7 It was an eighteen-year-old case, persons of
8 multiple names -- I mean, the name was a common
9 name, I think the Court noted. I would agree
10 with that, to a degree.

11 But it goes back to what I said
12 yesterday with respect to what the State was
13 presenting their case initially with the
14 understanding that we had prior to trial, that
15 the State would be restricted.

16 I understand that doesn't bind you,
17 and I would never bind you -- the right to
18 challenge it. But based on the restriction,
19 then I think the State would have to go back
20 in.

21 Let me state now, that while y'all
22 were talking, I'm not so sure that the numbers
23 necessarily would be something that I would
24 allow in the first place. I'm not sure I would
25 change that. I think that would be more

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1 prejudicial than probative, because we still
2 have the same issue. They're just convictions.

3 But I think we start getting into
4 evidence of arresting officers testifying, mug
5 shots, anything that points that identified
6 this person as the person who's subject to that
7 conviction.

8 So that's the evidence that I was
9 talking about that I think the State would have
10 an opportunity. You have a right to object to
11 it.

12 MARY BETH MULVANEY: I ---

13 THE COURT: Just let me finish.
14 I'm just framing the record of what we're doing
15 here.

16 But, clearly, I would agree with you.
17 I understand what you want. And let me now go
18 to --- unless you want to say 'based on what
19 you're saying I want to call this person and I
20 want to ask her further questions.'

21 MARY BETH MULVANEY: No, sir.

22 THE COURT: Now, if you stick by
23 what you said, we don't want to do that, then
24 I'll go to your next level. Based on that
25 restriction that I've just announced, do you

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1 want this person to come testify so you can ask
2 them questions?

3 MS. MULVANEY: Well -- if they do,
4 what I want to do is are you going to allow in
5 evidence of his prior burglaries or just
6 evidence of the two that they are seeking to
7 prove?

8 THE COURT: I don't know what
9 they're going -- to the level they're going
10 to prove. I would be happy to entertain any
11 objection that you want. If they have, for
12 instance, another conviction and everybody's
13 present that would help facilitate that, then
14 -- whatever they need, in fairness to them.
15 Because we restricted them -- "we" meaning you
16 and me. Because before we started they said
17 'we're prepared to prove this.' And I said
18 'okay.' And you -- we never got into the
19 objection but you were not going to allow them
20 to go into anything other than the convictions.
21 Is that not correct?

22 MS. MULVANEY: Yes.

23 THE COURT: In their case in chief.
24 How much they do, I can't try this case in a
25 vacuum. I don't know. They present it. You

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1 make objections. I rule on them. The extent
2 to which they do, I'll be happy to hear it
3 because there's no question. We've got -- now
4 you've raised an issue. And they've got to
5 prove that issue. The best proof, I don't know
6 what that's going to be. That's not for me to
7 decide. That's for them to decide.

8 SOLICITOR SIMPSON: Yes, sir.

9 THE COURT: You don't need to say
10 that until we get there.

11 Folks, one thing's for sure. We don't
12 have to try the case at that level until we get
13 to that level.

14 I just want to know whether we're
15 going to get to that level. That's all I'm
16 asking. And; no, you don't know. Because, my
17 goodness, wouldn't that be great that as trial
18 lawyers if we knew exactly what we had to face?
19 Because then I think we could make pretty good
20 decisions that way. But that's part of being a
21 trial lawyer. You don't know what's going to
22 come in. I don't know what's going to come in.

23 MS. MULVANEY: That's true. But,
24 Judge, at the beginning of this case I offered
25 to stipulate ---

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1 THE COURT: Ms. Mulvaney, let's
2 don't rehash something.

3 MARY BETH MULVANEY: Okay.

4 THE COURT: We all know that.

5 MARY BETH MULVANEY: Yes, sir.

6 THE COURT: They refused it. You,
7 then, have the right to challenge that. We
8 don't need to go back through -- we've beaten
9 that horse to death. I've even said I agree
10 with you, I think that's a part of the law that
11 ought to be changed. But the Court's not
12 changed it. That's just my personal opinion.

13 MS. MULVANEY: Well, could be,
14 outside the presence of the jury just tell me
15 what's going to come in?

16 THE COURT: No, ma'am. No, ma'am.
17 That's not the way we try cases. It doesn't
18 work that way. That's a nice convenient way
19 to do it. You have to -- that's part of being
20 a trial lawyer. I don't think I'm required to
21 do that. Because everything that they're
22 saying now is not necessarily objectionable.

23 MS. MULVANEY: It's just that,
24 Judge, I'm trying to determine the prejudice
25 to my client.

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1 THE COURT: Ms. Mulvaney, you
2 determine the prejudice by doing something
3 that's called 'opening the door'. That's the
4 phrase that I've always used and was always
5 used against me. How wide that door is opened,
6 I don't know. No judge does.

7 If any judge sits where I am
8 today and answers your question, I think that's
9 wrong. Because I don't think we should be so
10 presumptuous to know what proof can be
11 presented. Just as I was wrong when I said to
12 you I think you're borderline perpetrating a
13 fraud. I agree with you. I even said that to
14 you this morning. I was in error in that
15 statement. Because when I thought about it, of
16 course you challenge. We all know, and I've
17 said it to defendants all day long, 'You may
18 know as guilty as -- and you know you're
19 guilty...' -- but that doesn't prevent this
20 process from taking place. That's not a fraud.
21 That's due process. That's what this whole
22 conflict's about. So I don't have any problem
23 with that.

24 But clearly, clearly you can't
25 restrict what the State can do and then

1 challenge what they've done. I'm sorry. They
2 have a right to have the opportunity. How far?
3 That's my responsibility to balance that. I
4 don't know.

5 MS. MULVANEY: But they're limited
6 by two under the case law. And they've chosen
7 those two.

8 THE COURT: No, they're not limited
9 by two under the case law. You can't read that
10 as black-letter law. That's not what that case
11 said. That case said, 'Judge, in that
12 circumstance it was more prejudicial than
13 probative.' But they didn't challenge, as you
14 have in this case. They didn't challenge
15 whether that was the person. They agreed to
16 that. That was part and parcel of it. They
17 were willing to say, 'Sure, no problem.'

18 MS. MULVANEY: And I am too.

19 THE COURT: No, no, no, no, no.
20 They were willing to say, 'Those are his
21 convictions' for purposes of that element.
22 They wanted to stipulate to avoid it, but they
23 didn't. But they said, 'Okay, just two.
24 That's fine.' That's fine.

25 You don't have to do that. You can

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1 challenge that, that those are not his. But
2 when you do, you change what's now become more
3 probative than prejudicial. Because now they
4 have to prove it. So that's the difference.

5 So I don't -- you can't read that as
6 'nope, you can't introduce more than two.'
7 That's not what that case says. In that case
8 the Court said -- it didn't really say you
9 can't. It was said it was more prejudicial
10 than probative and therefore the judge should
11 not have allowed more than -- it should not
12 have allowed seven. It didn't say it couldn't
13 have been three. It may have been four. Don't
14 know. So that case means something. It says
15 to me, 'You've got to balance it, judge.' And
16 that's what I'm saying, and that's precisely
17 all I'm saying.

18 What I'm going to have to balance, I
19 don't know because I don't know what we're
20 going to confront. I just want to know do I
21 present -- do you want to present that, and
22 then we'll go from there. So that's my
23 question, first. And if you can answer that,
24 then I will be happy to address your second
25 request.

1 MARY BETH MULVANEY: Judge, I am --

2 I'm sorry, my client ---

3 THE COURT: Ms. Mulvaney, just one
4 second here. Let me point out something for
5 the record. I've had a few lawyers do this,
6 and I always admired them when they did. It
7 was in the level that Mr. Aiken was taking
8 about yesterday, it was at the second level of
9 a PCR complaint. And the lawyer stood up
10 before and said, 'I've looked at this case and
11 as an officer of this court my client has no
12 legal basis for it. He's entitled to his day
13 in court, and I'm going to give him that.'
14 That's a statement by a lawyer who has talked
15 with his client and is doing what his client
16 wants him to do, as you're doing, representing
17 them fully.

18 But the client doesn't make the call.
19 That's what -- you're the lawyer. You talk to
20 him and then you tell me what you want to do.
21 Okay?

22 But we've got a jury ready to go,
23 folks. So let's keep moving here. I need to
24 know.

25 MS. MULVANEY: Yes, sir.

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1 LORI PROCTOR: One second.

2 MARY BETH MULVANEY: (Sidebar with
3 defendant and co-counsel), -- Your Honor, my
4 client does not wish me to go forward with
5 that.

6 THE COURT: And you believe that
7 that's what you should do in this case, as
8 his lawyer?

9 MS. MULVANEY: Yes, sir.

10 THE COURT: Very well. Now, the
11 next level that you've asked is does the cross
12 examination of that witness open or create a
13 charge for a lesser-included offense of burg
14 second.

15 It speaks for itself. I understand
16 what you're saying. No question you asked
17 that.

18 The problem that I have with it is
19 this. The case that was given to me is a case
20 that's unpublished. But I think the philosophy
21 -- and at least it's mine. I think we talked
22 about this yesterday and I've thought about
23 this even moreso. If that were the case,
24 basically that a jury -- and you're right --
25 that a jury has to decide what they believe to

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1 be true and that's what they have to say. But
2 they have to base it on -- and so in that
3 situation we would always charge, every time,
4 -- a lesser-included offense would have to be
5 charged every time because a jury could
6 disbelieve the evidence necessary for the
7 greater offense. I mean, that's really what
8 you're saying. The jury could disbelieve that
9 that's him.

10 MS. MULVANEY: But, Judge, that's
11 the risk that the prosecutor takes.

12 THE COURT: No, ma'am.

13 MS. MULVANEY: Because I have
14 stipulated ---

15 THE COURT: Ms. Mulvaney, you keep
16 going back to that stipulation. And if you say
17 it again, I'm going to find you in contempt of
18 court. You don't need to say that. You can't
19 do it in this state. That's the law. Okay?

20 MARY BETH MULVANEY: Okay.

21 THE COURT: You wanted to do that.
22 I understand it. But you don't get the benefit
23 -- the only evidence that I've got to create
24 that is to say 'this isn't that person -- that
25 isn't the same person.'

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1 And, frankly, there's no -- that would
2 always be the case in every case. For
3 instance, you could charge, well, in a murder
4 case where there's no heat of passion, we
5 should charge voluntary manslaughter, because a
6 jury could believe that they were upset and
7 that's why they did it. Because people
8 wouldn't just methodically kill somebody. And
9 therefore, voluntary manslaughter would be --
10 or the gun just happened -- notwithstanding
11 they shot it, but maybe the gun just
12 accidentally discharged. Because that can
13 happen. And the jury could disbelieve that
14 the person really pulled the trigger.

15 I just don't think that's what we
16 have. I don't think that's proper. And I
17 don't have any evidence, other than the fact
18 that we don't have -- you asked the question
19 'you don't know whether this is the same
20 person' and I think she said, 'I don't,'
21 basically was what the line of questioning
22 said.

23 So I thank you, but -- and you've got,
24 for purposes of review, and the State has -- no
25 question about it -- they're going to have to

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1 argue, you've raised the issue that *Jackson*
2 creates.

3 MARY BETH MULVANEY: Yes, sir.

4 THE COURT: And no question *Jackson*
5 creates that. No question about it. I
6 acknowledge that, that *Jackson* basically -- if
7 I take *Jackson* literally and apply it, I'd
8 direct a verdict. Because they said, 'That's
9 not sufficient. Therefore, the State has
10 failed to meet its burden of proof.' That's
11 what I was saying to you yesterday. I don't
12 think it's a jury issue. It's me. And you're
13 going to be able to argue whether or not the
14 Court should have directed a verdict if that's
15 all the proof they have. I think it is a
16 matter of law, based on what this case says.
17 Because this case doesn't say it's a jury
18 issue. This case says it didn't rise to the
19 level necessary. Isn't that what *Jackson* says?
20 I mean, that's what I read. Maybe I misread
21 it.

22 MS. MULVANEY: Obviously my
23 interpretation is a little different.

24 THE COURT: Interpretation of what?
25 That's what I'm asking you.

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1 MS. MULVANEY: Well, I think it
2 says that they have to prove it beyond a
3 reasonable doubt.

4 THE COURT: That's correct.

5 MS. MULVANEY: So that there is
6 reason to believe here that they haven't proved
7 it beyond a reasonable doubt, so I'm entitled
8 to the charge. That they could have presented
9 photographs or fingerprints but chose not to,
10 and I challenged that. That's my reading of
11 it.

12 THE COURT: No, they couldn't have,
13 because you restricted that by your basic
14 statement that I just want -- the State said,
15 'This is what we're proving. Do you have any
16 objection to that?' And you wanted to minimize
17 what they wanted to present.

18 MS. MULVANEY: Well, in those two cases
19 they could have brought in mug shots or
20 fingerprints.

21 THE COURT: Again, Ms. Mulvaney --

22 MS. MULVANEY: I don't want to
23 anger you, Your Honor.

24 THE COURT: You're not angering me.
25 What angers me is you to make a statement like

1 that when the record doesn't have -- and what
2 we should have done is put a full -- the State
3 should have been -- and in the future -- I've
4 learned something. I'm going to make you argue
5 your position fully about what they should be
6 able to do with respect to the two. Because we
7 were sitting here and I just said, 'I think you
8 need to restrict it.' And Mr. Simpson said, 'I
9 agree. We want to minimize that. Do you have
10 any problem with just the convictions and
11 nothing else?' I said, 'Yes, I'm sure they
12 don't want you to go into detail about that.'
13 And you said, 'No, we don't.' Did you not?

14 MS. MULVANEY: That's correct. I
15 don't want to open the door.

16 THE COURT: No, no, no, no. I'm not
17 talking about opening the door. I'm talking
18 about when we were talking about how they were
19 going to prove this issue, we discussed the
20 dilemma that it presents. Number one, we said
21 we want to restrict the numbers. And, number
22 two, we said, 'All we want them to do is prove
23 just the conviction, not go into any detail
24 about it.' And that's what you wanted.

25 MS. MULVANEY: Right, to prove the

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1 conviction.

2 THE COURT: That's what you wanted.

3 Nothing more than that. So they honored that.

4 So just so long as you understand that
5 when you say, 'Well, we were always going to
6 challenge it,' that's fine. But you've created
7 a dilemma that really and truly opens the door.
8 And now you want to try to backdoor your basis
9 for it in getting some review.

10 All I'm saying to you is this case
11 that you've given me talks about the Court's
12 conclusion that -- let me find it so I can read
13 it specifically. Interestingly enough, in that
14 case you talk about a case where that's exactly
15 what they did with respect to challenging the
16 identity.

17 This is the Court's statement, on page
18 four of the one that you've given me. And it
19 says as follows:

20 "We cannot accept the government's
21 argument without more. A court record showing
22 a conviction of a similarly-named person,
23 especially..." -- and, parenthetically, an 18-
24 year-old record which I think is somewhat
25 significant in this case -- "...cannot

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1 conceivably furnish assurance beyond a
2 reasonable doubt that it pertains to the
3 present defendant. We reject the government's
4 proposed rule that sufficiency is satisfied as
5 the result of the defendant's failure to offer
6 proof in rebuttal."

7 I would agree with that statement
8 because the defendant has no obligation to
9 disprove it.

10 (Reading): "The government's argument
11 that defendant's identity as the person
12 convicted was sufficiently corroborated by
13 other evidence is insubstantial as the
14 corroborating evidence was scant and
15 unconvincing. While finally we see no merit
16 in the government's contention, the defendant
17 either stipulated his prior conviction or
18 engaged in deceptive misconduct which should
19 excuse it from its burden."

20 I would agree with you, but that
21 language says based on what they're stating,
22 then that being the requirement of the State,
23 it's a directed verdict. Because it says it
24 can't be beyond a reasonable doubt. That's
25 the conclusion of the Court.

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1 I understand your position. I
2 disagree, I don't think that's the law. I
3 think it's been recognized, and I think that
4 given all the facts and circumstances in this
5 case, I think it would be improper to charge
6 burg second and I think it would be improper to
7 direct a verdict.

8 So you're protected. You rely on
9 Jackson. That's your position. And you rely
10 on the argument that you're entitled to it
11 because they could disbelieve the testimony of
12 a witness that this is, in fact, your client.

13 MS. MULVANEY: Yes, sir. Thank
14 you for letting me make a record.

15 THE COURT: Thank you, Ms. Mulvaney.
16 You bet. Anything else?

17 SOLICITOR SIMPSON: Your Honor,
18 just for the purposes of this going to appeal,
19 I'd like to preserve of things. As is already
20 clear on the record we have at least seven
21 prior burglaries we could have gotten into.
22 We also have evidence of mug shots from a
23 incident date wherein the defendant was
24 arrested for five prior burglaries. That was
25 in our evidence. But, again, we proceeded

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1 under the understanding from pretrial that we
2 were limited in evidence. We agreed to
3 limiting that evidence to the prior two. And
4 we'd just like to put on the record that we
5 proceeded in the course that we did because of
6 that agreement to balance. Certainly we could
7 have presented more extensive evidence of his
8 prior convictions.

9 THE COURT: There could have been
10 more evidence. There could have been challenge
11 to it. There could have been objections made.
12 I want the record to be clear, though, that
13 they have elected -- the defendant has elected
14 not to pursue that course. Is that correct,
15 Ms. Mulvaney?

16 MS. MULVANEY: Yes, due to the
17 prejudice it might cause. Yes, sir.

18 THE COURT: No, ma'am. You've made
19 an election not to go forward. I don't really
20 want to know your rationale, because I'm giving
21 you the opportunity to do that. Is that
22 correct? You choose not to do that.

23 MS. MULVANEY: That's correct,
24 Your Honor.

25 THE COURT: Thank you. All right,

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1 insofar as requests to charge, I have the
2 intent. That's from the charge book. I'll be
3 happy to give the charge -- those basically are
4 in my charge. But I'll give the entire intent
5 from the charge book.

6 SOLICITOR SIMPSON: Your Honor, for
7 the record, we have no objection to that.

8 THE COURT: Ms. Mulvaney, it is your
9 desire that I give what's been entitled
10 'proposed charge?'

11 MS. MULVANEY: Yes, sir.

12 THE COURT: Very well. I will also
13 give that charge.

14 MS. MULVANEY: Thank you very
15 much.

16 THE COURT: In its entirety.

17 MS. MULVANEY: Thank you very
18 much.

19 THE COURT: Thank you. Anything
20 else?

21 MS. MULVANEY: No, sir.

22 THE COURT: Ms. Mulvaney, I want to
23 assure you -- you made a comment. You're not
24 making me angry.

25 MS. MULVANEY: Okay. I'm sorry.

1 THE COURT: No way. I have a bad
2 habit -- Ms. Proctor knows. I'm passionate a
3 little bit. Angry, I'm not. And there really
4 is a distinction. I haven't taken off my
5 glasses, I don't think.

6 MARY BETH MULVANEY: No, sir. She
7 told me that if you took off your glasses to
8 sit down and be quiet.

9 THE COURT: I don't think the veins
10 have popped out in my neck. There are
11 occasions when I am, and I work on that. But I
12 love this profession. And I love -- in fact, I
13 went home and told my wife, 'I enjoy encounters
14 like we have today and yesterday.' It's how
15 you grow.

16 And I appreciate -- Mr. Aiken, I said
17 something out of your presence that I want to
18 say in your presence. We were talking about --
19 the State had talked about 'we weren't
20 prepared', and you recall me telling them, 'you
21 better get ready because things can change.'
22 And one of the things that made me say that was
23 your deliberative process that you demonstrated
24 to me and your thought process. And I commend
25 you, sir, for getting through life and doing as

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1 well as you've done. You may have made some
2 mistakes in the past. We all make mistakes.
3 But one thing's for sure. I was given and had
4 an opportunity that was great and wonderful and
5 afforded me an opportunity to go further my
6 education. Some people of my good friends
7 didn't have that same opportunity or things
8 came up that changed what they could do. And
9 you, sir, have showed some great thought, being
10 restricted in a formal education. I'm not
11 saying you haven't been educated, because you
12 certainly have. And the folks that have been
13 with you have been part of that as well.

14 But, clearly, you have every right to
15 take as much time as you want. And if you want
16 to change your mind, I respect that and would
17 honor that. It doesn't upset me at all. I
18 think that's an example of what this whole
19 thing is all about -- 'this thing' meaning this
20 process that we have in this country. And so
21 when I said to you yesterday, you said 'it's
22 your courtroom.' It's my responsibility to
23 preside, but the courtroom belongs to you and
24 me. It's yours too. But, most importantly,
25 it's your trial. That's what I want to afford

1 you -- that opportunity, sir.

2 DEFENDANT: May I ask one question?

3 THE COURT: Sure.

4 MR. AIKEN: When you said if I
5 wanted to change, it was my choice to change,
6 I don't know what you're talking about.

7 THE COURT: You changed in the sense
8 that you said you wanted to testify, and then
9 you changed and said you didn't want to
10 testify. That's what I'm talking about.

11 DEFENDANT: Yes, sir. If I would be
12 allowed, I want to testify.

13 THE COURT: You will be allowed.

14 DEFENDANT: I will testify.

15 THE COURT: Do you want to testify?

16 DEFENDANT: Yes, sir, I do.

17 THE COURT: Okay. You're sure
18 that's what you want to do?

19 DEFENDANT: Yes, sir, I do.

20 THE COURT: You understand they're
21 going to get to ask you all these questions
22 about this issue that you just preserved for
23 the record.

24 DEFENDANT: I'm going to tell you
25 this ---

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1 THE COURT: No, sir. You don't need
2 to tell me. I just need you to answer me one
3 question.

4 DEFENDANT: What?

5 THE COURT: They're going to get to
6 ask you about these charges.

7 DEFENDANT: Right. That's fine. I
8 understand.

9 THE COURT: That's fine. As long as
10 you understand that.

11 DEFENDANT: (Sidebar with counsel).

12 THE COURT: Why are you making your
13 choice, your change?

14 DEFENDANT: Your Honor, here's why
15 I'm making my choice. I feel that I have to --

16 THE COURT: Excuse me. Go ahead. I
17 interrupted you. I apologize.

18 DEFENDANT: Because -- and I'm going
19 to say this, in all honesty, most of my
20 business with counsel has been just like what's
21 been going on just then. And I haven't been
22 able to -- especially because of my past, my
23 record, and the fact that they entered the
24 priors concerning burglary and burglary first,
25 I had needed to speak with counsel and talk to

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1 counsel and I really didn't have the
2 opportunity to really, like,, express and be
3 heard out. And so when things went the way
4 that they went yesterday and the witnesses not
5 testifying truthfully, and I feel personally
6 that counsel had not done a good job on cross
7 exam. This is my personal opinion -- that she
8 had not did a job on cross exam -- a good
9 enough job. And so I feel that I'm at a loss
10 here. And, and, and the main thing is, Your
11 Honor, the issue that you've been drilling down
12 her throat, I provided her with the cases I
13 found where a trial judge -- I mean a trial
14 attorney went with this same thing about the
15 identification of the person, 'that's not the
16 same person.' It's burglary, but that's not
17 the person. So in this particular case, the
18 judge said, 'Okay, that ain't you,' all right,
19 and he stopped the trial and took prints. Of
20 course it's him.

21 So my thing is it doesn't make sense.
22 I have too many burglaries on my record.

23 THE COURT: Well, ---

24 DEFENDANT: Don't -- I'm sorry --
25 and so I'm just saying, well, don't do that.

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1 And it was just based off of reading and
2 understanding the case.

3 THE COURT: Well, let me point out
4 something.

5 DEFENDANT: Okay.

6 THE COURT: What's taken place
7 between your lawyer and me is what I love
8 about this profession. And what you've just
9 demonstrated, no disrespect to you, but because
10 you haven't had -- I went to law school for
11 three years. I've been a lawyer -- this year
12 will be -- in November it will be thirty-eight
13 years that I've been a lawyer. I was a
14 practitioner for twenty-one. In February, I
15 will have been a judge for seventeen. I think
16 I've learned a little bit more than I learned
17 when I went to law school, from practicing.

18 What I know is -- and it's why I love
19 it, and it's why people that are not involved
20 in it something get frustrated, because we live
21 in a world of two plus two is four. We live in
22 a mathematical world where everybody wants a
23 precise answer. And for many things that's
24 very possible. But in this profession it's
25 mostly gray. And 'gray' means that what your

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1 lawyer was doing was creating something for
2 your benefit, notwithstanding you didn't like
3 it. She was doing something to try to help
4 strategically. Because, certainly, from her
5 perspective and from your perspective, if we
6 give a jury a compromise verdict, and that's
7 what judges have to make that call. Then you
8 get a chance -- somebody gets upset, they work
9 it out. And that's the way the process is.
10 And that's what we know as lawyers, we try to
11 do.

12 And I have to make sure that there's
13 a basis for that. That's where it becomes this
14 gray area. She argues it because she's an
15 advocate for you. The State argues it because
16 it's an advocate for the State. I'm not an
17 advocate for either. I try to make the playing
18 surface level and confine it to the rules.
19 Sometimes I do okay. Sometimes I don't do so
20 well. But when they review it, they correct it
21 and I try not to make the same mistake twice.

22 So -- but one of the things that I do
23 know is that when your lawyer gives you advice
24 and other people give you advice it's one of
25 the reasons that people don't represent

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1 themselves very well. Because it is impossible
2 -- and I say this about me. It's impossible
3 for one to be objective about themselves. You
4 can't do it. You can't look at everything
5 because you get caught in some of the things
6 that are human nature. And one is what you've
7 just said. What they said wasn't true, from
8 your perspective. And the temptation is,
9 'well, I want to tell them the truth.' Well,
10 you have to remember something -- that with
11 that goes some other things. And the English
12 language is so incredible it sometimes leads to
13 innuendo and suggestion that, unfortunately,
14 when you don't testify you don't permit that.
15 And now by your testimony you now have the jury
16 thinking about that.

17 But having said all that, I'm here to
18 defend absolutely and one hundred percent your
19 right as a party to this lawsuit to have your
20 day in Court and to testify, if that's what you
21 want to do. So whether I believe it's good,
22 bad or indifferent doesn't matter, because it's
23 your decision.

24 So my question, sir, is this: do you
25 want to testify?

1 DEFENDANT: I understand what you
2 say about counsel doing what she did to help
3 me. I know the elements of burglary first and
4 burglary second is generally the same. And so
5 my line of thinking was I didn't expect a
6 fifteen year plea to burglary first and the
7 elements were the same. I really couldn't see
8 or understand why, you know, counsel would go
9 that route.

10 I understand what you said about the
11 gray areas because laypersons, that's the area
12 where you made clear to those of us who may be
13 confused in that area. I appreciate and thank
14 you for hearing me and allowing me to express
15 myself.

16 THE COURT: Yes, sir.

17 DEFENDANT: And I heard you was a
18 good trial judge and that you would allow me --
19 that you allow people to speak and to hear from
20 them. And so that's why I was really so
21 adamant on just wanting to express and to
22 speak.

23 THE COURT: Thank you. Now let me
24 ask you again the question. Do you want to
25 testify?

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1 DEFENDANT: No, I'm not. I'm not.
2 I'm not. I am going to take your ---

3 THE COURT: You're sure. I didn't
4 advise you to do anything.

5 DEFENDANT: No, I didn't say your
6 advice. I'm saying -- there's a reason why,
7 and you mentioned the gray area. It's the
8 reason why.

9 THE COURT: That's a strategy you
10 have to work out. I'm not your lawyer. I'm
11 just talking to you about what you do.

12 DEFENDANT: Yes, sir -- (sidebar
13 with counsel).

14 MS. MULVANEY: Yes, sir. We're
15 ready to proceed. My client asked to confer
16 with me and decided to follow my advice and not
17 to testify.

18 THE COURT: Thank you. Is that
19 correct?

20 DEFENDANT: Yes, sir.

21 THE COURT: And you understand
22 you're still under oath.

23 DEFENDANT: Yes, sir.

24 THE COURT: And that is your
25 decision?

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1 DEFENDANT: Yes, sir.

2 THE COURT: And that is your final
3 decision?

4 DEFENDANT: Yes, sir.

5 THE COURT: Thank you, Mr. Aiken. I
6 appreciate it.

7 DEFENDANT: Thank you, sir.

8 THE COURT: Yes, sir. Is the State
9 ready?

10 SOLICITOR SIMPSON: Yes, we are
11 ready.

12 THE COURT: Let's bring in our jury.

13 MARY BETH MULVANEY: Judge, may I
14 run to the restroom?

15 THE COURT: Take your time.

16 (BRIEF RECESS)

17 (DEFENDANT PRESENT)

18 THE COURT: Invite the jury to
19 return.

20 (JURY ENTERS @ 10:33 A.M.)

21 BAILIFF: The jury is present,
22 Your Honor.

23 THE COURT: Thank you very much.

24 And thank you, ladies and gentlemen. Thank you
25 for your patience again this morning. We were

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1 here after you left for a little while, and it
2 turns out it was a good thing we didn't
3 continue, because it would have been maybe 6:30
4 or 7:00 before we would have been able to get
5 to this stage.

6 So I hope you had a good evening and
7 we're ready to continue now. We're now moving
8 into that final two phases which are also very
9 important in this process of dispute
10 resolution.

11 As I told you last night, you're not
12 going to hear any additional evidence,
13 obviously. The evidence, you've already heard.
14 But you're going to hear the closing arguments
15 of the attorneys and those arguments will be
16 extremely helpful to you when you do begin the
17 process of analyzing the evidence in this case
18 and deciding what you find to be credible and
19 believable. Because they will now, in
20 accordance with our rules, be entitled to
21 discuss the evidence and reasonable inferences
22 that you may draw from that evidence. While
23 beneficial, though, their remarks are not
24 evidence.

25 Then following the closing arguments I

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1 will, of course, then give you the instruction
2 on the law that you must accept and apply
3 fairly and impartially to those facts that you
4 will ultimately determine.

5 Thank you for your attention thus far.
6 Please give your attention now to the attorneys
7 as they give their closing arguments. Mr.
8 Simpson.

9 SOLICITOR SIMPSON: Thank you, Your
10 Honor.

11 Ladies and gentlemen of the jury, I'd
12 like to start by saying on behalf of myself and
13 the Court and, I'm sure, Ms. Mulvaney our
14 thanks and our appreciation. I hope by this
15 stage of the proceeding you all understand how
16 crucial you are to this process. I'm going to
17 speak a little bit later about your role in the
18 process.

19 I told you when we started this trial
20 that it would be a relatively short trial.
21 That has proven to be, as we are here in the
22 last stages. It's a short trial because the
23 facts of the case are uncomplicated. You heard
24 from four witnesses. I could summarize the
25 facts briefly because it's such a straight-

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1 forward case.

2 Mr. Morrison woke up with an absolute
3 stranger, the defendant James Ivan Aiken,
4 rifling through his possession on top of his
5 dresser right by his bed. When Mr. Aiken was
6 confronted with that, confronted with 'why are
7 you in my house', Mr. Aiken threw a pill bottle
8 at him, backed up, dropped his shoe and said,
9 'Oh, I'm just bringing your shoe back,' and
10 fled. Those are the facts of the case.

11 Rather than go through each of those
12 facts again I want to get right to the heart of
13 the matter and talk to you a little bit about
14 the law and about the law that the judge is
15 going to charge you of burglary in the first
16 degree.

17 To find the defendant guilty of
18 burglary first degree you must find that the
19 elements are met. It is my burden, the State's
20 burden, to satisfy you beyond a reasonable
21 doubt of these elements.

22 A person is guilty of burglary in the
23 first degree if the person enters a dwelling.
24 We have our first element. Did the person in
25 this case enter a dwelling? Of course. James

1 Aiken entered the dwelling of Michael Morrison.

2 The second element, without consent.

3 Again, check that box. We know that exists in
4 this case. No one gave Mr. Aiken permission to
5 go in that house. When the detective

6 questioned him, he even told the detective that
7 no one gave him permission to enter the house.

8 The next element, with the intent to
9 commit a crime once they go into the dwelling.
10 I want to stop and focus on this element for
11 awhile. I submit to you that this element has
12 been satisfied as obviously the other two
13 beyond a reasonable doubt. But because we
14 could tell from Ms. Mulvaney's opening and the
15 course of this trial that this is the element
16 that's going to be challenged, I want to talk
17 about this element for a while.

18 What is the role of a jury? There's
19 lots of legal language, flowing, complicated
20 language to describe what you're doing here
21 today. But my favorite, because it's the most
22 accurate and the simplest to understand, and
23 you've even heard it said by Judge Dennis a few
24 times in this process, is common sense. Common
25 sense in the true form, truest way possible in

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1 that we bring in twelve people from the
2 community to apply the community's sense to
3 their experience, to their course of life.
4 Your common sense -- that's why you're here.

5 How do people determine what a
6 person's intent is, what a person's purpose is,
7 what they have in their brain to do? You'll
8 hear from Judge Dennis, and I'll echo this,
9 that technically there's no way for the State
10 to look inside a person's brain and bring that
11 in to you and say, 'look, this is what' -- look
12 into his brain scientifically and say, 'this is
13 what he was thinking.' There's no way for us
14 to that.

15 So the way you do that is you take
16 your common sense and you apply it to conduct
17 -- to the conduct of the person. What did this
18 person intend to do? He acts. The actions of
19 the person are the best reflection of what his
20 intent to do was. And so let's apply that
21 common sense that you've all gained through
22 your life experience to the facts of this case,
23 as it applies to the intent that Mr. Aiken had
24 when entering Mr. Morrison's house.

25 Because make no mistake, we've heard

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1 two stories here. The State would present to
2 you Mr. Aiken entered that house with the
3 intent to commit a crime, with the intent to
4 steal. Mr. Aiken told the police and Mr.
5 Morrison he intended to return a shoe. And so
6 your job as jury is to look at exactly what
7 happened, what took place, and determine what
8 you believe.

9 Apply that common sense. If a person
10 was to come across a lone shoe in the road,
11 what does that common sense tell you that
12 person would do? First of all, most likely the
13 person would just walk by the shoe and not take
14 it.

15 But if a person was concerned with
16 returning the shoe, what would the person do?
17 Maybe put it in the yard. Put it on the front
18 doorstep, if that was true and their intent was
19 just to return the shoe. Put it on the front
20 doorstep. Mr. Aiken didn't do that because
21 that wasn't Mr. Aiken's intent.

22 Once you arrive at the door of a
23 complete stranger's house what does your common
24 sense tell you a person does who is intending
25 to merely return a shoe? Knock. Did Mr. Aiken

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1 knock? No. Ring the doorbell. In State's
2 Exhibit 1 shows very clearly there's a doorbell
3 right beside the door. Did Mr. Aiken ring the
4 doorbell? No. Even at this stage it gets odd.
5 If, in fact, the door's unlocked maybe at least
6 stick your head in and say, 'Hello, is anybody
7 home?' Mr. Aiken didn't do that.

8 Mr. Morrison wasn't awoken by a
9 doorbell or a knock. He testified there were
10 two other individuals in that house and a dog,
11 none of whom were alarmed by a knock or a
12 doorbell or a 'Hello, who's there?'

13 He didn't do those things because
14 returning the shoe was not his intent. He
15 entered the home quietly because his intent
16 was to commit a crime -- steal.

17 Once inside the threshold of the door
18 you see the pictures of the staircase leading
19 upstairs. What does one do with a shoe if it's
20 truly their intent to just return the shoe?
21 Set it down on the inside stair? Even that
22 would be odd. Even that defies common sense.
23 But if you're already in and you see the
24 staircase, just sit it down, if you believe
25 that's the home where it belongs.

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1 He didn't just set the shoe down on
2 the staircase. He walked up the staircase
3 quiet enough not to have alerted Mr. Morrison
4 and two other female roommates in the house or
5 the dog. He went all the way through a living
6 room and then into a bedroom. Certainly, at
7 this point if your intent is to return the
8 shoe, when you come to a bedroom, you knock on
9 the inside and say, 'hey, I've got your shoe.'
10 He didn't do that. Because that wasn't his
11 intent. His intent was to enter as quietly as
12 possible to see if there was anything of value.

13 If you even are to allow your common
14 sense to get this far, what does the person do
15 once in the room if his intent is to return the
16 shoe? Does he rifle through the homeowner's
17 personal possession on the dresser and in the
18 dresser? Of course not. It's completely
19 illogical. It defies all common sense. You
20 return the shoe. You don't sneak into a
21 complete stranger's house, and you certainly
22 don't rifle through the items on top of and in
23 the dresser.

24 We establish the element of intent
25 through using your common sense, what your

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1 lives have taught you humans do in the course
2 of their business. And Mr. Aiken's excuse
3 defies all common sense. Even after -- even
4 after confronted by Mr. Morrison, Mr. Aiken's
5 behavior continues to reflect that intent.

6 One of the first things Mr. Aiken does
7 when confronted is through an empty pill bottle
8 in the direction of Mr. Morrison. Use your
9 common sense. Do you guys do that? 'Here's
10 the book you let me borrow. Oh, by the way,
11 I'm going to pelt you with a pill bottle.'

12 No, it makes no sense. Because it wasn't his
13 intent to return the shoe. His intent was to
14 steal. His intent was to take things of value.

