

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

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S.C. Supreme Court

JAMES WEST,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212845

APPENDIX

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STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF DORCHESTER	)	Case No(s) : 09-GS-18-01000
	)	
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
James West,	)	
	)	
Defendant.	)	
	)	

February 2 & 4, 2010
Dorchester, South Carolina

B E F O R E :

HONORABLE DIANE SCHAFER GOODSTEIN, Judge.

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Reporter by: Bonnie Kelly
Circuit Court Reporter

Transcribed by: Teresa B. Johnson
Circuit Court Reporter

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P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 2nd day of February, 2010 at approximately 2:16 p.m.)

THE COURT: All right. Mr. Bell, will you please call your first case for trial this week.

MR. BELL: Thank you, Your Honor. May it please the Court. The State would call indictment number 2009-GS-18-1000, the State versus James West. He's charged with Assault and Battery with Intent to Kill. I believe he is represented by Mr. -- I'm sorry -- Assault and Battery of High and Aggravated Nature. He is represented by Mr. Scott Bischoff.

Uh, Bischoff, how does your client wish to plead?

MR. BISCHOFF: Not guilty.

MR. BELL: Does he waive arraignment?

MR. BISCHOFF: He does.

MR. BELL: The State is ready to proceed, Your Honor. I believe you have the indictment with you.

THE COURT: I do. Very much, uh, Mr. Bell. Ladies and Gentlemen, let me tell you what, uh, what has just transpired. And then there's some definitions that I want to go over with you

1 just a little bit. Uh, Mr. Bell, Mr. Harrison
2 Bell is the Senior Assistant Solicitor in the
3 Solicitor's Office for the First Judicial
4 Circuit. Now, in South Carolina, the prosecutor
5 is called the Solicitor. There may be one other
6 state, I think Virginia, may call their
7 prosecutors solicitors. But we are either the
8 only one or there are two. Everywhere else, they
9 are called district attorneys. So if you are
10 familiar with watching things on TV, you will
11 hear district attorney. In South Carolina, the
12 prosecutor is called the solicitor.

13 Now, Mr. Bell who is the, again, the Senior
14 Assistant Solicitor has called the first case for
15 trial this week. He has given the name of the
16 case, the caption, if you will, of the case.
17 Now, Ladies and Gentlemen, in just a moment, I'm
18 going to be reading to you some of the
19 allegations of the indictment. The reason that
20 I'm going to be doing that is to find out whether
21 or not any of you know or think you may know or
22 have you heard or think you may have heard
23 anything about these allegations to include
24 today. That's the reason that I am going to be
25 reading to you some of the allegations of the

1 indictment.

2 Now, I want to tell you what an indictment is
3 and then what an indictment is not. An
4 indictment, Ladies and Gentlemen, is a piece --
5 first of all, it's a piece of paper. Piece of
6 paper. It is the charging document. It is the
7 notifying document. It is a piece of paper that
8 notifies a citizen that the State maintains that
9 that citizen has violated one or more of the
10 criminal laws of the State of South Carolina.
11 What an indictment is not is any evidence of any
12 of the allegations that it contains. It is
13 simply the notifying document. It is the notice
14 document, if you will.

15 Now, let me hasten to tell you that Mr. West
16 has pled not guilty to the allegations of this
17 indictment. So, again, the reason that I'm going
18 to be reading to you some of the allegations of
19 this indictment is to find out whether or not any
20 of you know or think you may know or if you have
21 heard or think you may have heard anything about
22 these allegations. Then I'm going to introduce
23 you to some folks and I have some additional
24 questions that I'm going to ask of you.

25 Now, Ladies and Gentlemen, I'm going to be

1. using the term "acquainted with" this week. I
2. want to define it for you because I mean, I
3. intend, a very general, a very general definition
4. of the phrase "acquainted with"; are you
5. acquainted with. I'm going to be using the phrase
6. in this way, are you related by blood or marriage
7. or acquainted with, and then I will fill in the
8. blank. When I use the term "acquainted with", I
9. am trying to find out whether you have any
10. relationship with the individuals who I will be
11. asking you about at all. Do you have a
12. relationship at all with these folks?

13. Let me give you some examples of how general
14. I intend the term "acquainted with". You may
15. have gone to school with someone who I'll ask you
16. about 20 years ago. You may not have seen or
17. heard or thought about that person for 20 years.
18. But you know that you did go to school with this
19. individual 20 years ago. Believe it or not, that
20. relationship is old and moldy, as tenuous as it
21. is, as limited as it is, would be encompassed
22. within my definition of "acquainted with". You
23. can stand and say I went to school with this
24. individual 20 years ago. Haven't thought about
25. him. Haven't seen him, but went to school and

1 that's how I know him, 20 years ago.

2 It may be that you simply work in the same
3 location as someone who I'll mention. You are
4 not friends. You don't visit each other's homes,
5 but you do work in the same location and you know
6 this person to waive at them and perhaps
7 occasionally cross the parking lot. That might
8 be the extent of your relationship. Believe it
9 or not, that relationship would be encompassed
10 within my definition of acquainted with. Again,
11 I'm trying to find out whether or not you have
12 any relationship with these individuals that I
13 will ask you about. So please keep that in mind
14 as we go through this process.

15 Now, Ladies and Gentlemen, indictment 2009-
16 GS-18-1000 alleges, in part, that the Defendant,
17 James West did in Dorchester county on or about
18 May the 18th of 2009 unlawfully commit an assault
19 and battery on the victim Lance Malmquist
20 accompanied by circumstances of aggravation, to
21 wit: causing serious bodily injury to the victim
22 by beating him with his head -- with his hands,
23 thereby violating the common law of the state of
24 South Carolina. Then there's some other
25 verbiage.

1 Ladies and Gentlemen, do you know or think
2 you may know or have you heard or think you may
3 have heard anything about these allegations? If
4 so, please stand at this time. (No response.)

5 And I find no one standing.

6 Now, Ladies and Gentlemen, allow me to
7 introduce you to Mr. Harrison Bell and he is
8 going to introduce the Solicitors who will be
9 participating in this matter as well as the other
10 Solicitors in his office.

11 MR. BELL: Thank you, Your Honor.

12 THE COURT: Mr. Bell.

13 MR. BELL: Please the Court. As stated, my
14 name is Harrison Bell, Senior Assistant Solicitor
15 for the First Judicial Circuit. I work with your
16 elected Solicitor, Mr. David Pascoe, who is the
17 elected Solicitor of the First Judicial Circuit.
18 Helping me with this case is Ms. Mandy Kimmons.
19 Also in the courtroom is Ms. Dana Paul who is an
20 Assistant Solicitor. We have Blair Jennings as
21 an Assistant Solicitor. June Pecowski as an
22 Assistant Solicitor, Russell Hilton as an
23 Assistant Solicitor and we have Vergil Deas who
24 is our Assistant Solicitor who works in Family
25 Court with juveniles.

1 THE COURT: Thank you very much.

2 Ladies and Gentlemen, are you related by
3 blood or marriage or acquainted with either Mr.
4 Bell, Ms. Kimmons, Ms. Hall or any of the lawyers
5 in the Solicitor's office that Mr. Bell just
6 mentioned or do you happen to be acquainted with,
7 related by blood or marriage with any of the
8 employees at the Solicitor's office? If so,
9 please stand at this time.