15 Ms. Mulvaney, in her opening
16 statement, illuminated a little bit about this
17 day that Mr. Aiken had saying he was merely on
18 his way to work at the market and happened to
19 do a good deed by returning his shoe. So after
20 throwing the pill bottle, if that were the
21 case, which way does he head? Having done his
22 good deed, head to work towards the market?
23 No, he heads in the opposite direction. Again,
24 another piece of evidence telling you that the
25 version of events the defense is going to

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1 present to you defies common sense.

2 Where did this shoe story come from?
3 Judge Dennis, and I forget in which context in
4 jury qual -- I don't know if you recall this,
5 made the comment that adults are merely
6 sophisticated children. It's very true, and
7 especially in this case. What does a child do
8 when confronted and caught red-handed? First,
9 lash out and throw things. And then make up
10 the quickest excuse that pops in their mind, no
11 matter how absurd and no matter how ridiculous.

12 That's what happened in this case.
13 That's how we get the shoe story. Mr. Aiken
14 did not, as Ms. Mulvaney said in her opening
15 statement, make a mistaken or act weird that
16 day. Mr. Aiken committed a crime and was
17 caught in the act of that crime and presented
18 to you a ridiculous and an absurd excuse for
19 being in that home.

20 Ladies and gentlemen, a ridiculous and
21 absurd excuse that defies common sense is not
22 reasonable doubt. We can't look inside
23 someone's head to prove intent. So we take the
24 person's conduct and infer with our common
25 sense his purpose of being in that house.

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1 The wallet -- Mr. Morrison's wallet.
2 Mr. Morrison is certain his wallet was on his
3 dresser by his keys. If you look at the
4 State's picture, right on the top of the
5 dresser where Mr. Aiken was going through the
6 stuff -- the night before when he went to
7 sleep. I'm not trying to pull a rug over your
8 eyes and say something that's not true. The
9 wallet wasn't found on Mr. Aiken when he was
10 arrested. However, there was testimony that
11 this pursuit of Mr. Aiken from Mr. Morrison's
12 residence is a quarter of a mile in downtown
13 Charleston. We all live here. We know what
14 downtown Charleston's like. How many
15 opportunities in a quarter of a mile, including
16 those time periods when Mr. Aiken was out of
17 sight, was there to see how things are going.
18 'I'm just caught in the act red-handed. I need
19 to get rid of this wallet.'

20 So the missing wallet is certainly
21 evidence for you to consider. However, the law
22 does not require that the State prove to you
23 that wallet was taken. The crime of burglary
24 requires entering the house with the intent to
25 commit a crime, as the judge will instruct you

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1 on the law. It does not require that the
2 person completed that crime.

3 And that makes sense. If someone
4 comes home and you catch someone in your house
5 and they run out, it doesn't matter if they
6 didn't get the opportunity to take something.
7 You don't have to wait and hide behind your
8 couch and say, 'okay, he's got my TV. He's
9 left with it. Now I can get him.' The
10 completion of the crime is not an element.
11 But the missing wallet does remain evidence --
12 evidence of that criminal intent.

13 What makes a burglary a first degree?
14 Once you've decided that the burglary occurred
15 and reached that conclusion the law then
16 provides elements that make it a first-degree
17 burglary. Only one we're alleging in this
18 case. After you've concluded that a burglary
19 took place, if the burglary is committed with
20 a prior record of two or more convictions for
21 burglary, then it's a first degree. That is
22 the only reason you heard testimony of his
23 priors is to meet this element of the crime.
24 But it's met.

25 The Clerk's Office, the office charged

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1 with the duty of maintaining criminal
2 convictions, State's 7 and 8 -- or 6 and 7 in
3 evidence show Mr. Aiken's prior convictions,
4 presently merely to meet this element of the
5 crime.

6 And so your job as a jury is to take
7 your common sense that you've learned in your
8 life experience and check the box.

9 Did Mr. Aiken enter a dwelling? Of
10 course, he did.

11 Did he enter that dwelling without
12 consent? Yes. That's by his own admission.

13 Did he enter that dwelling with the
14 intent to commit a crime therein? Every single
15 factual circumstance of his entry and his
16 flight says yes. That one is met.

17 Is Mr. Aiken an individual with at
18 least two prior convictions for burglary? Yes.

19 Checking all the boxes, the only just
20 and fair result is Guilty.

21 Entering a guilty verdict is not about
22 revenge. It's not something that you should
23 feel bad about. It's about using your common
24 sense, apply it to the law and the elements of
25 the crime. And if those elements are

1 satisfied, the only fair and just verdict is
2 guilty of burglary in the first degree.
3 I think you once again for your time and
4 patience.

5 THE COURT: Thank you, Mr. Simpson.
6 Ms. Mulvaney?

7 MS. MULVANEY: I told you when we
8 started this case that truth is stranger than
9 fiction. And that in this court became more
10 and more true as this case progressed. The
11 truth became stranger than fiction.

12 Mr. Morrison testified that the night
13 before this happened he was going through the
14 garbage and he found a shoe, a shoe that
15 inspired him in some way to put it on the wall
16 in front of his residence. Who would have
17 expected that to be true? But it is. Because
18 people oftentimes act in funny and unexpected
19 ways that surprise us all the time.

20 And just as that shoe inspired Mr.
21 Morrison, Mr. Aiken saw that shoe that morning
22 and he thought of something else. That morning
23 Mr. Aiken is walking around downtown waiting
24 for the market to open. He has a stack of
25 greeting cards that he's going to take to the

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1 market to try to make a dollar or two.

2 And Mr. Aiken sees the shoe in front
3 of the residence and sees the door partially
4 open. And, remember, Mr. Morrison said he
5 doesn't remember whether the door was shut or
6 open, because somebody went out that morning to
7 get the paper. And Mr. Aiken thinks, 'you know
8 what? I'll return this shoe to someone in the
9 house and I'll tell them, you know, your door's
10 open. And maybe, just maybe, they'll give me a
11 dollar or two. Maybe I'll get a tip. So
12 that's what I'll do.' So he takes the shoe and
13 he goes up the stairs and he goes into the
14 house, and he's looking for somebody. He's
15 looking for somebody to give the shoe to.

16 And you know what's the strongest
17 evidence about that this wasn't a burglary,
18 that Mr. Aiken was doing what he said, is the
19 testimony that comes from Mr. Morrison himself.
20 Remember when Mr. Morrison testified he said,
21 'you know, when I woke up and he was in the
22 room, he was hesitant to leave. He was
23 hesitant to leave the room and he was hesitant
24 to go down the stairs.' And I believe he
25 testified, he said, 'It was odd. I said to

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1 him, 'dude, you've got to go.' ' He's hanging
2 around. This wouldn't have been a burglary if
3 his intent was to go in and take the wallet.
4 And if at that point he already had the wallet,
5 he would have taken off running down the stairs
6 and been out of there and gotten a head start.
7 But that wasn't his intent. His intent was to
8 return the shoe and maybe get a buck or two.

9 There are other factors in this case
10 that aren't consistent with a burglary, that
11 show that he didn't go in there with the intent
12 to commit a burglary. Burglars go into your
13 house when you're not home, when somebody's not
14 there. This was a Saturday morning, 8:00
15 o'clock, when people are home. Also, there's
16 cars in the driveway. He knows there's cars in
17 the driveway. He sees them. The cars in the
18 driveway are in the picture. He's looking for
19 somebody.

20 And why would he go through the living
21 room and into the bedroom when a person is
22 sleeping in the bed? The Solicitor may say or
23 may argue and say, 'well, maybe he didn't see
24 him.' You know, maybe Mr. Morrison's asleep
25 under the covers. Well, first of all, Mr.

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1 Morrison isn't five years old. He was asleep
2 in his bed when Mr. Aiken goes into the room.
3 But if he went in there with the intent to take
4 the wallet, he would have gone in, taken the
5 wallet and as soon as Mr. Morrison woke up, he
6 would have been down the stairs and gone.

7 Plus, if he went in there with the
8 intent to commit a burglary why would he go in
9 there - he's got a shoe in one hand and he's
10 got a grocery bag, a plastic grocery bag with
11 cards and a shirt in it. If the intent was to
12 go in there and steal, why would he be going in
13 there with all this, and walk up the stairs and
14 through the living room and into the bedroom
15 and say, 'hey, I brought you your shoe'?

16 Because his intent wasn't to steal.
17 That's not why he went in there. And if that
18 was his intent he would have grabbed something
19 of value in the living room. A laptop, a
20 computer, a PC, and taken off and run out the
21 door.

22 Let's talk about the sound. Okay, the
23 Solicitor testified -- excuse me, I'm sorry.
24 He didn't testify. When the Solicitor was up
25 here and he spoke to you he said, 'well, he got

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1 caught red-handed.' He woke up and he saw Mr.
2 Aiken rifling through his stuff. But that
3 wasn't the testimony. What Mr. Morrison said
4 was that he heard something. The Solicitor's
5 going to argue that what he heard shows his
6 intent.. But what Mr. Morrison heard could just
7 have easily been explained by Mr. Aiken coming
8 in, walking into the bedroom, standing in front
9 of the bed and, with his plastic grocery bag,
10 knocking something over or stepping on
11 something in the room. Mr. Morrison said, 'I
12 heard keys.'

13 When he testified he testified a lot
14 about keys. And he remembers that sound of the
15 keys, because it was a distinctive sound. You
16 know, now a year later, that's something that
17 stuck out in his memory. But, yet, in his
18 written statement that he gave to the police
19 moments after, he doesn't mention keys. And he
20 doesn't mention it to the police officer,
21 either of the police officer.

22 Am I saying that Mr. Morrison is lying
23 about this? No. But what I am saying is that
24 he's embellishing that. And that, over time,
25 he's making it worse and remembering it worse

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1 and giving details of things that really
2 weren't there and that didn't happen. For
3 instance, the pill bottle. He said he throws
4 a pill bottle. But if you look at the picture
5 the pill bottle isn't thrown. The pill bottle
6 is right there in the picture on his dresser.
7 And you didn't hear from Officer Duren that
8 they went in and picked up stuff and put it
9 back. He went in and took pictures of his
10 bedroom as he saw it right after this occurred.

11 Let's talk about the wallet, because
12 the wallet or the lack of the wallet is really
13 important in this case. Mr. Morrison says that
14 he put the wallet down next to his dresser and
15 that that's where he puts the wallet -- that's
16 where he keeps his things. And he knows that.
17 Because that's where he puts things away.

18 Well, y'all -- you know, look at this
19 picture. Look at this room. Does this look
20 like the room of somebody who always puts
21 things away, who always puts things in its
22 place? No. Mr. Morrison is scattered. That's
23 okay. He's an artist. He's a free spirit.
24 But he's not a type of personality that never
25 misplaces anything. And I'll tell y'all what

1 probably happened to that wallet. Mr. Morrison
2 probably lost his wallet or dropped the wallet
3 the night before when he was in the garbage,
4 looking for things to inspire him in his
5 artwork. And that's probably where that wallet
6 is and where that wallet is probably in a trash
7 dump somewhere to this day.

8 The State wants you to believe that
9 Mr. Aiken went in there and that he was able to
10 lift the wallet without anyone seeing it and to
11 get rid of the wallet without anyone seeing it.

12 But listen to his testimony. Mr.
13 Morrison says that he lost sight of him, once
14 when he went to get the cell phone. So when he
15 went to get the cell phone, that means that he
16 came back out and -- then he said that Mr.
17 Aiken was still on the stoop, right there on
18 the stoop. So if Mr. Aiken had ditched the
19 wallet right there, they would have found it.
20 He would have found it or one of the police
21 officers would have found it or one of his
22 roommates would have found it.

23 Mr. Morrison later said that he may
24 have lost sight when he was in the parking lot
25 of the Museum, behind the container. However,

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1 when he's on the phone with the 911 operator,
2 he wasn't telling the 911 operator that he lost
3 sight of him. Again, I'm not saying that he's
4 lying. I'm saying that he's embellishing.

5 But assuming that -- so he lost sight
6 of him by the container. He would have been
7 able to look around that container.

8 He also said that he fell in the
9 bushes.

10 So he's got three places that wallet
11 could be: by the stoop, by the container or
12 by the bushes. We have two trained police
13 officers out there and Mr. Morrison himself
14 looking for that wallet. And nobody finds it.
15 Nobody finds it to this day. If he would have
16 ditched it, somebody would have found the
17 wallet. And he lives right there, or somebody
18 would have tried to use the wallet. But we
19 never hear anything else about the wallet
20 because the wallet was not taken.

21 This case is not a popularity contest
22 between Mr. Morrison or Mr. Aiken. It's not
23 about who is more likeable. Because if it's
24 about who's more likeable, then Mr. Morrison
25 wins.

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1 This case is about one of the most
2 serious felonies besides murder that we have in
3 this State -- burglary in the first degree.
4 That's what this is about. That's what they
5 have to prove to you beyond every reasonable
6 doubt.

7 And if you think for one second that
8 Mr. Aiken went in that house to return the shoe
9 or if you think that wallet is sitting in a
10 garbage dump, then you have to find him not
11 guilty.

12 I told you in the beginning Mr. Aiken
13 is guilty of a trespass. But the State has
14 decided not to charge him with that. They are
15 going for all or nothing on this charge -- all
16 or nothing. But you cannot convict him of the
17 wrong charge because they've chosen not to out
18 the right crime in front of you.

19 The State is asking you to convict
20 him. They've brought the most serious charge
21 against him hoping that you'll convict him of
22 the most serious crime because of his past.
23 The judge will instruct you on the law. And
24 you cannot do that. The judge will tell you
25 that you cannot consider the fact that Mr.

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1 Aiken has a record for two burglaries as proof
2 that he did this crime.

3 Today you will make the most important
4 decision in this man's life and his family's.
5 But it is also a very important decision in
6 your own life. It is your verdict, yours as an
7 individual and yours collectively. And you
8 should render a verdict that you can be proud
9 of, because very rarely will you have the
10 quality of someone's life in your hands like
11 you do today.

12 If you go home tonight and you go to
13 bed and you wake up tomorrow morning and you
14 think 'You know what, Mr. Morrison's a quirky
15 guy, maybe Mr. Aiken's a quirky guy. Maybe he
16 just went in there to try to return the shoe.
17 Maybe he didn't take that wallet. Maybe that
18 wallet is in a landfill somewhere.' And if you
19 call my office tomorrow and say, 'I've change
20 my vote' -- after I reach for the garbage can
21 to throw up in my office, because this happened
22 to me before, I would tell you that it's too
23 late.

24 What the prosecution has presented to
25 you is not enough. It's a fabrication. I ask

1 you follow the law and find Mr. Aiken not
2 guilty of burglary in the first degree.

3 THE COURT: Thank you, Ms. Mulvaney.

4 Ladies and gentlemen, it's now my
5 responsibility to give you the charge on the
6 law that, of course, you have promised that you
7 will accept and apply fairly and impartially to
8 the facts that you determine.

9 When you begin your deliberations,
10 please remember that nothing that I say during
11 this instruction should be ever considered by
12 you as an indication or a suggestion of how you
13 are to resolve the factual issue. Because I
14 have absolutely nothing to do with that.
15 That's your job and yours alone.

16 Likewise, if you hear a principle of
17 law with which you may differ, I respect your
18 right to feel that way, but you have promised
19 the Court, you promised the parties and their
20 attorneys that you would set aside those
21 feelings and take the law as I give it to you,
22 notwithstanding your personal opinions and
23 feelings.

24 Both the State and Mr. Aiken expect
25 that very shortly you will go back to your jury

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1 room and evaluate the evidence in this case and
2 decide -- apply your common sense and decide
3 what you believe to be credible and believable,
4 and then take the law and apply it fairly and
5 impartially. And when that is done you will
6 have honored the commitment that you made to
7 both of them and to this court when we began
8 this process.

9 During this instruction you may hear
10 me from time to time use the term 'defendant.'
11 Defendant is simply a term that we use to
12 designate a party and generally is used to
13 designate the party against whom a claim is
14 made.

15 In this state, as you know, and in
16 this case the State is making the claim against
17 Mr. Aiken. And that, of course, has been
18 raised in that document, the indictment, which
19 I showed to you when I started, as it appears
20 to be simply a piece of paper. It's not
21 evidence. It won't accompany you to your jury
22 room.

23 But from time to time we use that
24 term, "defendant." And please know that when I
25 use that term it's just a way of identifying

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1 . Mr. Aiken.

2 He's been accused in the indictment
3 of the crime of burglary first. And to that
4 indictment he's entered a plea of not guilty,
5 which then places upon the State the burden of
6 proving his guilt beyond a reasonable doubt.

7 You will recall when we qualified you
8 for this case I told you that persons such as
9 Mr. Aiken is in this case, who are accused of
10 committing some criminal offense, those persons
11 have no responsibility whatsoever to prove in
12 any way or explain in any way any of the
13 charges or are certainly not required to prove
14 their innocence. Because the law says that
15 persons so accused are to be presumed innocent.
16 And that presumption, as I stated earlier, is
17 an active presumption. That means that you
18 must actively presume he is innocent of the
19 charges raised against him or made against him.
20 And that can only be removed when, in the
21 process of deliberating in this case, you're
22 convinced beyond a reasonable doubt that the
23 State has met its burden of proof as to each
24 element of the crime so charged. Then, and
25 only then, may that presumption be removed.

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1 And it is, again, the burden on the
2 State to present evidence which persuades
3 beyond a reasonable doubt of his guilt.

4 Obviously, ladies and gentlemen, if a
5 person so accused has no responsibility to
6 prove or disprove anything, the fact that a
7 person accused of committing a criminal offense
8 does not testify in his or her own behalf is
9 never to be considered by a jury in any
10 fashion. I would instruct you that a person so
11 accused has the Constitutional right to remain
12 silent, and the assertion of that right cannot
13 and must not be considered in the delibera-
14 tions..

15 Therefore, under your oath, it would
16 be a violation of that oath if you were to
17 reach any inference or draw any conclusion from
18 the fact that Mr. Aiken did not testify in this
19 case. His failure to testify should not even
20 been considered by your or discussed by you in
21 the jury room.

22 The burden rests upon the State, as I
23 stated to prove beyond a reasonable doubt his
24 guilt. And the fact that he didn't testify is
25 not a factor to be considered by you in making

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1 that determination.

2 What is a reasonable doubt? A
3 reasonable doubt is a doubt that would make an
4 honest, sincere, conscientious juror who was
5 searching for the truth in a case, to hesitate.
6 Proof beyond a reasonable doubt is proof that
7 leaves you firmly convinced of the defendant's
8 guilt.

9 Now, I would instruct you that there
10 are very few things in this world or in this
11 life that we know with absolute certainty. And
12 in criminal disputes such as this, our law does
13 not require the State to present proof that
14 overcomes every possible doubt.

15 If, based on your consideration of the
16 evidence, you are firmly convinced that Mr.
17 Aiken is guilty of this crime, the crimes
18 charged, then you must return a verdict of
19 guilty.

20 If, on the other hand, you think there
21 is a real possibility that he is not guilty,
22 then you must return a verdict of not guilty.

23 A reasonable doubt may arise from the
24 evidence which is in the case or from the lack
25 or absence of evidence in the case. And it's

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1 up to you to determine whether or not a
2 reasonable doubt exists as to the guilt of this
3 defendant.

4 I charge you that he's entitled to
5 every reasonable doubt arising in the whole
6 case. And that means simply this. If, upon
7 any issue of fact which is essential to a
8 conviction and therefore a verdict of guilty,
9 you should have a reasonable doubt as to how
10 that issue is to be resolved, I would instruct
11 you that it is your duty to resolve that in the
12 favor of Mr. Aiken.

13 The evidence which you are to
14 consider, as you know, consists of the
15 testimony of the witnesses and the exhibits
16 that were introduced through their testimony
17 and nothing else.

18 The objections and my rulings that
19 were made during the trial or any comments made
20 during the trial that were made in your
21 presence should not be considered by you in any
22 fashion. The fact that an attorney made an
23 objection is not to be considered because that
24 is their duty as officers of this Court. That
25 is their responsibility as advocates of their

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1 clients to raise those issues for my
2 consideration. And the fact that I may have
3 excluded testimony or prevented a witness from
4 testifying should never be considered. Because
5 if you do, then you've stepped over into my
6 area of responsibility.

7 On the other hand, if I allow
8 testimony, you shouldn't put any greater weight
9 on that testimony because I permitted it.

10 Quite frankly, in that situation, where I
11 overruled an objection and permitted the
12 question and answer, it really does demonstrate
13 how you and I work together. I simple said, as
14 a matter of law and our rules of evidence, I
15 would permit the question and the answer.
16 That's as far as it goes. Once that's done, it
17 shifts to you. Then you consider the answer
18 and you decide whether or not you believe it or
19 not. And if so, how strong do you believe it.
20 And so we work together in that fashion. I
21 make the rulings as to what they will testify
22 to. You decide whether you believe that
23 testimony.

24 Now, also the remarks of the attorneys
25 should never be considered by you in any

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1 fashion. Their remarks, they have a very
2 important responsibility. They are officers of
3 this court. Their remarks are extremely
4 helpful but never should be considered
5 evidence.

6 And I would instruct you if their
7 statements about what a witness said or didn't
8 say differs from your collective recollection,
9 you must disregard their comments and go with
10 your recollection of what the witness said or
11 didn't say. Why? Because you're the sole
12 judges of the facts of this case.

13 Likewise, if any of the statements of
14 the law differ from what I tell you the law is,
15 you are to disregard their remarks and take it
16 as I state it to you. Because for the purposes
17 of today, I'm the sole judge of the law in this
18 case and you must take the law as I give it to
19 you.

20 With regard to resolving a factual
21 issue if it should arise a situation where your
22 recollection differs from that of the attorneys
23 and you can't come to a collective agreement,
24 please remember that the person who has the
25 sole responsibility for the record in this case

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1 is Ms. Garrison. She's the court reporter, and
2 that's her duty. If you do have a difference
3 of what a witness said or didn't say, we can
4 resolve that by replaying that testimony for
5 you, should that become necessary. I'd just
6 remind you of that if that is necessary. All
7 you have to do is send a note and request that
8 that testimony be replayed and we can
9 accomplish that for you.

10 Ladies and gentlemen, in cases of this
11 nature, these types of dispute, there are two
12 types of evidence basically that you consider.
13 One is called direct evidence and the other is
14 indirect. The more popular name would be
15 circumstantial evidence.

16 Direct evidence is typically when
17 someone comes and testifies as to a sensory
18 perception. I saw something. I heard
19 something or the like. And if you should be
20 convinced of the credibility of that testimony
21 and satisfied with that testimony beyond a
22 reasonable doubt, then, of course, that would
23 establish that particular fact or circumstance.

24 Circumstantial evidence is basically
25 when you testify to a number of factors and you

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1 combine them. And that leads you to another
2 conclusion, basically inductive or deductive
3 reasoning. You take those and that means you
4 can reach this conclusion. That is another
5 proper way of presenting a case.

6 Our law makes absolutely no
7 distinction between the weight or the value to
8 be given to direct or circumstantial evidence,
9 nor is there any greater degree of certainty
10 required of circumstantial evidence than direct
11 evidence. Rather, the law instructs you to
12 weigh all the evidence in the case and decide
13 what you find to be credible and believable.

14 I would instruct you, however, that
15 the fact that circumstances brought out in a
16 case are strongly suspicious of guilt or the
17 circumstances are such that the defendant's
18 guilt is probable, as I told you, that would
19 not be sufficient, because that does not rise
20 to the level of beyond a reasonable doubt.
21 Because the proof, as you know, offered by the
22 State, has to reach that level before you may
23 return a verdict of guilty.

24 How do you decide the facts in the
25 case? As I stated, you brought with you

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1 everything that you needed. And you've done
2 this many times in your life. You do it the
3 same way you've always done it. You apply your
4 common sense, your sense of logic and reason,
5 and you decide what you find to be credible and
6 believable. And it's necessary to evaluate the
7 testimony of witnesses because it's not only
8 what someone says -- the testimony doesn't have
9 to be contradicted necessarily to render it
10 disputed. Because you have to assess the
11 credibility, the believability, the logic of
12 what a person says. And we require all those
13 facts that we've used in our life to assist us
14 in making those decisions.

15 I'd like to discuss with you some of
16 those factors. If I don't mention a method or
17 factor that you've used in your life to assist
18 you in making this type of decision, please
19 remember to use it when you begin the process
20 of deciding this case.

21 In considering or evaluating the
22 credibility and the believability of a witness,
23 I would suggest that you may want to consider
24 the manner of the testimony or the appearance
25 of the witnesses who testified.

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1 How did they appear to you?

2 Straightforward or hesitant in answering
3 questions?

4 Was the testimony of a witness
5 consistent or inconsistent?

6 How did the witness come to know the
7 facts that he or she testified to? And what
8 was the ability of that witness to know those
9 particular facts and circumstances?

10 Is there a reason for a witness to
11 give testimony which may be helpful or
12 detrimental to one side or the other? In other
13 words, was the witness biased or prejudiced in
14 any fashion?

15 In making a determination on
16 credibility and believability you are given
17 very wide latitude and broad discretion. You
18 have the right to believe one witness as
19 against many, many witnesses against one.
20 You have a right to believe all of a witness's
21 testimony, parts of a witness's testimony or
22 none of a witness's testimony.

23 Now, of course, you don't make these
24 decisions arbitrarily. But if there's a reason
25 in the record of this case for taking that

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1 position, you have that prerogative. Because
2 your objective is to determine the truth
3 regardless of the source of the evidence.

4 Now, when it comes to the law you
5 don't have any latitude with that. Please
6 remember that, that you must accept the law as
7 I give it to you. And in that regard I would
8 instruct you that the fact that I give you an
9 instruction on a particular area or aspect of
10 this case is not to be taken as suggestion of
11 how you are to resolve any factual issue.

12 Nothing that I say should be considered to
13 be a statement of fact. The order of the
14 instruction means nothing. I had to put it in
15 some order. And, please, when you apply it,
16 consider the charge as a whole.

17 Now, as I told you the defendant in
18 this case is charged with burglary in the first
19 degree. And the State, in order to obtain a
20 conviction, has to prove beyond a reasonable
21 doubt that the defendant, Mr. Aiken, entered a
22 dwelling without consent. Now, in entering the
23 dwelling the State is not required to prove
24 that there was force used to gain entry. If
25 they entered the dwelling in any fashion, then

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1 that would have been established.

2 A dwelling is any building or portion
3 of a building in which a person ordinarily
4 sleeps.

5 Next, the State must prove beyond a
6 reasonable doubt that the defendant, Mr. Aiken,
7 intended to commit a crime, either a felony or
8 a misdemeanor, at the time of the entry. The
9 mere entry into a dwelling without consent is
10 not burglary. If the intent to commit a crime
11 is formed after entry, it is not burglary. On
12 the other hand, if the defendant intended to
13 commit a crime at the time of the entry, it is
14 burglary even if the intent was abandoned after
15 entry. It does not matter that the intended
16 crime was not completed.

17 Finally, for burglary in the first
18 degree the State must prove beyond a reasonable
19 doubt that the defendant, Mr. Aiken, has a
20 prior record of two or more convictions for
21 burglary and/or housebreaking. Now, evidence
22 of prior offenses committed by the defendant
23 has been offered not to prove the defendant has
24 bad character or to prove that the defendant
25 committed the burglary on this occasion. Nor

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1 can you consider this evidence as proof that
2 the defendant intended to enter the building
3 with the intent to commit a crime in this case.
4 The prior conviction may be considered by you
5 only for the purpose of determining whether or
6 not it satisfies that element of the offense
7 that makes it a burglary first.

8 If you enter a building without
9 consent to commit a crime and you have two
10 prior convictions for burglary or house-
11 breaking, that would be burglary in the first
12 degree.

13 Before you can consider the evidence
14 of the defendant's prior burglaries and/or
15 housebreaking convictions which have been
16 presented for your consideration, you must
17 first find that the State has proved beyond a
18 reasonable doubt that a burglary was committed.

19 If you find beyond a reasonable doubt
20 that the burglary was committed, then you may
21 consider the evidence of the prior conviction
22 as evidence of one of the circumstances which
23 would make it burglary in the first degree.

24 If you do not find beyond a reasonable
25 doubt that the defendant committed these

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1 alleged prior offenses, then you cannot return
2 a verdict of guilty of burglary in the first
3 degree because that is a required element.

4 Now, in order to establish criminal
5 liability criminal intent is required.
6 Criminal intent must be proven by the State
7 beyond a reasonable doubt. It is always a
8 matter that must be determined by the jury from
9 the circumstances surrounding the situation.

10 There is no way to prove intent to a
11 mathematical certainty. There's no way for
12 medical science to dissect a person's brain and
13 determine what a person had in mind. So the
14 law says that criminal intent may be inferred
15 from the circumstances shown to have existed.
16 This is how you make a determination of whether
17 or not the element requiring intent was
18 present.

19 It is not necessary to establish
20 intent by direct and positive evidence. But
21 intent may be established by inference in the
22 same way as any other act, by taking into
23 consideration the acts of the parties and all
24 the facts and circumstances of the case.
25 Criminal intent is a mental state of conscious

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1 wrongdoing and it's up to you to determine what
2 the defendant intended to do based on the
3 circumstances shown to have existed. Criminal
4 intent can arise from actions or failure to
5 act. It may arise from negligent, reckless or
6 an indifference to duty or to consequences that
7 is considered by law to be the equivalent of
8 criminal intent.

9 Ladies and gentlemen, you are not
10 partisans or advocates for the State or Mr.
11 Aiken. You do not serve as jurors to reward
12 any friends nor to punish any enemies. You've
13 been selected by the State and Mr. Aiken to be
14 fair and impartial judges with me.

15 And in being a judge, we have to make
16 another very obvious but very real commitment.
17 As humans, we all are moved by certain
18 emotions. One thing's for certain -- human
19 emotion has nothing to do with the job of
20 performing the task of a judge. You can't be
21 motivated by anything. You have to be
22 deliberate. You have to be -- you have to
23 simply apply your common sense, your sense of
24 logic and reason, fairly and impartially,
25 analyze the evidence, decide what you find to

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1 be the truth.

2 And then once you decide that, you
3 take the law and apply it fairly and
4 impartially to those facts and report that
5 decision.

6 To assist you, Madam Presiding Juror,
7 in reporting that decision, I will be sending a
8 verdict form back to you. You will not receive
9 the indictment, as I stated. But the verdict
10 form will simply be captioned -- it will simply
11 state, 'The State of South Carolina versus
12 James Ivan Aiken.' It will have a caption.
13 That caption is just to facilitate the filing
14 of the document. It should mean nothing else
15 to you.

16 The body will give you two choices --
17 in the body of the document it will say you
18 find the defendant, James Ivan Aiken -- and
19 there are two choices. The order in which they
20 appear means absolutely nothing. I had to put
21 it in some order. The first one will say
22 'guilty,' and there'll be a line drawn after
23 it. The second, 'not guilty' with a line
24 drawn. Then there is a place for you to sign
25 where it says Presiding Juror. Whatever your

1 choice, and it has to be unanimous to be a
2 choice, all twelve of you must agree. Eleven
3 to one won't work. It has to be twelve to
4 zero.

5 But if the first one, Guilty, is your
6 choice what will you be saying? You'll be
7 saying that you've analyzed the evidence and
8 each of you are convinced beyond a reasonable
9 doubt that the State has met its burden of
10 proof and established that Mr. Aiken did enter
11 a dwelling without consent with the intent to
12 commit a crime and that when he entered he had
13 two prior convictions. And you're convinced of
14 that beyond a reasonable doubt. If that's your
15 decision, then you check 'guilty.' I would ask
16 you to also circle it. That way we know it's
17 your decision.

18 If your choice is Not Guilty what will
19 you be saying? That you've analyzed the
20 evidence and you're not convinced beyond a
21 reasonable doubt of one or more of those
22 elements. And if you are not convinced beyond
23 a reasonable doubt that Mr. Aiken entered a
24 building with the intent to commit a crime with
25 two or more prior convictions, then you must

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1 return a verdict of not guilty as I've stated
2 by law, because the State has that burden to
3 prove that beyond a reasonable doubt.

4 Once you've checked that and circled
5 it I would ask you to sign it and knock on the
6 door and we will be happy to return you to the
7 courtroom to receive your verdict.

8 I know you're anxious to get started. And
9 I told you it'd be the last thing that I told
10 you when you left is when you may start. I
11 need to excuse you in just a moment to discuss
12 with the attorneys my charge. It may be
13 necessary that I return you to the courtroom to
14 give you some additional instructions. If
15 necessary, we will do that. But if there
16 aren't any additions, then we will gather the
17 exhibits and I'll send in the verdict form and
18 we'll deliver it to you. When you receive the
19 exhibits then you may commence your
20 deliberations, but not before.

21 Now, once the deliberations start the
22 only restriction that I place on the delibera-
23 tions is this: if any juror has to leave the
24 table for any reason, you must stop
25 deliberating until all twelve of you are

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1 together. But other than that, you proceed as
2 you deem fit and proper.

3 Thank you for your attention. I need
4 to ask you now the first twelve of you that
5 were selected, do any of you believe that you
6 will not be able to continue? If so, please
7 raise your hand. (No response).

8 Thank you. Mr. Montgomery, at this
9 point it appears that the first twelve will be
10 able to continue. So when you and the other
11 jurors exit the courtroom, I'm going to ask
12 that you not join them in the jury room. They
13 will take you to another room, and I'll be in
14 very shortly to discuss with you how much long
15 you need to remain with us.

16 Thank you very much, ladies and
17 gentlemen. Please retire to your jury room and
18 await your exhibits before commencing your
19 deliberations.

20 (JURY OUT AT 12:35 P.M.)

21 THE COURT: Exceptions or additions
22 from the State?

23 SOLICITOR SIMPSON: None from the
24 State, Your Honor.

25 THE COURT: Exceptions or additions

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1 from Mr. Aiken?

2 MS. MULVANEY: No, sir, but I
3 would restate my objections.

4 THE COURT: I understand. All your
5 objections are preserved. Thank you very much.
6 And we'll be at-ease.

7 (JURY IN DELIBERATION)

8 (JURY REQUESTED LUNCH @ 12:45 P.M.)

9 (REQUESTED CHARGE ON BURGLARY STATUTE @ 1:00
10 P.M. - ENTERED AS COURT'S EXHIBIT 1)

11 (DEFENDANT PRESENT)

12 THE COURT: We have a note from the
13 jury asking for the burglary statute and I've
14 printed that and attached it to the note. Any
15 objection from the State?

16 SOLICITOR SIMPSON: No, sir.

17 THE COURT: Any objection from the
18 Defendant?

19 LORI PROCTOR: No, sir.

20 MARY BETH MULVANEY: No, sir.

21 THE COURT: You can take it to the
22 jury, (tenders to bailiff).

23 (JURY IN DELIBERATION)

24 (NOTIFIED OF VERDICT AT 2:35 P.M.)

25 (DEFENDANT PRESENT)

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1 THE COURT: Let the record reflect
2 Mr. Aiken is present. Is the defendant ready
3 to receive the verdict, Ms. Mulvaney?

4 MS. MULVANEY: Yes, sir, Your
5 Honor.

6 THE COURT: Is the State ready to
7 receive the verdict, Solicitor?

8 SOLICITOR SIMPSON: Yes, Your
9 Honor.

10 THE COURT: Very well, let's bring
11 in our jury.

12 (JURY IN AT 3:00 P.M.)

13 THE COURT: Thank you, thank you
14 ladies and gentlemen. I appreciate your
15 patience. I was in the middle of a plea
16 involving another case totally unrelated to
17 this. They had a number of people here and so
18 I needed to complete that before we could bring
19 you in. I apologize for the delay to you.
20 thank you.

21 Ms. Cannon, as I understand, the jury
22 has reached a verdict. Is that correct?

23 Juror NUMBER 37: Yes, sir.

24 THE COURT: If you would pass the
25 verdict form, please, to (bailiff).

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1 JUROR NUMBER 37: (Complies)

2 THE COURT: Thank you very much.

3 (Upon review), -- the verdict for has been
4 properly completed. Mr. Callahan, if you would
5 assist the Court in publishing the verdict,
6 sir.

7 CLERK MIKE CALLAHAN: Please have the
8 defendant stand.

9 DEFENDANT: (Complies)

10 CLERK MIKE CALLAHAN: The verdict
11 form in the matter of State of South Carolina
12 versus James Ivan Aiken, defendant on the
13 charge of burglary in the first degree,
14 (reading): "We, the jury, by unanimous consent
15 find the defendant, James Ivan Aiken, guilty."
16 Signed by the foreperson on January 19, 2011.

17 Ladies and gentlemen of the jury, if
18 this was your verdict, please raise your right
19 hand -- (unanimous response by jurors).

20 Thank you. Please let the record
21 reflect that all twelve jurors raised their
22 right hands.

23 THE COURT: It will so reflect.
24 Each juror did raise their right hand in
25 response to Mr. Callahan's question.

1 Anything further from the jury from
2 the State?

3 SOLICITOR SIMPSON: No, sir.

4 THE COURT: Anything further from
5 the jury panel from Mr. Aiken?

6 MS. MULVANEY: No, sir.

7 THE COURT: Thank you. You may be
8 seated. Thank you very much.

9 Thank you, ladies and gentlemen, for
10 assisting in resolving this dispute. As I
11 stated, it's an honor and it has been a true
12 honor to serve with each one of you. I
13 appreciate the services you've rendered. I
14 appreciate the manner in which you approached
15 your responsibilities as jurors.

16 I'm pleased to inform you this will
17 conclude your services for this week. You are
18 now free to discuss this case with anyone if
19 you choose to. But it's also your right not
20 to. If someone should persist in asking you
21 questions and you don't want to talk to them
22 about it, just let Ms. Armstrong know. She can
23 make that known to me and we'll assist you in
24 that.

25 Good luck to each one of you. You're

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1 free to leave. Thank you.

2 (JURY DISMISSED)

3 THE COURT: Anything from Mr. Aiken
4 at this point? Any motions?

5 MS. MULVANEY: Your Honor, I'd
6 renew the Motions I made during the course of
7 the trial, and I also make a motion for a new
8 trial.

9 THE COURT: Very well. Your Motions
10 are noted. Based on the prior rulings and
11 certainly the evidence viewed, I think the jury
12 certainly was a jury issue -- I think the
13 evidence supports their decision. So I
14 respectfully deny your motion in that regard.

15 Anything further from the State? Are we
16 ready for sentencing?

17 SOLICITOR SIMPSON: The State's
18 ready.

19 THE COURT: Do you have a sentencing
20 sheet?

21 SOLICITOR SIMPSON: I do, Your
22 Honor.

23 THE COURT: Very well. Is the
24 defendant ready for sentencing?

25 MS. MULVANEY: Yes, sir.

1 THE COURT: Okay. He doesn't have
2 to sign it. You can, if you like, but it's
3 really a sentencing sheet. I know we started
4 them signing it, but I don't think they have to
5 because they're not pleading.

6 Anything from the State? Anything
7 further from the State?

8 SOLICITOR SIMPSON: Your Honor,
9 just briefly, you heard the facts of the case.
10 I don't think there's any expanding on that.
11 I would like to put on the record his prior
12 record.

13 THE COURT: Yes, sir.

14 SOLICITOR SIMPSON: In 1985, a
15 distribution of marijuana in New York.

16 In 1987, a robbery in Georgia.

17 In 1991, shoplifting, petty larceny,
18 simple assault.

19 '93, petty larceny and receiving
20 stolen goods.

21 A trespass in '94.

22 in '96 two counts of receiving stolen
23 goods, two shopliftings and possession of
24 marijuana.

25 In '97, shoplifting, petty larceny and

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1 five counts of burglary in the second degree,
2 for which the defendant received an eight-year
3 sentence.

4 2001 an additional burglary second
5 degree, two counts of strong armed robbery. It
6 appears that he was given a suspended sentence
7 for that and entered into the Rebound Program.

8 However, in the following year, 2002,
9 there are misdemeanors of petty larceny and
10 false report as well as an attempted burglary.
11 On that, and I believe a combination of the
12 revocation of probation of his prior sentence,
13 he was given an active ten-year sentence.

14 THE COURT: Thank you very much.
15 Ms. Mulvaney, I'll be happy to hear from you.

16 MS. MULVANEY: Thank you so much.
17 Judge, Mr. Aiken is forty-five years old. I
18 would ask that you consider the minimum
19 sentence of fifteen years. That's what the
20 Solicitor felt was appropriate before the
21 trial, and I would ask you not to punish him
22 too much for going to trial.

23 I would also like to point out that
24 while he was in jail Mr. Aiken did help the
25 Solicitor on the Kate Waring case. Detective

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1 Osborn contacted me and told me that it was
2 through the work of Mr. Aiken that he called
3 the witness that he called in the Kate Waring
4 case to help the State in that case. And that
5 had it not been for Mr. Aiken's cooperation
6 with that, he would never have gotten that
7 witness and had that witness to testify. So,
8 I mean, he has helped the State, and I would
9 ask Your Honor to keep that in mind.

10 The longest sentence he's ever gotten
11 is eight. Out of that he's done five years.

12 THE COURT: Ten.

13 MS. MULVANEY: (Affirmative nod),
14 ten. But the longest time that he's ever done
15 on a stretch was five years. And so I think
16 that fifteen years would be three times that.
17 And as you know it's a violent crime and he is
18 getting up there in age. So I think fifteen
19 years is a significant penalty.

20 His mom and his stepdad have been here
21 the whole time. I would ask if they could
22 address the Court.

23 And Mr. Aiken did, I think, when he
24 thought about testifying, I think he made the
25 right decision by not testifying. He would

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1 like to talk also.

2 THE COURT: I'll be happy to hear
3 from any of them.

4 GLORIA AIKEN: I'm Gloria Aiken. I
5 am the mother of James Aiken.

6 THE COURT: Yes, ma'am.

7 GLORIA AIKEN: Not only is he my
8 only son, he's my only child. And all I can
9 ask is for some compassion from you. I know
10 he's done wrong, but I would just ask for some
11 compassion from you. I have been -- I'm a Vet,
12 I served in the Marine Corps. I guess it just
13 wasn't enough. I just ask that you have some
14 compassion on him. Thank you.

15 THE COURT: Thank you, ma'am.

16 DEFENDANT: Thank you for being so
17 open and the fairness about the trial.

18 I have a lengthy criminal history.
19 It's due from drug use, drug use, drug use.
20 If you notice, Mr. Simpson started with my
21 criminal history in New York. And what
22 happened was when the crack habit had started,
23 I was one of the first people who -- and I left
24 New York and went to my mother's brother's in
25 Atlanta. I ended up going to prison there.

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1 When I got out of prison it was there. I went
2 back on a violation, came back.

3 I left and come on back to Charleston.
4 When I get to Charleston, it's here. It's like
5 I was running from something that was just
6 spreading.

7 And as Mr. Simpson said I was
8 sentenced to the Rebound Program. I didn't go
9 because I had to wait on bed space and the
10 probation officer just allowed me not to go.

11 However, I hadn't ever really dealt
12 with my addiction. I had been accepted into
13 the South Carolina Strong Program prior to
14 this, and I submitted the letter to Ms.
15 Mulvaney. They said the program was for hard
16 core people who, you know, were considered too
17 hard core for outpatient treatment and things
18 like that. And -- for whatever reason, they
19 simply chose not to accept me.

20 Oh, and one other thing. The reason
21 why I was going to testify is because something
22 took place a week before at my mother's
23 residence. I'm her only child, and -- I was
24 living in Greenville and we was visiting, were
25 pulling up from grocery shopping and a

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1 Charleston police office meet us in the
2 driveway and said, 'Who lives here?' I said,
3 'I do, but I live in the back part.' A
4 neighbor lives here..

5 He said he'd got a call from a
6 concerned neighbor that a door was open -- the
7 neighbor come to the door and we went on in the
8 house. I was putting up the groceries and my
9 mother said, 'I'm glad somebody called, you
10 know, to check on us because, you know, I live
11 here by myself, I'm a senior.'

12 So truthfully, honestly, that's why I
13 did what I did that day by entering. That
14 right there moti--, -- I had been requesting
15 counsel to obtain that particular report from
16 the Police Department to make you understand.
17 And so that's what kind of guided and motivated
18 my, you know, purpose for entering.

19 All I can ask is what counsel asked,
20 that you consider the fifteen years. I'm an
21 only child. My mother's been real good to me.

22 And I have a daughter whose mother's
23 past is like mine, who pretty much been in the
24 same, uh, -- who past is like mine. And so
25 this child has grown up with me out of her life

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1 most of the time. And I've just let the child
2 down. And I'm just asking -- not so much for
3 me but for those who actually love me and care
4 for me, that you consider that along with the
5 sentencing.

6 Also, one last thing I'll mention is
7 that you mentioned that I had only been to
8 school through the eighth grade. You said
9 somewhere along the line, uh, during my stint
10 inside the facilities and institutes -- which
11 don't address the drug addiction. They always
12 send you back just the way you came.

13 THE COURT: Right.

14 DEFENDANT: I always tried to better
15 myself. Always. And never re-entered society
16 with the intent to do wrong or planned to do
17 wrong, and things like that. And so this is
18 why I am able to express -- I've tried to do
19 what I could to better myself and my position.
20 And the person who is, like, speaking to you
21 right now is the person that is really the
22 person. But because drugs is the way they are
23 and they do what they do to people, then you
24 have wishing direction (phonetic), you see. We
25 know illegal drugs and narcotics are

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1 voluntarily and are not forced on an
2 individual. I recognize that, you know.

3 I just really never had no help, Your
4 Honor, with this problem. It's always go to
5 jail, go to jail. And so, uh, -- there's
6 nothing more I can actually say. I am just
7 speaking in all sincerity.

8 THE COURT: Thank you, sir.

9 Defendant: Just one other thing.

10 THE COURT: Sure.

11 DEFENDANT: The bag that I had was
12 actually greeting cards, and I actually sell --
13 I've got my own line of greeting cards. I've
14 got my name and e-mail address on the back.
15 I've been doing that since '94. So it's always
16 been a means of supporting, you know, -- so
17 it's not like I was just in society wanting to
18 do -- I guess, to put the whole picture of
19 James Aiken and not just the ugly part that the
20 drugs have made, you know. So thank you for
21 your time. I really hope you will really
22 consider that. I am my mother's only child.

23 THE COURT: Thank you, sir. Thank
24 you, Mr. Aiken.

25 DEFENDANT: Thank you, sir.

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1 THE COURT: Anything else, Ms.
2 Mulvaney?

3 MS. MULVANEY: No, sir.

4 THE COURT: Mr. Aiken, one thing's
5 for sure -- both as a lawyer and as a judge
6 I've seen first-hand --

7 MS. MULVANEY: I'm sorry, Judge.
8 His stepdad would like to say something.

9 THE COURT: Yes, sir. If you'd give
10 me your name, please, sir.

11 EZEKIEL CROSS: My name is Ezekiel
12 Cross, Jr. I'm 70 years old.

13 THE COURT: Yes, sir.

14 EZEKIEL CROSS: What I would like
15 to say about Mr. Aiken is -- I'm a living
16 testament to God's grace and a judge's
17 compassion. I made some choices that I
18 received some consequences for. I had Judge
19 David Norton. He gave me a break. And I'm
20 now writing a book. And I'm now working in a
21 program with boys five to twelve years old,
22 empowering them.

23 Mr. Aiken has been collaborating with
24 me from the county jail. I've witnessed a man
25 who has got good insight and a good grasp on

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1 some of the problems that we face. And I've
2 witnessed his ability to construct those cards
3 that he makes.

4 Like I say, you know, we make bad
5 choices and there are consequences.

6 I only ask the Court to give him the
7 grace that a judge gave me.

8 THE COURT: Thank you, sir.
9 Well, one thing you learn is that most of the
10 time, especially when crack is involved -- it's
11 one of the most vicious addictions I believe
12 I've ever seen in my life.

13 I remember the first time I ever had a
14 client that was addicted to crack. I was
15 representing him on armed robbery and I asked
16 him how far he went in school and what did he
17 do. He said, "I do crack." I said, 'No, I
18 mean what do you do for a job.' He said, "I do
19 crack." And that was all he did. That
20 controlled his life. He wasn't a bad person.

21 I know a number of persons, both in
22 this and outside as well. And I don't think
23 that that's you at all.

24 The sad thing is -- and some of it's
25 our fault when we make those mistakes. You

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1 have to be responsible because there are
2 resources. They may not be as easy for
3 everyone.

4 One of my true blessings in my life
5 was the opportunity to serve on the Berkeley
6 County Alcohol and Drug Abuse Commission from
7 1973 until when I took this job in '94. I wish
8 I could say we helped everyone. We didn't.
9 But we helped some. I'm grateful for that
10 opportunity to be a part of that. Hopefully,
11 their lives are turned around.

12 I heard somebody say in presenting a
13 drug program one time, 'Do you know what you
14 get when you get a drug addict who goes to
15 jail? When he gets out, you've got a punished
16 addict.' He's still an addict, it hasn't done
17 a thing for his addiction. We punished him,
18 but we haven't done a thing for his addiction.

19 Somewhere along the line we've got to
20 try to figure out how to make all that work.
21 It's a difficult task. I'm not blaming a soul.
22 It's just the reality of life.

23 And I agree with the statement just
24 made about grace and opportunities. I noticed
25 -- couldn't help but notice on the two

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1 sentencing sheets that were offered up, one was
2 a recommendation and the other was a plea to a
3 lesser-included offense, which had to have been
4 burg first down to burg second.

5 That's grace. That's an opportunity,
6 as was the opportunity to be in that program
7 that you represented.

8 DEFENDANT: Burg second?

9 THE COURT: No, no. When you pled
10 down, it was a plea to a lesser-included
11 offense with Mr. Dunaway, your lawyer.

12 DEFENDANT: Right. Right.

13 THE COURT: That was an opportunity.
14 Unfortunately, you didn't take advantage of it.
15 I don't question that punishment doesn't cure
16 your addiction. All it does is warehouse you.
17 And that's all I'm doing. But at some point
18 you run out of opportunities.

19 The sentence of the Court, Mr. Aiken,
20 is you be committed to the Department of
21 Corrections for a term of twenty (20) years.
22 I give you credit for time served.

23 DEFENDANT: Thank you.

24 THE COURT: Thank you, sir.

25 LORI PROCTOR: Thank you, Your

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1 Honor.

2 SOLICITOR SIMPSON: Thank you, Your

3 Honor.

4 (END OF PROCEEDINGS)

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State of South Carolina v. James Ivan Aiken
Case No. 2010-GS-10-03117
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1 CERTIFICATE OF REPORTER

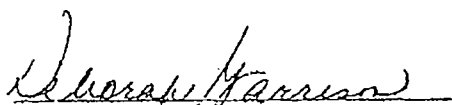
2

3 I, the undersigned, Deborah Garrison,
4 official court reporter for the 9th Judicial
5 Circuit of the State of South Carolina, do
6 hereby certify that the foregoing is a true,
7 accurate and complete transcript of the jury
8 trial held before The Honorable R. Markley
9 Dennis, Jr., on January 18-19, 2011;

10 I further certify that I am neither kin
11 nor counsel to any of the parties and have no
12 interest in the outcome of this action.

13

14



15

Deborah Garrison

16

Circuit Court Reporter

17

9th Judicial Circuit

18

19

20

21

22 Charleston, South Carolina

23 December 20, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

THE STATE,)

Respondent,)

v.)

JAMES AIKEN)

Appellant.)

IN THE SOUTH CAROLINA COURT OF APPEALS

AFFIDAVIT

PERSONALLY appeared before me, James Aiken, who being duly sworn, deposes and says:

1. I am the appellant in the above captioned case.
2. I understand that I am entitled to an appeal of my conviction, and that, because I am indigent, I am entitled to the assistance of an attorney from the South Carolina Office of Appellate Defense. I have been informed that if I drop my direct appeal that I forever waive those issues that could be raised.
3. In light of the risks which have been explained to me, it is my desire that the South Carolina Office of Appellate Defense drop the appeal formerly filed on my behalf.
4. I have made this decision on my own, with a full understanding of all the possible consequences of this action.
5. I do not wish to appeal.

SWORN TO before me this 11
day of Aug, 2011.

Debra Surles (L.S.)

Notary Public for South Carolina

My Commission Expires: 11-4-2015

James Aiken
James Aiken

file

The South Carolina Court of Appeals

The State,

Respondent

RECEIVED

SEP - 6 2011

v.

James Ivan Aiken,

Appellant.

**ATTORNEY GENERALS
OFFICE**

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2010-GS-10-03117

ORDER of DISMISSAL

The above entitled case is pending on appeal in this Court. It appears that Appellant, with full understanding of all possible consequences of this action and with agreement of counsel, wishes to withdraw the appeal and moves the Court for an Order dismissing the appeal.

IT IS ORDERED that the above captioned appeal is dismissed. The remittitur will be sent to the lower court as provided by Rule 221(b), of the South Carolina Appellate Court Rules.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Appellate Defender Breen R. Stevens
James Aiken, #294853
Mary Beth E. Mullaney, Esquire
Assistant Attorney General Salley E. Elliott
Benjamin C. Simpson, Esquire
The Honorable Julie J. Armstrong

FILEDEnter 9/2/11

Close

The South Carolina Court of Appeals

The State,

Respondent,

RECEIVED

v.

SEP 23 2011

James Ivan Aiken,

Appellant.

ATTORNEY GENERALS
OFFICE

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2010-GS-10-03117

REMITTITUR

No Petition for Reinstatement having been filed in the above matter since issuance of this
Court's Order dated September 2, 2011,

IT IS SO ORDERED that the above appeal be and hereby is remitted.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy
Clerk

Columbia, South Carolina

Original to: The Honorable Julie Armstrong

cc: Appellate Defender Breen R. Stevens
James Aiken, #294853
Mary Beth E. Mullaney, Esquire
Assistant Attorney General Salley E. Elliott
Benjamin C. Simpson, Esquire

FILED
9/21/11

FORM 5

mf 9

STATE OF SOUTH CAROLINA

County of CHARLESTON2011-CP-10-7419
IN THE COURT OF COMMON PLEASJAMES IVAN AIKEN #294853

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF2011 OCT 13 AM 10:13
CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LEE CORRECTIONAL INSTITUTION (LEE CI)
990 WISACKY HWY., BISHOPVILLE, SC 29010
2. Name and location of Court which imposed sentence COURT OF COMMON PLEAS
NINTH CIRCUIT, CHARLESTON COUNTY, 100 BROAD ST., CHARLESTON, SC 29401-2258
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2010GS1003117 BURGLARY FIRST DEGREE

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) JANUARY 19, 2011
- (b) 20 YEARS
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. THE STATE OF SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. APPEAL DISMISSED AT APPLICANT'S REQUEST
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. SEPTEMBER 2, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. REMITTAR; NO PETITION FOR REINSTATEMENT HAVING BEEN FILED
- ii. SEE ATTACHED ORDER FOR COURT OF APPEALS.
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____

The South Carolina Court of Appeals

The State,

Respondent,

v.

James Ivan Aiken,

Appellant.

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2010-GS-10-03117

REMITTITUR

No Petition for Reinstatement having been filed in the above matter since issuance of this Court's Order dated September 2, 2011,

IT IS SO ORDERED that the above appeal be and hereby is remitted.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allan, Deputy
Clerk

Columbia, South Carolina

Original to: The Honorable Julie Armstrong

cc: Appellate Defender Breen R. Stevens
James Aiken, #294853
Mary Beth E. Mullaney, Esquire
Assistant Attorney General Salley E. Elliott
Benjamin C. Simpson, Esquire

9/21/11
FILED

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance of Counsel
- (b) ineffective assistance of Counsel
- (c) ineffective assistance of Counsel
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) failure to interview/call witnesses; Adequately investigate, present defense, haerful closing arguments
- (b) failure to thoroughly/Properly cross-examine CRUCIAL PROSECUTION witnesses
- (c) Failure to confront witnesses against applicant and prepare applicant to testify on his behalf
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. N/A
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

CONT'D 11(a)

1. ~~COUNSEL~~ COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE FACTS AND CIRCUMSTANCES SURROUNDING THE 911 CALL TO APPLICANT'S MOTHER'S RESIDENCE ON 1/9/10. COUNSEL'S FAILURE TO CONDUCT SUCH AN INVESTIGATION DEPRIVED THE JURY OF CRITICAL INFORMATION RELEVANT TO AN ACCURATE ASSESSMENT OF APPLICANT'S GUILT OR INNOCENCE. (SEE TRIAL TRANSCRIPT Pg. 290/20-25) 291/1-18).
2. COUNSEL FAILED TO INVESTIGATE, DEVELOP, AND PRESENT ALL AVAILABLE, RELEVANT, AND ADMISSIBLE EXCULPATORY AND/OR MITIGATING EVIDENCE. AS A RESULT OF COUNSEL'S FAILURE TO UNCOVER AND PRESENT THIS EVIDENCE, APPLICANT'S 20 YR SENTENCE FOR BURGLARY 1ST IS UNRELIABLE.
3. COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW AND CALL WITNESSES WHO WERE NOT CALLED DURING TRIAL BECAUSE COUNSEL "BELIEVED THE WITNESSES WOULD NOT ADD MUCH TO APPLICANT'S DEFENSE." THE DEFENSE WITNESSES APPLICANT SOUGHT DURING TRIAL "WOULD HAVE ADDED SIGNIFICANTLY TO THE CREDIBILITY OF APPLICANT'S CASE." COUNSEL'S CONDUCT WAS ALSO DEFICIENT FOR MAKING HARMFUL STATEMENTS IN CLOSING ARGUMENTS (TRIAL TRANS. Pg 35/11-13). Pg 253/13-14).
4. TRIAL COUNSEL FAILED TO INVESTIGATE, DISCOVER, AND PRESENT EVIDENCE THAT APPLICANT SUFFERED MENTALLY FROM IMPAIRED JUDGEMENT. COUNSEL'S FAILURE TO DISCOVER AND PRESENT THE

EVIDENCE AND THAT APPLICANT'S 20 YR SENTENCE VIOLATES ATKINS V. VIRGINIA, 536 U.S. 304 (2002), AND THE 8TH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE APPLICANT WAS MENTALLY IMPAIRED. (17-24-10, SEQ.).

5. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S CLOSING ARGUMENTS. THE SOLICITOR'S CLOSING ARGUMENTS WERE HIGHLY DAMAGING TO APPLICANT BY UNREASONABLY FAILING TO ~~ADJECT~~ PRESERVE THE ISSUE FOR DIRECT REVIEW AND THAT THIS FAILURE PREJUDICED THE OUTCOME OF THE CASE (TRIAL TRANS. 246 2-11)

11(b) THE SOLICITOR CALLED TO TESTIFY SEVERAL WITNESSES. MORRISON THE VICTIM, WHO ON DIRECT AND CROSS-EXAMINATION, MADE CONFLICTING STATEMENTS. IN SPITE OF THIS COUNSEL FAILED TO THOROUGHLY AND PROPERLY CROSS-EXAMINATION MORRISON. MORRISON'S TESTIMONY WAS EXTREMELY DAMAGING TO APPLICANT, BUT AT THE SAME TIME HIGHLY SUSPECT. (TRANS. 106/1-19).

FURTHER, ~~THE~~ OFFICER LARRY DUREN THE RESPONDING OFFICER (R/O) WHO TESTIFIED AT BOTH APPLICANT'S TRIAL AND PRELIMINARY HEARING. DUREN'S TESTIMONY AT APPLICANT'S PRELIMINARY HEARING WAS OF AN INHERENTLY DISHONEST NATURE, WHICH IS/WAS ADMISSIBLE FOR IMPERCHMENT IF WITNESSES UNDER THE SOUTH CAROLINA RULES OF EVIDENCE.

(SEE PRELIMINARY HEARING TRANS. PG 1/11-16) COMPARE HARRISON'S WRITTEN STATEMENT,
~~LETTER~~ MOREOVER, DETECTIVE DONALD LAQUIGAN TESTIFIED
 AS WELL BUT COUNSEL'S REFUSAL TO CROSS-EXAMINE HIM
 SIGNIFICANTLY PREJUDICED APPLICANT BY ALLOWING THE JURY
 TO HEAR THE DAMAGING TESTIMONY UNCHALLENGED.
 (TRANS. 152/18-19)

11(c) APPLICANT SUGGESTED TO COUNSEL MULTIPLE TIMES OVER THE
 DURATION OF THE ONE YEAR PERIOD BETWEEN THE DATE OF
 THE DAY IN QUESTION AND THE BEGINNING OF APPLICANT'S
 BURGLARY TRIAL THAT APPLICANT WOULD TESTIFY IN HIS
 OWN DEFENSE. HOWEVER, TRIAL COUNSEL DID NOT ATTEMPT TO
 PREPARE APPLICANT TO TESTIFY IN HIS OWN DEFENSE, AS IS
 HIS RIGHT UNDER THE 5TH AMENDMENT TO THE U.S.C., TRIAL
 COUNSEL DECIDED ~~NOT~~ THAT SHE WOULD NOT ALLOW APPLICANT
 TO TESTIFY. TRIAL COUNSEL'S FAILURE TO PROPERLY PREPARE
 APPLICANT TO TESTIFY AND HER REFUSAL TO LET APPLICANT
 TESTIFY IN HIS OWN DEFENSE ARE DEFICIENT AND INEFFECTIVE
 ASSISTANCE OF COUNSEL (TRIAL TRANS. 24/8-13), 253/14-17).

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) direct appeal IS NOT forum for ineffective counsel
 (b) " " " " " " "
 (c) " " " " " " "

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. MARY BETH MULLANEY (TRIAL ATTORNEY)
CHARLESTON COUNTY PUBLIC DEFENDER, 101 MEETING ST, CHARLESTON, SC 29401
 ii. BREEN RICHARD STEVENS (APPELLATE DEFENDER)
1330 LADY ST, SUITE 401, COLUMBIA, SC 29201-3322
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. MARY BETH MULLANEY (PRELIMINARY HEARING, BOND SETTING, ARRAIGNMENT AND TRIAL)
 ii. BREEN RICHARD STEVENS (DIRECT APPEAL)
 iii. _____

19. State clearly the relief you seek in filing this application:

NEW TRIAL, CONVICTION VACATED AND SET-ASIDE

20. Are you now under sentence from any other court that you have not challenged?

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

VERIFICATION

I, JAMES I. AIKEN, 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.

James I. Aiken

SWORN to and subscribed before me this

day of Oct.

2011

R. Bracey Smith
Notary Public

(L.S.)

My Commission Expires: 5-16-12

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, JAMES E. ALKEN, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

James E. Alken
Applicant

SWORN or affirmed to and subscribed before me this

7 day of Oct. 2011.
Braun & Pina
Notary Public

My Commission Expires: 5-16-14

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	2011-CP-10-7419
James Ivan Aiken, #294853,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the Application for post-conviction relief filed October 13, 2011, 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 Clerk of Court for Charleston County. The Applicant was indicted at the May 2010 term of the Charleston County Grand Jury for burglary – 1st degree (2010-GS-10-3117). Mary Beth Mullaney, Esquire, and Lori Proctor, Esquire, represented the Applicant. The Applicant proceeded to trial on January 18-19, 2011, after which a jury found him guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced the Applicant to confinement for twenty (20) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Applicant signed an affidavit dated August 11, 2011 indicating that we wished to withdraw the appeal. The Court of Appeals issued an Order of Dismissal on September 2, 2011 and a Remittitur on September 22, 2011.

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the trial transcript, the affidavit dated August 11, 2011 indicating that Applicant wished to withdraw the appeal, the Court of Appeals' Order of Dismissal dated September 2, 2011, and the Remittitur dated September 22, 2011.

II.

In his application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to adequately investigate the facts and circumstances surrounding the 911 call to Applicant's mother's residence on 1/9/10.
 - b. Failed to investigate, develop, and present all available, relevant, and admissible exculpatory and/or mitigating evidence. As a result of counsel's failure to uncover and present the evidence, Applicant's 20 year sentence for burglary 1st is unreliable.
 - c. Failed to interview and call witnesses who were not called during trial because counsel "believed the witnesses would not add much to Applicant's defense." The defense witnesses Applicant sought during trial "would have added significantly to the credibility of Applicant's case." Counsel's conduct was also deficient for making harmful statements in closing arguments.
 - d. Failed to investigate, discover, and present evidence that Applicant suffered mentally from impaired judgment. Counsel's failure to discover and present evidence that Applicant's 20 year sentence violates Atkins v. Virginia, 536 U.S. 304 (2002), and the 8th Amendment to the U.S. Constitution because Applicant was mentally impaired.
 - e. Failed to object to the Solicitor's closing arguments. The Solicitor's closing arguments were highly damaging to Applicant by unreasonably failing to preserve the issue for direct review and that this failure prejudiced the outcome of the case.
 - f. Failed to properly cross-examine the victim.
 - g. Did not attempt to prepare Applicant to testify in his own defense and decided that she would not allow Applicant to testify.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. (1) (2)

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Feb. 13, 2012.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JAMES IVAN AIKEN, #294853

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

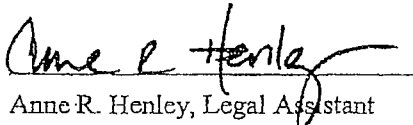
2011-CP-10-7419

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Elizabeth Wells Balletine, Esquire
Hood Law Firm
PO Box 1508
Charleston, SC 29402

DATED this 13th day of February, 2012


Anne R. Henley, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

James Ivan Aiken #294853

CASE NO. 2011-CP-10-7419

☒ Plaintiff(s),AMENDED PCR APPLICATION AND
MEMORANDUM

Versus

State of South Carolina,

☐ Defendant(s).

check box above indicating submitting party

Plaintiff's attorney:

Justin T. Bamberg (SC #100337)
HOOD LAW FIRM, LLC
172 Meeting Street, P.O. Box 1508
Charleston, SC 29401
P: 843-577-4435; F: 843-722-1630
E: info@hoodlaw.com

Defendant's attorney:

Karen C. Ratigan, Esquire
Office of the Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia, SC 29211-1549☐ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III)☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion:

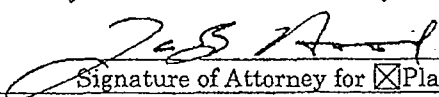
Estimated Time Needed: Minutes

Court Reporter Needed: YES ☐ / NO ☐

SECTION II: Motion/Order Type

☐ Written motion attached☒ Form Motion/Order -

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff/ ☐ Defendant11/15/12
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: _____☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support(check reason) ☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the
attached order.☐ Other: _____

JUDGE

CODE: _____

DATE: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)☐ MOTION FEE COLLECTED: _____☐ CONTESTED-AMOUNT DUE: _____

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

JAMES IVAN AIKEN # 294853)

Full name and prison-number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010
2. Name and location of Court which imposed sentence Court of Common Pleas, Ninth Circuit, Charleston County, 100 Broad St., Charleston, SC 29401
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010GS1003117 Burglary First Degree
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:

FILED
 2012 NOV 16 AM 10:06
 JULIE J. ARMSTRONG
 CLERK OF COURT

- (a) Sentence was imposed on January 19, 2011 for a term of twenty (20) years.
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Applicant plead not guilty.
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list: ..
- (a) the name of each Court to which you appealed:
- i. The State of South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal dismissed at Applicant's request.
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. September 2, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Order of Dismissal (Filed 9/2/11)
- ii. Remittur: No Petition for Reinstatement Having Been Filed (Filed 9/22/11)
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

- (a) Ineffective Assistance of Trial Counsel (Please see attached Memorandum in Support)
- (b) Ineffective Assistance of Appellate Counsel (Please see attached Memorandum in Support)

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Please see attached Memorandum in Support
- (b) Please see attached Memorandum in Support
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:

i. Applicant filed his original Application for Post-Conviction Relief on October 13, 2011; A copy of which is attached. (C/A No. 2011-CP-10-7419). Applicant's original application is scheduled to be heard in the December 2012 term. This application is to serve as Applicant's Amended Application for Post-Conviction Relief.

ii. _____

iii. _____

iv. _____

- (b) the name and location of the Court in which each was filed:

i. In the Court of Common Pleas, Ninth Circuit, Charleston, SC

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. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
N/A
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - i. N/A
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised:
 - i. N/A
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Mary Beth Mullaney: Charleston County Public Defender, 101 Meeting St.,

Charleston, SC 29401

ii. Breen R. Stevens: 1330 Lady St., Suite 401, Columbia, SC 29201

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Preliminary Hearing, Bond Setting, Arraignment and Trial

ii. Direct Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

Conviction vacated and set-aside; New trial on the merits.

20. Are you now under sentence from any other court that you have not challenged?

No.

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

VERIFICATION

I, JAMES IVAN AIKEN, 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.

James I. Aiken

SWORN to and subscribed before me this 14th

day of November, 2012.

Robin R. King
Notary Public

(L.S.)

My Commission Expires: September 23, 2021

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, JAMES IVAN AIKEN, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

James I. Aiken
Applicant

SWORN or affirmed to and subscribed before me this
14th day of November, 2012.

Robin L. King
Notary Public

My Commission Expires: September 22, 2021

FILED
2012 NOV 16 AM 10:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
James Ivan Aiken, #294853,	)	C/A No. 2011-CP-10-7419
	)	
Applicant,	)	MEMORANDUM OF LAW IN
	)	SUPPORT OF AMENDED
Versus	)	APPLICATION FOR POST-
	)	CONVICTION RELIEF
State of South Carolina	)	
	)	
Respondent.	)	

COMES NOW James Ivan Aiken (the "Applicant"), through his undersigned counsel, who submits this Memorandum of Law in Support of the Applicant's Amended Application for Post-Conviction Relief. The Applicant will show that his arguments and citations to relevant case laws will establish that he was denied his rights to a fair trial because he was denied his Sixth Amendment right to the effective assistance of counsel.

FACTS

This action arises as a result of the sentence of the Applicant, for the count of burglary in the first degree. On the morning of January 16, 2010, Michael Morrison ("Morrison") was asleep in bed at his apartment located at _____ in Charleston, South Carolina. He awoke to find the Applicant in his bedroom, who had entered the apartment through the unlocked front door. Morrison instructed the Applicant to leave his room, at which time the Applicant dropped a woman's leopard print shoe that he had found in front of Morrison's apartment and brought inside. As the Applicant exited Morrison's room, Morrison pursued. Morrison then briefly return to his room, grabbed his cell phone, and continued to pursue the

Applicant on foot while on the phone with the 911 dispatcher. The Applicant was arrested shortly thereafter and charged with burglary in the second degree. The Applicant's charge was later upped to burglary in the first degree when the police learned of the Applicant's prior burglary convictions. The Applicant was represented by Mary Beth Mullaney, Esquire ("Trial Counsel") and Lori Proctor, Esquire.¹ On January 19, 2011, the Applicant was convicted of burglary in the first degree and sentenced to twenty (20) years imprisonment. The Applicant initially appealed his conviction and was represented by Breen Stevens, Esquire ("Appellate Counsel"). On September 2, 2011, the South Carolina Court of Appeals dismissed the Applicants appeal. This action for Post-Conviction Relief now follows.²

LEGAL STANDARD

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). The presumption is strong that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Ard. v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). A PCR applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel

¹ Both Mary Beth Mullaney and Lori Proctor appeared on behalf of the Applicant at trial. However, Ms. Mullaney was the attorney who tried the Applicant's case.

² The Applicant filed his original Application for Post-Conviction Relief on October 13, 2011. See Exhibit 1.

failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case. Strickland, 466 U.S. 668, 687; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When counsel's performance falls below the standard, an applicant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

LAW/ANALYSIS

Trial Counsel was ineffective in at least six instances: (1) failure to move to exclude or object to testimony regarding Morrison's missing wallet and mention of the wallet during closing arguments; (2) failure to object to certain testimony by Morrison and failure to properly cross-examine him; (3) failure to reasonably investigate evidence that would rebut evidence of Applicant's criminal intent; (4) failure to request the State to advance a reason as to why it refused to accept the stipulation to Applicant's priors; (5) failure to request a bifurcated trial on the issue of prior convictions; and (6) making improper comments during closing arguments. Additionally, each instance of ineffective assistance prejudiced the Applicant such that, but for Trial Counsel's ineffective assistance, the outcome of the Applicant's trial would have been different. The Applicant also contends that Appellate Counsel was ineffective for failing to fully inform him of the consequences of abandoning his direct appeal.

~~I. Trial Counsel was Ineffective for Failing to Move to Exclude or Object to Testimony Regarding Morrison's Missing Wallet and Mention of the Wallet during Closing Arguments~~

Trial Counsel was ineffective in not moving to exclude testimony regarding Morrison's missing wallet and mention of the wallet during closing arguments. Trial Counsel was also ineffective in not objecting to testimony regarding the missing wallet. The Applicant contends that the testimony regarding the wallet was inadmissible evidence of an uncharged crime. Moreover, even if that testimony fell within a Lyle exception, the Applicant contends that the testimony was inadmissible under Rule 403 of the S.C. Rules of Evidence. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). However, due to Trial Counsel's failure to move to exclude or object, these issues were not preserved for the Applicant's direct appeal.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 326 (2000) (quoting Rule 404(b), SCRE; Lyle, *supra*). Even though evidence may fall within the Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Brooks, 341 S.C. at 62, 533 S.E.2d at 328.

During the Applicant's Preliminary Hearing on February 23, 2010, the State conducted the direct examination of Officer Larry Duren ("Duren").³ Duren was one of the responding officers in this case. Duren testified that Morrison had told him

³ See Exhibit 2.

~~that he could not find his wallet and that the wallet was on the dresser that he~~
 observed the Applicant going through.⁴ Duren further testified that "[he] did not charge [the Applicant] with that based on the fact that [he] could not tell if [Morrison] misplaced the wallet." (Prelim. Tr. 3,4). Duren further testified that the wallet was not in the plastic bag that the Applicant was carrying at the time of his arrest. Id. Duren also testified that he "[did not] know what happened to the wallet." Id.

At trial, Duren testified that after the Applicant had been apprehended, it came to his attention that the wallet was missing from Morrison's apartment. (Trial Tr. 134:24-135:5). He further testified that he and other responding officers searched for the wallet. (Trial Tr. 135:6-11). Implying that the wallet was never found, the State's line of questioning focused on the fact that the police were searching for a "fairly small item" and that "there could have been a lot of places one could have stashed something the size of a wallet." (Trial Tr. 135:12-136:3).⁵ Morrison's own testimony supported the contention that Morrison may have misplaced his wallet and could not be sure that the Applicant had taken it.⁶ Morrison's bedroom was also in a state of disarray, evidenced by his testimony that the State not "tell [his] mother [he] left his room like this" when shown a photograph of his bedroom at trial. (Trial Tr. 103:15-17). Furthermore, there was inconsistent evidence on the issues of when and if Morrison had or had not lost

⁴ Duren's incident report stated that Morrison reported that nothing was taken from the residence. (Incident Rpt. Pg.2); See Exhibit 3.