10 Very -- you on our jury panel?

11 THE JUROR: Yes.

12 THE COURT: You are on our jury panel? I
13 don't see your -- where is your --

14 THE JUROR: It's in my pocket.

15 THE COURT: Oh, it's in your pocket. Very
16 well. Thank you. Yes, ma'am. Tell me your name
17 or number.

18 THE JUROR: Uh, 30.

19 THE COURT: Number 30. All right. And
20 first of all, who do you know?

21 THE JUROR: Ms. Mandy Kimmons.

22 THE COURT: You know Ms. Kimmons. Do you
23 visit in each other's homes?

24 THE JUROR: No.

25 THE COURT: All right. And would you

1 describe your relationship as to whether it's
2 more personal or professional?

3 THE JUROR: Yeah, we went to high school
4 together.

5 THE COURT: You went to high school
6 together. Very well. Now, and would you
7 describe your relationship as acquaintances by
8 folks who went to high -- not 20 years ago, but
9 more like 15 minutes ago? All right. As a
10 result of that acquaintanceship, might that,
11 could that interfere with your ability to be
12 completely fair and impartial both to the State
13 as well as to Mr. West?

14 THE JUROR: No, ma'am.

15 THE COURT: Can you set that relationship
16 completely aside and make up your mind based upon
17 what you hear in court while court is in session?

18 THE JUROR: Yes, ma'am.

19 THE COURT: Thank you so much.

20 Yes, ma'am. Your number.

21 THE JUROR: 64.

22 THE COURT: Yes, ma'am. Tell me who you
23 know.

24 THE JUROR: Russell Hilton.

25 THE COURT: Mr. Hilton. All right. Do you

1 visit in each other's homes?

2 THE JUROR: No.

3 THE COURT: All right. Would you describe
4 your relationship as one that is more of a
5 professional or personal?

6 THE JUROR: Personal.

7 THE COURT: Personal? All right. And would
8 you -- as a result of that relationship, might
9 that, could that in any regard interfere with
10 your ability to be completely fair and impartial
11 both to the State as well as to Mr. West?

12 THE JUROR: Yes.

13 THE COURT: Can you set that relationship
14 completely aside and make up your mind based upon
15 what you hear in court while court is in session?

16 THE JUROR: Yes, ma'am.

17 THE COURT: Thank you. Anyone else?
18 Yes, sir. Your number.

19 THE JUROR: 155.

20 THE COURT: Yes, sir. And tell me who you
21 know.

22 THE JUROR: Vergil Deas.

23 THE COURT: Yes, sir. And do you all visit
24 in each other's homes?

25 THE JUROR: No, we do not.

1 THE COURT: All right. Would you describe
2 your relationship which is more or a friendship,
3 a personal relationship, I should say, or a
4 professional?

5 THE JUROR: Friendship.

6 THE COURT: Friendship, personal?

7 THE JUROR: Yes.

8 THE COURT: All right. And as a result of
9 that relationship, might that, could that in any
10 regard interfere with your ability to be
11 completely fair and impartial both to the State
12 as well as to Mr. West?

13 THE JUROR: No, it would not.

14 THE COURT: Can you set that relationship
15 aside and make up your mind based upon what you
16 hear in court, while court is in session?

17 THE JUROR: Yes.

18 THE COURT: Thank you. You may stay with
19 us. Anyone else? (No response.)

20 Very well. Now, Ladies and Gentlemen, please
21 allow me to introduce you to Mr. James West. If
22 you could stand and face our jury panel, this is
23 Mr. James West.

24 Thank you, sir. You may be seated.

25 Ladies and Gentlemen, are you related by

1 blood or marriage or acquainted with Mr. James
2 West? If so, please stand at this time. (No
3 response.)

4 And I find no one standing.

5 Ladies and Gentlemen, Mr. West is represented
6 by Mr. Scott Bischoff. This is Mr. Bischoff. Mr.
7 John Loy. All right.

8 And you got folks right behind you too, Mr.
9 Bischoff. And Mr. Bischoff, if you would
10 introduce the folks who are in your office. If
11 you all will stand.

12 MR. BISCHOFF: I will, Your Honor. Thank
13 you. As the judge told you, my name is Scott
14 Bischoff. With me is John Loy. Our boss is the
15 Chief Public Defender of the First Circuit, Mr.
16 Leiendecker. He's not in the courtroom today but
17 he presides over the entire First Circuit as the
18 Chief Public Defender. Other ladies from our
19 office are Mary Lematty and Katie Dahlheim and
20 then Mitch Farley seated here at the table is
21 also a member of our office.

22 THE COURT: Thank you so much.

23 Now, Ladies and Gentlemen, are you related by
24 blood or marriage or acquainted with or have you
25 or any member of your immediate family, to your

1 knowledge, ever been represented by Mr. Bischoff,
2 Mr. Loy or any of the attorneys that Mr. Bischoff
3 just introduced. If so, please stand.

4 Yes, sir. Tell me your last -- your number.

5 THE JUROR: Uh, 65.

6 THE COURT: Yes, sir. Tell me who you know.

7 THE JUROR: They work underneath my office.
8 We're in the same building.

9 THE COURT: You're in the same building. So
10 you are acquainted with all of these folks?

11 THE JUROR: Yes, ma'am.

12 THE COURT: Very well. As a result of that
13 acquaintanceship, might that, could that in any
14 regard interfere with your ability to be
15 completely fair and impartial both to the State
16 as well as to Mr. West? Can you set those
17 acquaintanceships aside and make up your mind
18 based upon what you hear in court while court is
19 in session?

20 THE JUROR: Yes, ma'am.

21 THE COURT: Thank you. Thank you very much.
22 Yes, sir. Tell me your number.

23 THE JUROR: 152.

24 THE COURT: 152. Yes, sir. Tell me who you
25 know.

1 THE JUROR: Mark Leiendecker.

2 THE COURT: All right. Would you describe
3 your relationship with Mr. Leiendecker one that
4 is more personal or professional?

5 THE JUROR: Professional.

6 THE COURT: As a result of that, uh,
7 professional relationship, is it ongoing or in
8 the past?

9 THE JUROR: In the past.

10 THE COURT: All right. As a result of that
11 relationship, do you believe that might or could
12 in any regard interfere with your ability to be
13 completely fair and impartial both to the State
14 as well as to Mr. West?

15 THE JUROR: No. I also sat on a jury last
16 time with both Mr. Bell and Mr. Loy.

17 THE COURT: Very well. So you are
18 acquainted with them because you have served on a
19 jury and both of them are in court?

20 THE JUROR: Correct.

21 THE COURT: Very well. As a result -- let
22 me finish -- can you set the relationship aside
23 that you mentioned with Mr. Leiendecker, can you
24 set that aside and make up your mind based upon
25 what you heard in court while court is in

1 session?

2 THE JUROR: Yes.

3 THE COURT: Now, let me ask you this
4 question, as a result of your having been a juror
5 approximately a year ago in a case involving Mr.
6 Bell as well as Mr. Loy, do you believe that that
7 experience in any regard would have any affect on
8 your ability to be completely fair and impartial
9 both to the State as well as to Mr. West?

10 THE JUROR: Not at all.

11 THE COURT: Very well. Thank you, sir.

12 Anyone else? (No response.)

13 Very well. Now, Ladies and Gentlemen, I am
14 now going to be reading to you a list of
15 potential witnesses, potential witnesses. My
16 question as to each of these individuals is are
17 you related by blood or marriage or acquainted
18 with any of these individuals.

19 And folks, if you happen to be in the
20 courtroom, please stand. It is so often easier
21 to put a face with a name than the name alone.
22 I'd like to have an opportunity to introduce you
23 to our jury panel.