⁵ During closing arguments, the State alluded that the Applicant could have thought: "I'm just caught in the act red-handed. I need to get rid of this wallet." (Trial Tr. 147:1-25).

⁶ "I actually asked my roommate if she had seen [the wallet]. She asked me if maybe I'd misplaced it somewhere. I said no. We looked through the house, couldn't find it." (Trial Tr. 113:20-114:1).

~~sight of the Applicant during the ordeal.~~⁷ During closing arguments, the State offered that "the missing wallet does remain evidence -- evidence of that criminal intent." (Trial Tr. 248:11-12).

Although Trial Counsel solicited on cross-examination that Morrison never saw the Applicant take anything, that the officers had never found the wallet and that Morrison could have misplaced it, (Trial Tr. 120:11-13; 142:4-10), the initial testimony that the wallet was missing and that the Applicant may have just "stashed" it was extremely prejudicial. The prejudicial effect of this testimony was further exacerbated given the very nature of a burglary charge, the Applicant's prior convictions, and the lack of certainty as to whether Morrison merely misplaced his wallet. Given these issues, there is a reasonable probability that upon objection or motion to exclude, testimony regarding the wallet would have been suppressed. The Trial Judge himself stated when denying Trial Counsel's Motion for Directed Verdict that "[w]hether [the Applicant] took anything or not really has nothing to do with the burglary. It has a lot to do with larceny, but nothing to do with burglary." (Trial Tr. 173:7-13). If suppressed, the jury would have found criminal intent lacking and acquitted the Applicant. Additionally, even if unsuccessful in suppressing the evidence, the issue would have been preserved for the Applicant's appeal. There is a reasonable probability that, absent Trial Counsel's error, the jury would have had a reasonable doubt respecting guilt of the Applicant. Strickland, 466 U.S. at 695, 104 S.Ct. 2052. For the aforementioned reasons, Trial Counsel's

⁷ Preliminary Hearing testimony of Duren indicates Morrison did not lose sight of the Applicant. (Prelim. Tr., 4,6). This directly contradicts Morrison's testimony at trial.

~~performance on this issue fails both prongs of the Strickland test.~~

II. Trial Counsel was Ineffective for Failing to Object to Certain Testimony from Morrison and for Failing to Properly Cross-Examine Him

At trial, the State called Morrison to testify. He testified that it was cold the morning of the incident and that he had lots of blankets on. Morrison went on to testify that he thought that "[the Applicant] probably didn't see [him]" under the blankets "or something." (Trial Tr. 102:9-11). Trial Counsel failed to object.

Trial Counsel was ineffective for failing to object to Morrison's statement that the Applicant "probably" did not see him. This statement is clearly speculation on the part of Morrison. The Applicant was prejudiced by this instance of ineffectiveness. The jury's ability to consider this statement in deliberations was clearly pertinent to the Applicant's conviction. Trial Counsel's failure to object to this statement allowed the jury to make the inference that the Applicant thought no one was there and could get away with a quick theft. It is highly probable that had Trial Counsel objected, the objection would have been sustained and the outcome would have been different. Accordingly, Trial Counsel was deficient in failing to pose an objection and the Applicant was prejudiced therefrom such that the Applicant should be granted Post-Conviction Relief. Strickland, 466 U.S. 668.

Additionally, Trial Counsel was ineffective in not properly cross-examining Morrison. While the Applicant contends that Trial Counsel should have moved to suppress or object to testimony regarding Morrison's missing wallet, that testimony had already been solicited at this point in trial. As such, Trial Counsel should have cross-examined Morrison on the issue of the wallet. Not only did Trial Counsel fail

~~to properly cross-examine Morrison on the wallet, Trial Counsel did not ask~~

Morrison a single question regarding his missing wallet. By her own admissions, Trial Counsel acknowledged the significance of testimony regarding the wallet; and therefore, Trial Counsel was deficient in failing to cross-examine the State's key witness regarding the very issue that resulted in the Applicant's conviction. This deficiency prejudiced the Applicant, and the Applicant should be granted Post-Conviction Relief. Strickland, 466 U.S. 668.

III. Trial Counsel was Ineffective for Failing to Reasonably Investigate Evidence that Would Rebut Evidence of Applicant's Criminal Intent.

Trial Counsel was ineffective for failing to reasonably investigation evidence which would rebut evidence of the Applicant's criminal intent. Criminal intent was the key issue in dispute at the Applicant's trial, and this fact was known to Trial Counsel. (Trial Tr. 98:3-7). The State relied heavily on testimony regarding the wallet to evidence the Applicant's criminal intent. Trial Counsel's strategic choices at trial regarding the Applicant's intent were made after an incomplete investigation so lacking as to fall well below a reasonable attorney standard.

The South Carolina Supreme Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation." See Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 733, 734 (2004) (quoting Wiggins v. Smith, 539 U.S. 510, 533 (2003)). A criminal defense attorney has the duty to conduct a reasonable investigation "to discover all reasonably available mitigation evidence and all reasonably available evidence

~~tending to rebut any aggravating evidence introduced by the State."~~ Nance v. Ozmint, 367 S.C. 547, 557 n.8, 626 S.E.2d 878, 883 n.8 (2006) (quoting Wiggins, 539 U.S. at 524-25).

When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690, 104 S.Ct. 2052. Although the scope of a reasonable investigation depends on various issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an *independent investigation* of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (citing Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla. 1986), *aff'd*, 828 F.2d 670 (11 Cir. 1987)) (emphasis added); *see also* ABA Guidelines, 31 Hofstra L.Rev. at 1019 ("counsel should seek out and interview potential witnesses").

Prior to trial, the Applicant informed Trial Counsel that he did not enter Morrison's apartment with criminal intent. The Applicant further contends that he informed Trial Counsel that approximately one week before his arrest, he and his mother had returned home from grocery shopping to find police in front of their apartment building. The police had responded to a phone call from a concerned neighbor regarding an open front door to an apartment directly in front of the Applicant's mother's apartment. After going inside, the Applicant's mother stated "that if that had happened to her, she would hope that someone would do the same for her." Leading up to his trial, the Applicant maintained that the front door to

~~Morrison's apartment was open. He further maintained that the open door, in~~
 conjunction with the woman's leopard print shoe in Morrison's front yard, led him to enter the residence out of concern and to return the shoe. Trial Counsel's knowledge of the Applicant's contentions can be inferred by Trial Counsel's notes attached hereto as Exhibit 4.

Trial Counsel did not reasonably investigate the Applicant's contentions. Trial Counsel should have, at a minimum, interviewed the Applicant's mother; the neighbor whose door was open; the concerned neighbor who called the police; or the officers involved. Moreover, Trial Counsel did not attempt to investigate or review any records that may have documented such an event. Had such action been taken, Trial Counsel could have found and used the following evidence to help rebut the State's evidence of the Applicant's criminal intent⁸:

- a. the call was made on 01/09/10 by Leon Goodwin, a resident of
 , which is located across the street from the Applicant's mother
 resided at ;
- b. the call was made one week prior to the Applicant's arrest;
- c. the nature of the call was for an unsecured building at ;
- d. Mr. Goodwin advised that his neighbor's residential door was wide open and when he yelled in no one answered – therefore requesting an officer come check it out; and
- e. An assisting officer, Tanya M. Duby, was also an assisting officer in the arrest of the Applicant on 01/16/10.

Trial Counsel's deficient performance in this regard prejudiced the Applicant's case. Intent when entering the dwelling was the determinant element in

⁸ See Exhibit 5, Charleston Police Department Event Report that the undersigned obtained from CPD.

~~whether the Applicant would be convicted or not. The jury needed to hear evidence~~
of why the Applicant would enter Morrison's dwelling as he did. Trial Counsel's failure to, at a minimum, independently investigate the Applicant's factual contentions as to why he entered the dwelling left him with no means to rebut the evidence presented by the State that he entered the dwelling with criminal intent. Had the jury been presented this evidence, there is a reasonable probability that the outcome of the trial would have been different. For the aforementioned reasons, Trial Counsel's performance on this issue fails both prongs of the Strickland test.

IV. *Failure to Request the State to Advance a Reason as to why it Refused to Accept the Stipulation to Applicant's Priors*

At trial, Trial Counsel offered to stipulate to the Applicant's prior burglary convictions such that if a burglary did occur in this case, it would constitute a burglary in the first degree. (Trial Tr. 9:7-12). However, the State refused to agree to such stipulation. Trial Counsel should have requested that the State Advance for the record a Reason as to why it refused to accept the Applicant's offer to stipulate. The facts cumulatively contained in this Memorandum, as well as the testimony that will be presented at the PCR hearing will support the Applicant's contention that Trial Counsel's performance in this regard was deficient.

The Applicant was prejudiced by this deficiency. Failure to make such request for the record resulted in the issue not being preserved for the Applicant's appeal. Furthermore, the Applicant contends that the direct, in-court testimony regarding prior convictions was especially damaging to his case; and his offer to stipulate to two prior convictions would have given the State the requisite proof for

~~that element of the crime charged. The refusal to stipulate was an attempt to use~~
 the Applicant's priors to unconstitutionally sway the jury, which in turn denied the Applicant of his constitutional right to a fair trial. The facts in this case suggest that, had Trial Counsel requested the State advance a reason for its refusal to accept the stipulation, they would have been unable to do so. This would have resulted in a high probability of acquittal. Trial Counsel was deficient in failing to make this request and the Applicant was prejudiced therefrom such that the Applicant should be granted Post-Conviction Relief. Strickland, 466 U.S. 668.

V. *Trial Counsel was Ineffective for Failing to Request a Bifurcated Trial on the Issue of Prior Convictions Given the Unique Circumstances Surrounding Applicant's Case*

Given the facts, evidence, and circumstances surrounding the Applicant's case, Trial Counsel should have requested a bifurcated trial on the issue of prior convictions. Specifically, Trial Counsel should have requested bifurcation such that the jury would have to first determine if a burglary did in fact occur; and if so, did it constitute a burglary in the first degree. The facts cumulatively contained in this Memorandum, as well as the testimony that will be presented at the PCR hearing will support the Applicant's contention that Trial Counsel was ineffective in failing to request a bifurcated trial. Such a request or motion could easily be made either before or at the onset of the trial, and failure to do so is an egregious deviation from acceptable practice such that it cannot be considered trial strategy.

The Applicant was prejudiced by this deficiency. Not only did allowing the jury to hear testimony regarding the Applicant's prior convictions unfairly prejudice

~~the Applicant at trial, but Trial Counsel's failure to request bifurcation resulted in~~

the issue not being preserved for the Applicant's appeal. The facts in this case suggest that, had evidence of the Applicant's prior burglary convictions not been presented to the jury until after the jury first determined a burglary did in fact occur, there would have been a high probability of acquittal. Accordingly, Trial Counsel was deficient in failing to request or move for a bifurcated trial on the issue of prior convictions and the Applicant was prejudiced therefrom such that the Applicant should be granted Post-Conviction Relief. Strickland, 466 U.S. 668.

.VI. Trial Counsel was Ineffective for Making Improper Comments During Closing Arguments

During closing arguments, Trial Counsel made improper comments regarding the Applicant. In making these comments, Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Further, these comments resulted in prejudice to the Applicant, and without such, the outcome of the Applicant's trial would have been different. Trial Counsel stated the following during her closing arguments:

That morning . . . Mr. Aiken thinks, 'you know what? I'll return this shoe to someone in the house and I'll tell them, you know, your door's open. And maybe, just maybe, they'll give me a dollar or two. Maybe I'll get a tip. So that's what I'll do.' So he takes the shoe and he goes up the stairs and he goes into the house, and he's looking for somebody. He's looking for somebody to give the shoe to.

Trial Tr. 250:22-251:15

This statement prejudiced the Applicant's case because it painted him in an unfavorable light to the jury. This statement caused the jury to view the Applicant

~~as an opportunist who would spontaneously act on any opportunity to make a few~~

extra dollars. Trial Counsel was well aware that the Applicant had a job selling greetings cards at the market. Moreover, at no time did the Applicant inform Trial Counsel that he entered the residence for those purposes. Trial Counsel further hammered home her point by saying the Applicant's "intent was to return the shoe and maybe get a buck or two." (Trial Tr. 252:7-8).

Trial Counsel's performance further prejudiced the Applicant's case when she told the jury "[t]his case is not a popularity contest between [Morrison] or [the Applicant]. It's not about who is more likeable. Because if it's about who's more likeable, then [Morrison] wins." (Trial Tr. 257:21-25). Under the facts of the Applicant's case, it was unreasonable for Trial Counsel to instruct the jury that her client was less likeable than the victim in the case. There is a reasonable probability that, but for Trial Counsel's error in this regard, the result of the proceedings would have been different.

VII. Appellate Counsel was Ineffective for Failing to Fully Inform Applicant of the Consequences of Abandoning Applicant's Direct Appeal

Six months after the Applicant's conviction on January 19, 2011, Appellate Counsel had still not reviewed Applicant's trial transcript. The Applicant indicated to Appellate Counsel that he wanted to drop his direct appeal and proceed to PCR. The Applicant was concerned about the time a direct appeal would take, as well as the availability of his witnesses should he be granted a new trial. Appellate Counsel advised the Applicant that he should wait until Appellate Counsel could read the trial transcript and advise him of potential issues for direct appeal. Appellate

~~Counsel further informed the Applicant that his right to raise any directly~~
appealable issues would be waived. On August 11, 2011, the Applicant signed a sworn affidavit indicating that he desired to drop his direct appeal and had been informed that by doing so, he would forever waive those issues that could be raised on direct appeal.

Appellate Counsel was ineffective in failing to fully inform the Applicant of the consequences of abandoning his direct appeal. Despite the aforementioned facts, the Applicant had the understanding that he could raise any available issue in PCR and was unaware that not all issues are PCR issues. While Appellate Counsel informed the Applicant that any direct appeal issues would be waived, Appellate Counsel never informed the Applicant that certain issues could not be raised in PCR. Appellate Counsel was deficient in assuming that the Applicant, who had no legal training, could appreciate the difference between waiving directly appealable issues and certain issues not qualifying as PCR issues. This is a legal discrepancy that the Applicant was not able to understand without the same having been explained to Applicant by the lawyer appointed to represent him. Moreover, the Applicant contends that Appellate Counsel could not fully inform Applicant of the consequences of dropping his direct appeal if Appellate Counsel had never reviewed the trial transcript. Appellate Counsel's performance on this issue falls below the Strickland standard. It is unreasonable for an appellate attorney to allow his client to "forever waive" issues without having taken the time to investigate what those issues may have been. This unreasonableness is intensified by the fact that over six

~~months has passed.~~

There exists an issue that, on appellate review, would likely result in the Applicant receiving a new trial. At trial, Trial Counsel offered to stipulate to the Applicant's prior burglaries such that if a burglary did occur, it would constitute a burglary in the first degree. (Trial Tr. 9:7-12). However, the State refused to agree to such stipulation. Later in the trial, the State introduced testimony of Sarah Lippe, an employee of the Charleston County Clerk's office. (Trial Tr. 153:1-161:19). The State also entered in evidence certified copies of the sentencing sheets. (Trial Tr. 160:6-7). Ms. Lippe testified as to the name, date-of-birth, and charge contained on the sentencing sheets. (Trial Tr. 160:17-161:17). On cross-examination, Trial Counsel attempted to challenge the sufficiency of the prior convictions offered by the State. (Trial Tr. 161:22-162:14). The Trial Judge did not allow this and out of the presence of the jury accused Trial Counsel of attempting to borderline perpetuate fraud on the jury. (Trial Tr. 164:23-165:12; 169:16-21). The Trial Judge would not initially allow Trial Counsel to challenge the sufficiency of the prior convictions because she had earlier offered to stipulate to the same. (Trial Tr. 163:18-168:2). Trial Counsel informed the Trial Judge that the State could offer fingerprints or a photo and that, in fact, the Social Security Numbers on the sentencing sheets were wrong. (Trial Tr. 168:12-18). The Trial Judge then told Trial Counsel that if that was her position, "then we'll put them all in" - referring to the Applicant's other priors. (Trial Tr. 168:19-22). Trial Counsel did not want this to happen and chose to not challenge the issue. Trial Counsel provided case law to the

~~Trial Judge showing that prior convictions introduced by the State can be attacked,~~

and the Trial Judge agreed the following day after reviewing the case law. (Trial Tr. 197:9-198:21; 206:1-10). Trial Counsel then requested, if she reopened the case, whether the Trial Judge was going to allow in evidence the Applicant's other priors or just evidence of the two priors that the State was seeking to prove. (Trial Tr. 208:2-7; 210:13-15). The Trial Judge would not entertain such an inquiry. (Trial Tr. 210:16-22). Trial Counsel did not go forward with challenging the prior convictions.

This issue was best raised on direct appeal, but because of Appellate Counsel's ineffective assistance, the Applicant has waived any right to raise the issue on appeal. For the aforementioned reasons, Appellate Counsel's performance in this regard fails Strickland, and the Applicant should be granted Post-Conviction Relief.

CONCLUSION

Trial Counsel was ineffective in at least six instances: (1) failure to move to exclude or object to testimony regarding Morrison's missing wallet and mention of the wallet during closing arguments; (2) failure to object to certain testimony by Morrison and failure to properly cross-examine him; (3) failure to reasonably investigate evidence that would rebut evidence of Applicant's criminal intent; (4) failure to request the State to advance a reason as to why it refused to accept the stipulation to Applicant's priors; (5) failure to request a bifurcated trial on the issue of prior convictions; and (6) making improper comments during closing arguments. The Applicant suffered prejudice because of each of these deficiencies such that, had

~~the Applicant had effective assistance, the outcome of his trial likely would have~~
been different. Additionally, Appellate Counsel was ineffective for failing to fully inform the Applicant of the consequences of abandoning his direct appeal. Accordingly, the Applicant requests the Court grant this application for Post-Conviction Relief and remand this case for a new trial.

HOOD LAW FIRM, LLC
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Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Justin T. Bamberg (#100337)

Attorney for the Applicant
James Ivan Aiken

November 14, 2012
Charleston, South Carolina

FORM 5

mf 9

STATE OF SOUTH CAROLINA

2011 CP-10-7419
IN THE COURT OF COMMON PLEASCounty of CHARLESTONJAMES IYAN AIKEN #294853

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

2011 OCT 13 AM 10:13
CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LEE CORRECTIONAL INSTITUTION (LEE CI)
990 WISACKY HWY., BISHOPVILLE, SC 29010
2. Name and location of Court which imposed sentence COURT OF COMMON PLEAS
NINTH CIRCUIT, CHARLESTON COUNTY, 100 BROAD ST., CHARLESTON, SC 29401-2258
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2010GS1003117 BURGLARY FIRST DEGREE



- (b) _____
 (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) JANUARY 19, 2011
 (b) 20 YEARS
 (c) _____
6. Check whether a finding of guilty was made:
 (a) after a plea of guilty _____
 (b) after a plea of not guilty ☒ _____
 (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
 (a) the name of each Court to which you appealed:
 i. THE STATE OF SOUTH CAROLINA COURT OF APPEALS
 ii. _____
 iii. _____
 (b) the result in each such Court to which you appealed:
 i. APPEAL DISMISSED AT APPLICANT'S REQUEST
 ii. _____
 iii. _____
 (c) the date of each such result:
 i. SEPTEMBER 2, 2011
 ii. _____
 iii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. REMITTAL; NO PETITION FOR REINSTATEMENT HAVING BEEN FILED
 ii. SEE ATTACHED ORDER FOR COURT OF APPEALS.
 iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
 (a) _____

The South Carolina Court of Appeals

The State,

Respondent,

v.

James Ivan Aiken,

Appellant.

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2010-GS-10-03117

REMITTITUR

No Petition for Reinstatement having been filed in the above matter since issuance of this Court's Order dated September 2, 2011,

IT IS SO ORDERED that the above appeal be and hereby is remitted.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allan, Deputy
Clerk

Columbia, South Carolina

Original to: The Honorable Julie Armstrong

cc: Appellate Defender Breen R. Stevens
James Aiken, #294853
Mary Beth E. Mullaney, Esquire
Assistant Attorney General Salley E. Elliott
Benjamin C. Simpson, Esquire

FILED
2011

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance of Counsel
- (b) ineffective assistance of Counsel
- (c) ineffective assistance of Counsel
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) failure to interview/call witnesses; Adequately investigate, present defense, heartfelt closing arguments
- (b) failure to thoroughly/Properly cross-examine CRUCIAL PROSECUTION witnesses
- (c) failure to confront witnesses against applicant and prepare applicant to testify on his behalf
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. N/A
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. N/A
- iii. _____

CONT'D 11(a)

1. ~~COUNSEL~~ COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE FACTS AND CIRCUMSTANCES SURROUNDING THE 911 CALL TO APPLICANT'S MOTHER'S RESIDENCE ON 1/9/10. COUNSEL'S FAILURE TO CONDUCT SUCH AN INVESTIGATION DEPRIVED THE JURY OF CRITICAL INFORMATION RELEVANT TO AN ACCURATE ASSESSMENT OF APPLICANT'S GUILT OR INNOCENCE. (SEE TRIAL TRANSCRIPT Pg. 290/20-25) 291/1-18).
2. COUNSEL FAILED TO INVESTIGATE, DEVELOP, AND PRESENT ALL AVAILABLE, RELEVANT, AND ADMISSIBLE EXCULPATORY AND/OR MITIGATING EVIDENCE. AS A RESULT OF COUNSEL'S FAILURE TO UNCOVER AND PRESENT THIS EVIDENCE, APPLICANT'S 20 YR. SENTENCE FOR BURGLARY 1ST IS UNRELIABLE.
3. COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW AND CALL WITNESSES WHO WERE NOT CALLED DURING TRIAL BECAUSE COUNSEL "BELIEVED THE WITNESSES WOULD NOT ADD MUCH TO APPLICANT'S DEFENSE." THE DEFENSE WITNESSES APPLICANT BROUGHT DURING TRIAL "WOULD HAVE ADDED SIGNIFICANTLY TO THE CREDIBILITY OF APPLICANT'S CASE." COUNSEL'S CONDUCT WAS ALSO DEFICIENT FOR MAKING HARMFUL STATEMENTS IN CLOSING ARGUMENTS (TRIAL TRANS. Pg 35/11-13) Pg 253/13-14).
4. TRIAL COUNSEL FAILED TO INVESTIGATE, DISCOVER, AND PRESENT EVIDENCE THAT APPLICANT SUFFERED MENTALLY FROM IMPAIRED JUDGEMENT. COUNSEL'S FAILURE TO DISCOVER AND PRESENT THE

EVIDENCE AND THAT APPLICANT'S 20 YR SENTENCE VIOLATES ATHINS V. VIRGINIA, 536 U.S. 304 (2002), AND THE 8TH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE APPLICANT WAS MENTALLY IMPAIRED, (17-24-10, SEQ.).

5. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S CLOSING ARGUMENTS. THE SOLICITOR'S CLOSING ARGUMENTS WERE HIGHLY DAMAGING TO APPLICANT BY UNREASONABLY FAILING TO OBJECT PRESERVE THE ISSUE FOR DIRECT REVIEW AND THAT THIS FAILURE PREJUDICED THE OUTCOME OF THE CASE (TRIAL TRANS. 246 2-11)

11(b) THE SOLICITOR CALLED TO TESTIFY SEVERAL WITNESSES. MORRISON THE VICTIM, WHO ON DIRECT AND CROSS-EXAMINATION, MADE CONFLICTING STATEMENTS. IN SPITE OF THIS COUNSEL FAILED TO THOROUGHLY AND PROPERLY CROSS-EXAMINATION MORRISON. MORRISON'S TESTIMONY WAS EXTREMELY DAMAGING TO APPLICANT, BUT AT THE SAME TIME HIGHLY SUSPECT. (TRANS. 106/1-19).

FURTHER, ~~THE~~ OFFICER LARRY DUREN THE RESPONDING OFFICER (R/O) WHO TESTIFIED AT BOTH APPLICANT'S TRIAL AND PRELIMINARY HEARING. DUREN'S TESTIMONY AT APPLICANT'S PRELIMINARY HEARING WAS OF AN INHERENTLY DISHONEST NATURE, WHICH IS INADMISSIBLE FOR IMPERCHMENT IF WITNESSES UNDER THE SOUTH CAROLINA RULES OF EVIDENCE.

(SEE PRELIMINARY HEARING TRANS. PG 1/11-16) COMPARE HARRISON'S WRITTEN STATEMENT.

~~FOOTNOTED~~ MOREOVER, DETECTIVE DONALD LACOLLIGAN TESTIFIED

AS WELL BUT COUNSEL'S REFUSAL TO CROSS-EXAMINE HIM

SIGNIFICANTLY PREJUDICED APPLICANT BY ALLOWING THE JURY

TO HEAR THE DAMAGING TESTIMONY UNCHALLENGED.

(TRANS. 152/18-19)

11(C) APPLICANT SUGGESTED TO COUNSEL MULTIPLE TIMES OVER THE

DURATION OF THE ONE YEAR PERIOD BETWEEN THE DATE OF

THE DAY IN QUESTION AND THE BEGINNING OF APPLICANT'S

BURGLARY TRIAL THAT APPLICANT WOULD TESTIFY IN HIS

OWN DEFENSE. HOWEVER, TRIAL COUNSEL DID NOT ATTEMPT TO

PREPARE APPLICANT TO TESTIFY IN HIS OWN DEFENSE, AS IS

HIS RIGHT UNDER THE 5TH AMENDMENT TO THE U.S.C., TRIAL

COUNSEL DECIDED ~~NOT~~ THAT SHE WOULD NOT ALLOW APPLICANT

TO TESTIFY. TRIAL COUNSEL'S FAILURE TO PROPERLY PREPARE

APPLICANT TO TESTIFY AND HER REFUSAL TO LET APPLICANT

TESTIFY IN HIS OWN DEFENSE ARE DEFICIENT AND INEFFECTIVE.

ASSISTANCE OF COUNSEL (TRIAL TRANS. 24/8-13), 253/14-17).

- iv. _____
- (c) the disposition thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) direct appeal is NOT forum for ineffective counsel
 (b) " " " " " " " "
 (c) " " " " " " " "

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. MARY BETH MULLANEY (TRIAL ATTORNEY)
CHARLESTON COUNTY PUBLIC DEFENDER, 101 MEETING ST, CHARLESTON, SC 29401
 ii. BREEN RICHARD STEVENS (APPELLATE DEFENDER)
1336 LADY ST, SUITE 401, COLUMBIA, SC 29201-3322
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. MARY BETH MULLANEY (PRELIMINARY HEARING, BOND SETTING, ARRAIGNMENT AND TRIAL)
 ii. BREEN RICHARD STEVENS (DIRECT APPEAL)
 iii. _____

19. State clearly the relief you seek in filing this application:

NEW TRIAL, CONVICTION VACATED AND SET-ASIDE

20. Are you now under sentence from any other court that you have not challenged?

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

VERIFICATION

I, JAMES I. AIKEN, 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.

James I. Aiken

SWORN to and subscribed before me this 7
day of Oct. 2011

R. Bracey (L.S.)
Notary Public

My Commission Expires: 5-16-12

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, JAMES E. ALLEN, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

James E. Allen
Applicant

SWORN or affirmed to and subscribed before me this

7 day of Oct. 2011.

Raymond J. Davis
Notary Public

My Commission Expires: 5-16-14

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2011-CP-10-7419

JAMES IVAN AIKEN,)
)
 Applicant,) TRANSCRIPT OF RECORD
)
 -vs-) December 5, 2012
)
)
 STATE OF SOUTH CAROLINA,) Charleston, South Carolina
)
 * Respondent.)

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

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

Justin Bamberg, Esquire
Attorney for the Petitioner

Ashleigh Wilson, Esquire
Attorney for the Applicant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1	I N D E X				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	Leon Goodwin	6	--	--	--
4	Cora Aiken	8	--	--	--
5	Mary Beth Mullaney	11	58	66	--
6	Breen Stevens	68	88	--	--
7	James Aiken	90	105	--	--
8					
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22					
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24					
25					

1	E X H I B I T S			
2	NO.	DESCRIPTION	ID.	EV.
3	Applicant's 1	Trial Transcript	11	97
4	Applicant's 2	Hearing Transcript	17	97
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1 (December 5, 2012.)

2 THE COURT: All right. This is the case of
3 James Ivan Aiken versus the State of South Carolina. You
4 are James Ivan Aiken?

5 THE APPLICANT: Excuse me?

6 THE COURT: Are you James Ivan Aiken?

7 THE APPLICANT: Yes, sir.

8 THE COURT: All right, sir. We're here then
9 to handle your post-conviction relief. Do you still want
10 to go forward?

11 THE APPLICANT: Yes, sir.

12 THE COURT: I just want to go over a
13 preliminary thing -- let's see. You got convicted of
14 burglary in the first degree. You got a sentence of 20
15 years.

16 Burglary in the first degree is punishable by
17 a sentence of 15 years to life without parole. If you
18 are successful in your appeal today and get a new trial,
19 the State will try you again on the charge of burglary in
20 the first degree, and you are exposed again to a sentence
21 of 15 years to life without parole. There's nothing that
22 binds any future sentencing judges to give you 20 years
23 or less. The judge could give you up to life without
24 parole if he or she feels it's warranted.

25 Do you understand that?

1 THE APPLICANT: Yes, sir.

2 THE COURT: You still want to proceed?

3 THE APPLICANT: Yes, sir.

4 THE COURT: You ready to go?

5 MR. BAMBERG: Yes, sir.

6 THE COURT: You want to make a little brief
7 opening, tell me what this is about?

8 MR. BAMBERG: Your Honor, Mr. Aiken is here
9 on his amended PCR application. Through the evidence
10 here today, we will show that Mr. Aiken's trial counsel,
11 Ms. Mary Beth Mullaney, was ineffective in at least one
12 of six instances. Specifically, she failed to move to
13 exclude or object to testimony regarding the victim,
14 Mr. Morrison's missing wallet and any mention of the
15 wallet during closing arguments.

16 She's also ineffective for failing to object
17 to certain testimony from the victim, Mr. Morrison, and
18 for failing to properly cross-examine him, additionally
19 for failing to originally investigate evidence that would
20 rebut the State's evidence of criminal intent.

21 She also failed to request the State to
22 advance a reason as to why it refused to accept
23 Mr. Aiken's stipulation that he did, in fact, have two
24 prior convictions. Trial counsel was also ineffective
25 for failing to request a bifurcated trial on the issue of

1 prior convictions given the unique facts and
2 circumstances in Mr. Aiken's case, and she lastly was
3 ineffective for making improper comments during closing
4 arguments.

5 The evidence will also show that Mr. Aiken's
6 appellate counsel, Mr. Breen Stevens, was ineffective for
7 failing to fully inform the applicant of the consequences
8 of abandoning his direct appeal. Your Honor, we would
9 show that each of these instances of ineffective
10 assistance of counsel prejudice Mr. Aiken such that he
11 should be granted a new trial.

12 THE COURT: Call your first witness.

13 MR. BAMBERG: Your Honor, the applicant would
14 call Mr. Leon Goodwin.

15 LEON GOODWIN,

16 having been first duly sworn,
17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. BAMBERG:

20 Q. Good morning, Mr. Goodwin.

21 A. Good morning.

22 Q. Where do you currently reside?

23 A. , Charleston.

24 Q. Do you recall where you resided during January of
25 2010?

1 A. Same residence.

2 Q. Mr. Goodwin, do you recall an incident that
3 occurred on January 9, 2010?

4 A. Yes. If you're referring to my neighbor --

5 Q. Yes, sir.

6 A. Yes, I do recall that incident.

7 Q. Please tell the Court a little bit about that
8 date, if you will.

9 A. It was a clear day. I believe it may have been a
10 Saturday, I'm not particularly sure, but I went outside
11 for whatever reason, like, around 8:30, 9:00 in the
12 morning, and my neighbor's front door was open. I was a
13 little bit alarmed because, you know, I didn't see any
14 activity over there and the door is usually closed, you
15 know.

16 So I went over and knocked on the door. Nobody
17 answered. I opened the door. The glass door was open,
18 tried to call for my neighbors. You know, I called my
19 neighbor's names, Mari, and her husband, I believe his
20 name is John, and nobody answered.

21 So eventually I called the policeman because I was
22 a little bit concerned about why the door was open, and
23 apparently nobody answered the door or nobody was home.

24 Q. Yes, sir. And did the police come that day?

25 A. Yes, they did.

1 Q. Okay. Now, Mr. Goodwin, do you know Mr. James
2 Ivan Aiken?

3 A. No, sir.

4 Q. All right.

5 MR. BAMBERG: Thank you. Please answer any
6 questions the State may have.

7 MS. WILSON: No questions, Your Honor.

8 THE COURT: You can step down. Next witness?

9 MR. BAMBERG: Your Honor, the applicant would
10 call Ms. Cora Aiken to the stand.

11 CORA AIKEN,

12 having been first duly sworn,
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. BAMBERG:

16 Q. Good morning, Ms. Aiken.

17 A. Good morning.

18 Q. Now, you are Mr. Aiken's mother?

19 A. I am.

20 Q. Okay. And you just heard Mr. Goodwin testify
21 regarding an incident on January 9th, 2010?

22 A. I did.

23 Q. Do you recall that day?

24 A. I do.

25 Q. Would you please tell the Court a little of what

1 happened on January 9th.

2 A. Well, my son and I had went shopping at Food Lion.
3 When we came back, there was a police officer to the
4 house next door to me, you know, in front of the door. I
5 don't know if he was coming in or out. And he was
6 looking for , so I told him, this is
7 and a half. is the house next door.

8 Q. Yes, ma'am.

9 A. In talking, the officer rang the bell, I think, to
10 the people that lived in that residence because they had
11 been called because the door apparently was open, and I
12 think what concerned people -- because to me, if I
13 remember correctly, it was kind of cold.

14 And just conversating {sic}, Mr. Goodwin
15 apparently called the cops because he was concerned.

16 Q. Yes, ma'am.

17 A. Okay, and --

18 Q. Sorry to interrupt. Now, after you and Mr. Aiken
19 arrived to the residence -- and I just want to clarify
20 here, the police weren't looking for your specific
21 apartment, correct?

22 A. No.

23 Q. Your apartment is, I guess, adjacent the neighbor
24 they were looking for?

25 A. My apartment was behind theirs, because it's a big

1 house, and then I was in the smaller house behind them,
2 down in the courtyard.

3 Q. And after you and Mr. Aiken got there and you
4 spoke to the police officer, what did you do next?

5 A. We was taking our groceries and stuff in the
6 house.

7 Q. Yes, ma'am.

8 A. And I remember saying to my son, I says, you know,
9 wow, that's such a nice neighbor to call the cops out of
10 concern. I says, If anything like that happened to me, I
11 certainly would hope someone would do the same for me.

12 Q. Yes, ma'am. And when you said that, you believed
13 Mr. Aiken was paying attention to what you were saying?
14 You were having a conversation with him?

15 A. Yeah. We were just conversating back and forth.
16 I'm sure he did.

17 Q. Now, Ms. Aiken, you remember Mr. Aiken's public
18 defender, Ms. Mary Beth Mullaney?

19 A. Somewhat, yes.

20 Q. Do you recall Ms. Mullaney ever asking you about
21 this incident?

22 A. To my recollection, I really don't remember too
23 much, but I don't recall her specifically asking me about
24 the incident itself. I had spoken to her a few times
25 over the phone, you know, but specifically about what

1 actually happened, not too much. I don't remember.

2 Q. And if you had been called at trial to testify
3 regarding this, would you have been willing to do so?

4 A. Yes.

5 MR. BAMBERG: Thank you. Please answer any
6 questions the State may have.

7 MS. WILSON: No questions. Thank you.

8 THE COURT: You may step down. Next witness?

9 MR. BAMBERG: Your Honor, the applicant would
10 call Ms. Mary Beth Mullaney to the stand.

11 MARY BETH MULLANEY,

12 having been first duly sworn,

13 was examined and testified as follows:

14 MR. BAMBERG: Your Honor, may I approach the
15 witness?

16 THE COURT: You may.

17 DIRECT EXAMINATION

18 BY MR. BAMBERG:

19 Q. Now, Ms. Mullaney, this -- and I'm sure it's part
20 of the record.

21 MR. BAMBERG: I would like to mark the trial
22 transcript as Exhibit 1.

23 (Applicant's Exhibit No. 1 marked for
24 identification.)

25 BY MR. BAMBERG:

1 Q. You have a copy of the transcript in front of you?

2 A. Yes, sir, I do.

3 Q. Now, Ms. Mullaney, Mr. Aiken was arrested on
4 January 16, 2010; is that correct?

5 A. Let me just double-check. Yes, that's correct.

6 Q. Okay. And you were assigned to defend Mr. Aiken
7 on February 9 -- February 9th, 2010; is that also
8 correct?

9 A. Yes.

10 Q. So the jury trial in this matter was held on
11 January 18th and 19th of 2011, correct? If you look at
12 the front of the trial transcript.

13 A. That's correct.

14 Q. Okay. So that would mean you had about eight --
15 excuse me. You had about ten to eleven months to prepare
16 for Mr. Aiken's trial?

17 A. That's correct.

18 Q. And that would include strategizing?

19 A. Yes, sir.

20 Q. Investigating?

21 A. Yes, sir.

22 Q. Interviewing any potential witnesses?

23 A. Yes, sir.

24 Q. Okay. Now, Ms. Mullaney, for the record, Ms. Lori
25 Proctor also appeared as counsel for Mr. Aiken, correct?

1 A. That's correct.

2 Q. But would you agree you, in fact, tried
3 Mr. Aiken's case?

4 A. I was the lead counsel, correct.

5 Q. So you did the opening and closing?

6 A. Yes. I think -- reading the transcript, I think I
7 did all the witnesses.

8 Q. Okay. Now, Ms. Mullaney, would you agree with me
9 that your role as trial counsel consists of not only
10 trying the case but also preserving the record for
11 appeal?

12 A. Yes.

13 Q. Now, Ms. Mullaney, if you would recall at
14 Mr. Aiken's trial, there was an issue as to the victim,
15 Mr. Morrison's, wallet?

16 A. That's correct.

17 Q. And this wallet was, in fact, missing, correct?

18 A. That was what Mr. Morrison testified to.

19 Q. Yes, ma'am. And to the best of your knowledge,
20 the wallet wasn't found or anything?

21 A. That's correct.

22 Q. Okay. Now, would you agree with me that there was
23 no evidence that Mr. Aiken took Mr. Morrison's wallet?

24 A. Well, that's what I argued at the trial.

25 Q. Well, would you at least agree that there was a

1 high degree of uncertainty as to whether or not Mr. Aiken
2 took the wallet?

3 A. That was the crux of my defense, yes.

4 Q. And his wallet wasn't found in his possession?

5 A. That's correct.

6 Q. Correct? And this wallet, you didn't move to
7 exclude testimony as to the wallet, did you?

8 A. No, I didn't.

9 Q. And you didn't object to testimony regarding this
10 missing wallet, did you?

11 A. I didn't because I didn't believe that I had legal
12 grounds to move to preclude that testimony. I didn't
13 think there was any legal basis.

14 Q. Now, Ms. Mullaney, would you agree that had you
15 objected to the testimony or made a motion to exclude
16 this wallet and it had been sustained, the jury wouldn't
17 have been able to consider this missing wallet in their
18 deliberations? Would you agree with that?

19 A. I didn't feel like I had a legal basis to object
20 to this testimony, and during the trial, if you remember
21 in the transcript --

22 Q. Ms. Mullaney -- and sorry to interrupt you, but
23 please listen to my question. Okay?

24 A. Okay.

25 Q. Would you agree that had you objected to testimony

1 regarding the wallet or moved to exclude the wallet that
2 the jury would not have been able to consider this
3 missing wallet in their deliberations had the objection
4 been sustained?

5 A. Had the judge grant --

6 Q. Had the judge ruled in your favor?

7 A. Had the judge ruled in my favor, if the judge had
8 ruled that way, then yes, that would have been what the
9 testimony would have been.

10 Q. Okay. And had the judge ruled against your
11 motion, that issue would have been preserved for
12 Mr. Aiken's direct appeal, correct?

13 A. Yes, correct. Again, I don't think there was a
14 legal issue there, that's why I didn't raise it.

15 Q. We're going to go through some of the testimony at
16 trial regarding this wallet to show you there was, in
17 fact, a legal question as to whether or not it would have
18 been admissible.

19 Now, Ms. Mullaney, would you agree that the State
20 used this testimony regarding this missing wallet to
21 their advantage at trial?

22 A. Yes, but I think I also used it to my advantage at
23 trial, so I think it -- you know, I was able to spin it
24 in a way that helped us.

25 Q. Ms. Mullaney, when Mr. Morrison was on the stand

1 testifying that his wallet couldn't be found, the word
2 wallet didn't come out of your mouth, did it?

3 A. I'm sorry. I don't understand your question.

4 Q. At trial, Mr. Morrison testified that he had his
5 wallet that was on his nightstand, correct, and that he
6 couldn't find it. Is that also correct?

7 A. That's not my recollection of the testimony. My
8 recollection is that Mr. Morrison woke up with Mr. Aiken
9 in his bedroom. He followed Mr. Aiken, cornered him
10 until the police arrested him, and then it wasn't until
11 several hours later that he called the police again to
12 say that when he got back to his room he realized that he
13 couldn't find his wallet.

14 I believe he might have said that he -- it is his
15 practice to put his wallet on his dresser. That's my
16 recollection of the testimony.

17 Q. Ms. Mullaney, would you agree with me that
18 testimony regarding this missing wallet was prejudicial
19 to Mr. Aiken's case at trial?

20 A. Yes, I would agree with that.

21 Q. You would agree with that. Would you also agree
22 that given the nature of a burglary charge in and of
23 itself, testimony that the victim can't find his wallet
24 after Mr. Aiken had been in his room is severely
25 prejudicial?

1 A. Yes.

2 Q. Okay. Now, Ms. Mullaney, you represented
3 Mr. Aiken at his preliminary hearing, correct?

4 A. That's correct.

5 MR. BAMBERG: Can I approach the witness,
6 Your Honor?

7 THE COURT: You may.

8 BY MR. BAMBERG:

9 Q. Ms. Mullaney, I want to show you a letter that you
10 sent to Mr. Aiken. Okay? Can you tell me the date of
11 that letter?

12 A. July 19th, 2010.

13 Q. Okay. And that letter -- in that letter you
14 reference in closing the preliminary hearing transcript,
15 correct?

16 A. That's correct. I ordered the preliminary
17 hearing. I had my paralegal transcribe it, and then I
18 sent a copy to Mr. Aiken, and then I went to the jail to
19 go over it and meet with Mr. Aiken regarding any issues
20 he may have.

21 Q. Okay. Now, Ms. Mullaney, I want to show you --

22 MR. BAMBERG: And I would like to mark this
23 as Exhibit 2.

24 (Applicant's Exhibit No. 2 marked for
25 identification.)

1 BY MR. BAMBERG:

2 Q. If you will please look at this transcript. Was
3 this the transcript you sent to Mr. Aiken?

4 A. It certainly looks like it, yes.

5 Q. Okay. Now, Mr. Aiken's preliminary hearing was
6 held on February 23rd, 2010; is that correct?

7 A. Yes.

8 Q. And this testimony at this preliminary hearing was
9 given sworn and under oath, correct?

10 A. That's correct.

11 Q. Okay. Now, is it safe to say that when you were
12 preparing for Mr. Aiken's trial, at trial, you had access
13 to this transcript of the preliminary hearing and the
14 testimony that was offered therein?

15 A. Yes.

16 Q. Okay. Now, if you recall, an Officer Larry Duren
17 testified at the hearing, correct?

18 A. Yes, sir.

19 Q. And if you'll look at page three of this
20 transcript, Officer Duren testified that Mr. Morrison
21 said he could not find his wallet, correct?

22 A. Yes.

23 Q. And he also testified that Mr. Morrison did not
24 report losing sight of Mr. Aiken. Is that also correct?

25 A. That's what he testified to, yes.

1 Q. Okay. And he also said that Mr. Morrison stated
2 that he didn't see Mr. Aiken discard anything. Is that
3 also correct?

4 A. I'm sorry. Can you ask me that question again?

5 Q. Officer Duren testified -- and I'm going to direct
6 you to page six of the transcript, that Morrison did not
7 see Mr. Aiken discard anything, correct?

8 A. That's what -- that's what Officer Duren testified
9 to at the preliminary hearing.

10 Q. Yes, ma'am.

11 A. Yes.

12 Q. And because this testimony was sworn and under
13 oath, that means it was available to you to use to
14 cross-examine or impeach the witnesses at trial?

15 A. That's correct.

16 Q. Okay. Now, if you'll look with me again, and
17 we're going to go back to page three and four of this
18 transcript, do you recall Officer Duren testifying, and I
19 quote, did not charge Mr. Aiken with that, referring to
20 the missing wallet, based on the fact that he could not
21 tell if Mr. Morrison had misplaced the wallet or if it
22 was never on his person, correct?

23 A. That's correct. That's what he testified to, yes,
24 sir.

25 Q. And he also testified that it was not in the

1 plastic bag of possessions that Mr. Aiken had with him at
2 the time of his arrest?

3 A. That's correct, yes, sir.

4 Q. Okay. Now, I want to turn to the trial testimony
5 of Officer Duren, okay?

6 A. Uh-huh.

7 Q. Do you recall Officer Duren testifying that he and
8 other officers had searched for this wallet?

9 A. Yes. I asked him that on cross-examination. If
10 you could just tell me, do you know what page his
11 testimony starts on?

12 Q. Officer Duren's testimony starts on page 130.

13 A. Thank you.

14 Q. Okay. Now, would you agree that the State's line
15 of questioning of Officer Duren was aimed at showing the
16 jury that the police were looking for a, quote, fairly
17 small item, and that there could have been a lot of
18 places one could have stashed something as small as a
19 wallet?

20 A. I believe the State's testimony regarding Officer
21 Duren was to bring out the statement that Mr. Aiken made
22 admitting he had been in the victim's house. I felt like
23 that was the main point of Officer Duren's testimony on
24 direct.

25 Q. Ms. Mullaney, if you'll look with me at page 135

1 from the trial transcript, on line 12, the state asks
2 Officer Duren, you're looking for a fairly small item,
3 correct?

4 Officer Duren answers, right.

5 Do you agree that's what it says?

6 A. I'm sorry. What line?

7 Q. Line 12 through 14.

8 A. On page 134?

9 Q. Page 135. Question: You're looking for a fairly
10 small item, correct?

11 A. Yes. That's what it says, yes, sir.

12 Q. And Officer Duren says right?

13 A. Yes.

14 Q. So would you not agree that that would give the
15 jury the impression that this wallet could have been
16 anywhere? It's small compared to where they were
17 searching.

18 A. It would give them the impression, that one
19 question would, yes.

20 Q. Thank you. Now, during the State's closing
21 argument, do you recall the prosecutor saying that
22 Mr. Aiken could have thought, I'm just caught red-handed
23 and that I need to get rid of that wallet. Do you recall
24 that testimony?

25 A. That was his argument, yes.

1 Q. That was his argument, and that argument was to
2 give the impression to the jury that Mr. Aiken could
3 have, as he said, been caught red-handed and he just
4 wanted to stash this wallet somewhere, correct?

5 A. That was his argument, yes.

6 Q. Okay. Now, Ms. Mullaney, given the testimony of
7 Officer Duren, would you agree, as we established, he
8 didn't charge Mr. Aiken with this missing wallet, right?

9 A. That's correct. I brought that out during
10 cross-examination.

11 Q. Yes, and he didn't charge him with the wallet,
12 correct?

13 A. That's correct, that's correct. Technically
14 that's correct, yes.

15 Q. Okay. But yet the State used the testimony as to
16 this wallet to essentially hang Mr. Aiken at trial.
17 Would you agree with that?

18 A. They used that and the testimony of the victim
19 saying that they heard -- that the victim awoke to
20 Mr. Aiken moving -- to the sound of things moving on his
21 dresser.

22 Q. Yes, ma'am.

23 A. And that it appeared that he awoke and it appeared
24 that Mr. Aiken was rifling through his dresser drawers.

25 Q. But he didn't see Mr. Aiken take anything.

1 MS. WILSON: Excuse me. Counsel, could you
2 please let the witness finish?

3 MR. BAMBERG: I apologize.

4 THE WITNESS: That's correct. He did not see
5 Mr. Aiken take anything, but he testified that Mr. Aiken
6 took a pill bottle and threw it at him.

7 BY MR. BAMBERG:

8 Q. Okay. And, Ms. Mullaney, since you mentioned this
9 pill bottle, you never received any fingerprint evidence
10 off the pill bottle or anything?

11 A. I didn't receive it, or I didn't request it
12 because Mr. Aiken admitted that he was in the house.

13 Q. But that has nothing to do with whether or not he,
14 in fact, touched this pill bottle, correct? Would you
15 believe those are two separate and distinct issues?

16 A. No. I'm not really sure what your question is.
17 I'm sorry.

18 Q. Okay. I'll move on.

19 Ms. Mullaney, it's clear that Mr. Aiken wasn't
20 charged with the law, but would you agree it appears that
21 the State was using as evidence as to the wallet
22 essentially as an uncharged crime?

23 A. It wasn't evidence. It was testimony, and it was
24 the victim's recollection of the event and what the
25 victim recalled, so I didn't -- since it was in evidence,

1 I didn't feel like there was a suppression motion I could
2 make or that I had a legal basis to preclude that
3 testimony, and I had already angered the judge during the
4 trial on the issue that I thought was the most important
5 issue. He had almost put me in jail during the trial, so
6 I certainly did not want to make a motion for something
7 that I didn't feel like I was going to win.

8 Q. Ms. Mullaney, during the State's closing argument,
9 do you recall the State saying, The wallet does remain
10 evidence, evidence of that criminal intent?

11 Do you recall that?

12 A. That was their argument, yes.

13 Q. That was their argument. So they set it forth to
14 the jury that this missing wallet is, in fact, evidence,
15 correct?

16 A. That was their --

17 Q. That's what they said?

18 A. That was their argument, yes.

19 Q. So when the jury went back to deliberate, in their
20 mind, the missing wallet was evidence of this crime.

21 A. Well, when the jury went back to deliberate, they
22 were instructed by the Court that what was said in
23 openings and summation was not evidence but argument, and
24 I also argued the victim had testified that he was
25 digging through the trash the night before this happened,

1 and so I was able to argue that he may have misplaced his
2 wallet that night when he was digging through the trash.

3 I was also able to bring out that -- I was able to
4 argue that they didn't lose sight of Mr. Aiken and that
5 he would have seen him discard the wallet.

6 Q. Ms. Mullaney, do you recall Mr. Morrison, the
7 victim, testifying at trial?

8 A. I do recall that, yes.

9 Q. Okay. And do you also recall him testifying that
10 when he initially told his roommate that he couldn't find
11 his wallet, his roommate asked him, Maybe you just
12 misplaced it?

13 A. That was my argument, yes, that he misplaced his
14 wallet.

15 Q. Ms. Mullaney, if you'll look with me at page 113
16 of the trial transcript, and if you look at line 22 to
17 24, you see that?

18 A. Yes.

19 Q. And Mr. Morrison says, like, I made the phone
20 call. I actually asked my roommate if she had seen it.
21 She asked me if maybe I misplaced it somewhere.

22 That's what Mr. Morrison testified, correct?

23 A. Correct.

24 Q. And that was Mr. Morrison's testimony, correct?

25 A. Correct.

1 Q. And you didn't -- that didn't come out of your
2 mouth, correct?

3 A. No. I felt like it helped me.

4 Q. But you agree that that was, in fact,
5 Mr. Morrison's own testimony.

6 A. Yes.

7 Q. Okay. Now, I believe we've established here that
8 there was some degree of uncertainty as to whether or not
9 Mr. Aiken took that wallet. Would you agree that that
10 has been established?

11 A. That was one of the issues at the trial, yes.

12 Q. Okay. And to murky the waters even more, you
13 know, Mr. Morrison wasn't the most organized person.
14 Would you agree with that?

15 A. Exactly. That was my argument, yes.

16 Q. In fact, when Mr. Morrison was shown a photograph
17 of his bedroom, he testified that the State, you know,
18 Please don't tell my mother I left my room this way?

19 A. Exactly.

20 Q. And that was Mr. Morrison's testimony?

21 A. Yes.

22 Q. And you saw the photos of Mr. Morrison's bedroom,
23 right?

24 A. Yes, sir.

25 Q. And you would agree he was very disorganized and

1 messy?

2 A. Yes.

3 Q. Okay. So would you agree that it was possible
4 that Mr. Morrison had really just misplaced the wallet
5 and --

6 MS. WILSON: Objection, Your Honor. This has
7 been asked and answered. Ms. Mullaney has testified
8 several times that that was the point of her questioning
9 of Mr. Morrison, if he had misplaced the wallet.

10 THE COURT: Do you have a point?

11 MR. BAMBERG: Withdrawn.

12 BY MR. BAMBERG:

13 Q. As you said earlier, you know, there's no -- you
14 didn't feel that there was an evidentiary reason to
15 object to this testimony as to the law, correct?

16 A. That's correct.

17 Q. Now, are you familiar with Rule 403 of the South
18 Carolina Rules of Civil Procedure?

19 A. Yes.

20 Q. And under that rule, testimony can be excluded if
21 its probative value is outweighed by its prejudice to the
22 defendant?

23 A. That's correct.

24 Q. And as you testified earlier, testimony as to this
25 wallet was prejudicial to Mr. Aiken?

1 A. Yes. Yes, it was.

2 Q. And the probative value of this evidence and the
3 State's argument was evidence of Mr. Aiken's criminal
4 intent, correct?

5 A. That was one of their arguments. They had other
6 arguments that evidenced his criminal intent, but that
7 was one of them.

8 Q. So had this testimony to this wallet been
9 excluded, would you agree that the State's key piece of
10 evidence in its case in chief would have went out the
11 window?

12 A. No. I think they had other evidence also, which
13 was him rifling through the drawers and his keys being
14 moved and throwing the pill bottle.

15 Q. Ms. Mullaney, do you agree that the wallet
16 testimony was relevant to the State's case?

17 A. Yes. That was part of the argument, but I don't
18 think that was the key. You know, had it just been a
19 missing wallet and had Mr. Aiken not been going -- heard
20 or seen going through his drawers or holding his pill
21 bottles, I think the case would have been different, but
22 that was one piece of the puzzle.

23 Q. Ms. Mullaney, Mr. Morrison didn't see Mr. Aiken do
24 any of that, correct?

25 A. He was sound asleep and he woke up to the sound of

1 small things moving, and he said he saw him, I believe it
2 was his testimony, throw the pill bottle at him.

3 Q. Ms. Mullaney, I want to direct you to -- do you
4 recall making a motion for directed verdict at trial?

5 A. Yes, sir.

6 Q. And the judge denied your motion for directed
7 verdict, correct?

8 A. That's correct.

9 Q. Now, would you look with me at page 173 of the
10 trial transcript. Are you there?

11 A. Yes.

12 Q. If you look with me at lines seven through eleven,
13 and this is the judge speaking as he denies your directed
14 verdict, he says, quote, whether he, referring to
15 Mr. Aiken, took anything or not really has nothing to do
16 with burglary. It has a lot to do with larceny, but
17 nothing to do with burglary. He doesn't have to take
18 anything once he gets in there.

19 Do you recall the judge telling you that?

20 A. Yes.

21 Q. So knowing that and knowing, as we established the
22 prejudicial nature of this testimony, would you agree
23 that there was a substantial likelihood that had you
24 moved to exclude this testimony the judge would have been
25 inclined to accept your motion or objection?

1 A. I disagree with that.

2 Q. Okay. And you're entitled to do so. The evidence
3 will speak for itself on that.

4 Now, Ms. Mullaney, let's turn to some specific
5 testimony about Morrison at trial, your
6 cross-examination.

7 A. Certainly.

8 Q. Okay. Now, do you recall Morrison's testimony
9 regarding the morning of the incident?

10 A. I do. Could you refer me to what page?

11 Q. Page 102, and we're looking at lines nine through
12 eleven. Do you see that?

13 A. Okay.

14 Q. Okay. And Mr. Morrison testified, It's cold, so I
15 had, like, lots of blankets, and I think that he probably
16 just didn't see me in there.

17 He was referring to Mr. Aiken, correct?

18 A. That's my understanding of it, yes.

19 Q. Okay. Now, do you believe this statement -- this
20 statement was prejudicial to Mr. Aiken, correct?

21 A. Yes.

22 Q. Yes? And you didn't object to this statement, did
23 you?

24 A. I didn't feel like I had a legal basis to object.

25 Q. Would you agree that Mr. Morrison has no way of

1 knowing whether or not Mr. Aiken saw him in the bed?

2 A. I'm not sure how to answer that question. I'm not
3 sure what Mr. Morrison may or may not have known.

4 Q. So just like you are unable to know what
5 Mr. Morrison may or may not have known, there is no way
6 Mr. Morrison could have known, you know, what Mr. Aiken
7 was thinking, or whether or not he thought anybody was in
8 the room, correct? Would you agree with that?

9 A. I'm sorry. Can you ask me that question again?

10 Q. You just testified that you're unable to say what
11 Mr. Morrison knew, correct?

12 A. That's correct.

13 Q. So would it then make sense that Mr. Morrison
14 wouldn't be able to know what Mr. Aiken did; i.e., that
15 there's nobody in this bedroom? You would agree with
16 that?

17 A. I agree with that.

18 Q. And you would agree Mr. Morrison was merely
19 speculating as to whether Mr. Aiken saw him in the room?

20 A. I would agree.

21 Q. Thank you. Now, you're aware of the applicant's
22 position regarding the wallet and that you should have
23 moved to exclude testimony or object to it, but once that
24 testimony had already been introduced, do you feel you
25 had an obligation to cross-examine the witnesses

1 regarding the wallet?

2 A. Yes. I tried to use that testimony to my
3 advantage.

4 Q. And you agree that you were aware of the
5 significance of this wallet to the case.

6 A. Yes.

7 Q. And you even pointed out the significance of the
8 wallet during your closing argument, correct?

9 A. That's correct.

10 Q. Now, did you cross-examine Mr. Morrison about his
11 missing wallet?

12 A. Yes, I believe I did.

13 Q. You believe you did? Well, Ms. Mullaney, I'll
14 represent to you that I've read through this transcript
15 and there is no cross-examination by you regarding this
16 missing wallet, and if you want to take the time to look
17 through it, you're more than welcome to.

18 A. I cross-examined him about his -- that he didn't
19 lose sight of Mr. Aiken, and so it was my argument that
20 because he didn't lose sight of Mr. Aiken that he didn't
21 see Mr. Aiken discard. That was my strategy on
22 cross-examination. I didn't want to ask the ultimate
23 question because I felt like he could have hurt me with
24 that.

25 Q. So you agree that you didn't ask Mr. Morrison a

1 single question about the missing wallet?

2 A. I focussed instead on him saying that he didn't
3 lose sight of Mr. Aiken so then I could then go back and
4 argue that he didn't see Mr. Aiken discard the wallet.
5 That was my theory of cross-examination.

6 Q. And I understand that, but will you agree with me
7 you did not ask Mr. Morrison --

8 MS. WILSON: Objection, Your Honor. Asked
9 and answered.

10 THE COURT: Go ahead. Go ahead.

11 BY MR. BAMBERG:

12 Q. Ms. Morrison {sic}, would you agree with that,
13 that you did not ask Mr. Morrison a single question about
14 this wallet?

15 A. If I could just -- and that may be correct, but
16 before I answer that, I would just like to just briefly
17 quickly just go through my cross-examination just to make
18 sure that that is correct.

19 MR. BAMBERG: While Ms. Mullaney is answering
20 the question, may I request Mr. Aiken be un-handcuffed so
21 he can write notes and suggestions?

22 THE COURT: That's fine.

23 THE WITNESS: That's correct. The answer to
24 your last question is yes.

25 BY MR. BAMBERG:

1 Q. Would you agree then that your failure to
2 cross-examine Mr. Morrison on this wallet prejudiced
3 Mr. Aiken's case?

4 A. No. I would not agree with that.

5 Q. Now, Ms. Mullaney, I want to turn now to your
6 investigation of Mr. Aiken's case here.

7 Now, would you agree at trial that the State had
8 to prove beyond a reasonable doubt that Mr. Aiken
9 intended to commit a crime, either a felony or
10 misdemeanor, at the time of entering the dwelling?

11 A. Yes, sir. I would agree with that.

12 Q. Okay. And you would also agree that mere entry
13 into the dwelling itself without consent is not a
14 burglary?

15 A. That was my argument, my defense, yes, sir.

16 Q. And if the intent to commit a crime is formed
17 after entry, that doesn't make it a burglary either,
18 correct?

19 A. That's correct. That would be my argument, yes,
20 sir.

21 Q. So you were aware going into trial and during
22 trial that the criminal intent would be one of the key
23 issues, if not the key issue, during Mr. Aiken's case,
24 correct?

25 A. That's correct, yes, sir.

1 Q. Now, Ms. Mullaney, Mr. Aiken maintained he didn't
2 enter the victim's dwelling with the intent to commit a
3 crime, correct?

4 A. That was our defense, yes.

5 Q. And did Mr. Aiken also maintain that the victim's
6 door was wide open, correct?

7 A. That their door was ajar, yes.

8 Q. And that he knocked before he went in.

9 A. That -- that is what Mr. Aiken said. That is not
10 the testimony that came in, but --

11 Q. Yes, ma'am.

12 A. But that's what Mr. Aiken would have testified to,
13 had he testified.

14 Q. Yes, ma'am. Now -- may I approach the witness,
15 Your Honor?

16 THE COURT: You may.

17 MR. BAMBERG: Now, I'm going to show you --
18 and I would like to mark this as Exhibit No. 3.

19 (Applicant's Exhibit No. 3 marked for
20 identification.)

21 BY MR. BAMBERG:

22 Q. Ms. Mullaney, do you recognize Exhibit No. 3?

23 A. Yes. These are my notes from a jail visit on
24 February 22nd with Mr. Aiken.

25 Q. Okay. And if you just want to flip through those

1 pages, would you agree that all of those are your notes?

2 A. Yes, sir. These are all my notes. I recognize my
3 handwriting.

4 Q. Now, Ms. Mullaney, at trial you didn't put up any
5 evidence, really, to rebut the criminal intent element,
6 would you agree with that?

7 A. That's correct. I did not put up a case. I made
8 that argument.

9 Q. Yes, ma'am. So you agree that you didn't put up
10 any evidence to rebut criminal intent. Correct?

11 A. Correct.

12 Q. All right. And I want to show you -- may I
13 approach the witness, Your Honor?

14 THE COURT: You may.

15 MR. BAMBERG: And I would like to mark this
16 as Exhibit 4.

17 (Applicant's Exhibit No. 4 marked for
18 identification.)

19 BY MR. BAMBERG:

20 Q. Exhibit 4 is a two-page document, which would have
21 been front and back, okay? Now, Exhibit 4, Ms. Mullaney,
22 is an inmate request form, correct?

23 A. That's correct.

24 Q. Okay. And this request is dated January 31st,
25 2010.

1 A. That's correct.

2 Q. Okay. Now, do you recall Mr. Aiken requesting
3 that you obtain from the Charleston Police Department an
4 evidence log of a call that was placed on January 9th,
5 2010?

6 MS. WILSON: Excuse me, counsel. Could you
7 point me to what you just showed her?

8 MR. BAMBERG: Oh, yes, ma'am.

9 MS. WILSON: Sorry.

10 MR. BAMBERG: It's in the preliminary hearing
11 tab.

12 MS. WILSON: Got it. Thank you.

13 BY MR. BAMBERG:

14 Q. I'll repeat the question.

15 A. Yes, thank you.

16 Q. Do you recall Mr. Aiken requesting that you obtain
17 an evidence log for an incident that occurred on January
18 9, 2010?

19 A. Yes. Mr. Aiken requested a lot of things, but I
20 think -- I recall that being one of them.

21 Q. Okay. And this request was made in writing?

22 A. Probably, yes.

23 Q. Okay. Ms. Mullaney, if you'll look at the second
24 page of Exhibit 4 --

25 A. Yes.

1 Q. And if you look about the middle of the page,
2 you'll see some stars with two lines underlined, and that
3 says evidence log of call to police department on 1/9/10
4 to , Charleston, South
5 Carolina, correct?

6 A. That's correct.

7 Q. So you would agree then that Mr. Aiken's request
8 that you obtain this information was made in writing?

9 A. Yes.

10 Q. Okay. Thank you. Now, Ms. Mullaney, as you may
11 recall, Mr. Aiken resided at ,
12 ; is that correct?

13 A. If that -- yes, if that's what you're telling me.
14 I can double check, but if that is your recollection,
15 then yes, it was most likely true.

16 Q. Okay. Thank you. Now, you also agree that you
17 referenced this incident in your own notes, correct?

18 A. I have lots of notes. I may have --

19 Q. Yes, ma'am. I'll point you to it. If you look at
20 Exhibit 3, the third page, okay, then you'll see there a
21 story about a neighbor, a week before at my neighbor's
22 house?

23 A. Uh-huh.

24 Q. And you wrote that?

25 A. Yes.

1 Q. Now, Mr. Aiken explicitly stated to you that this
2 information, and I quote, tends to support my intent and
3 reason for my actions on January 16, 2010.

4 A. That was his belief, yes.

5 Q. That was his belief. And that's what was written
6 in that request log, was it not?

7 A. It's one of the many things, yes.

8 Q. So you agree it's written and he explicitly told
9 you that, correct?

10 A. Yes, he did.

11 Q. Okay. Now, would you agree with me that you never
12 obtained this evidence log?

13 A. The evidence log from -- I don't believe that -- I
14 obtained what evidence was admitted, but I'm not familiar
15 with what they call -- the police call an evident log. I
16 don't think something like that exists. You just get
17 evidence vouchers on each particular case.

18 Q. Yes, ma'am, and I understand that, but you agree
19 with me Mr. Aiken is not a lawyer, correct?

20 A. Yes.

21 Q. And he's not trained in legal terminology,
22 correct?

23 A. That's correct.

24 Q. And according to his inmate request form, he asked
25 to you get this evidence log, and underlined, intent and

1 reason for his actions, correct?

2 A. That's correct.

3 Q. And you didn't feel the need whatsoever to follow
4 up with him and ask him what he was referring to.

5 A. No. We discussed it. I knew what he was
6 referring to.

7 Q. Okay. So everything you just said about not
8 knowing what evidence log is, that was really moot then,
9 if you understood what he was talking about, correct?

10 A. He wanted me to introduce evidence at trial that I
11 felt like would hurt him. This was not necessarily what
12 you would call an evidence log, but we did discuss the
13 evidence that he wanted to -- he felt like we should
14 admit and I felt like it would hurt his case.

15 Q. Now, Ms. Mullaney, we're not referring to the
16 January 16th incident that resulted in Mr. Aiken's
17 arrest. We're referring to the incident that happened on
18 January 9th.

19 A. That's correct.

20 Q. Okay. Now, Ms. Mullaney, do you recall
21 interviewing miss Cora Aiken about this incident on
22 January 9th?

23 A. I know that I had spoken to his mom several times.
24 I don't particularly recall, you know, if we spoke about
25 this, but I know I did speak with his mom.

1 Q. Okay. And had you spoken about this incident with
2 his mother, do you believe it would have been in your
3 notes? You would have made a note of it somewhere?

4 A. Probably, probably. I mean most likely. It's
5 possible I could have spoken to her and not made a note
6 about it.

7 Q. But as you sit here today, you don't recall ever
8 speaking with Ms. Aiken about this specific incident,
9 correct?

10 A. I don't have an independent recollection of
11 definitely speaking to her about it. I know I spoke with
12 her several times.

13 Q. And you also didn't speak with Mr. Leon Goodwin
14 regarding the incident, correct?

15 A. That's correct. I did not speak with him.

16 Q.

17 MR. BAMBERG: Your Honor, may I approach the
18 witness?

19 THE COURT: You may.

20

21 BY MR. BAMBERG:

22 Q. And I wanted to show you -- and I'll mark this as
23 Exhibit 5.

24 (Applicant's Exhibit No. 5 was marked for
25 identification.)

1 BY MR. BAMBERG:

2 Q. Now, Ms. Mullaney, this document is an event
3 report, correct, Charleston Police Department?

4 A. That's correct.

5 Q. And it's dated January 9th, 2010?

6 A. That's correct, yes, sir.

7 Q. And prior to today, you had not seen this?

8 A. That's correct.

9 Q. Okay. Now, I want to take a second and go through
10 this report. If you look, it says location,

11 , correct?

12 A. Yes, sir.

13 Q. It say nature of the call unsecured building,
14 correct?

15 A. Yes, sir.

16 Q. And the caller is identified as Leon Goodwin,
17 correct?

18 A. Yes.

19 Q. And list address is listed at .?

20 A. Yes.

21 Q. Correct? Now, if you look at the notes, and I'm
22 looking at the last two lines on the note section, it
23 says, Complainant advises his neighbors's residential
24 door is wide open and when he yelled in, no one answered.
25 Correct?

1 A. That's correct.

2 Q. Complainant needs an officer to check it out.

3 A. That's what this report says, yes, sir.

4 Q. Okay. And, Ms. Mullaney, if you'll look up top,
5 it says unit. Can you see that? Unit, and then
6 identifies Tonya M. Dubey, looking at the top middle of
7 the page -- right up here.

8 A. Oh, yes, sir. I see that, yes.

9 Q. Now, Ms. Mullaney, would you agree with me that at
10 the time of Mr. Aiken's trial, this event report would
11 have been available?

12 A. Yes.

13 Q. And in preparing for Mr. Aiken's trial, this event
14 report would have been available?

15 A. Yes.

16 Q. Now, do you also recall that an officer Tonya M.
17 Dubey was also an assisting officer in Mr. Aiken's
18 arrest?

19 A. I don't recall that.

20 MR. BAMBERG: Your Honor, may I approach the
21 witness?

22 THE COURT: You may.

23 MR. BAMBERG: And, Ms. Wilson, Exhibit 6
24 is going to be a letter from Ms. Mullaney,
25 okay?

1 (Applicant's Exhibit No. 6 was marked for
2 identification.)

3 BY MR. BAMBERG:

4 Q. Now, Ms. Mullaney, you would agree that this is a
5 letter that you sent -- or not a letter you sent, excuse
6 me -- a letter that was sent to you and indicates that
7 the incident report, the 911 dispatch tape and the
8 catalog report were being given to you?

9 A. Yes. That's what this letter states, yes, sir.

10 Q. Okay. And if you look at the fourth page of the
11 documents, is the incident investigation report page
12 three? Do you see that?

13 A. Yes, sir.

14 Q. And if you look where it says assisting officers,
15 do you see that?

16 A. Yes.

17 Q. And do you see T.M. Dubey?

18 A. Yes, sir. She's one of the assisting officers.

19 Q. So you would agree that Ms. Dubey is listed on the
20 event report from January 9th, 2010, as well as the
21 incident report for Mr. Aiken's arrest?

22 A. I would agree with that, yes, sir.

23 Q. Thank you. Now, Ms. Mullaney, were you in the
24 courtroom when Ms. Cora Aiken testified earlier?

25 A. Yes, I was.

1 Q. And would you agree that had you interviewed Ms.
2 Cora Aiken regarding this incident and she told you that
3 I told my son, you know, if that had happened to me, I
4 wish somebody would do the same thing, do you agree that
5 using her at trial would have helped Mr. Aiken's case as
6 far as criminal intent?

7 A. No, sir. I don't agree with that.

8 Q. Would you agree that would at least slightly rebut
9 the criminal intent element at trial?

10 A. No, sir. I actually think it would hurt me on
11 that element. That's why I didn't pursue it.

12 Q. Well, Ms. Mullaney, you just testified that you
13 didn't even investigate the one incident report.

14 A. I spoke with Mr. Aiken about it. I knew about the
15 incident, and I may have spoken to his mom, but I was
16 aware of the incident, and I decided not to pursue it or
17 introduce it because I felt like it would be more
18 prejudicial to Mr. Aiken than it would be helpful.

19 Q. So without doing any investigation whatsoever
20 about the incident, despite Mr. Aiken telling you that
21 that supports his reason and intent for why he did what
22 he did, you just made that decision on your own that this
23 wouldn't help my clients case.

24 A. No, sir, I don't think that's a fair
25 characterization. I did speak with Mr. Aiken about it.

1 I was aware of this incident, but I made a strategic
2 decision not to introduce it. My concern was in the
3 incident, the neighbor had called the police before he
4 entered, or after he entered. In this -- Mr. Aiken's
5 case he never called the police, he just entered this
6 man's home, went into his bedroom, and was heard rifling
7 through his drawer. I felt like if I introduced this
8 evidence that then the solicitor would argue, look, this
9 is what you're supposed to do when somebody's front door
10 is open. You're supposed to call the police, not go into
11 their bedroom, not go into their drawers.

12 So that's why I didn't introduce that testimony
13 because I felt like it would give the solicitor more
14 ammunition against us at trial. And that was my
15 decision.

16 Q. And, Ms. Mullaney, I understand your position on
17 it, but would you agree that your strategic decision was
18 made on an incomplete investigation? You didn't
19 interview Mr. Goodwin. You didn't even get the event
20 report, and as you sit here today, you don't even recall
21 whether or not you discussed the event with Ms. Aiken,
22 correct?

23 A. No, sir. I know I discussed it with Mr. Aiken,
24 and I know I explained to Mr. Aiken why I felt it would
25 be harmful.

1 So I -- it's not like I didn't believe that what
2 happened with Mr. Leon did not occur. I took him at his
3 word, and I certainly felt like if this would have helped
4 our case I would have introduced it and I would have
5 pursued it, but I felt like this was a lead that would
6 hurt us a lot more than it was going to help us. That
7 was my position.