24 Lance Malmquist. This is Mr. Malmquist.
25 Thank you so much, Mr. Malmquist. You may be

1 seated.

2 Officer Driscoll. This is Officer Driscoll.
3 Thank you so much and you may be seated.

4 Doug Wright who is not present, Officer J.
5 Graves, Officer Mike Graham, Mary Ashe, Dr.
6 Ronald Teed, T-E-E-D. Dr. Ronald Teed from the
7 Medical University. And with regards to Dr.
8 Ronald Teed, I would add this, have you or any
9 member of your immediate family ever been treated
10 by Dr. Ronald Teed? Or I should say any doctors
11 at the Storm Eye Institute. If so, please stand
12 at this time. (No response.)

13 All right. And if you are related by blood
14 or marriage or acquainted with any of those
15 individuals, please stand at this time.

16 Yes?

17 **THE JUROR:** I'm Juror 125. Did you mention
18 a Doug Wright?

19 **THE COURT:** Doug Wright. Lieutenant Doug
20 Wright.

21 **THE JUROR:** I know him -- no, that's not
22 right.

23 **THE COURT:** A different Doug Wright.

24 **THE JUROR:** I know a Doug Wright.

25 **THE COURT:** Another Doug Wright?

1 THE JUROR: Another Doug Wright. Who is not
2 a lieutenant.

3 THE COURT: He's not a lieutenant. All
4 right. Is Doug Wright still a lieutenant?

5 MR. BELL: He is a lieutenant. Used to be a
6 sergeant and is now a lieutenant.

7 THE COURT: Used to be a sergeant and now
8 he's a lieutenant.

9 THE JUROR: Okay.

10 THE COURT: Your Doug Wright is not
11 currently a sergeant or a lieutenant.

12 THE JUROR: No.

13 THE COURT: Got it. All right. Thank you.

14 THE JUROR: Thank you.

15 THE COURT: That is so appropriate to be
16 very careful. I really do appreciate that. I
17 really do.

18 Now, Ladies and Gentlemen, I'm going to ask
19 you -- have some questions to ask of you. I'm
20 going to ask, first -- I'm going to ask the first
21 question, then I'm going to ask a couple
22 together. All right. Is any member of our jury
23 panel currently, currently a member of the Armed
24 Forces or has served as a member of the Armed
25 Forces in the past? If so, please -- I just need

1 you to identify yourself by your juror number.
2 We're going to start over here. Your juror
3 number?

4 THE JUROR: 57.

5 THE COURT: Thank you.

6 THE JUROR: 50.

7 THE COURT: 50.

8 THE JUROR: 139.

9 THE COURT: Thank you.

10 THE JUROR: 79.

11 THE COURT: Yes.

12 THE JUROR: 26.

13 COURT REPORTER: I'm sorry. I did not hear.

14 THE JUROR: 26.

15 THE JUROR: 41.

16 THE JUROR: 25.

17 THE JUROR: 65.

18 THE COURT: Thank you so much. Now, Ladies
19 and Gentlemen, I'm going to ask you two questions
20 together. Please do not respond to either until
21 I have asked them both. I'm going to ask you to
22 please approach if you need to respond. First
23 question, has any member of our jury panel or
24 member of your immediate family, to your
25 knowledge ever been the victim of a crime of

1 violence, a crime of violence or have you had a
2 close family member who has been the victim of a
3 crime of violence? Now, let me tell you about
4 this close personal -- this is a close personal
5 friend is so close that you can not differentiate
6 between a family member and this close personal
7 friend. They are that close to you. That's the
8 first question.

9 The second question is this, uh, is any
10 member of our jury panel a member of or supporter
11 of, meaning you give money to, any anti-violence
12 advocacy group such as CAV, Citizens Against
13 Violence, PAR, People Against Rave, SADD,
14 Students Against Drunk Driving or driving and
15 MADD, Mothers Against Drunk Driving or any other
16 similar group. Are you a supporter of, meaning
17 you give money to or you are a member of those
18 groups or have you or a member of your immediate
19 family to your knowledge or close personal friend
20 as I have described been a victim of a crime of
21 violence. If so, please stand and come forward.
22 All right. I'll meet you guys down there.

23 THE BAILIFF: Juror Number 25.

24 (WHEREUPON, the following bench conference with
25 Juror Number 25, Teal Burl, is unable to be

1 transcribed due to a malfunction with the court
2 reporter's equipment during the proceedings.)

3 THE COURT: You want me to follow up with
4 that?

5 MR. BISCHOFF: I think that line of
6 questions is totally sufficient right there.

7 THE COURT: Oh, you like the follow up?

8 MR. BISCHOFF: I do.

9 THE BAILIFF: Juror Number 26.

10 THE COURT: Hello.

11 (WHEREUPON, the following bench conference with
12 Juror Number 26, Roland Canning, is held on the
13 record.)

14 THE JUROR: Yes, several years ago, my
15 daughter was a manager at Subway. She was
16 closing up. She got attacked when she left the
17 restaurant.

18 THE COURT: All right. As a result of that
19 experience, do you believe that that might or
20 could interfere with your ability to be
21 completely fair and impartial both to the state
22 as well as to Mr. West?

23 THE JUROR: I don't think so.

24 THE COURT: Can you set that experience
25 aside and make up your mind based upon what you

1 hear in court while court is in session?

2 THE JUROR: I think so.

3 THE COURT: Thank you. Please stay with us.

4 (WHEREUPON, the juror returns to the gallery.)

5 THE BAILIFF: Juror Number 79.

6 (WHEREUPON, the following bench conference with
7 Juror Number 79, Joseph Hostler, is held on the
8 record.)

9 THE COURT: Hello. Yes.

10 THE JUROR: (inaudible)

11 COURT REPORTER: I'm sorry. I can not --

12 THE COURT: You have two cousins.

13 THE JUROR: (inaudible)

14 THE COURT: They were beaten to the point of
15 mental retardation by their --

16 THE JUROR: Biological.

17 THE COURT: By their biological father. How
18 long ago?

19 THE JUROR: Uh, 10 years ago.

20 THE COURT: 10 years ago. All right. As a
21 result of that experience, do you believe that
22 that could interfere with your ability to be
23 completely fair and impartial both to the State
24 as well as to Mr. West?

25 THE JUROR: (inaudible)

1 THE COURT: As long as it does not involve

2 a --

3 THE JUROR: Child.

4 THE COURT: -- a child. It is my
5 understanding that this does not involve a child.

6 THE JUROR: All right.

7 THE COURT: Very well. Now let me ask you
8 this question, can you set that experience
9 completely aside and make up your mind based upon
10 what you hear in court while court is in session?

11 THE JUROR: Yes.

12 THE COURT: Thank you, sir. This does not
13 involve a child in any way shape or form?

14 MR. BELL: Correct.

15 THE COURT: All right.

16 THE JUROR: Okay.

17 THE COURT: All right. Very well. All
18 right.

19 (WHEREUPON, the juror returns to the gallery.)

20 THE BAILIFF: Juror 121.

21 THE COURT: Hi.

22 (WHEREUPON, the following bench conference with
23 Juror Number 121, Karen Ross, is held on the record.)

24 THE JUROR: My mother was the victim of a
25 violent crime.

1 THE COURT: Your mother was the victim of a
2 violent crime.

3 THE JUROR: This was about 10 years ago.

4 THE COURT: About 10 years ago. As a
5 result of that experience would that, could that
6 interfere with your ability to be completely fair
7 and impartial both to the State as well as to Mr.
8 West?

9 THE JUROR: Yes.

10 THE COURT: Can you set that experience
11 aside and make up your mind based upon what you
12 hear in court while court is in session?

13 THE JUROR: Yes, ma'am.

14 THE COURT: Thank you.

15 (WHEREUPON, the juror returns to the gallery.)

16 THE BAILIFF: Juror 41.

17 (WHEREUPON, the following bench conference with
18 Juror Number 41, Raiford Deloach, is held on the
19 record.)

20 THE COURT: Hi. Which one?

21 THE JUROR: Family member victim of a
22 violent crime.

23 THE COURT: All right. A family member was
24 a victim of a violent crime?

25 THE JUROR: Yes.

1 THE COURT: All right. And, uh, how long
2 ago?

3 THE JUROR: About 15 years.

4 THE COURT: About 15 years ago. And might
5 that, could that interfere with your ability to
6 be completely fair and impartial both to the
7 State as well as to Mr. West?

8 THE JUROR: Yes.

9 THE COURT: Can you set that experience
10 aside and make up your mind based upon what you
11 hear in court while court is in session?

12 THE JUROR: Yes, ma'am.

13 THE COURT: Thank you, sir.

14 (WHEREUPON, the juror returns to the gallery.)

15 THE BAILIFF: Juror 57.

16 (WHEREUPON, the following bench conference with
17 Juror Number 57, Christopher France, is held on the
18 record.)

19 THE COURT: Hello.

20 THE JUROR: Hello.

21 THE COURT: Which question are you
22 responding to?

23 THE JUROR: I've been a victim of a violent
24 crime.

25 THE COURT: You have been. When?

1 THE JUROR: About a year and a half to two
2 years.

3 THE COURT: About a year and a half to two
4 years ago?

5 THE JUROR: Yes.

6 THE COURT: All right. And, uh, where?
7 I'll ask where.

8 THE JUROR: In a club.

9 THE COURT: In what county?

10 THE JUROR: Berkeley.

11 THE COURT: In Berkeley county. As a result
12 of that experience, do you believe that that
13 might or could interfere with your ability to be
14 completely fair and impartial?

15 THE JUROR: Yes, ma'am.

16 THE COURT: Because it's been fairly recent?

17 THE JUROR: Yes, ma'am.

18 THE COURT: I'm going to ask you to sit this
19 one out but don't leave me.

20 THE JUROR: I won't.

21 THE COURT: All right. Thank you.

22 (WHEREUPON, the juror returns to the
23 gallery.)

24 THE BAILIFF: Juror Number 96.

25 (WHEREUPON, the following bench conference with

1 Juror Number 96, Russell Mathias, is held on the
2 record.)

3 THE COURT: Hello. Which question are you
4 responding to?

5 THE JUROR: I was a victim.

6 THE COURT: Okay.

7 THE JUROR: My uncle was murdered in an
8 armed robbery.

9 THE COURT: When?

10 THE JUROR: 1987.

11 THE COURT: 1987. As a result of that
12 experience, might that, could that interfere with
13 your ability to be fair and impartial both to the
14 State as well as to Mr. West?

15 THE JUROR: I don't believe so.

16 THE COURT: Can you set that experience
17 aside and make up your mind ---

18 THE JUROR: Yes.

19 THE COURT: --- based upon what you hear in
20 court ---

21 THE JUROR: Yes.

22 THE COURT: --- while court is in session?

23 THE JUROR: Yes.

24 THE COURT: Thank you.

25 (WHEREUPON, the juror returns to the gallery.)

1 THE BAILIFF: Juror Number 64.

2 (WHEREUPON, the following bench conference with
3 Juror Number, 64, Melissa Grooms, is held on the
4 record.)

5 THE COURT: Hi. Which question are you
6 responding to?

7 THE JUROR: (inaudible)

8 THE COURT: All right. And so that's in
9 1989, during that time period. As a result of
10 that experience, do you believe that that might
11 or could interfere with your ability to be fair
12 and impartial?

13 THE JUROR: No, ma'am.

14 THE COURT: Could you set that experience
15 aside and make up your mind based upon what you
16 hear in court ---

17 THE JUROR: Absolutely.

18 THE COURT: --- while court is in session?

19 THE JUROR: Yes, ma'am.

20 THE COURT: Thank you.

21 (WHEREUPON, the juror returns to the gallery.)

22 THE BAILIFF: Juror 50.

23 (WHEREUPON, the following bench conference with
24 Juror Number 50, Eric Embleton, is held on the
25 record.)

1 THE COURT: Hello. Which question are you
2 responding to?

3 THE JUROR: Violent crime.

4 THE COURT: Yes, sir.

5 THE JUROR: My wife's cousin and son was
6 murdered a couple of years ago.

7 THE COURT: A couple of years ago. All
8 right, sir. As a result of that experience, do
9 you believe that that could have an affect on
10 your ability to be completely fair and impartial
11 both to the State as well as to Mr. West?

12 THE JUROR: Probably so.

13 THE COURT: Well, it's been very recent.

14 THE JUROR: Yes, ma'am.

15 THE COURT: I'm going to ask you to sit this
16 one out.

17 THE JUROR: Yes, ma'am.

18 THE COURT: Thank you, sir.

19 (WHEREUPON, the juror returns to the gallery.)

20 THE COURT: That was number 50?

21 COURT REPORTER: Yes, Your Honor.

22 THE BAILIFF: Juror Number 8.

23 (WHEREUPON, the following bench conference with
24 Juror Number 8, Andrea Bishopp, is held on the
25 record.)

1 THE COURT: Hello.

2 THE JUROR: My younger brother was involved
3 in a bar fight a couple of years ago.

4 THE COURT: All right.

5 THE JUROR: I think they took the worse
6 beating from the bouncers, not each other. It
7 came to court and got dismissed. I don't know if
8 you --

9 THE COURT: It really does. Thank you. As
10 a result of that experience that your brother
11 had, do you believe that that might or could
12 interfere with your ability to be completely fair
13 and impartial both to the State as well as to Mr.
14 West?

15 THE JUROR: No.

16 THE COURT: Can you set that aside and make
17 up your mind based upon what you hear in court
18 while court is in session?

19 THE JUROR: Yes, ma'am.

20 THE COURT: Okay.

21 (WHEREUPON, the juror returns to the gallery.)

22 THE COURT: All right. Ladies and
23 Gentlemen, this is my final question. Yes, it's
24 general and it is intended to be general. It is
25 this, do you know any reason why you ought not,

1 should not, could not be a juror in this case,
2 being ready, willing and able to be completely
3 fair and impartial both to the State as well as
4 to Mr. West, being able to make up your mind
5 based upon what you hear in court while court is
6 in session being completely unaffected by
7 matters, extraneous by matters outside the court?

8 Now, it could be anything, anything. It
9 could be that, uh, you know, you were shy earlier
10 and you really thought about maybe I really need
11 to say something to the judge about this, but,
12 gosh, I'm really shy, but we've been together now
13 a long time and y'all have warmed up and we
14 getting to be friends and you are more
15 comfortable telling me what you didn't want to
16 tell me earlier. It could be when you went
17 outside, you zipped to your car and the tickets
18 to Bora Bora were above the visor and you had
19 completely forgot that you were supposed to go to
20 Bora Bora Thursday afternoon and how in the world
21 are you supposed to tell me now about Bora Bora.
22 Well, it's alright.