8 Q. Well, you took your position based on an
9 incomplete investigation?

10 MS. WILSON: Objection, Your Honor. Asked
11 and answered.

12 THE COURT: Sustained.

13 BY MR. BAMBERG:

14 Q. Ms. Mullaney, would you agree putting up some
15 evidence to rebut criminal intent is better than putting
16 up no evidence?

17 A. No, I would not agree with that.

18 Q. Now, Ms. Mullaney, I want to turn and discuss the
19 stipulation.

20 MR. BAMBERG: One second. Court's
21 indulgence.

22 THE COURT: This would be a good point to
23 take a five-minute rest room break, so why don't we do
24 that and you can gather your thoughts. All right?

25 (Recess taken.)

1 BY MR. BAMBERG:

2 Q. Ms. Mullaney, before the break I was telling you I
3 wanted to turn a little to the stipulation at trial, or
4 your attempt to stipulate.

5 A. Yes, my attempt.

6 Q. Your attempt, and -- so you recall attempting to
7 stipulate that Mr. Aiken did, in fact, have two prior
8 burglary convictions?

9 A. I recall. It won't be anything I probably will
10 ever forget.

11 Q. And I guess this offer to stipulate was made in an
12 attempt to keep the jury from hearing about Mr. Aiken's
13 priors?

14 A. That's correct.

15 Q. And you wanted to keep them from hearing that
16 until they, in fact, decided that a burglary did occur?

17 A. That's correct. That was my argument.

18 Q. Okay. Now, would you agree with me that a
19 stipulation that Mr. Aiken had two prior burglaries would
20 have been sufficient to satisfy that element of the
21 burglary first charge?

22 A. That was my hope, yes.

23 Q. Okay. And do you have an opinion, Ms. Mullaney,
24 as to why the State refused to accept your stipulation?

25 A. Sure. I think they wanted to jury to hear about

1 his priors because it would help satisfy the elements of
2 their case.

3 Q. And it would, I guess, prejudice the defendant a
4 little bit under the table, so to speak?

5 A. That was my understanding of it, yes.

6 Q. And, Ms. Mullaney, you know, if you look at your
7 notes, page five of your notes, your attorney notes?

8 A. Sure.

9 Q. And you just testified that was your opinion but
10 do you also agree you wrote that in your notes, the State
11 refused because they want the jury to hear his priors?
12 Do you see that?

13 A. Yes, that's correct.

14 Q. All right. Now, Ms. Mullaney, you didn't request
15 that the State advance a reason for refusing to hear the
16 stipulation, did you?

17 A. Judge Dennis was really mad at me for making that
18 argument. I did not push it, no.

19 Q. Okay. So you agree that you didn't request that
20 they advance a reason, correct?

21 A. That's correct.

22 Q. Okay. Did you at the time of trial -- or prior to
23 trial, did you consider requesting the State advance a
24 reason? You didn't consider it, did you?

25 A. Yes, of course I considered it. I made the

1 argument. I made the argument the best I could to the
2 Court. The Court rejected my argument and told me if I
3 made it again I was going to be held in contempt and he
4 told me to sit down.

5 Q. Now, Ms. Mullaney, I listened to your answer just
6 now, and, you know, I understand that you did attempt to
7 stipulate to the priors. My questioning to you is, as
8 you sit here today, do you recall whether or not the
9 thought of, well, let me ask the State, for the record,
10 why they don't want to accept the stipulation? That
11 didn't cross your mind, did it?

12 A. I mean, it crossed -- it crossed my mind. I mean,
13 I knew why the State wanted it in, and I think that the
14 judge kind of went on and talked about why he thought the
15 State wanted it in also, which is in the transcript.

16 So it did cross my mind, but it certainly did not
17 cross my mind to ask the Court to ask the State to state
18 that on the record.

19 Q. And, Ms. Mullaney, would you agree with me that
20 had you asked the State, for the record, to set forth a
21 reason why they refused to accept the stipulation, would
22 you agree with me that they would have been able to do
23 that?

24 A. No, I don't agree with you about that.

25 Q. Ms. Mullaney, as you testified, you believe that,

1 you know, they wanted the -- they wanted the jury to hear
2 his priors right?

3 A. Yes, that's my belief, yes.

4 Q. So it's your testimony here today that the State
5 would have been able to, you know, come up with another
6 relevant reason as to why, aside from satisfying the
7 element of burglary?

8 A. Well, I'm sure the State would have come up with
9 lots of reasons.

10 Q. Okay. But you, as you said, don't agree that the
11 stipulation would have satisfied that element?

12 A. Yes. I mean, that's what I tried to do. That
13 was -- you know.

14 Q. And because you didn't request the State advance a
15 reason, that issue wasn't preserved for right to appeal,
16 was it?

17 A. Oh, I think it was preserved.

18 Q. Ms. Mullaney, you're aware that the trial -- the
19 appellate Courts can hear an issue that isn't raised in
20 trial court.

21 A. Yes, but I believe I raised it up to the point of
22 not being held in contempt, so I think I preserved it the
23 best I could.

24 Q. Ms. Mullaney, now, I think we're not on the same
25 page here. I'm not referring to your offer to stipulate.

1 It's undisputed that you did offer to do that. I am
2 referring to your failure to request, for the record,
3 that the State advance a reason as to why they didn't
4 want to accept the stipulation. That specific issue was
5 not preserved for Mr. Aiken's appeal because it wasn't
6 raised, correct?

7 A. The judge told me if I didn't sit down and be
8 quiet that he was going to hold me in contempt, so I --
9 you know, it wasn't something --

10 THE COURT: We need to move on to a different
11 subject, because you're asking about something that is
12 black letter law. The State doesn't have to give a
13 reason other than it's an element of the crime, so it's
14 unappealable.

15 I mean, it's been refused so many times. I
16 agree. She would be incurring the wrath of the judge to
17 continue to argue a point in which he has told her is
18 settled law. The State doesn't have to stipulate, and
19 they are entitled to put that in the defense, or into
20 evidence, for the simple purpose of proving another
21 crime.

22 That is settled law. What would be the point
23 of her asking them for the reason? The reason is
24 self-evidence.

25 MR. BAMBERG: Yes, Your Honor. I understand.

1 We were just attempting to establish that had she
2 challenged it, it would give the appellate Courts another
3 opportunity to reevaluate the issue. I mean --

4 THE COURT: Go ahead. Move on.

5 BY MR. BAMBERG:

6 Q. Thank you. Ms. Mullaney, moving on, would you
7 agree with me that you didn't request a bifurcated trial?

8 A. That's correct. I did not request that.

9 Q. And, Ms. Mullaney, as you sit here today, would
10 you agree with me that you probably should have requested
11 a bifurcated trial?

12 A. Yes, I probably should have, but, again, I didn't
13 want to anger the judge any more than I already had. I
14 didn't think that he would grant that motion, and I felt
15 like I had stronger motions that I wanted to make and I
16 wanted to focus on those.

17 Q. Yes, ma'am. But you would agree that that issue
18 wasn't preserved for appeal because you didn't raise it?

19 A. Yes, sir. I would agree with that.

20 THE COURT: What do you mean when you asked
21 for a bifurcated trial?

22 MR. BAMBERG: Let me clarify, Your Honor.

23 BY MR. BAMBERG:

24 Q. And when we're talking about bifurcated trial,
25 we're specifically referring to a trial first to

1 determine whether a burglary occurred --

2 A. And then a trial to determine whether it was his
3 priors. I did not move for that. I did not move for two
4 trials.

5 MR. BAMBERG: Your Honor?

6 THE COURT: Okay. If that's what you mean.
7 I've never heard of it.

8 BY MR. BAMBERG:

9 Q. Now, Ms. Mullaney, basically you agree Mr. Aiken
10 was prejudiced because the issue wasn't preserved for
11 appeal?

12 A. That's correct. I did not ask for a bifurcated
13 trial.

14 Q. Ms. Mullaney, I want to move on now to our last
15 issue, specifically regarding the comments you made
16 during your closing argument, okay?

17 Now, do you recall the reason that you gave the
18 jury during closings as to why Mr. Aiken entered the
19 residence?

20 A. Yes. I said he had entered the residence to
21 return a shoe that he had found on -- out in front of the
22 house.

23 Q. All right. Ms. Mullaney, let's look at trial
24 transcript, page 250. Now, Ms. Mullaney, you're looking
25 at page 251, and we'll go to line ten, and you tell the

1 jury -- and maybe, just maybe, they'll give me a dollar
2 or two. Maybe I'll get a tip.

3 Okay? You agree that you said that?

4 A. Yes.

5 Q. And in saying that, you were referring to
6 Mr. Aiken, correct?

7 A. That's correct.

8 Q. Okay. Do you think that statement prejudiced
9 Mr. Aiken?

10 A. No.

11 Q. You wouldn't agree that that statement sort of
12 paints Mr. Aiken in an unfavorable light to the jury?

13 A. Well, Mr. Aiken -- what came in was that Mr. Aiken
14 was carrying a plastic bag with homemade greeting cards
15 and clothing in it, so it had already -- the jury had
16 already heard when that evidence came in that Mr. Aiken
17 was somebody who, you know, was potentially homeless
18 because he was carrying around his clothing and selling
19 homemade greeting cards, so I was trying to reconcile
20 that evidence.

21 Q. Ms. Mullaney, you would agree Mr. Aiken did have a
22 job, in fact, selling greeting cards at the Market?

23 A. He didn't have -- I wouldn't say he had a job, but
24 I would agree that yes, he made homemade cards that he
25 sold.

1 Q. And you wouldn't agree that that was Mr. Aiken's
2 job? That's how he makes his living selling, greeting
3 cards?

4 A. Yes. That's how he would try to make money.

5 Q. Okay. Now, looking at page 257 of the transcript,
6 would you agree with me in general that it's not the best
7 idea for a lawyer to tell the jury that their client is
8 not likeable. Would you agree with that?

9 A. No.

10 Q. You wouldn't?

11 A. I wouldn't agree with that.

12 Q. Would you agree that a statement like that would
13 prejudice a defendant?

14 A. No. I think sometimes you have to be honest with
15 a jury and reconcile what the evidence is and ask them to
16 follow the law and they have to deal with the facts that
17 they're given.

18 Q. And, Ms. Mullaney, on page 257, line 23 through
19 25, you said, and I quote, This case is not a popular
20 contest between Mr. Morrison and Mr. Aiken. It's not
21 about who is more likeable, because if it is about who is
22 more likeable, then Mr. Morrison wins.

23 You don't believe that prejudiced his defense?

24 A. No.

25 Q. Do you think it helped his defense?

1 A. Yes, I do. That's why I made it.

2 Q. All right. Now, Ms. Mullaney, would you agree
3 that, you know, the jury could go back and deliberate and
4 think to themselves, well, man, this guy's own lawyer
5 admits that he's not likeable, based on your closing
6 statements?

7 A. Well, I would hope that they would follow the law.
8 That's what I asked them to do and to decide the case
9 based on the law.

10 Q. But would you agree that it's possible that they
11 could have thought that?

12 A. What the jury thought, anything is possible, yes.

13 Q. And if, in fact, they did think that, that that
14 would prejudice Mr. Aiken's case?

15 A. Again, I think that my point was to have
16 credibility with the jury and to present the case in the
17 evidence as it was.

18 Q. And I understand that, Ms. Mullaney. But my
19 question is, do you think that would have prejudiced Mr.
20 Aiken's case if they, in fact, did think that?

21 A. No. I did not think that. If I had thought that,
22 I wouldn't have said it.

23 MR. BAMBERG: Thank you. No more questions.

24 THE COURT: Cross?

25 CROSS-EXAMINATION

1 BY MS. WILSON:

2 Q. Thank you, Your Honor. Ms. Mullaney, how long
3 have you been practicing law?

4 A. Since 1993.

5 Q. Has the majority of your time been spent doing
6 criminal law?

7 A. Pretty much all of it except for last year I've
8 started doing different areas of law.

9 Q. And you were retained to represent Mr. Aiken in
10 this case?

11 A. I was appointed.

12 Q. Excuse me, appointed.

13 A. Sure.

14 Q. And how many times did you meet with Mr. Aiken
15 prior to representing him at trial?

16 A. Numerous times, February 22nd, May 18th, in
17 August, in October, in February -- I met with him
18 numerous times.

19 Q. Okay. And did you file Brady or Rule 5 motions on
20 his behalf?

21 A. Yes, I did.

22 Q. And whatever you received as a result of filing
23 those motions, did you review the discovery with the
24 applicant?

25 A. Yes.

1 Q. And prior to trial, did you discuss the elements
2 of the burglary charge against Mr. Aiken with him?

3 A. Yes.

4 Q. And did you discuss his version of the facts?

5 A. Yes.

6 Q. And did you discuss any possible defenses?

7 A. Yes.

8 Q. Can you briefly characterize the State's evidence
9 against Mr. Aiken.

10 A. Sure. The State argued that Mr. Aiken -- it was a
11 Saturday morning, and Mr. Aiken had gone into
12 Mr. Morrison's home. Mr. Morrison was in his bedroom.
13 He lived on the second floor.

14 So there was two doors.. There is like, you know,
15 the door to get in and then the door to go up the stairs
16 into the apartment, and he went into Mr. -- the testimony
17 is he went into Mr. Morrison's bedroom. Mr. Morrison
18 awoke when he heard his keys and other small objects on
19 his dresser. He woke up and said, Get out of here.

20 Mr. Aiken said, I brought you your shoe, that he
21 had found in the front yard, a woman's leopard print
22 shoe. He threw a pill bottle at Mr. Morrison. He then
23 left the residence.

24 Mr. Morrison grabbed his cell phone, followed
25 Mr. Aiken while he was calling 911, cornered Mr. Aiken in

1 the parking lot of the Charleston Museum where the police
2 apprehended Mr. Aiken.

3 Mr. Aiken was found holding a plastic bag, holding
4 clothing and homemade greeting cards, and Mr. Aiken
5 admitted he had gone into Mr. Morrison's house to return
6 a shoe.

7 Q. Okay. Thank you. And do you feel like you had
8 ample time to prepare for Mr. Aiken's trial?

9 A. Yes.

10 Q. With regard to Mr. Morrison's missing wallet --
11 and it was your defense strategy at trial that the wallet
12 couldn't be found, that's correct?

13 A. The wallet couldn't be found, and Mr. Morrison
14 testified that night before he had been digging through
15 his trash. That's when he found this leopard print shoe.
16 Mr. Morrison was an artist at the College of Charleston,
17 and something struck him about the shoe so he purposely
18 put it, 'you know, on his -- on the wall in front of his
19 home because he thought it was a cool looking shoe, and
20 then he went in and went to bed.

21 So I argued that the wallet -- he might have lost
22 the wallet when he was digging through the trash. The
23 police looked for the wallet, and Mr. Morrison himself,
24 in fact, testified that he retraced the steps of when he
25 followed Mr. Aiken and that he didn't see Mr. Aiken, you

1 know, discard the wallet and that he didn't find the
2 wallet. He went shortly thereafter, within an hour or so
3 after this occurred, and never found the wallet.

4 Q. So you didn't think there was any legal basis to
5 object to the testimony about the wallet at trial?

6 A. Yes.

7 Q. And you, in fact, felt you were able to spin that
8 into Mr. Aiken's favor at trial?

9 A. That's correct.

10 Q. And it's likely any motion to suppress that
11 testimony would have been futile?

12 A. That's why I didn't make that motion, yes.

13 Q. And you also testified that the missing wallet was
14 not the only evidence that the State had against
15 Mr. Aiken?

16 A. That's correct. They had the pill bottle and, of
17 course, him going -- you know, waking up to hear
18 Mr. Aiken moving things on the victim's dresser.

19 Q. And you didn't feel the testimony was inadmissible
20 under Rule 403?

21 A. That was my belief.

22 Q. Moving to Mr. Morrison's testimony, did you feel
23 like you adequately cross-examined Mr. Morrison at trial?

24 A. Yes, I did.

25 Q. And what was your theory of cross-examination of

1 the victim?

2 A. My theory was to get out the fact that Mr. Aiken
3 had said, I brought your shoe. Here's the shoe, and to
4 also bring out the fact that Mr. Morrison, you know, was
5 on the phone with 911. He was close to Mr. Aiken, even
6 described his stubble. Never saw him throw a wallet
7 away, and to kind of bring out the fact that Mr. Morrison
8 was kind of like a free spirit artist kind of guy who
9 might have, you know, easily misplaced his wallet.

10 Q. And you didn't feel like your failure to
11 cross-examine Mr. Morrison specifically on the wallet
12 prejudiced the defendant?

13 A. No. I didn't want to ask him directly because I
14 felt like he could say something that could hurt me more
15 than it could help me with regard to the wallet.

16 Q. And what did you do to investigate Mr. Aiken's --
17 the charges against Mr. Aiken?

18 A. I spent a lot of time meeting with Mr. Aiken. I
19 went to the scene and took pictures, kind of got the
20 layout of the apartment. I talked to -- you know, I
21 talked to I believe it was Susan Dunn, who was the
22 roommate of Mr. Morrison, and spent a lot of time going
23 over the discovery.

24 Q. With regard to your investigation of this January,
25 I think, 9, 2010 event, you were aware of that event; is

1 that your testimony?

2 A. I was aware of that event, but I felt like that
3 event would prejudice Mr. Aiken more than it would help
4 him, because in that event, the person called the police,
5 and here, in this situation, Mr. Aiken, you know, was
6 found in his bedroom and heard going through his dresser.

7 Q. You wouldn't have called Mr. Goodwin or Ms. Aiken
8 at trial?

9 A. I wouldn't have.

10 Q. And it was your strategic decision not to bring
11 that up?

12 A. That's correct.

13 Q. Moving on to the issue of stipulating to the -- to
14 Mr. Aiken's prior record, it was your strategic move not
15 to -- this kind of goes back to the testimony about the
16 January event. It was also a strategic move not to put
17 up any evidence.

18 A. That's correct.

19 Q. Okay. And the record reflects that you tried to
20 stipulate with the State about Mr. Aiken's prior record
21 because you didn't want them to be able to say, you know,
22 he has X burglary on this day and Y burglary on that day,
23 so once the State decided not to stipulate, did you feel
24 like you needed a reason, then to articulate a reason?

25 A. No. My strategy was, first, to try to keep his

1 priors out and to offer to stipulate that if he was
2 convicted of a burglary, that it would be a burglary in
3 the first degree. The State, of course, did not agree
4 with that.

5 Then my strategy was that Judge Dennis had found
6 that they could enter two burglaries into evidence, only
7 two, even though Mr. Aiken had other burglaries on his
8 record.

9 The burglaries that they chose, the sentencing
10 sheets had different social security numbers on them, so
11 I wanted to argue and cross-examine the clerk to say that
12 it's potentially -- it wasn't Mr. Aiken who was convicted
13 of these two burglaries, and Judge Dennis precluded me
14 from that testimony, and I had referred Judge Dennis to
15 some federal cases, which held that you have to have more
16 than just certificates of conviction in order to
17 establish that element.

18 So my argument was to argue that the State didn't
19 prove that beyond a reasonable doubt and that therefore I
20 should be entitled to the charge of burglary second as a
21 matter of law.

22 Judge Dennis did not agree with me on this. At
23 first he thought that I was perpetrating a fraud on the
24 Court for making this argument, that's why he got upset
25 with me during the trial. Then he read the cases. He

1 said I was correct, and then he said if I wanted to
2 pursue this, that he was going to open the door and
3 potentially let in all of Mr. Aiken's prior convictions
4 if this was the argument I wanted to make.

5 I felt like Mr. Aiken may have had a good appeal
6 issue with regards to what had occurred and that I felt
7 like that was Mr. Aiken's best argument. I told him
8 that. I filed a notice of appeal for Mr. Aiken, and that
9 was my strategy.

10 Q. Okay. With regard to the applicant's allegation
11 that you should have requested a bifurcated trial, do you
12 think Judge Dennis would have granted that motion?

13 A. No. It's just never been done in Charleston.
14 I've heard -- public defenders, we would talk about
15 creative ways to possibly deal with the burg first and
16 the prejudice of the priors coming in and in the office
17 we had talked about a way that possibly we could get
18 around that, something that we could try, but I had never
19 heard of it done in Charleston County, and that's why I
20 didn't make that motion.

21 I felt like my better motion was to try to get the
22 charge, the burg second charge, and to try to establish
23 that they hadn't proved his priors beyond a reasonable
24 doubt.

25 Q. And regarding your closing argument statements,

1 did you feel like those statements supported your
2 argument that Mr. Aiken did not have any criminal intent?

3 A. Yes, yes. It was a difficult case. Mr. Aiken was
4 in his bedroom and he admitted to being in his bedroom,
5 and he had had greeting cards on him and things that gave
6 indicia of possibly being a homeless person, or -- you
7 know, that was kind of what was presented during the
8 trial, so I wanted to explain why someone would go into
9 someone's home and into someone's bedroom on a Saturday
10 morning. And that was what I had to deal with and to
11 explain and to present a defense on.

12 MS. WILSON: Nothing further.

13 THE COURT: Redirect?

14 MR. BAMBERG: Briefly, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. BAMBERG:

17 Q. Ms. Mullaney, it was clear that Mr. Aiken wasn't
18 homeless, correct?

19 A. I wouldn't say that, no.

20 Q. Do you recall what Mr. Aiken was wearing the day
21 of his arrest?

22 A. I recall he was wearing -- because that was one of
23 the things we argued, that he had on, like, hard soled
24 shoes and he had walked up -- you know, the stairs to the
25 second floor were hardwood, and that was one of the

1 arguments.

2 Q. Do you remember the shirt that he had on?

3 A. He had on a nice shirt, but he was also carrying
4 clothing with him in a plastic bag...

5 Q. And he had one article of clothing in that plastic
6 bag?

7 A. I don't remember. I just remember the testimony
8 was that he had a bag with homemade greeting cards and
9 clothing.

10 Q. Okay. Mr. Aiken had on a Ralph Lauren thermal.
11 That's not something that a homeless person would have.

12 A. I think he had on dress pants and like a sweat
13 shirt over the dress pants, but that may not be 100
14 percent accurate, but that's what I remember.

15 Q. I misspoke, in the bag, he had a Ralph Lauren
16 thermal, correct?

17 A. I'm sorry. I just don't remember.

18 MR. BAMBERG: No more questions.

19 MS. WILSON: Nothing from the State, Your
20 Honor.

21 THE COURT: You may step down. Do you intend
22 to call any other witnesses?

23 MR. BAMBERG: Yes, Your Honor. We call
24 appellate counsel, Breen Stevens.

25 THE COURT: Let's break right here, and we'll

1 try to get in this motion. We've got some people here
2 for that. It was delayed because of the transportation
3 issue.

4 (Recess taken.)

5 BREEN STEVENS,
6 having been first duly sworn,
7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. BAMBERG:

10 Q. All right. Mr. Stevens, now appellate cases take
11 time, correct?

12 A. Yes, sir, they do. It's an unfortunate side
13 effect of the lack of resources over the criminal justice
14 system.

15 Q. And the appellate issues can be relatively
16 complex?

17 A. Yes, sir. They can run the gamut.

18 Q. And that would be complex to lawyers?

19 A. They can be complex to some attorneys; other
20 attorneys, they might not be complex. I don't know.

21 Q. So they can also be complex to, I guess, the lay
22 person?

23 A. They could be, yes, sir.

24 Q. Now, Mr. Aiken was convicted on January 19, 2011.

25 A. I would have to check the sentence sheet, but

1 that's my understanding, yes.

2 Q. I will represent to you that's the correct date,
3 and his notice of appeal was filed on January 25, 2011?

4 A. I can check my file, if you like.

5 MR. BAMBERG: Your Honor, may I approach the
6 witness?

7 THE COURT: You may.

8 MR. BAMBERG: And I would like to mark these
9 as the next exhibit, Exhibit 7.

10 (Applicant's Exhibit No. 7 marked for
11 identification.)

12 BY MR. BAMBERG:

13 Q. Mr. Stevens, these are the appellate documents as
14 related to Mr. Aiken's case?

15 A. Yes, sir. They do look that way.

16 Q. Looking at the first document, his notice of
17 appeal was file on January 25th, 2011. Do you see the
18 file date there?

19 A. Yes, sir. That is the date of the filing stamp
20 from Julie Armstrong, Charleston County Clerk of Court.

21 Q. And if you would look at the third document from
22 the back, his direct appeal order of dismissal was filed
23 on September 2, 2011?

24 A. Yes, sir.

25 Q. Okay. And if you flip one more page to the

1 remitter, that was filed on September 22, 2011, correct?

2 A. Yes, sir.

3 Q. Okay. And his direct appeal, if you look at the
4 last document, was formally closed on September 29th,
5 2011, correct?

6 A. Yes, sir. That is -- well --

7 Q. Well, the letter says, therefore, with this
8 letter, we are closing our direct appeal file in this
9 matter, and it's dated September 29th, correct?

10 A. Well, this letter is not from our office. This
11 letter is from the Attorney General's office to the
12 elected solicitor of the Ninth Circuit; Ms. Wilson, so I
13 would have to look through my file to see when the
14 closing letter was filed.

15 Q. But would you agree that this letter states that
16 they're closing their direct appeal?

17 A. Yes, sir. Again, I mean, this means that the
18 Attorney General's office is closing their file on direct
19 appeal. They're notifying the solicitor about that. We
20 would file a similar document, or send a similar document
21 to our client, yes, sir.

22 Q. All right. Thank you. So from, I guess, the
23 closing of his appeal to when his first appeal was filed,
24 you would agree that is about eight months, eight months
25 passed from January 25th until --

1 A. Yes, sir. I mean -- yes.

2 Q. About eight months? Okay. Now --

3 A. From notice of appeal to actual filing, or closing
4 of the file itself?

5 Q. Yes, sir. Do you recall Mr. Aiken's reasonings
6 for wanting to drop his direct appeal?

7 A. If memory serves, and I think he wrote a letter
8 about this too -- and that's what prompted me to also set
9 up a conference phone call with him at the facility. He
10 was concerned about time, how long was it going to take.

11 I believe he felt that his issues on PCR would be
12 stronger than direct appeal. I believe he indicated not
13 only in writing but also on the phone, he said he read
14 his transcripts and he knows there is nothing in there
15 and he has also read the law and that he doesn't have any
16 issues on direct.

17 Q. Do you also recall him telling you that he was
18 concerned about witnesses being available should he get a
19 new trial?

20 A. I don't specifically recall that. I'm not saying
21 he may not have said that, I'm just saying I don't
22 specifically recall that.

23 Q. Okay. If you'll look with me at document number
24 two and three, do you recall receiving this letter from
25 Mr. Aiken?

1 A. Yes, sir.

2 Q. Okay. And the letter is dated August 24, 2011,
3 correct?

4 A. Yes, sir, and it was received in our office --
5 well --

6 Q. Well --

7 A. I think it was not the correct date on there
8 because if we also check the date of the envelope that he
9 sent, I think he probably -- probably, I don't know, you
10 have to ask him -- but he probably meant to say July.

11 Q. Yes, sir. So the envelope is stamped July 26th;
12 the letter should read July 24th?

13 A. That's my guess, yes, sir.

14 Q. Okay. And you received this letter, as I said, on
15 the 27th, correct?

16 A. Yes, sir. The office stamps it as soon as it
17 comes to our front desk.

18 Q. Would you agree Mr. Aiken references reading his
19 trial transcript?

20 A. Yes, sir.

21 Q. So as of July 24th, he would have had access to
22 his transcript?

23 A. Yes, sir. When -- part of our process at
24 appellate defense, when the client's file is officially
25 opened -- and that doesn't occur at the moment a notice

1 of appeal is filed. When a client is sent his new client
2 letter from me, signed by me, I also include a copy of
3 his trial transcript as well, full copy. In this case, I
4 believe it was April 8th, 2011 when I sent that letter to
5 him -- in other words, it took all the way up until then
6 for the trial transcript to be made by the court reporter
7 and for our office to fully open the file and for me to
8 then send it to him and say, I now have your case.

9 Q. So you agree as of the date of letter you also had
10 a copy of the transcript?

11 A. Yes, sir.

12 Q. Okay. Now, this letter, Mr. Aiken states, I
13 quote, I have no merits for traditional review.

14 You agree Mr. Aiken is not a lawyer?

15 A. I presume so, yes, sir.

16 Q. And he has no legal training. You were appointed
17 to defend him?

18 A. I would agree that I don't know if he had had any
19 prior legal training in the past, like paralegal courses
20 at Midlands Tech or something, but to my knowledge, he
21 does not have any legal training.

22 Q. Now, as Mr. Aiken's appointed counsel for appeal,
23 would you agree that your role as lawyer to make that
24 determination of whether or not he has merits for
25 judicial review?

1 A. That is part of my analysis when I do review his
2 direct appeal documents, materials, yes, sir.

3 Q. And as you sit here today, do you agree that from
4 the time you received his trial transcript until his
5 appeal closed, you had never reviewed his trial
6 transcript?

7 A. The only review I was able to complete by the time
8 I had a conversation with him, I believe it was August
9 1st, around there, when I was able to set up a conference
10 call would have a cursory examination of the trial
11 transcripts -- I'm sorry. Let me back up.

12 When I first open a file for a client and send out
13 the new client letter and send them a copy of the trial
14 transcript, one thing I have to try to do is make sure
15 that the basics are included in the trial transcript
16 because we only have approximately 30 days after the
17 transcript is produced and sent to us to notify the court
18 reporter that certain aspects are missing, otherwise the
19 court rules allow the court reporters to destroy the
20 tapes after that 30 days expires. So what I have to do
21 is when I open the file, I go through and just make sure,
22 again, basics.

23 Q. That everything is --

24 A. Yeah, that jury selection should be there, that
25 opening statements are there, that closing arguments are

1 there, that the sentencing phase is there; the basic
2 components of the trial itself.

3 Q. But you're not necessarily reviewing it for
4 appellate issues?

5 A. Correct. I do not analyze it at that point for
6 the merits of the case itself in preparation for spotting
7 issues, researching issues, and drafting a brief, that's
8 correct.

9 Q. And as you're aware, Mr. Aiken's trial transcript
10 was 299 pages?

11 A. Yes, sir.

12 Q. And would you agree that that's relatively brief
13 compared to some trial transcripts?

14 A. Yes, sir. I've had trial transcripts as short as
15 a little over 100 pages, and all the way up to, you know,
16 a couple thousand pages. So in that range, it would fall
17 closer to the smaller end, sir.

18 Q. Yes, sir. Now, if you will look with me at the
19 fourth document there, fourth, fifth, and sixth
20 documents.

21 A. Yes, sir.

22 Q. This fourth document is a letter dated August 3rd
23 it's a letter from you to Mr. Aiken, correct?

24 A. Correct.

25 Q. And in this letter, you advise him -- and I'm

1 reading from the second line, I urge you to wait until I
2 can read your trial transcripts and advise you about
3 potential issues for direct appeal before dropping your
4 current appeal, correct?

5 A. Yes, sir, that's correct.

6 Q. Okay. And then you also indicate that you're
7 enclosing an affidavit for Mr. Aiken to sign, notarize,
8 and return if he wishes to amend in his appeal?

9 A. Yes, sir.

10 Q. Okay. And Mr. Aiken did, in fact, sign that after
11 and return it to you, did he not?

12 A. Yes, sir, he did.

13 Q. And he did that on August 11th, signed it on
14 August 11th?

15 A. Yes, sir. That's what the affidavit says,
16 according to the notary public, yes, sir.

17 Q. And looking at paragraph two of this affidavit, it
18 states in part, I have been informed that if I drop my
19 direct appeal that I forever waive those issues that
20 could be raised.

21 A. Yes, sir.

22 Q. Now, Mr. Stevens, what is your definition of
23 forever waived?

24 A. Gone for good.

25 Q. Not coming back?

1 A. Barring some unlikely circumstances that if he --
2 if, for example, some reason he was, you know, not
3 competent, mentally competent, to understand what was
4 going on at the time or at the time he actually signed
5 something, then yeah, I mean, I don't think that could be
6 a knowing, intelligent, and voluntary waiver, but I don't
7 know that information because at the time, talking to him
8 on the phone and also reading his written materials, he
9 appeared to be -- I did not see indications that he was
10 not mentally competent, but then again, I did not have
11 the benefit of medical records or mental history,
12 SCDC mental history records, and I did not interview him
13 from a basis of knowledge like Donna Schwartz-Watts or
14 somebody like that who could be able to adequately say
15 whether or not he was mentally competent. That is out of
16 my wheelhouse.

17 Q. But you agree then in signing the affidavit his
18 direct appeal is gone?

19 A. Yes, sir.

20 Q. Now, would you agree with me that once you've been
21 retained or appointed, it's your responsibility to look
22 out for the best interest of your client?

23 A. Yes, sir.

24 Q. Okay. And would you also agree that as the
25 lawyer, you're able to make certain decisions, even if

1 they contravene those that your client may want you to
2 make?

3 A. But for a limited few that are strategic decisions
4 that only the client can make, yes, the remaining
5 decisions are for the lawyer to make.

6 Q. Okay. Now, Mr. Stevens, would you agree that you
7 cannot effectively represent your client in an appellate
8 matter if you allow the client to make the determinations
9 regarding the case specifically in the instance where you
10 haven't even looked at his trial transcript?

11 A. Let's unpack that. I mean, do I let my clients
12 run my cases to select issues to brief? No. I
13 definitely take into consideration anything that they may
14 feel is pertinent. They're the ones at trial, not me.

15 They may feel very strongly about some aspects of
16 it, but ultimately, when it comes to the issue of
17 selection of a brief, it's mine alone, and that's the
18 responsibility I bear.

19 If I think that he's competent to go ahead and
20 spot his own issues, you know, I would urge a word of
21 caution to any client that thinks so unless they've been
22 legally trained, as I previously indicated. Now, I think
23 part of the problem of whether or not to continue forward
24 with an appeal is solely -- it's one of those strategic
25 decisions that only a client can make, kind of like

1 whether they want to have a jury trial, whether they want
2 to have an attorney, represent themselves. It's one of
3 those overarching strategic decisions.

4 Q. And, Mr. Stevens, I understand your position on
5 that, but would you agree that allowing your client to
6 forever waive, as we defined here today, any and all
7 directly appealable issues, without having even touched
8 his trial transcript, that's prejudicial to the client,
9 would you agree with that?

10 A. Well, it could be prejudicial if there were issues
11 that were present that were ripe for appellate review.
12 For example, in our new client letter, which, again, I
13 sent out April 8th, it kind of explains in layman's
14 terms, we try, anyway, to explain what's involved when it
15 comes to whether it's issues there, whether it's ripe for
16 review, et cetera.

17 If you like, I could look to the file to get a
18 copy of that letter, but yeah, I would strongly recommend
19 against any client wanting to go ahead and waive their
20 appeal without me ever having an opportunity to go ahead
21 and first reviewing the transcript. I vehemently urge my
22 clients not to do that. I think it's a bad course of
23 action.

24 Q. If you look with me briefly at document seven --
25 and this is a letter from you to the Court of Appeals

1 dated August 18, 2011.

2 A. August 18th? Yes.

3 Q. Yes. Do you see that?

4 A. Yes, sir.

5 Q. Now, do you recall sending this letter to the
6 Court of Appeals?

7 A. Yes, sir, I do.

8 Q. And in this letter, your first sentence is, The
9 initial brief and the -- the initial brief of appellate
10 and designation of the matter in the above case were due
11 to be served and filed on August 31, 2011, correct?

12 A. Yes, sir, that's correct.

13 Q. Now, you would have received Mr. Aiken's affidavit
14 dropping his appeal sometime between August 11th, the day
15 he signed it, and August 18th, the day this letter went
16 out, correct?

17 A. Yes, sir.

18 Q. Okay. And would you agree with me that despite
19 the initial brief deadline approaching, roughly two weeks
20 out, you had still not touched Mr. Aiken's trial
21 transcript?

22 A. That's correct. I was -- if you would like me to
23 elaborate further, I would be glad to.

24 Q. Well, specifically, up until the moment you
25 received Mr. Aiken's affidavit, you weren't even sure he

1 was going to drop his direct appeal; is that correct?

2 A. That's correct, especially since I advised him as
3 strongly as I could, it's a bad idea. I wrote him. My
4 hope is that he was going to listen to my advice, but,
5 again, it's a strategic decision of my client that I
6 can't make for him.

7 Q. Okay. I want to turn now to the issue regarding
8 Mr. Aiken's affidavit. You know, you stated in this
9 letter that Mr. Aiken's decision is knowing and
10 voluntary, correct?

11 A. Correct.

12 Q. Okay. And that you had discussed the advantages
13 and disadvantages of pursuing a direct appeal of
14 Mr. Aiken?

15 A. Correct.

16 Q. Now, it's undisputed that you informed Mr. Aiken
17 that you had abandoned his direct appeal issue. My
18 question to you is at any point during your discussion
19 with Mr. Aiken, did you advise him of the difference
20 between the direct appeal issues and PCR issues?

21 A. I don't know that we specifically broached the
22 topic of what constitutes a good PCR issue. I think the
23 only way I can try to explain it to clients is to say,
24 look, PCR issues is when you're actually saying my
25 attorney made the mistake, not the trial Court.

1 Q. And are you aware of if you did that in this case?

2 A. I don't specifically recall.

3 Q. Okay. Now, are you aware that Mr. Aiken believed
4 that he could raise any available issue at PCR?

5 A. No. I would never advise that.

6 Q. Are you aware that that is what Mr. Aiken
7 believed?

8 A. No, no.

9 Q. And that he was unaware that not all issues are
10 PCR issues?

11 A. I would have no way of knowing that's what his
12 understanding was. The only thing I can say is we did go
13 over what was a direct appeal issue, not only written
14 down in our new client letter sent to him on April 8,
15 2011, but also that, you know, the types of issues I'm
16 looking for now on direct appeal, the advantages of
17 actually staying on direct appeal, the opportunity to
18 turn around and get either a new trial or, if there is a
19 directed verdict issue in there, which typically is in
20 most trials, there is going to be at least a directed
21 verdict motion, but they were rarely successful --
22 sometimes they are.

23 In this case, just from listening to the testimony
24 here from trial counsel and everything, it sounds as if
25 there may have been some issues, or at least one,

1 possibly two issues to raise in a direct appeal. But I
2 was very clear that, you know, once you drop, you can't
3 go back.

4 Q. Mr. Aiken is not a lawyer?

5 A. Yes, sir.

6 Q. And you were appointed counsel to represent him
7 and handle the legal matters?

8 A. Yes, sir.

9 Q. All right. Now, how is it then that Mr. Aiken
10 could be expected to make a knowing and voluntary
11 decision without his counsel informing him of the legal
12 distinction between waiving directly appealable issues
13 and then certain issues not being available for argument
14 at PCR?

15 A. I don't know specifically how I explained to him
16 what would be available on PCR if he dropped his direct
17 appeal. I do know that I fully explained to him what he
18 was giving up if he does not go forward with his direct
19 appeal, that the only things left is trial errors by
20 counsel. That would be it, or -- I mean, now, in that
21 sense, that may have been wrong too, because if you
22 actually look at the PCR statute, it does give a wider
23 range, but at the time, I didn't know how much to
24 really -- how much he would comprehend, but yeah, I told
25 him we're limited, but still -- I did not go in depth as

1 to precisely what he would be limited to if that's what
2 your question is.

3 Q. Yes, sir. So you would agree that there is a
4 legal distinction between PCR issues and direct appeal
5 issues?

6 A. Yes, sir, definitely so.

7 Q. And the law draws that distinction?

8 A. Very clear.

9 Q. And so is it your testimony here today that
10 Mr. Aiken was able to knowingly and voluntarily waive any
11 and all of his direct appeal issues?

12 A. If we say knowingly, intelligently, voluntarily
13 waive, in my view, yes, I believe he did from this
14 perspective, from the fact that he specifically indicated
15 what he actually informed himself of.

16 I told him it was a bad idea and why. I told him
17 what is involved and what he's going to give up. We
18 briefly discussed matters that he felt very strongly
19 about, and he was very, very set on what he wished to do,
20 and, again, it's not something I'm allowed to make a
21 decision on myself.

22 Now, do I wish I had more time to actually stop
23 everything that I'm doing, stop the transcripts I'm
24 reading, stop other cases and then reach forward a couple
25 months and grab his file and then read that one overnight

1 and then you do a quick and ready analysis, I wish to God
2 I could have, I really do, but the reality is with our
3 caseload in appellate defense -- and believe me, I'm not
4 grouching or complaining. I mean, I love my job, I really
5 do, but the realities of time are very difficult.

6 I mean, for example, the ABA recommends that the
7 proper workload for an appellate attorney is 25 appeals
8 per year. That's appeals filed, not open appeals. In
9 appellate defense, I typically file two appeals per week,
10 some weeks more, some weeks less, but on average I would
11 say roughly two a week, and that's just to be able to
12 keep your head above water.

13 And they just keep coming, and that's because we
14 handle roughly anywhere between 80 to 90 percent of the
15 felony appeals in the State of South Carolina with nine
16 attorneys in our office. That's including the chief
17 public defender as well.

18 So do I wish I had the most valuable resource of
19 time in order to stop doing what it was for other cases,
20 put them aside, reach forward and grab his case because
21 my client wants to drop his appeal? I wish to God I
22 could do that. I don't have that luxury, and it's not
23 saying it's solely a problem of appellate defense. The
24 judicial system needs more resources, I acknowledge that,
25 but we do the best with what we have.

1 Q. And not to cut you off, and I understand your
2 position, but would you agree that despite your caseload,
3 that's no excuse for not working on a client's case?

4 A. Well, I'm not saying that I would never work on a
5 client's case. For example, in the new client letter,
6 which I sent, again, April 8, I think it pretty clearly
7 states that it typically takes around six months for me
8 to file his initial brief. So if we go six months for
9 people, I mean, that would be fairly close to what we're
10 talking about. That would put it right around October.

11 Do I want to wait that long? The answer is no.
12 Do I wish I could actually fully inform my clients about
13 everything involved in the case? Yeah, I really, really
14 do, which is why I recommend to them strongly that please
15 don't drop your appeal now. At least wait until I can
16 get to your file and then inform you of what issues are
17 there.

18 Q. Okay. Mr. Steven, jumping back to Mr. Aiken's
19 desire to abandon his appeal, do you agree Mr. Aiken
20 informed you that part of the reason he was making this
21 decision was because he was concerned about his
22 witnesses, specifically that one of his witnesses may
23 move away?

24 A. Again, I don't recall that specific aspect of the
25 conversation, but what I do recall from his conversation

1 was he was concerned about time.

2 Q. Okay.

3 A. Whenever I get clients that do have that concern,
4 especially if they have more than ten years that they've
5 been sentenced with in the first place, my recommendation
6 is almost invariably to say at least give it a shot for
7 direct appeal. Even if it's an Anders brief, you might
8 have a chance. It doesn't always look good, but at least
9 you have that one bite of the apple, and I don't throw
10 away at least one opportunity to get relief.

11 I most certainly would have said that to Mr. Aiken
12 because it would, I think, be throwing away an
13 opportunity for a chance at relief on direct appeal
14 before going to the PCR phase if that became necessary.

15 Q. And just in closing, would you agree that, you
16 know, if Mr. Aiken did, in fact, have an issue that could
17 have resulted in his conviction being overturned on
18 appeal and he abandoned his direct appeal, he would be
19 prejudiced by that?

20 A. Yes. I mean, essentially if there is a golden
21 issue out there in his file, and if his waiver of appeal
22 is not knowingly, intelligently, or voluntarily entered,
23 I think it would be prejudicial.

24 MR. BAMBERG: Thank you. No more questions.

25 CROSS-EXAMINATION

1 BY MS. WILSON:

2 Q. Good afternoon, Mr. Stevens. You said the
3 applicant sent you a letter advising you to withdraw his
4 appeal. It was prompted by him sending you a letter?

5 A. Yes, ma'am. I believe that was the July letter.

6 Q. And so that prompted you to set up a phone call
7 with Mr. Aiken?

8 A. Yes, sir {sic}. , I mean, we do our best to get in
9 contact with the client. Probably, without exaggeration,
10 have one of the largest collect call phone bills in the
11 State of South Carolina because the primary way we do
12 speak with our clients is over the phone, and we go ahead
13 and ask them -- if we have to actually call them, it's
14 about a one day minimum in between, so it does take a
15 little bit of time because we have to work around the
16 Department of Corrections and their scheduling issues as
17 well to make sure we don't disrupt the facility when we
18 do make our call.

19 Q. And when you're on this conference call with him,
20 you advised him of the rights of waiving his appeal?

21 A. Yes, ma'am, I believe I did.

22 Q. And you urged Mr. Aiken to wait until you could
23 review his transcript before you could do that?

24 A. Absolutely.

25 Q. And you spoke with him about how he would waive

1 all his direct appeal issues?

2 A. Yes.

3 Q. Okay. And whether to pursue an appeal or to
4 withdraw an appeal is a decision that can only be made by
5 the client; is that correct?

6 A. That's my understanding, yes, ma'am.

7 Q. And based on your phone conversation with
8 Mr. Aiken, you felt that his decision to waive his right
9 to a direct appeal was knowing and voluntary?

10 A. Yes, ma'am.

11 Q. And after you advised him not to withdraw until
12 you could look at his trial transcript, he indicated by
13 signing an affidavit that he wanted to withdraw; is that
14 correct?

15 A. Yes, ma'am. It was after we had our phone
16 conversation, after I advised him, after I advised him
17 not to do it until at least I could get a chance, an
18 opportunity, to go ahead and get to his file, get into
19 his file, analyze it, and, you know, informing him of the
20 issues and the relative strength. At least wait until
21 that time, and it was -- he still went ahead and signed
22 the affidavit to drop the case.

23 MS. WILSON: Nothing further. Thank you, Mr.
24 Stevens.

25 THE COURT: Anything else?

1 MR. BAMBERG: Nothing, Your Honor.

2 THE COURT: You may step down.

3 THE WITNESS: Thank you.

4 MR. BAMBERG: Your Honor, we would like to
5 call Mr. Aiken to the stand.

6 THE COURT: All right.

7 JAMES AIKEN,

8 having been first duly sworn,
9 was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. BAMBERG:

12 Q. Now, Mr. Aiken, you've heard the testimony here
13 today of Mr. Leon Goodwin and Ms. Cora Aiken. Had
14 Ms. Mullaney fully investigated the January 9th, 2010
15 incident and interviewed those witnesses, and those
16 witnesses agreed to testify at your trial, would you have
17 testified in your own defense?

18 A. Yes. In fact, that was the reason that I had
19 informed counsel in the very early stages that my reasons
20 for entering, the way that I did and that the jury needed
21 to hear that was prompted by what took place at my
22 mother's residence one week prior and that even though my
23 mother was willing to testify because she's my mother and
24 her testimony alone wouldn't be sufficient, I felt -- and
25 me and my prior convictions for burglary in my past, I

1 could not myself get up here and give any testimony
2 without substantiating factually my contentions and my
3 reasons for entering into Mr. Morrison's residence the
4 way that I did.

5 Q. Okay. And, Mr. Aiken, do you also agree that
6 counsel was ineffective for failing to request the State
7 advance a reason for refusing a stipulation?

8 A. Before -- if it's all right, before I answer that
9 question, there is just one other thing I wanted to
10 mention regarding counsel's failure to investigate --

11 Q. Okay.

12 A. -- the situation that happened at my mother's
13 residence. Because I had the right to a defense,
14 requested that counsel present a defense, and I
15 actually -- be patient with me. I'm a little nervous up
16 here. It's not every day that -- but I requested that
17 counsel present the defense.

18 Q. And she didn't.

19 A. No, she didn't.

20 Q. Okay.

21 A. Because the jury needed to hear why I went into
22 someone else's residence just merely to return a shoe,
23 and without the presentation of that evidence that took
24 place at my mother's house, the jury, based on my prior
25 convictions for burglary and the omission of that

1 evidence by counsel could only conclude that I was using
2 the shoe as a ruse in the event that I was caught I could
3 say that I was returning a shoe.

4 Q. Okay. So, Mr. Aiken, back to my original
5 question. You agree that Ms. Mullaney was ineffective
6 for failing to request the State to advance a reason as
7 to why they didn't accept the stipulation, correct?

8 A. Yes, that's correct, and I would like to
9 mention -- and specifically, I want to state this for the
10 record to preserve because I would like to say for the
11 record where to begin, I understand, and I'm asking the
12 Court here, today to be patient with me, because I
13 understand South Carolina's position as far as not
14 affording a criminal defendant the right to stipulate to
15 the prior burglary convictions and prevent them from
16 coming in.

17 However, the State's refusal to accept counsel's
18 offer to stipulate and to admit my prior convictions for
19 unrelated burglaries as well as the inference that the
20 State drew in its closing argument improperly suggested
21 to the jury that I had a propensity to commit the crime
22 that I was on trial for, denied me a right to a fair
23 trial, and the danger that the jury would unfairly rely
24 on my prior convictions for burglary to suggest my
25 current guilt was not cured in this particular case by

1 the trial Court's limited instructions to the jury.

2 Q. Okay. Mr. Aiken, you also had a problem with the
3 statements Ms. Mullaney made on her closing arguments.

4 A. Before we go there, I would like to state further
5 on this issue, as trial counsel's failure to advance a
6 reason, to begin with, I was tried only for the alleged
7 burglary that occurred in January 2010. I was not
8 charged with the 1997 and the 2003 burglaries, so with
9 that backdrop in mind, I would like to direct the Court's
10 attention to the argument that the State's refusal to
11 accept the offer to stipulate and admit my prior crimes
12 in this case in chief as well as the inference the State
13 drew in its closing argument improperly suggested to the
14 jury that I was more likely to be guilty of the crime
15 charged than the average man on the street who had never
16 been convicted of burglary and that the testimony
17 concerning my involvement in unrelated burglaries in the
18 past could only show a propensity to commit the crime
19 charged, not that I was guilty of burglary on January
20 2010.

21 Q. Okay.

22 A. And when the State refused to accept this offer to
23 stipulate and insisted upon admitting this evidence of my
24 prior convictions to establish conviction element, first
25 and most importantly, counsel should have requested --

1 should have argued -- I'm sorry, should have argued that
2 the offer to stipulate provided the State with the
3 requisite proof that -- provided the State with the
4 requisite proof of the element of the crime charged.
5 Specifically, counsel should have requested that the
6 State advance a reason other than show propensity while
7 he was refusing to stipulate for the following reasons.

8 Number one: The record reflects that the State
9 was only using the prior convictions to establish the
10 prior conviction element;

11 No. 2: The State's offer to stipulate provided
12 the State with alternative, relevant, and admissible
13 evidence of the prior conviction element;

14 Number 3: There was a formal agreement that the
15 State satisfy the conviction element;

16 Number four: It addressed no detail in the
17 definition of the prior conviction element that would not
18 be covered by the stipulation;

19 Number five: It supported evidentiary value at
20 least equivalent to what the State's own evidence can
21 carry;

22 Number 6: The admission of unrelated crimes was
23 not close enough in time to be relevant to the matter in
24 issue, which was the 2010 alleged burglary;

25 Number 7: Evidence of any prior crimes was not

1 necessary to complete the story on trial, nor was it
2 needed to avoid a conceptual or chronological void in the
3 story of the alleged 2010 burglary;

4 And, lastly, number nine: It was not
5 necessary to explain the circumstances of the alleged
6 burglary in January 2010.

7 So with the above facts in mind, had counsel
8 offered -- had counsel requested the State to advance a
9 reason why they was refusing to stipulate other than to
10 show propensity to commit the crime charged, they would
11 not have been able to do so.

12 Q. Mr. Aiken, you heard and are aware of the other
13 issues we raised. Do you have anything else?

14 A. Yes. I would like to keep this because this was
15 two parts. This was necessary in this particular case
16 for counsel to advance a reason -- for counsel to request
17 the State to advance a reason why they was refusing to
18 stipulate. The reason that the State had introduced
19 testimony in my prior convictions became clear during the
20 State's closing argument.

21 During the closing arguments, the State used my
22 unrelated prior crimes to show propensity, explicitly
23 stating, is Mr. Aiken an individual with at least two
24 prior convictions for burglary? Yes. Checking all the
25 boxes, the only just and fair result is guilty. That's

1 trial transcript 249, lines 17 through 20.

2 Also, counsel failed to object, and I was
3 prejudice by this error, because the inference that the
4 State explicitly grew for the jury during this closing
5 argument asked the jury to decide my fate, based on the
6 inference that because I had committed at least two prior
7 burglaries demonstrated my guilt.

8 Q. Okay. Mr. Aiken, anything regarding the other --

9 A. Yes. And from what I'm understanding -- I don't
10 want to be rushed, but I want to get this out.

11 Q. Yes, sir.

12 A. And there is one other thing I want to mention.
13 Moreover, while a jury was deliberating, they requested a
14 charge on the burglary statute at 1 p.m. The jury was
15 not given additional instructions. The jury reached its
16 verdict of guilty at 2:35 p.m.

17 And I would like -- and what I am attempting to
18 direct the Court's attention to is in consideration of
19 how prejudicial the introduction of my prior convictions
20 were, how they was used by the State at trial and the
21 indications from both the record and verdict, the jury
22 likely received and considered the impermissible
23 evidence, and it cannot be said for certain that the
24 evidence of my prior unrelated crimes for burglary did
25 not contribute to the jury's verdict.

1 And when the State cannot explain how a prior
2 conviction relates to the question of intent without
3 resorting to a propensity inference, it would be unfair
4 to expect the jury to do so. And, lastly, and because
5 South Carolina don't hold this view, we can only look for
6 guiding light in the other circuits, and the majority of
7 judicial thought hold this opinion, that -- and including
8 United States Supreme Court case, at least one, states
9 that you cannot show a defendant's bad acts, his prior
10 crimes, to show that he is probable of guilt by
11 propensity.

12 I mean, it's forbidden to do that, and that's what
13 I would like to get out on that issue.

14 Q. Thank you.

15 THE COURT: Tell you what. Let's take a ret
16 room break right now.

17 (Recess taken.)

18 MR. BAMBERG: I would just like to take this
19 time to move all the exhibits that have been marked into
20 evidence.

21 THE COURT: Okay.

22 (Applicant's Exhibit Nos. 1-7 were admitted
23 into evidence.)

24 THE WITNESS: I belive you had asked if there
25 was anything else pertaining to some of the other issues,

1 like the bifurcation for one.

2 BY MR. BAMBERG:

3 Q. Yes, sir.

4 A. In this case where counsel requested to stipulate,
5 prior to requesting to stipulate, I think -- or counsel
6 should have requested the bifurcation, and prior to the
7 opening statements, counsel should have specifically
8 requested that the trial Court advised the jury that this
9 would be a first degree burglary trial, which would be
10 bifurcated into two parts.

11 The jury could have been advised that a separate
12 proceeding could take place in order to determine the
13 degree of burglary, if and only if, the defendant was
14 convicted of burglary. Trial Court could have also went
15 on to specifically advise the jury that the purpose of my
16 telling you this is to emphasize that you're only to
17 determine the innocence or the guilt of the defendant
18 based upon the evidence that would be introduced at the
19 trial, or in the trial of this case.

20 So with that in mind, here, the most the jury
21 needed to know was that a person is guilty of burglary if
22 they first enter a dwelling without consent and with
23 intent to commit a crime. As stated above already, it
24 doesn't take away from the story of the crime on trial.
25 However, the testimony and evidence in this case suggests

1 that I was only doing a good deed of returning the shoe
2 and checking to make sure that no one was injured or in
3 need of help and that there was no proof that I had taken
4 his wallet, so I was not charged with and under the rare
5 and unique circumstances in this particular case trial
6 counsel's failure to request a bifurcated proceeding was
7 deficient and I was prejudiced by this deficiency because
8 allowing a jury to hear direct in court testimony
9 concerning my prior, unrelated crimes for burglary during
10 the guilt phase of the trial would only mislead the jury
11 to believe that it was permitted to consider the
12 unrelated prior crimes at the guilt phase of the trial.

13 This phase of a trial is solely limited to the
14 determination of guilt or innocence, based on the
15 evidence, not the unrelated prior convictions and trial
16 counsel's failure to request a bifurcation failed to
17 properly limit the State's use of my prior convictions.

18 And again, Your Honor, I was informed by counsel
19 about being lengthy and how it may not fare in -- you
20 know, in my behalf here, but, however, the failure to
21 advance a reason, the offer to stipulate and the
22 bifurcation, the decision I propose is consistent with a
23 large body of judicial thought, and this is just not
24 something that I'm coming up along with, and the majority
25 of the states have adopted procedures --

1 MS. WILSON: Objection, Your Honor.

2 Mr. Aiken is arguing the law, and that is Mr. Bamberg's
3 role here, so the State would object to his testimony
4 about case law.

5 THE WITNESS: Your Honor from --

6 THE COURT: I'm not really sure what you're
7 saying at this point.

8 THE WITNESS: Okay.

9 THE COURT: Okay?

10 THE WITNESS: And I say this, and I'll bring
11 this to a close, and I didn't mean to be lengthy.

12 Again, the introduction of my priors were
13 very, very prejudicial. That's what I'm saying in a
14 nutshell. Given a fact that I had a defense, a lawful
15 explanation consistent with innocence for entering the
16 residence, and the fact that the officer testified that
17 there was no evidence of guilt, no overwhelming evidence
18 of guilt, then under these rare and unique set of
19 circumstances in this case, my priors should not have
20 been admitted into -- to the jury.

21 My priors should not have been admitted to
22 the jury because they was only directed towards
23 establishing propensity caused, the same two prior
24 convictions that they were entering into evidence was the
25 same two priors that I was stipulating to and saying that

1 I have. However, in closing this issue and just moving
2 along from this issue is that I needed to get this on the
3 record, and I understand South Carolina's laws on this
4 position.

5 My only thing is as the criminal defendant in
6 this case, my concern lies in the prejudice that resulted
7 from that, and, again, the majority of states have
8 adopted procedures which mitigate the inherent prejudice
9 that a defendant suffers when his priors are introduced
10 and so in a single state trial, the offer to stipulate is
11 granted in the other circuits by reasonable juries to
12 mitigate the potential prejudice, and United States
13 versus O'Keefe says since there is no mechanical
14 solution, then some kind of alternative should be
15 advanced, and so by counsel not requesting a bifurcation
16 then, even though she offered to stipulate, I mean,
17 something has to be done.

18 You can't say for sure that the jury did not
19 consider my prior burglaries when they were deliberating,
20 if you review the transcript, and that's just my only
21 thing. I have an eighth grade education. I'm not versed
22 in law. I'm just trying to help myself, and I ask you to
23 not hold that against me for being lengthy and not
24 sounding redundant. I beg you, please don't hold that
25 against me.

1 THE COURT: I don't think I have done
2 anything that would indicate I have. Only thing I did
3 was take a bathroom break.

4 THE WITNESS: And lastly on that, the
5 decision I would propose would require South Carolina to
6 make a relatively minor adjustment in their criminal
7 procedure to void the manifest unfairness and prejudice
8 which have already been eliminated in the majority of
9 states, at least 35 other states, and this was back since
10 1967, and I'm relying on O'Keefe versus United States.
11 The cite is 117 South Carolina -- I'm sorry, excuse me,
12 Supreme Court 644 1997.

13 For the other jurisdictions that allow
14 bifurcation or stipulations to mitigate the potential
15 prejudice is mentioned in the footnotes in Spencer versus
16 Texas and that's 87 Supreme Court 648. And, lastly, how
17 South Carolina conduct a bifurcated trial, the State
18 versus Moore, 593 S.C. 2d 608, and I also have two United
19 States Supreme Court -- two United States Court of
20 Appeals from the Seventh Circuit, United States versus
21 Miller, and it's opinion number 11-1038, and the cite is
22 763 F.3d 618 212, and United States versus Simpson,
23 opinion number 05-2993.

24 Q. Okay. Thank you, Mr. Aiken, for explaining your
25 position on that. Anything else regarding the other

1 issues that weren't presented, specifically comments
2 during closing arguments?

3 A. During closing arguments by my attorney?

4 Q. Ms. Mullaney's closing arguments, yes, sir.

5 A. Yes, sir. The closing arguments that she used at
6 trial, I never told Ms. Mullaney that was the reason why
7 I had entered the residence. And that prejudiced me
8 because it showed me in a real bad light because -- and
9 it goes back to her failure to investigate because -- and
10 please bear with me for a minute.

11 Q. I asked you, had she investigated she would have
12 been able to offer other evidence of your intent, aside
13 from saying that you entered --

14 A. Right, right, yes, yes. And as I said, I didn't
15 inform her -- I didn't tell her that that was my reason,
16 you know, for entering. Also, Mr. Morrison's written
17 statement does not suggest or does not state I would
18 appeal. And it's only a year later at trial for the
19 first time that Morrison said I threw a pill bottle at
20 him; however, counsel in light of that, she elicited
21 testimony from him that I picked up -- that Morrison
22 picked up the pill bottle and put it back on the dresser
23 before the officers had taken pictures.

24 Q. Okay. And that goes to your issue No. 2 regarding
25 Ms. Mullaney's failure to properly cross-examine

1 Mr. Morrison?

2 A. Right, right.

3 Q. Okay. Anything else, Mr. Aiken?

4 A. As far as my appellate situation, the issue with
5 time was that when I went to trial -- and first of all,
6 it might be on page five in the trial transcript, I'm not
7 sure, but when we entered, I noticed my witnesses weren't
8 called, and so I attempted to address the Court, the
9 trial Court, and inform the Court that my witnesses were
10 not called and he told me could I only address him
11 through counsel, and counsel just disregarded it and
12 proceeded to trial, and -- and she didn't call any of my
13 witnesses; however, the neighbor whose house that
14 Mr. Goodwin called 'cause the front door was open, March
15 2011, a little a month over past the trial, when my trial
16 was over, when I first made my initial call to
17 Mr. Stevens or Breens, the appellate attorney, that
18 particular witness had moved already.

19 And I was concerned with witnesses moving,
20 witnesses dying, and I expressed that to Mr. Breens
21 because the State case hinged on if I be convicted or not
22 based on intent and everything centered around whether or
23 not I had intent when I entered. And so I was overly
24 concerned with that, and as you know yourself, I didn't
25 know if you have the documentation with you today, that

1 my other witness has passed since then, and so I was
2 concerned with the fact that I have these two priors that
3 the jury is going to be told about and that my attorney
4 needs to present my defense, and she didn't present the
5 defense, so now I need my witnesses in court. I mean, I
6 don't know what to do. And I expressed that to
7 Mr. Breens. That was my concern.

8 Q. Okay.

9 A. And so under that state of mind and being pressed
10 with that situation, I mean, what is it that I do?

11 Q. Okay. Mr. Aiken, if you would just answer any
12 questions that opposing counsel may have.

13 MS. WILSON: Very briefly, Your Honor.

14 CROSS-EXAMINATION

15 BY MS. WILSON:

16 Q. How are you doing this afternoon, Mr. Aiken?

17 A. Fine. How about yourself?

18 Q. Great. Thank you.

19 A. Okay.

20 Q. You recall meeting with Ms. Mary Beth Mullaney
21 several times before you went to trial, correct?

22 A. I met with her occasionally while in the jail and
23 because the living units is the way it is, so most of my
24 visits with Ms. Mullaney was her coming in the unit and
25 seeing other inmates, and I had a chance to speak with

1 her briefly, and she did not have my file with her many
2 times that I talked with her so there was nothing she
3 could really --

4 Q. Let me rephrase my question as a yes or no
5 question. Did you meet with Ms. Mullaney several times
6 prior to trial? Yes or no.

7 A. I just answered that question. The times I met
8 with Ms. Mullaney, most of which she did not have my file
9 with her.

10 Q. But you met with her.

11 A. She --

12 Q. Yes or no, you met with her.

13 A. She did not have my file with her.

14 Q. Whether or not she had the file with her, you met
15 with her?

16 A. No. She didn't come to see me on many occasions.
17 Many occasions it's an open living unit. She comes into
18 the unit, you may see -- and the public defenders, the
19 people from the public defender's office, and you speak
20 with them and you speak with them momentarily but they
21 actually see somebody else.

22 Q. Okay. Thank you. Do you recall reviewing
23 discovery with Ms. Mullaney, your discovery package, the
24 evidence the State had against you? Did you review that?

25 A. No, I didn't, and the trial transcript -- in the

1 trial transcript, at the end, right before the sentencing
2 phase, I proffered that on the record and I explained to
3 the Court that is why I asked to address the Court
4 because there were things in my discovery that I had
5 concern with that I had not had the opportunity to
6 discuss with Ms. Mullaney.

7 Q. Okay. So you knew there were things in your
8 discovery, that's correct, so you did review it in some
9 way with her, but you just didn't have the opportunity to
10 discuss it with her?

11 A. No. I did not have the opportunity to review it
12 with her.

13 Q. Okay. Thank you. We have here and your attorney
14 presented an affidavit you signed and you signed an
15 affidavit withdrawing your appeal; is that correct? Yes
16 or no.

17 A. I withdrew that statement. I withdrew my direct
18 appeal. It wasn't knowingly. It wasn't done
19 intelligently. It states that, however, I did not know
20 the magnitude of it. I did not know that all my PCR -- I
21 mean, I didn't know all issues couldn't be raised at PCR.
22 I mean, I didn't know that.

23 Q. But you signed the affidavit? That's a yes or no
24 question again.

25 A. I signed --

1 Q. Yes. Thank you. That's all the questions I have
2 for you. Okay. You can finish. Go ahead with --

3 A. I signed that affidavit because I could not tell
4 whether or not I was going to lose any more witnesses
5 than I had lost. I had gotten at the Department of
6 Corrections in March. A month and a half later, and one
7 of my witnesses had already moved.

8 MS. WILSON: Thank you, Mr. Aiken. I don't
9 have any more questions.

10 MR. BAMBERG: None from me, Your Honor.

11 THE COURT: You can step down.

12 Do you have any other witnesses?

13 MR. BAMBERG: No, Your Honor.

14 THE COURT: Does the State have any?

15 MS. WILSON: Nothing from the State, Your
16 Honor.

17 THE COURT: All right. I want to read
18 through the trial transcript before I make a decision.
19 I'll give y'all three weeks to come up with proposed
20 orders, or submit proposed orders while I'm looking at
21 the transcript, so three weeks today, send me a proposed
22 order. All right?

23 MR. BAMBERG: Thank you, Your Honor.

24 THE COURT: That will serve as your closing
25 argument. Okay. Thank you.

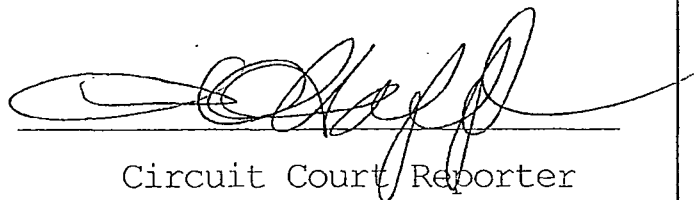
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(Whereupon, the proceedings were concluded.)

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 5th of December 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 22, 2013



Circuit Court Reporter

NINTH CIRCUIT PUBLIC DEFENDER
BERKELEY & CHARLESTON COUNTY
O T WALLACE COUNTY OFFICE BUILDING
101 MEETING STREET, 5th FLOOR
CHARLESTON, SC 29401-2214
(843) 958-1850

July 19, 2010
VIA HAND DELIVERY

 FILE COPY

James Ivan Aiken
Inmate #: 2032
Charleston County Detention

RE: State of South Carolina v. James Ivan Aiken

Dear Mr. Aiken:

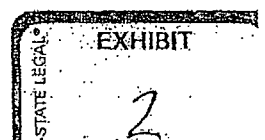
Enclosed is a copy of the Preliminary Hearing Transcript. Please review the materials and I will be in to visit you as soon as possible. Please keep this information confidential and do not share with anyone

Sincerely,

MaryBeth Mullaney

MaryBeth Mullaney
Assistant Public Defender

Enclosure as stated



PRELIMINARY HEARING
DATE: February 23, 2010
DEFENDANT: James Ivan Aiken
CHARGES: Burglary 1st

MAGISTRATE: JUDGE GOSNELL
SOLICITOR: LARRY TODD
DEFENSE: MARY BETH MULLANEY
OFFICER: LARRY AUGUSTA DAUREN, CITY OF CHARLESTON
POLICE

MAGISTRATE: We are in the Preliminary Hearing for the county of Charleston. Today is the 23rd day of February 2010. This is the case of state verses James Ivan Aiken. Mr Aiken has been charged with Burglary in the 1st degree. Representing the Defendant today is Ms. Mary Beth Mullaney. Representing the state today is Assistant Solicitor Larry Todd. Will the Officer please state his name and agency for the record.

OFFICER: Larry Augusta Dauren, Jr., Charleston Police Department.

MAGISTRATE: And. Do you swear to tell the truth, the whole truth, and nothing but the truth?

OFFICER: I do.

MAGISTRATE: State your case to the court.

OFFICER: On January 16th, at approximately 8:07 in the morning, ah I responded to in reference to a Burglary in progress. The victim sitting before you, Mr. Morrison informed me that approximately 8:00, while he was asleep in his room which is on the 2nd floor of the above of the mentioned residence. He hears rustling through his dresser drawer which is, which was situated next to his bed. Mr. Morrison advised that he heard something like someone opening and throwing a pill bottle. Then

woke up and observed the defendant, Mr. Aiken standing in his room. Mr. Morrison informed that he began to try and grab the defendant, the defendant turned and started running towards the entrance of the residence. Remember for the record, the room is actually situated on the second floor. So the defendant ran down the stairs out through the front door. Mr. Morrison actually pursued the defendant on foot. Meanwhile, he picked up his cell phone and notified Charleston Police Department. The defendant ran west on

and then north on Elizabeth Street and then west on Chapel Street where Mr. Morrison was able to kind of corner the defendant in the rear parking lot of 360 Meeting Street which is the Charleston Museum. It was at that time that I observed Mr. Morrison on the phone with me, excuse me, with dispatch, and dispatch was relaying the information to me and I saw Mr. Aiken with a plastic bag in his hand. Mr. Morrison was pointing at him saying this is the guy. Got out of my vehicle and ordered Mr. Aiken to the ground. Mr. Aiken then told me that he was just walking by and noticed a leopard print female shoe lying on the ground outside the residence. Just for the record of the court, he was not in custody nor was he merandized at this time. He was just talking. Mr. Aiken advised that he picked up the shoe and walked inside the residence in order to return the shoe to the probable, to the guy he thought owned the shoe. The doors of the residence was not locked at the time, but he did enter and went upstairs and that he said that the reason that he went inside was because he wanted to return the shoe. I arrested the defender, excuse me, the defendant for burglary the 2nd degree. However, base on his record, which is a burglary 1st degree conviction on the 17th of July of the year 2003 as well as a burglary in the 2nd degree conviction on the 14th of September of 2006. I escalated the charge to burglary in the 1st degree based off of his criminal history.

MAGISTRATE: Mr Todd

SOLICITOR: Just a couple questions, Your Honor. The burglary was of a place where someone lived?

OFFICER: Yes.

SOLICITOR: And, ah, was crime scene called?

OFFICER: Yes. No, I'm sorry. Crime scene was not called. I photographed the residence and submitted those photographs into evidence. Investor Dacrogen (?) with our department. Submitted the pill bottle that we found on scene into evidence and I also photographed the leopard print shoe which I found inside the victim's room, Mr. Morrison's room.

SOLICITOR: So was there a total of one shoe or two shoes?

OFFICER: There was only one shoe. One shoe was found outside on the front part of Mr. Morrison's residence. Mr. Aiken stated that he picked up that shoe and entered the house because he wanted to give that one shoe back to Mr. Morrison or who he thought was the owner of the shoe.

SOLICITOR: And that shoe was in fact the one that was left inside?

OFFICER: Yes.

SOLICITOR: Okay. What was in the plastic bag that the defendant was running with?

OFFICER: As... the best of my knowledge, it was the person's personal belongings. Um, Mr. Morrison said that he could not find his wallet. To this day, he still can't find his wallet. He said that it was sitting on top of the same dresser of which he observed Mr. Aiken going through, but I did not charge him with that based on the fact that I

could not tell if he missed placed the wallet or it was never in his pers...it was not in that plastic bag. So I don't know what happened to the wallet.

SOLICITOR: Ah, Does the victim report that he ever lost sight of the defendant?

OFFICER: Never told me he lost sight of him. Walked, ran downstairs, chased him on foot.

SOLICITOR: Thank you, Your Honor. That's it.

MAGISTRATE: Ms. Mullaney.

DEFENSE: Ah, yes sir. Officer, if I could just ask you some questions about the plastic bag.

OFFICER: Okay.

DEFENSE: So this is the plastic bag that Mr. Aiken was holding? Is that correct?

OFFICER: Yes.

DEFENSE: And what was in the plastic bag?

OFFICER: Clothes and miscellaneous items. He said that the clothes belong to him. But there is nothing in there that I could really... I mean it was just all clothes for the most part. I think a pair of shoes was in there.

DEFENSE: And when you say plastic, what kind of bag was it? Did it have a store name on it? Or...

OFFICER: No. Just a plain plastic bag to the best of my memory, it was just a plain plastic bag.

DEFENSE: And it had in fact Mr. Aiken's belongings in it?

OFFICER: That's what he said. I submitted that bag into our department as Mr. Aiken's personal belongings for lack of a better explanation as to where the belongings came from

DEFENSE: But they weren't Mr. Morrison's belongings? Correct?

OFFICER: No, not that I know of. No.

DEFENSE: And were they shown to Mr. Morrison to see if that they were....

OFFICER: Yes. Yes

DEFENSE: And he said that they were not his belongings?

OFFICER: Correct.

DEFENSE: So could it be, um...did Mr. Aiken appear be homeless to you?

OFFICER: No. He said actually that he was not homeless. He's from Greenville, but he was down here visiting, ah, his mother-in-law or mother, or one of the other. I can't remember exactly. And he actually had a place to stay.

DEFENSE: Okay. Um...and you vouchered that that the bag and those belongings?

OFFICER: Yes

DEFENSE: And um, in fact he told you that there was a leopard shoe in the middle of the street?

OFFICER: Not in the middle of the street. Where it was. It was located on Mr. Morrison's front lawn...somewhere on the front lawn. I don't know the exact location, but it was located on the front lawn.

DEFENSE: And in fact you later found out that there was a leopard shoe. Correct?

OFFICER: Yes. Yes

DEFENSE: Um, and where was it that you saw that leopard shoe?