23 It could be anything. It could be that you
24 went to your car because I know you left your
25 cell phone in your car and you had a little text

1 that said, oh, my gosh, the Clearinghouse people
2 are here. They got flowers and balloons and this
3 big old gigantic check. All of a sudden, you are
4 having a hard time focusing on what we are doing
5 here. You are thinking about that big check
6 being in your driveway, people getting wet. It
7 could really be anything. Just come on forward
8 and let us talk. (No response.)

9 Very well. I find that our panel is now
10 qualified. Now, counsel, in terms of the
11 strikes, it's five and five. Let's get one
12 alternate.

13 **MR. BELL:** Thank you, Judge.

14 **THE COURT:** All right. Now, let me tell you
15 what happens. I'm so happy to tell you that I
16 myself, many years ago, like a thousand years
17 ago, sat where you sat and I had to do what y'all
18 are fixing to do. If your number and your name
19 is called, come through here and you're just
20 going to stand right here. I'm so happy to tell
21 you that I went through this experience. All I
22 could remember is I would have loved to have left
23 my hands at my seat because I didn't know what to
24 do with them when I got up here. It's alright.
25 Just bring them with you. You're going to stand

1 here.

2 You are first going to hear from one of these
3 attorneys from the State. They are going to say
4 one of two things. They are either going to say
5 excuse the juror, in which case you will simply
6 take your seat back in the audience and please
7 don't take any embarrassment. I promise you
8 these lawyers mean no embarrassment. There are
9 like a million and twelve considerations that go
10 into jury, uh, uh, go into jury selection. I
11 promise you the last thing in the world they mean
12 is any embarrassment.

13 Then if you don't hear "excuse the juror",
14 you will hear from the State "present the juror".
15 And you're going to hear from Mr. Bischoff or Mr.
16 Loy. You will hear either "excuse the juror" and
17 you can take your seat or you will hear "seat the
18 juror" and you will take your seat in these nice
19 comfy chairs in the jury box.

20 Now, Ladies and Gentlemen, if you have an
21 umbrella or book or a jacket, pocketbook,
22 whatever, just bring it all with you, uh, and
23 just as you come and stand here. Again, we're
24 going to turn it over to you, Ms. Jeffers.

25 **THE CLERK:** Yes, Your Honor.

1 THE COURT: Five strikes each. On the
2 alternate, two for the defense and one for the
3 state.

4 THE CLERK: Thank you.

5 THE COURT: We'll have one alternate. Let
6 me take my seat so I can keep up with you guys.
7 Have you got a little sheet for me?

8 THE CLERK: Yes, ma'am.

9 THE COURT: Wonderful. Thank you. All
10 right. It's always exciting if you're the first
11 person too. Yes, ma'am.

12 THE CLERK: As I call your juror number,
13 please approach the front.

14 Juror Number 41, Raiford -- hang on just a
15 second.

16 THE COURT: Hold on.

17 (WHEREUPON, there is a pause.)

18 THE COURT: We were just kidding. Just
19 kidding. Just kidding. It was like a false
20 start. That's in, like, football, right? Yeah?
21 Five yard penalty. All right. I'm the mother of
22 a center so I know all about that. Okay. Thank
23 you.

24 THE CLERK: Thank you, Your Honor.

25 THE COURT: Yeah.

1 THE CLERK: Okay. As I call your juror
2 number, please come forward.
3 Juror Number 155, Rondell Goree. I just need
4 you to turn around and face the clock for me.
5 What sayeth the State?
6 MR. BELL: Present the juror.
7 THE CLERK: And the defense?
8 MR. BISCHOFF: Swear the juror please.
9 THE CLERK: Please have a seat in our jury
10 box.
11 Juror Number 18, Lynne Bowey.
12 What sayeth the State?
13 MR. BELL: Present the juror.
14 THE CLERK: The defense?
15 MR. BISCHOFF: Swear the juror please.
16 THE CLERK: Please have a seat in our jury
17 box.
18 Juror Number 100, Mickey Mcguire.
19 What sayeth the State?
20 MR. BELL: Please excuse the juror from this
21 trial.
22 THE CLERK: Thank you. Please have a seat
23 back in the audience.
24 Juror Number 26, Roland Canning.
25 What sayeth the State?

1 MR. BELL: Present the juror.

2 THE CLERK: And the defense?

3 MR. BISCHOFF: Swear the juror please.

4 THE CLERK: Please have a seat in our jury
5 box.

6 Juror Number 79, Joseph Hostler.

7 What sayeth the State?

8 MR. BELL: Present the juror.

9 THE CLERK: The defense?

10 MR. BISCHOFF: Swear Mr. Hostler please.

11 THE CLERK: Please have a seat in our jury
12 box.

13 Juror Number 1, Anthony Ackerman.

14 What sayeth the State?

15 MR. BELL: Present the juror.

16 THE CLERK: And the defense?

17 MR. BISCHOFF: Excuse Mr. Ackerman please.

18 THE CLERK: Please have a seat back in the
19 audience.

20 Juror Number 66, Deborah Gunn.

21 What sayeth the State?

22 MR. BELL: Present the juror.

23 THE CLERK: And the defense?

24 MR. BISCHOFF: Swear the juror please.

25 THE CLERK: Please have a seat in our jury

1 box.

2 Juror Number 25, Teal Burl.

3 What sayeth the State?

4 MR. BELL: Present the juror.

5 THE CLERK: And the defense?

6 MR. BISCHOFF: Excuse the juror please.

7 THE CLERK: Please have a seat back in the
8 audience.

9 Juror Number 152, Ross Wolfe.

10 What sayeth the State?

11 MR. BELL: Please excuse the juror from this
12 trial.

13 THE CLERK: Thank you. Please have a seat
14 back in the audience.

15 Juror Number 129, William Sekula.

16 What sayeth the State?

17 MR. BELL: Present the juror.

18 THE CLERK: And the defense?

19 MR. BISCHOFF: Swear the gentleman please.

20 THE CLERK: Please have a seat in our jury
21 box.

22 Juror Number 125, Nickole Samios.

23 What sayeth the State?

24 MR. BELL: Present the juror.

25 THE CLERK: And the defense?

1 MR. BISCHOFF: Swear the juror please.
2 THE CLERK: Please have a seat in our jury
3 box.
4 Juror Number 53, Susan Evanoff.
5 What sayeth the State?
6 MR. BELL: Present the juror.
7 THE CLERK: And the defense?
8 MR. BISCHOFF: Swear the juror please.
9 THE CLERK: Please have a seat in our jury
10 box.
11 Juror Number 73, Janet Holley.
12 What sayeth the State?
13 MR. BELL: Present the juror.
14 THE CLERK: And the defense?
15 MR. BISCHOFF: Excuse the juror please.
16 THE CLERK: Please have a seat back in the
17 audience.
18 Juror Number 65, Earl Gruber, Jr.
19 What sayeth the State?
20 MR. BELL: Present the juror.
21 THE CLERK: And the defense?
22 MR. BISCHOFF: Swear the juror please.
23 THE CLERK: Please have a seat in our jury
24 box.
25 Juror Number 109, Demetria North.

1 What sayeth the State?

2 MR. BELL: Present the juror.

3 THE CLERK: And the defense?

4 MR. BISCHOFF: Excuse the juror please.

5 THE CLERK: Please have a seat back in the
6 audience.

7 Juror Number 44, Michael Dinunzio.

8 What sayeth the State?

9 MR. BELL: Present the juror.

10 THE CLERK: And the defense?

11 MR. BISCHOFF: Excuse the juror please.

12 THE CLERK: Please have a seat back in the
13 audience.

14 Juror Number 96, Russell Mathias.

15 What sayeth the State?

16 MR. BELL: Present the juror.

17 THE CLERK: And the defense?

18 MR. BISCHOFF: Swear the juror please.

19 THE CLERK: Please have a seat in our jury
20 box.

21 Juror Number 95, Jill Mannix.

22 What sayeth the State?

23 MR. BELL: Present the juror.

24 THE CLERK: And the defense?

25 MR. BISCHOFF: Swear Ms. Mannix please.

1 THE CLERK: Please have a seat in our jury
2 box.

3 Juror Number 121, Karen Ross.

4 What sayeth the State?

5 MR. BELL: Present the juror.

6 THE CLERK: And the defense?

7 MR. BISCHOFF: Swear Ms. Ross please.

8 THE CLERK: Please have a seat in our jury
9 box.

10 And, Your Honor, this will be for our
11 alternate.

12 THE COURT: Yes.

13 THE CLERK: Juror Number 68, Linda Hammond.
14 What sayeth the State?

15 MR. BELL: Present the juror.

16 MR. BISCHOFF: Swear --

17 THE CLERK: The defense?

18 MR. BISCHOFF: I'm sorry. Swear the juror
19 please.

20 THE CLERK: Please have a seat in our jury
21 box.

22 Thank you, Your Honor.

23 THE COURT: Thank you so much.

24 Ladies and Gentlemen, -- or Gentlemen, I ask
25 this of you, are there any matters regarding the

1 qualification or the selection of the jury from
2 the State?

3 MR. BELL: None from the State, Your Honor.

4 THE COURT: From the defense?

5 MR. BISCHOFF: There are not, Your Honor.

6 THE COURT: Very well. Ladies and
7 Gentlemen, those of you who are in the audience
8 are now known as our remaining jurors. Under
9 this new age of technology, we have the ability
10 to stay in contact with each other. In your
11 packet of information, there was a card called
12 the juror information card.

13 All right, Ms. Jeffers, you got to hold it up
14 for me.

15 THE CLERK: I'm sorry, Your Honor. I showed
16 them downstairs and I have one right here. The
17 little card that I showed y'all downstairs.

18 THE COURT: That's wonderful. That's okay.
19 You had help.

20 THE CLERK: Thank you.

21 THE COURT: If you do not have your card
22 which was in your packet, not to worry because
23 Marvin is standing behind you with a huge stack
24 of them. Feel free to take two or three. I need
25 you, I need you to please call the juror

1 information line after six o'clock this evening.
2 After six o'clock this evening.

3 Please follow whatever the instruction is.
4 It may be to call back at a particular time. It
5 also may be to return at a particular time.
6 Irrespective of what the message is, please
7 follow it. You will be referred to on the
8 information line as the remaining jurors. Again,
9 whatever the instruction is, please follow it.

10 Ladies and Gentlemen, y'all have been
11 terrific. Those of you who are dashing off to
12 work and you want to have something to give to
13 your employer so there would be no question of
14 where you have been and what you have been up to
15 this morning, if you will stop by our clerk's
16 office, which is downstairs on the first floor on
17 that end of the building, all the way on that end
18 of the building, they will be delighted to get
19 that for you so that you will have it.

20 Ladies and Gentlemen, I thank you all so
21 much. Remember, call the line after six o'clock,
22 that means you can call it at 6:01, ten o'clock.
23 If you are up walking the floor tomorrow morning
24 at 2:00, give the line a call. But don't call
25 before six o'clock. The message will absolutely

1 make no sense to you at all. So please wait
2 until after 6:00 to give it a call. Thank you
3 all so very much for every tick of the clock that
4 you have given to us. I look forward to seeing
5 you later in the week.

6 (WHEREUPON, the jury panel exits at approximately
7 1:02 p.m.)

8 THE COURT: Now, I don't know about y'all,
9 but my din-din bell is going ding-a-ling, ding-a-
10 ling. So I do need to give you a little bit of
11 instruction, Ladies and Gentlemen. Then I'm
12 going to send you to go and get your lunch. But
13 before you do that, I want you to go with Ms.
14 Salisbury. She's going to show you your jury
15 room. Then she's going to talk to you about
16 gathering in the jury assembly room and then she
17 will escort you back up.

18 I'm going to ask you to please be in your,
19 uh, jury room, uh, ready to begin this matter at
20 2:30 because we've got a little bit more to do
21 and you're going to be with Ms. Salisbury for
22 just a few minutes. But I do need to give you a
23 little bit of instruction and I'd like to do that
24 now.

25 Ladies and Gentlemen, you will learn, when

1 you return, because I do have a few preliminary
2 remarks that I want to make to you, but you are
3 going to learn here very quickly that your duty
4 as jurors is to be the finders of the facts, be
5 the finders of the facts. You are the only sole
6 finders of the facts. Therefore, because I have
7 given you a little tiny bit of information, I've
8 already read to you some of the allegations in
9 the indictment. I'm going to introduce you to
10 some folks.

11 But because you have that little bit of
12 information, it really is appropriate for me to
13 instruct you do not discuss this matter or allow
14 anyone to discuss it with you. I want you to
15 know the reason I give you that instruction is
16 because since you are the finders of the facts,
17 it is very important that you are able to listen
18 open-mindedly to all the evidence.

19 What we know from 200 plus years of trying
20 cases is that apparently the way we are put
21 together, if we begin to talk about something, we
22 begin to pull opinions about it. The reason that
23 I will give you the instruction not to discuss
24 the case or allow anyone to discuss it with you
25 each and every time that you leave the courtroom

1 is to support your ability to listen open-
2 mindedly to all the evidence.

3 Now, if you happen to see any of these folks
4 about the courthouse or around St. George, please
5 understand they know, they are instructed to have
6 no contact with you whatsoever. So if they don't
7 even say hello, please understand they are not
8 being rude. They would simply be following my
9 instructions not to interact with you at all.
10 But you may even -- the lawyers are funny because
11 they just can't even look at you. So if you get
12 some strange reactions from the lawyers, please
13 don't think they are being rude. They are simply
14 following my instruction. I would also tell you
15 should someone talk to you about this case, if
16 you could get a name or a description, it would
17 be incumbent upon you to report that to me
18 immediately upon your return to the courthouse.
19 I will deal with that individual.

20 So we've got signs up, no cell phones, no
21 communication devices, no beepers, no -- you are
22 to have no way of communicating via the internet
23 or the radio, cell phones or whatever while you
24 are serving on the jury. So I'm going to ask you
25 please leave your cell phone, beeper, pager,

1 laptop, PDA communication device and otherwise
2 away from the courthouse at lunch.

3 Now, having said that, if you happen to bring
4 your cell phone with you when you return
5 accidentally, please, please just let us know.
6 We'll just take the phone from you for
7 safekeeping. It is not appropriate for you to
8 have such a device with you as you are serving on
9 the jury and I don't mind telling you why.
10 Because you must receive all of the information
11 from which you make up your mind while court is
12 in session. We have actually had -- I had to set
13 a trial aside, I had to mistry a case about two
14 years ago because I had a juror that was
15 communicating with the internet during the trial.
16 That's the reason for that.

17 And I'm not alone in that. That, uh, -- down
18 in Charleston several years ago, they were trying
19 a wreck case and the jury had a question about an
20 injury. Somebody said I have my cell phone. I
21 have numbers to a doctor, let's just call them
22 up. Well, the whole trial had to be done over
23 because again that was information that wasn't
24 received in court while court was in session.