OFFICER: The leopard shoe was inside Mr. Morrison's bedroom.

DEFENSE: And was anything taken from Mr. Morrison's apartment?

OFFICER: Unable to be proven. Based off of what I saw, nothing in Mr. Aiken's possession belonged to Mr. Morrison.

DEFENSE: Okay. And I believe the Solicitor asked you that, ah, that Mr. Morrison never lost sight of Mr. Aiken?

OFFICER: Correct.

DEFENSE: So did he see Mr. Aiken discard anything?

OFFICER: Didn't see him throw anything. He retraced the steps of the path that they traveled and he couldn't find anything. He was looking for his wallet, but he couldn't find anything.

DEFENSE: And this was Mr. Morrison that retraced the steps? Correct?

OFFICER: Correct.

DEFENSE: Did the police department also assist in this?

OFFICER: Yes. But we didn't do it with him. We did it afterwards.

DEFENSE: Okay. So, Mr. Morrison and the police department. How many officers retraced these?

OFFICER: My self and Officer Brown.

DEFENSE: And nothing was recovered?

OFFICER: Correct.

DEFENSE: Now, Mr. Morrison mentioned that he was asleep in the bed when he heard, I believe you said, what appeared to be a pill bottle open?

OFFICER: Correct.

DEFENSE: Now, was this Mr. Morrison's pill bottle? Or Mr. Aiken's pill bottle?

OFFICER: Yes. Mr. Morrison's pill bottle. The pill bottle, just to explain to elaborate a little bit more, the pill bottle was actually sitting on the dresser next to his bed, and it's a prescription pill bottle that belong to Mr. Morrison.

DEFENSE: And were any pills missing, that we know of from that prescription?

OFFICER: Not that I saw.

DEFENSE: And do you know what that was a prescription for?

OFFICER: No.

DEFENSE: And did you go back and take photographs of that?

OFFICER: Yes.

DEFENSE: And, in fact, was that pill bottle open or closed?

OFFICER: It was -- we photographed it. I can't remember.

DEFENSE: Did Mr. Aiken appear to be mentally ill to you?

OFFICER: No.

DEFENSE: And this was clearly day time?

OFFICER: Yes.

DEFENSE: The door to Mr. Morrison's Apartment was unlocked?

OFFICER: Yes.

DEFENSE: Was it unlocked or was it ajar? Do you know?

OFFICER: It was unlocked. It was closed, but it was unlocked.

DEFENSE: Thank you. No further questions

MAGISTRATE: MR Todd Any follow up?

SOLICITOR: Just one, Your Honor. How far was it from the residence to where you caught up with the defendant?

OFFICER: No more than a quarter mile.

SOLICITOR: About a quarter mile Okay. Thank you, nothing further.

DEFENSE: If I could just...how long was the chase in, in, time wise?

OFFICER: I can't really...from the time that we received the call, the burglary in progress, the time that I made contact with the defendant and Mr. Morrison was less than a minute.

DEFENSE: And again, the shoe was. in his. okay in his bedroom, I'm sorry.
Thank you Officer.

MAGISTRATE: Any motions?

DEFENSE: Yes, Your Honor. I would ask that the Burglary be dismissed. I think that an element of Burglary is that you have to enter with intent to commit a crime there in. It doesn't appear that State has made their burden that he entered with any attempt to commit a crime.

MAGISTRATE: Thank you ma'am. Mr. Todd?

SOLICITOR: We oppose Your Honor. We found the defendant going through the property of the victim, and the victim is still missing a wallet.

MAGISTRATE: Thank you. Anything else Ms. [Mullaney]?

DEFENSE: No, Sir.

MAGISTRATE: Thank you. Your motion is denied. The state has established probable cause in the Burglary 1st charge. Thank you.

PRELIMINARY HEARING ENDS.

TRANSCRIBED BY LATOSHA JENKINS 7/14/10

9

PROPERTY

INCIDENT/INVESTIGATION REPORT

Narr. (cont.) OCA: 10-00904

Charleston Police Department

Page 3

photographs into evidence and Inv. Daquigan submitted the pill bottle into evidence. The offender was transported to Charleston County Detention Center via CPD Transport Officer Gibbs and lodged accordingly. The victim was issued his copy of the victim sheet and victim statement and was advised of the offender's bond hearing. All parties were advised and issued case # 10-00904.

1/14
JV

Charlotte

Cora

573-7311

#38 waist

11 shoe

shirt x large

Aiken

clothes

Story about neighbor
cards -

Race / Ashley

week

before at

my mother's
house

2/22

mother
wva Aiken
573-7311

44

married
engaged

I was walking
downst going to
Harris Teeter
a woman shoot in
sidewalk on
Charlotte street door was
open

I picked up shoe
knocked on door to
tell owner that
door was open and
shoe was in st

2 children

17, 18

born SC CHS

GED

J Jay HS

door to door sales

own line of greeting
cards

I am on
medication

2008 finished 10yr
sentenced from 2003

got arrested
down the st
and around
the corner

Martha Dicus
was my atty

he grabbed my
bag
he followed me
out house

87 ro

91 sho

93 pet

96 sho

97 pet

97 Burg 2nd mon

2001 Burg 2nd mon

2003 10yrs

User: GREENAR

CHARLESTON POLICE DEPARTMENT

10/10/12 13:52:16

Event Report

Event ID: 2010-006674

Call Ref #: 711

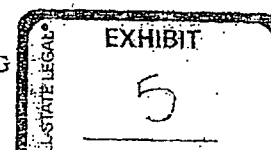
Date/Time Received: 01/09/10 09:43:54

Rpt #:	Call Source: PHONE	Prime 121D Unit: DUBY, TANYA M	Services Involved LAW			
Location: 2	(S)GADSDEN GREEN (N)CHAR					
X-ST: ASHLEY AVE	Jur: CAD	Service: LAW	Agency: CPD			
MARANDA HOLMES ST	St/Beat: 126	District: T1	RA:			
Business:	Phone: () -	GP: L126				
Nature: UNSECURED BUILDING	Alarm Lvl: 1	Priority: 2	Medical Priority:			
Reclassified Nature:						
Caller: GOODWIN, LEON	Alarm:					
Addr:	Phone:	Alarm Type:				
Vehicle #:	St:	Report Only: No	Race:	Sex:	Age:	
Call Taker: PORTERO	Console: C1					
Geo-Verified Addr.: Yes	Nature Summary Code:	Disposition: SEC	Close Comments:			
Notes: wind blew the door open. Resident states that everything is OK. [01/09/10 09:53:02 Unit:128D] COMPL ADVS A COUPLE STAYS IN THE HOUSE COMPL WOULD LIKE TO BE ADVS BY 85 [01/09/10 09:45:37 PORTERO] COMPL ADVS HIS NEIGHBORS RESD DOOR IS WIDE OPEN AND WHEN HE YELLED IN NO ONE ANSWERED COMPL NEEDS A OFFICER TO CHK IT OUT [01/09/10 09:45:19 PORTERO]						

Call Received:	01/09/10 09:43:54	Time From Call Received	
Call Routed:	01/09/10 09:45:19	000:01:25	Unit Reaction: 000:01:33 (1st Dispatch to 1st Arrive)
Call Take Finished:	01/09/10 09:45:19	000:01:25	En-Route: : : (1st Dispatch to 1st En-Route)
1st Dispatch:	01/09/10 09:48:10	000:04:16 (Time Held)	On-Scene: 000:04:03 (1st Arrive to Last Clear)
1st En-Route:	01/09/10 09:48:10	000:04:16	
1st Arrive:	01/09/10 09:49:43	000:05:49 (Reaction Time)	
Last Clear:	01/09/10 09:53:46	000:09:52	

Unit	Empl ID	Type	Description	Time Stamp	Radio Log Comments	Close Code	User
121D	1540	D	Dispatched	01/09/10 09:48:10	Stat/Beat: 121		MCDANI
121D	1540	E	En-Route	01/09/10 09:48:10	Stat/Beat: 121		MCDANI
128D	1074	D	Dispatched	01/09/10 09:48:10	Stat/Beat: 121		MCDANI
128D	1074	E	En-Route	01/09/10 09:48:10	Stat/Beat: 121		MCDANI
128D	1074	A	Arrived	01/09/10 09:49:43			Unit:128D
121D	1540	A	Arrived	01/09/10 09:53:09			Unit:121D
128D	1074	C	Cleared	01/09/10 09:53:13		ASST	Unit:128D
121D	1540	C	Cleared	01/09/10 09:53:46		SEC	Unit:121D

Unit	Empl ID	Type	Description	Time Stamp	Event Log Comments	Close Code	User
		TR	Time Received	01/09/10 09:43:54	By: PHONE		PORTER
		ENT	Entered Street	01/09/10 09:43:58			PORTER
		ENT	Entered Nature	01/09/10 09:44:03	UNSECURED BUILDING		PORTER



Event ID: 2010-006674 Call Ref #: 711 UNSECURED BUILDING at

Unit	Empl ID	Type	Description	Time Stamp	Event Log	Close Code	User
					Comments		
		ENT	Entered CallerNm	01/09/10 09:44:11	GOODWIN,LEON		PORTER
		ENT	Entered CallerPh	01/09/10 09:44:18			PORTER
		CHG	Changed CallerAddr	01/09/10 09:44:27	-->		PORTER
		ENT	Entered Remarks	01/09/10 09:45:19			PORTER
		FIN	Finished Call Taking	01/09/10 09:45:19			PORTER
		ARM	Added Remarks	01/09/10 09:45:37			PORTER
		REC	Unit Recommendation	01/09/10 09:47:07	Plan: LNOR Lvl:1 Recmd:126D,121D		MCDANI
		REC	Unit Recommendation	01/09/10 09:47:28	Plan: LNOR Lvl:1 Recmd:126D,121D		MCDANI
		ARM	Added Remarks	01/09/10 09:53:02			Unit:128D

Exhibit 6

*City of Charleston*

JOSEPH P. RILEY, Jr.

Mayor

South Carolina

GREGORY MULLEN

Chief of Police

POLICE DEPARTMENT

March 15, 2010

Marybeth Mullaney
101 Meeting Street
Charleston, SC 29401

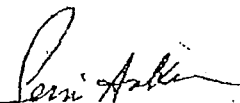
Re: FOIA Request for case number 1000904 / James Aiken / Tracking # 900

After reviewing your request for information pertaining to the above captioned, I am submitting to you copies of the following documents:

1. Incident Report
2. 911 Dispatch Tape
3. CAD Log Report

If I can be of any further assistance to you please contact me at (843) 720-3780.

Sincerely,

PP 
Sgt Fritts
Administrative Support



180 LOCKWOOD BLVD, CHARLESTON, SOUTH CAROLINA 29403, 843-577-7434
AN EQUAL OPPORTUNITY EMPLOYER
Please Complete & Return this Copy with remittance to Sgt Fritts in ID Unit.

ARREST REPORT

A G E N C Y	Agency Name Charleston Police Department		ORI SC0100100		Date/Time Arrested 01/16/2010 08:25 Sat		Case # See Charges	
	Total		Arrest Type CHAR		Arrest Number 8757			
A R R E S T E E	Name (Last First Middle) AIKEN, JAMES I		DOB 44	Sex B	Race M	Place of Birth Charleston		Country US
	Current Address GREENVILLE, SC		Phone		Occupation Unemployed		Real Estate Status S	
	Employer's Name		Address		Phone			
	Also Known As (Last First Middle)		Age 5'10	Wgt 176	Hair Black	Eyes Brown	Skin Tone Dark	
A R R E S T	Social Security #		Mugshot Date 007612015-SC		Mugshot Type			
	Nearest Relative Name		Address		Phone			
	If Armed: Type of Weapon UNARMED		Type of Arrest ON-VIEW ARREST		Place of Arrest 360 MEETING ST, CHARLESTON			
	Charge #1 Burglary 1st Degree	Case # 1000904	Type Fel	Counts 1	ICR Code 220	Warrant/Summons # K609743	State # 16-11-311	Warr Date 01/16/2010
I N F O	Charge #2	Type	Counts	ICR Code	Warrant/Summons #	State #	Warr Date	
	Charge #3	Type	Counts	ICR Code	Warrant/Summons #	State #	Warr Date	
	VIN	Make	Model	SSN				
	Color	Plate #/State/Plate Year	VIN					
C O N D	Date/Time Confined 01/16/2010 09:00:00		Place Confined CCDC		Detaining Agency BOND COURT CHARLESTON CO			
	Type Bond		Bond Amount		Total Due		Court Of General Sessions	
	Arresting Officer Name/ID # Bureau DUREN, L. A. PATLTM1P OPS		Released By (Name/Department/ID #)		Date/Time Released			
	Arresting Officer Name/ID # Bureau BROWN, Y. D. PATLTM1P OPS							
D R U G S	Status Codes: 1 = None 2 = Burned 3 = Counterfeit / Forged 4 = Damaged 5 = Recovered 6 = Seized 7 = Stolen 8 = Unknown/Lost							
	Code	Status	Quantity	Type Measure	Suspected Type		Up to 2 types of activity for each	
O T H E R	Name		Address		Phone			
	Name		Address		Phone			
N A R R A T I V E	Arresting Officers: L. Duren Rpt# 1728 Y. Brown Rpt# 1191 GS COURT PENDING							
	Arresting Officer Signature/ID # Bureau DUREN, L. A. PATLTM1P OPS							
S T A T U S	Case Status		Arrestee Signature					

L_11111

Printed By: AIKEN, MUGPC1

INCIDENT DATA		INCIDENT/INVESTIGATION REPORT				Case# 10-00904	
		Agency Name Charleston Police Department		ORI SC0100100		Date / Time Reported 01/16/2010 08:07 Sat	
Location of Incident Charleston SC 29403-		Premise Type Residence/home		Zone/Tract 122		Last Known Secure 01/16/2010 08:00 Sat	
At Found 01/16/2010 08:07 Sat							
#1	Crime Incident Burglary / Breaking & Entering 220	(Corn)	Weapon / Tools		Activity N		
			Entry	Exit	Security		
#2	Crime Incident	()	Weapon / Tools		Activity		
			Entry	Exit	Security		
#3	Crime Incident	()	Weapon / Tools		Activity		
			Entry	Exit	Security		
MO							
VICTIM	# of Victims 1		Type: INDIVIDUAL/ NOT LAW		Injury:		
	Victim/Business Name (Last, First, Middle) MORRISON, MICHAEL CARVER		Victim of Crime # 1	DOR Age 41	Race W	Sex M	Relationship To Offender IRU
	Home Address Charleston, SC 29403-		Home Phone				
	Employer Name/Address		Business Phone		Mobile Phone		
	VYR	Make	Model	Style	Color	Lic/Lis	VIN
OTHERS	CODES: V- Victim (Denote V2, V3) O = Owner (if other than victim) R = Reporting Person (if other than victim)						
	Type: INDIVIDUAL/ NOT LAW ENFORCEMENT		Injury:				
	Code CO	Name (Last, First, Middle) MORRISON, MICHAEL CARVER	Victim of Crime #	DOB Age 41	Race W	Sex M	Relationship To Offender IRU
	Home Address 1 Charleston, SC 29403		Home Phone				
	Employer Name/Address		Business Phone		Mobile Phone		
INVOLVED	Type:		Injury:				
	Code	Name (Last, First, Middle)	Victim of Crime #	DOB Age	Race	Sex	Relationship To Offender
	Home Address		Home Phone				
	Employer Name/Address		Business Phone		Mobile Phone		
	1 = None 2 = Burned 3 = Counterfeit / Forged 4 = Damaged / Vandalized 5 = Recovered 6 = Seized 7 = Stolen 8 = Unknown (*OJ* = Recovered for Other Jurisdiction)						
PROPERTY	VI #	Code	Status From To	Value	OJ	QTY	Property Description
	77	EVID		\$0.00		6	PHOTOGRAPHS
Officer ID# DUREN, L. A. (PATL, TMIP) (1728)							
Invest ID# STANLEY, M. J. (CENT, BURG) (1332)				Supervisor SMITH, M. E. (PATL, TMIP) (1102)			
Status	Complainant Signature		Case Status Pending Active		Case Disposition:		Page 1

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Charleston Police Department

Case# 10-00904

Status Codes: 1 = None 2 = Burned 3 = Counterfeit / Forged 4 = Damaged 5 = Recovered 6 = Seized 7 = Stolen 8 = Unknown

[illegible]

Assisting Officers

SMITH, M.E. (1102), DUBY, T.M. (1540), BROWN, Y.D. (1191), DAQUIGAN, D.F. (51).

Suspect Hate / Bias Motivated:

INCIDENT/INVESTIGATION REPORT

Narr. (cont.) OCA: 10-00904

Charleston Police Department

Page 3

NARRATIVE

On 01/16/2010 at approximately 0807 hours, R/O responded to the rear parking lot of 360 Meeting St. (The Charleston Museum) in reference to a Burglary in Progress that occurred at . Upon arrival, R/O noticed that the victim (Morrison, Michael W/M DOB 8) had his cell phone in his hand and was still relaying information to CPD Dispatch. At this time, R/O observed the offender (Aiken, James B/M DOB 5) standing in front of the victim holding a plastic bag. R/O gave the offender verbal commands to lie down on the ground with his hands out to the side. The offender complied and R/O detained the offender for investigative purposes and placed him in the rear of CPD Marked Cruiser # 129

The victim informed R/O that at approximately 0800 hours, while the victim was asleep in his room (), he heard someone rustling through his dresser drawer which is situated next to his bed. The victim advised he then heard what sounded like someone opening and then throwing a pill bottle. The victim then woke up and observed the offender standing in his room. The victim informed R/O that he began to try and grab the offender, however, the offender turned and started running towards the entrance of the residence. It should be noted that the victim's room is located on the second floor of the residence. The victim advised R/O that he then gathered his cell phone and chased the victim outside of the residence. Once outside of the residence, the victim notified CPD and continued to pursue the offender who ran West on Charlotte St., then North on Elizabeth St., then West on Chapel St., where the victim was able to corner the offender in the rear parking lot of 360 Meeting St. It should be noted that the victim's roommate (Dunn, Susan W/F DOB) heard the commotion from inside her room. Ms. Dunn's room is located adjacent to the victim's room; however, she stated that she did not come out of her room in time to see the offender inside the residence.

The offender advised R/O that he was walking by [redacted] and noticed a leopard-print female shoe lying on the ground outside of the residence. The offender advised that he picked up the shoe and walked inside of the residence in order to return the shoe to its probable owner. It should be noted that the doors of the residence were not locked. The offender advised that he went upstairs only to attempt to return the shoe to the victim. The victim also stated that he did not take anything from the inside of the residence. It should be noted that the victim denies having any form of relationship with the offender. The victim also denies ever seeing the offender at any other point in time besides the moment in question. R/O then placed the offender under arrest for Burglary in the 2nd Degree. The offender was placed in the rear of R/O Y. Brown's cruiser. R/O transported the victim back to his residence.

Sgt. Smith (Team 1 Supervisor) as well as Capt. Tillman (CDO) responded. Investigator Daquigan responded and spoke with both the victim and the offender. Upon further investigation, it was determined that the victim's wallet (containing \$6 in cash, 2 credit cards, driver's license, and CoFC Faculty ID) was missing from the residence. The victim advised R/O that he last saw the wallet on top of his dresser the night before. Further investigation of the offender's criminal history revealed a conviction for Burglary in the 1st Degree (Conv. date 07/17/2003) as well as Burglary in the 2nd Degree (Conv. date 09/14/2006). R/O then rectified the offender's charge to Burglary in the 1st Degree based off of the two prior Burglary convictions. R/O photographed the residence, the victim's room, the pill bottle that was opened and thrown, and the leopard-print shoe, which was found on the floor in the victim's room. R/O submitted the

INCIDENT/INVESTIGATION REPORT

Narr. (cont.) OCA: 10-00904

Charleston Police Department

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photographs into evidence and Inv Daquigan submitted the pill bottle into evidence. The offender was transported to Charleston County Detention Center via CPD Transport Officer Gibbs and lodged accordingly. The victim was issued his copy of the victim sheet and victim statement and was advised of the offender's bond hearing. All parties were advised and issued case # 10-00904

Incident Report Suspect List

Charleston Police Department

OCA: 10-00904

1		Name (Last, First, Middle)				Also Known As				Home Address			
		Aiken, James I								GREENVILLE, SC 29611			
		Business Address											
		DOB	Age	Race	Sex	Eth	Hgt	Wgt	Hair	Eye	Skin	Driver's License / State	
			44	B	M	N	510	175	BLK	BRO	DBR		
		Scars, Marks, Tattoos or other distinguishing features											
Reported Suspect Detail		Suspect Age		Race	Sex	Eth	Height		Weight		SSN		
Weapon, Type		Feature		Make		Model		Color		Caliber		Dir of Travel	
												Mode of Travel	
Veh Yr/Make/Model		Drs		Style		Color		Lic/St		VIN			
Notes		Physical Char											

Incident Report Related Property List

Charleston Police Department

OCA: 10-00904

1 Property Description PHOTOGRAPHS		Make		Model		Caliber	
Color	Serial No	Value \$0.00		Qty 6.00	Unit	Jurisdiction Locally	
Status Evidence (non	Date 01/16/2010	NIC #	State #		Local #	OAN	
Name (Last, First, Middle) * No name *			DOB		Age	Race	Sex

Notes*Photographs of the victim's room, residence, as well as the pill bottle.*

CASE SUPPLEMENTAL REPORT

Printed: 03/15/2010 15:59

Charleston Police Department

OCA: 1000904

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *PENDING ACTIVE*Case Mng Status: *PENDING ACTIVE*

Occured: 01/16/2010

Offense: *BURGLARY / BREAKING & ENTERING*Investigator: *DAQUIGAN D F (51)*

Date / Time: 01/16/2010 13 16 14, Saturday

Supervisor: *WEISS, J H (864)*

Supervisor Review Date / Time: 01/20/2010 10 44 26, Wednesday

Contact:

Reference: *Supplemental Report*

Incident= Burglary

Complainant= Morrison, Michael

Date and Location= 01/16/10;

Offender= James I Aiken, B/M, 5-10, 175 lbs,
Greenville, SC, 29611

On 01/16/10, R/O spoke to the above complainant in reference to the burglary that had occurred at the incident location. It was learned at this time that he was awakened by the sounds of small items being moved around on his dresser. He then rolled over to see what the sound was and saw a b/m standing in his room. The complainant then got up out of bed and the offender said "I brought you your shoe". I saw him throw a pill bottle towards my dresser. I then told him to get out of the house. We left my room and headed down the stairs. I then returned to my room to get my cell phone to call 911. I followed the suspect to the Charleston Museum on foot where the offender was stopped by the police. Upon returning to my room, I found the pill bottle which was originally was in my dresser drawer.

R/O spoke to the offender after advising him of his rights at which he claimed that he had found a shoe outside of the apartment and he was just returning it to the owner. He claimed that the front door was unlocked. R/O asked the offender if the door was unlocked and if he had called out to anyone before walking up the stairs. He replied "No". The R/O then asked the offender if he was invited into the house at any time and he replied "No". The R/O asked the offender if he had ever been charged with a crime before. The offender said "Yes, burglary". He also stated that he did not take anything from the apartment.

The offender was transported to the Charleston County Jail and charged with burglary in the first degree, because he has more than two prior convictions for burglary.

The complainant's statement and pill bottle were tagged as evidence.

Event Report

Event ID: 2010-012082

Call Ref #: 250

Date/Time Received: 01/16/10 08:07:42

Rpt #: 10-00904	Call Source: PHONE	Prime 121D Unit: DUBY, TANYA M	Services Involved LAW			
Location:		(S)WRAG (N)CHAR				
X-ST: ALEXANDER ST ELIZABETH ST	Jur: CAD	Service: LAW	Agency: CPD			
Business:	Phone: ()	GP: L122	St/Beat: 122	District: I1	RA:	
Nature: BURGLARY IN PROGRESS	Alarm Lvl: 1	Priority: 2	Medical Priority:			
Caller:	Phone:		Alarm:			
Addr:	Phone:		Alarm Type:			
Vehicle #:	St:	Report Only: No	Race:	Sex:	Age:	
Call Taker: PORTERO	Console: C1					
Geo-Verified Addr: Yes	Nature Summary Code:	Disposition: IA	Close Comments:			
Notes: AT CNTY JAIL [01/16/10 10:37:51 MCDANIELD] 125946 [01/16/10 10:37:40 MCDANIELD] 125938 BEG MILES ERT TO CNTY JAIL TO DROP A PRIOSNER TO TRANSPORT THE PARTY HAS CLEARED THE JAIL [01/16/10 10:24:24 MCDANIELD] Transport has 1 [01/16/10 09:26:57 Unit:124D] {124D} REQUESTED A CASE # [01/16/10 08:35:37 HINDERSH] {108} ADV THAT 124D BACK ENROUTE TO THE COMPLT'S LOCATION... [01/16/10 08:19:45 MOTENDA]. THE ML JUSTED THE FENCE [01/16/10 08:10:34 PORTERO] CORRECTION DRK GRY JACKET ML HAVE A BEARD [01/16/10 08:10:27 PORTERO] ON THE CHAPEL ST SIDE OF THE MUSEUM BY A CHAIN FENCE [01/16/10 08:10:09 PORTERO] PTYS ARE BEHIND THE MUSEUM IN THE PLOT [01/16/10 08:09:12 PORTERO] BM WERING BLK PANTS BLK JACKET WITH WHITE SHIRT [01/16/10 08:09:02 PORTERO] THEY ARE ON CHAPEL NEAR MUSEUM [01/16/10 08:08:46 PORTERO] COMPL A ML JUSTED BREAK INTO HIS RESD COMPL IS FOLLOWING THE ML ON FT [01/16/10 08:08:27 PORTERO]						

Times			
Call Received: 01/16/10 08:07:42	Time From Call Received		
Call Routed: 01/16/10 08:08:27	000:00:45	Unit Reaction:	(1st Dispatch to 1st Arrive)
Call Take Finished: 01/16/10 08:08:27	000:00:45	En-Route: 000:00:08	(1st Dispatch to 1st En-Route)
1st Dispatch: 01/16/10 08:10:31	000:02:49 (Time Held)	On-Scene: 002:43:14	(1st Arrive to Last Clear)
1st En-Route: 01/16/10 08:10:39	000:02:57		
1st Arrive: 01/16/10 08:10:31	000:02:49 (Reaction Time)		
Last Clear: 01/16/10 10:53:45	002:46:03		

Event Log

Unit	Empl ID	Type	Description	Time Stamp	Comments	Close Code	User
		TR	Time Received	01/16/10 08:07:42	By: PHONE		PORTER

Event ID: 2010-012082 Call Ref #: 250 BURGLARY IN PROGRESS at

CHARLESTON

Event Log

Close

Unit	Empl ID	Type	Description	Time Stamp	Comments	Code	User
		ENT	Entered Street	01/16/10 08:07:58		T	PORTER
		ENI	Entered Nature	01/16/10 08:07:59	BURGLARY IN PROGRESS		PORTER
		ENT	Entered Remarks	01/16/10 08:08:27			PORTER
		FIN	Finished Call Taking	01/16/10 08:08:27			PORTER
		ARM	Added Remarks	01/16/10 08:08:46			PORTER
		ARM	Added Remarks	01/16/10 08:09:02			PORTER
		ARM	Added Remarks	01/16/10 08:09:12			PORTER
		ARM	Added Remarks	01/16/10 08:10:09			PORTER
		ARM	Added Remarks	01/16/10 08:10:27			PORTER
		ARM	Added Remarks	01/16/10 08:10:34			PORTER
		ENT	Entered CallerPh	01/16/10 08:10:50			PORTER
		ARM	Added Remarks	01/16/10 08:19:45			MOTEND
		RPT	Requested Report#	01/16/10 08:29:36	CPD Report #10-00904		HINDERS
		ARM	Added Remarks	01/16/10 08:35:37			HINDERS
		ARM	Added Remarks	01/16/10 09:26:57			Unit:124D
		ROP	Re-Opened Event	01/16/10 10:22:40	ERROR		MCDANI
		ARM	Added Remarks	01/16/10 10:24:24			MCDANI
		ARM	Added Remarks	01/16/10 10:37:40			MCDANI
		ARM	Added Remarks	01/16/10 10:37:51			MCDANI

Radio Log

Close

Unit	Empl ID	Type	Description	Time Stamp	Comments	Code	User
124D	1728	D	Dispatched	01/16/10 08:10:31	On Evt: [E] at	ST	MCDANI
124D	1728	A	Arrived	01/16/10 08:10:31	On Evt: [E] at	ST	MCDANI
108	1102	D	Dispatched	01/16/10 08:10:39	Stat/Beat: R1		MCDANI
108	1102	E	En-Route	01/16/10 08:10:39	Stat/Beat: R1		MCDANI
122D	1191	D	Dispatched	01/16/10 08:10:42	On Evt: [A] at	ST	MCDANI
122D	1191	E	En-Route	01/16/10 08:10:42	On Evt: [A] at	ST	MCDANI
122D	1191	A	Arrived	01/16/10 08:11:29			MCDANI
108	1102	A	Arrived	01/16/10 08:13:17			MOTEND
831	51	D	Dispatched	01/16/10 08:29:21			CALDWE
831	51	E	En-Route	01/16/10 08:29:21			CALDWE
831	51	A	Arrived	01/16/10 08:41:03			MOTEND
122D	1191	C	Cleared	01/16/10 09:04:40		AU	Unit:122D
124D	1728	I	Transport	01/16/10 09:08:45	To: ST		MOTEND
121D	1540	AS	Assigned	01/16/10 09:12:14			MOTEND
831	51	C	Cleared	01/16/10 09:12:44		AU	MOTEND
108	1102	C	Cleared	01/16/10 09:17:24	OFFENDER IN CUSTODY FOR BURGLARY	REPT	Unit:108
124D	1728	I	Location Change	01/16/10 09:27:18	180 LOCKWOOD BLVD		Unit:124D
124D	1728	C	Cleared	01/16/10 10:03:08		ADV	Unit:124D
121D	1540	D	Dispatched	01/16/10 10:22:45	Out Srv: [FOLO] at MUSC		MCDANI
121D	1540	A	Arrived	01/16/10 10:22:45	Out Srv: [FOLO] at MUSC		MCDANI
121D	1540	I	Transport	01/16/10 10:22:49	To: CNIY JAIL		MCDANI
121D	1540	A	Arrived	01/16/10 10:37:43			MCDANI
121D	1540	C	Cleared	01/16/10 10:53:45		TA	Unit:121D

Related Names

Last, First, MI Suffix	Type	Race	Sex	HT	WT	Eyes	DOB	Age	Home Ph/Mobile Ph	Work Ph	Ext
<caller>	CALL				0				(	()	-
Address:	t Charleston, SC 29403-										

911 Call and dispatch

Operator: 911, what is your emergency?

Caller: Yeah, I have a man just break in my house. (unintelligible) apartment down the street

Operator: Okay. What's the address?

Caller: I'm on _____ and I'm turning onto Elizabeth Street

Operator: _____ and you're turning onto Elizabeth Street. What's your address though?

Caller: so, _____, Michael Morrison.

Operator: and he just tried. You said he just tried to break in?

Caller: I'm on my foot following him down Elizabeth Street

Operator: Did he get in?

Caller: Yeah, he got in. Woke me up. Did it in a barefoot

Operator: black male?

Caller: black male

Operator: What is he wearing?

Caller: ouch. I don't know how old the motherfucker is. By flower shop and headed by the Charleston Museum

Operator: Yall on _____?

Caller: Now I'm on Chapel Street

Operator: Yall on Chapel?

Caller: Yep.

O: Chapel where?

C: Chapel at the Charleston museum

O: You said near the museum?

C: Yep

O: And you said you still can't get a description of what he's wearing?

C: black pants, black jacket and a white shirt on

O: You said he has a white shirt on?

C: yep. Now we're behind the museum in the parking lot

O: Now you're behind the museum?

C: yep

O: In the parking lot? Is he still running? Is he still running?

C: No

O: Does he know that you're running behind him

C: yep.

O: Did he stop?

C: Uh. We're kind of trapped here behind the museum

O: Yeah, he's chasing on foot. And you said he's not running?

C: Yeah

O: Okay, sir

C: Yeah

O: Sir, hold on one second, okay? Sir?

C: Yeah

O: Where are you guys now?

C: We're behind the Charleston Museum

O: So you guys are stopped there?

C: On the Chapel Street side and there's a chain link fence. There's a container, a silver GMC. He's getting ready to jump the fence

O: GMC?

C: Yeah. He's got on a gray, a dark dark gray jacket, a black shirt, a white t-shirt on under it, black patent leather shoes.

O: Correction: it's a dark gray jacket

C: Uh. A little bit of beard from morning stubble. A little bit of grey. Yes. Thank you dude.

O: Someone stopped him?

C: Thank you. Thank you.

O: Someone stopped him?

C: Yes. There's an officer here.

O: Ok. The cops have him?

Hangs up call

Dispatch: Control 2. 122, 126 and advising 108 also of a burglary possibly in progress.
by Charlotte and Elizabeth. Standby for additional

Officer: 108 re in route near

Officer: 24 (unintelligible)

Dispatch: (unintelligible) Complaint is chasing suspect. He advised it was a male subject. They're on foot at the time. Chapel, heading near the museum. Black suspect wearing black pants, black jacket, white shirt. They're in the museum parking lot at this time.

Officer: 24 David, right around the corner

Dispatch: Copy 124, David.

Officer: 122, David. Just go to the lot. Just go to the museum where they are

Dispatch: On the scene. Unit 124, David, you out with them?

Officer: 124 David. I'm out with the suspect path detained

Dispatch: One party detained. Stay right there.

Officer: 108, re in route.

Dispatch: Copy on 122. David.

Officer: 124, David, is there a complaint with you also?

Officer: I have the complainer here with me.

Officer: Ask if anyone is home right now or if he left the house when he saw that boy.

Officer: I'm out at the museum

Dispatch: Copy.

Officer: (unintelligible)

Dispatch: 22, go ahead.

Officer: Run a check on James I. Aiken Adam iron king edwards north. Black male

Dispatch: Copy Aiken

Officer: 108 patrol

Dispatch: 108, go ahead. 124 David and myself came back around to the complainer's residence. 122, David and me standing by with the suspect behind the museum.

Everything is 04

Dispatch: 04, copy that information.

Officer: 124 David Control

Dispatch: Go ahead

Officer: (unintelligible) one adult male escort back to.

Dispatch: Copy

Dispatch: I have a person by the name of James Aiken. He's wanted. Black male

Height 110, Weight 160. Eyes brown black hair. He's wanted for failure to appear, but it states that the (unintelligible). Charges by shoplifting Fulton County OI, Atlanta

Operator: I'm looking at that same thing as well.

Officer: 124 David, control

Dispatch: Go ahead

Officer: unintelligible

Dispatch: 124 David, repeat

Officer: If the on air central unit is available, could you (unintelligible)?

Dispatch: copy

Dispatch: 831

Officer: 831

Dispatch: 831, they're requesting your assistance at .t. The cross is Alexander and Elizabeth. There was an arrest for a burglary in progress at that location.

Officer: Control, what's the number again?

Dispatch: ..

Officer: (unintelligible)

Dispatch: 24 David, go ahead

Officer: sorry, maam Could I have case #4 please?

Dispatch: 124, this is Charlotte

Officer: got it

Dispatch: 10 one thousand 904, one thousand 904

Dispatch: control, 124 David

Officer: one thousand 904

Dispatch: correct

Officer:

Dispatch: Control, copy 0841

Officer: 124 David, control

Dispatch: go ahead

Officer: Yes maam A transport (unintelligible)?

Dispatch: transport brought back to jail

Officer: alright. Thank you ma'am.

Officer: 124 David control

Dispatch: go ahead

Officer: transporting one adult male from 360 Meeting Street to MUSC to meet the transport.

Dispatch: copy 0909

Exhibit 7

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

R. Markley Dennis, Circuit Court Judge

INDICTMENT NO(S) : 2010GS1003117
WARRANT NO(S) : K-609743

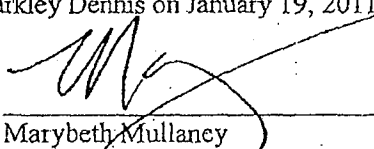
THE STATE, ... RESPONDENT,

v.

JAMES IVAN AIKEN, ... APPELLANT,

NOTICE OF APPEAL

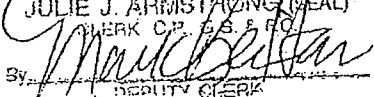
James Ivan Aiken appeals his conviction and sentence in this case. The sentence was imposed by the Honorable R. Markley Dennis on January 19, 2011


Marybeth Mullancy
Attorney for Appellant James Ivan Aiken
Charleston County Public Defender
O. T. Wallace County Office Building
101 Meeting Street
Charleston, SC 29401
(843) 958-1850

Other counsel of record are:
Benjamin Chad Simpson
Assistant Solicitor
O.T. Wallace County Office Building
101 Meeting Street, 4th Floor
Charleston, SC 29401
(843) 958-1900
Attorney for Respondent

ATTEST: A TRUE COPY

JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT

By  DEPUTY CLERK

FILED
2011 JAN 25 AM 11:26
CLERK OF COURT
JULIE J. ARMSTRONG