25 Now, our Chief Justice has instructed us, the

1 trial bench, that we are supposed to be very
2 careful. We also tell jurors please do not read
3 anything or listen to anything about this matter.
4 Don't do any Colombo, those of you who are old
5 like me. No Colombo. No investigation. Please
6 do not try to communicate with folks on Facebook
7 or My Space or whatever those social networking
8 sites are about this case. Don't ask questions.
9 No Colombo. No investigations. Again, you must
10 receive all of the information from which you
11 will make up your mind here in court while court
12 is in session.

13 Now, that's enough. It's time for lunch.
14 When you return, I'll have some preliminary
15 remarks for you and then we are going to get
16 right into trying this case. If you will please
17 go with Ms. Salisbury, remember not to discuss
18 this matter or allow anyone to discuss it with
19 you. Have a good lunch. 2:30.

20 (WHEREUPON, the jury exits at approximately
21 1:11 p.m.)

22 THE COURT: Do we have any preliminary
23 matters from the State?

24 MR. BELL: None from the State.

25 THE COURT: From the defense?

1 MR. BISCHOFF: Nothing from the defense,
2 Your Honor.

3 THE COURT: Very well. Now, you had
4 mentioned that there was some audio, that there
5 could be an objection that could arise?

6 MR. BISCHOFF: I just -- Your Honor, I was
7 wanting to know procedurally how we were going to
8 handle things now that we've broken for lunch. I
9 simply wanted to find out where the audio visual
10 systems were here. I think I can do that at
11 lunchtime.

12 THE COURT: They are rudimentary at this
13 moment.

14 MR. BISCHOFF: We'll make do, Your Honor.

15 THE COURT: The other courtroom is wired and
16 ready to go. We've obviously not done the
17 training but it's got all the bells and whistles,
18 but it doesn't have staining. So we are sort of
19 in-between. But very soon.

20 MR. BISCHOFF: We'll make do just fine.

21 THE COURT: Thank you so much, Mr. Bischoff.
22 If you all need me during the course of lunch,
23 I'm going to be in chambers. So if there are any
24 matters that arise, please come in chambers and
25 let me know so that we can handle those before

1 the jury arise back at 2:30. Thank you.

2 MR. BELL: Thank you.

3 MR. BISCHOFF: Thank you, Your Honor.

4 (WHEREUPON, a lunch recess is taken from

5 approximately 1:12 p.m. to 2:33 p.m.)

6 (WHEREUPON, Defendant's Exhibit 1 is marked for
7 identification purposes.)

8 (WHEREUPON, State's Exhibits 1 through 5 are
9 marked for identification purposes.)

10 THE COURT: All right. Anything before we
11 bring the jury out from the State?

12 MR. BELL: Nothing from the State, Your
13 Honor.

14 THE COURT: From the defense?

15 MR. BISCHOFF: Judge, just a motion for
16 sequestration for all witnesses except for the
17 victim or any case officer that may be associated
18 with the case.

19 THE COURT: All right. Oh, wait. The
20 Defendant is not here. Where is he?

21 MR. BISCHOFF: He's en route, Your Honor.

22 THE COURT: Okay.

23 (WHEREUPON, there is a pause.)

24 THE COURT: Let the record reflect that Mr.
25 West has joined us. He is here. And, uh, I just

1 -- counsel, I want you to have every opportunity
2 to, uh, just to share with Mr. West that as he
3 was coming in, as he was coming up the steps or
4 coming to the second floor that you all wanted
5 the witnesses to be sequestered. I don't know
6 that that was formally done since he wasn't
7 present. But I know that the State has removed
8 the witnesses and they have in fact been
9 sequestered. There will be a sequestration order
10 and I want you to have every opportunity to go
11 over that with him. All right..

12 MR. BISCHOFF: Thank you, Judge.

13 THE COURT: Tell me when you are ready.

14 (WHEREUPON, Mr. Bischoff consults with the
15 Defendant.)

16 THE COURT: All right. Now, again, Mr.
17 West, I don't think that counsel was going
18 forward. It's just as we were moving about to
19 get ready, we realized Mr. West needs to come on
20 in and so they stopped at that point. I think
21 that Mr. Bell heard that was coming and so he
22 just presumed that the motion would be granted.
23 But for the record, you would make the motion now
24 to sequester the witnesses?

25 MR. BISCHOFF: I would, Your Honor.

1 **THE COURT:** Okay. But for, of course, the
2 victim and the case officer. Very well. Of
3 course, if it's sauce for the goose, it's sauce
4 for the gander. If you all would be mindful of
5 that, that would be very helpful. And there --
6 as I understand, there are no other matters
7 before I bring the jury out. I'm going to bring
8 the jury out. I'm going to make my preliminary
9 remarks to them. There will be opening
10 statements, I gather, on both sides, both from
11 the state and from the defense. Is that right,
12 Mr. Bischoff?

13 **MR. BISCHOFF:** That is, Your Honor.

14 **THE COURT:** Thank you so much. Let's have
15 the jury.

16 (WHEREUPON, the jury enters at approximately
17 2:45 p.m.)

18 **THE COURT:** Very well. Ladies and
19 Gentlemen, I certainly hope that you all had a
20 very good lunch. There are a few preliminary
21 matters that I'm going to go over with you. But
22 at this time, I'm going to call on Ms. Jeffers to
23 please swear you in as the jury in this case.

24 **THE CLERK:** Ladies and Gentlemen of the jury,
25 please stand and raise your right hand to be

1 sworn. Do you solemnly swear or affirm that you
2 shall well and truly and true deliverance make
3 between the State of South Carolina and the
4 Defendant at bar whom you shall have and charge
5 and true verdict give according to the law and
6 the evidence. If you accept this oath, please
7 say "I do" and be seated.

8 (WHEREUPON, each juror responds.)

9 THE CLERK: Thank you.

10 THE COURT: All right. Now, Ms. Hammond,
11 you are our alternate. I am, again, going to ask
12 when you all return after afternoon break, if you
13 will, take that seat on the back row and keep
14 that seat throughout the balance of the trial so
15 that we may keep up with you as our alternate.
16 That would be wonderful. Thank you for that.

17 Also, Ladies and Gentlemen, our law provides
18 that there should be one of your number who
19 serves as your presiding juror. The presiding
20 juror has three additional tasks of, uh, along
21 with the other tasks of being a juror. The
22 presiding juror will actually take physical
23 possession of the verdict form. And once the
24 deliberations of the jury are concluded at the
25 conclusion of the trial, the presiding juror will

1 write the verdict on the verdict form.

2 It will be the presiding juror's
3 responsibility to preside in the jury room just
4 to be sure that everybody has a chance to talk
5 during the deliberations. And finally, the
6 presiding juror is the jury's spokesperson here
7 in court. What that means is that if the jury
8 needs to communicate with me for whatever reason,
9 the presiding juror will take that down in
10 writing, sign it and probably give it to Mr.
11 Taylor, who will, in turn, give that to me.
12 Those are the additional tasks of the presiding
13 juror.

14 Now, Ladies and Gentlemen, I'm going to ask
15 that, uh, on one of your breaks that you please
16 select your own presiding juror. When that
17 person has been selected, if they'll take the
18 seat where Ms. Hammond is now, the seat on the
19 front row closest to the door and keep that seat
20 throughout the balance of the trial, I will
21 appreciate that very much. It will allow me to
22 keep up with our presiding juror. I would
23 appreciate that.

24 Now, when you've been selected, you can tell
25 me when you come back to the courtroom that I've

1 been selected as the presiding juror, you can
2 give me a note and sign it or, or you can just
3 see if I figure it out as you keep the seat.
4 Either one of those methods is perfectly fine. I
5 just need to know when you have selected your
6 presiding juror.

7 Now, Ladies and Gentlemen, you are now the
8 jury in this case. We are about to try the case
9 of the State of South Carolina versus James West,
10 the Defendant. Ladies and Gentlemen, before we
11 begin this trial, I want to tell you that this
12 trial probably will be different from what you
13 might expect. Many people do not have the chance
14 to attend actual court proceedings as you are
15 doing now and may think from watching television
16 or from watching movies or reading books or the
17 like that trials are always full of high drama,
18 intense action and riveting circumstances.

19 While I can clearly tell you that while all
20 of these things are true at times, this trial is
21 not intended for entertainment. It is a
22 fundamental part. It may be the fundamental part
23 of our democracy, a search for truth in an effort
24 to make sure that justice is done between the
25 parties before the court. Searching for the

1 truth and making sure that justice is done is
2 often slow, deliberate and repetitive, the
3 opposite of what you may have read in books,
4 clearly not what is seen in movies or on
5 television.

6 This courtroom is a place of honor dedicated
7 to the protection and the preservation of
8 citizens' rights, what many have called, and I
9 concur, the greatest system of justice ever
10 created. Ladies and Gentlemen, the attorneys who
11 are appearing before you are advocates. They are
12 advocates for the parties they represent but, but
13 first and foremost, they are officers of the
14 court sworn to uphold the integrity and fairness
15 of our judicial system and help you in the search
16 for the truth. You should expect them to be
17 professional and competent and ethical in the
18 representation of their clients' interest.

19 Remember that you have taken an oath to try
20 this case and to reach a fair and just verdict.
21 You are also expected to be professional,
22 reasonable and ethical. I want to thank you for
23 accepting the important responsibility of jury
24 service and for your contribution in a real way
25 today to our judicial system.

1 Ladies and Gentlemen, what I now will say to
2 you is intended to serve as an introduction to
3 the trial of this case. My remarks are not a
4 charge on the law applicable to this case. Those
5 remarks, those instructions will come at the end
6 of the trial before you retire to your jury room
7 to consider your verdict. My comments to you now
8 are merely an explanation of the procedure that
9 we will be following in the trial of this case so
10 that you may better be able to follow where we
11 are in the procedure.

12 Ladies and Gentlemen, I want to tell you
13 that, uh, oftentimes jurors ponder about the taking
14 of notes. There is a debate that is ongoing
15 about the taking of notes during the course of a
16 trial. It goes like this. There is a concern
17 that a juror can miss something as it's coming
18 from the witness stand as they take a note.
19 There is another concern that a juror with a note
20 during deliberation can hold more weight than a
21 person with a memory. Because these are good
22 concerns, Ladies and Gentlemen, and they also
23 reflect it off of the concerns that when you've
24 got a long trial, jurors who are notetakers
25 simply may want to have notes to be able to

1 refresh their recollection.

2 Ladies and Gentlemen, as a policy matter,
3 when trials are expected to be of a relatively
4 short duration, I ask jurors not to take notes.
5 When trials are expected to be a longer duration,
6 I provide notebooks and paper and pen and
7 instructions so that jurors can certainly take
8 notes. Ladies and Gentlemen, because this trial
9 is anticipated to be of relatively short
10 duration, I'm going to ask you not to take notes
11 and trust your memory.

12 Given that I have now commented on the
13 anticipated duration of this trial, I want to
14 hasten to tell you that I only mention that
15 because I don't want you worried about not taking
16 notes. I, in no way, demean the importance of
17 this trial because it is of the utmost importance
18 to the State, to Mr. West and to our system.
19 Again, I just didn't want you worried about my
20 instruction not to take notes.

21 Now, Ladies and Gentlemen, the Defendant, Mr.
22 West, is charged by an indictment filed with this
23 court of the crime of Assault and Battery of High
24 and Aggravated Nature. The elements of which
25 will be explained to you later. The indictment

1 as we spoke earlier are simply the charge of
2 which the case is brought into court. It is not
3 in any sense evidence of any of the allegations
4 it contains.

5 The Defendant, Mr. West, has pled not guilty
6 to this indictment. The State therefore has the
7 burden of proving each of the elements of the
8 indictment beyond a reasonable doubt. It will be
9 your duty, Ladies and Gentlemen, to decide
10 whether the State has met that burden. Your
11 purpose as jurors is the find and to determine
12 the facts. You are the sole judges of the facts.
13 If, at any time during the course of this trial,
14 I make any comment regarding the facts, you must
15 disregard them. You are to determine the facts
16 from the testimony that you hear and the other
17 evidence which is introduced into court.

18 It is up to you to determine the inferences
19 which you feel may properly be drawn from the
20 evidence. It is especially important that you
21 perform your duty of performing the facts
22 diligently and consciously because ordinarily
23 there is no way, there is no way to correct an
24 erroneous determination of the facts by a jury.

25 On the other hand, and with equal emphasis,

1 the same law that makes you the judges of the
2 facts makes me the judge of the law. The law as
3 given to you by the court is the only law that
4 you may consider. You must accept the law even
5 though you may disagree with it. I can not tell
6 you what the facts are and you can not disagree
7 with me about what the law is or should be. Your
8 job is to take the law as I give it to you and
9 apply it to the facts as you find them to be from
10 the testimony of the witnesses and any other
11 evidence that is introduced. After doing that,
12 you will render your verdict a true and just
13 verdict under the solemn oath that you just took
14 as jurors.

15 Until I advise you to begin your
16 deliberations, you must not discuss this case
17 with anyone including your fellow jurors,
18 friends, family members and anyone involved in
19 this case. This includes discussions face-to-
20 face and those by telephone, email, texts and any
21 other method of communication. After the case is
22 submitted to you, you must discuss it only in the
23 jury room with your fellow jurors. The attorneys
24 and the parties in this case have been advised
25 that they are not to talk to you at all. So if

1 you happen to see anyone involved in the case and
2 they do not even say hello, they are not being
3 unfriendly, they are simply following my
4 instructions.

5 During this trial, do not read, listen to,
6 watch any news reports about this case. This
7 includes anything that may be in the newspapers,
8 on the internet, radio or the television. You
9 must not consider anything you may have read or
10 heard about the case outside the courtroom
11 whether before or during the trial. It is
12 important, Ladies and Gentlemen, that you keep an
13 open mind and not decide any issue in the case
14 until all of the evidence has been presented, the
15 parties have made their closing arguments and I
16 have instructed you on the law applicable to this
17 case. It is your solemn responsibility to
18 determine whether Mr. West is guilty or not
19 guilty. And your verdict must be based solely on
20 the evidence as it is presented to you during
21 this trial and on the law as I instruct you
22 during and at the close of the trial.

23 In a moment, the Solicitor will make what is
24 called an opening statement to you in which, no
25 doubt, the Solicitor will explain to you what he

1 or she believes the issues are in this case. One
2 of the attorneys for the Defendant may, and I
3 believe will, make an opening statement. Ladies
4 and Gentlemen, what the attorneys tell you during
5 their opening statements as well as their closing
6 argument is important. I urge you please give
7 them your undivided attention. But do realize
8 that what the attorneys say is not evidence. The
9 evidence comes from the sworn witnesses in the
10 case and exhibits which are admitted into
11 evidence.

12 Now, from time to time, during the course of
13 this trial, no doubt you will hear one or more
14 than one, no doubt, of these lawyers say
15 something like, Your Honor, we have a question of
16 law or matter of law to discuss with you or may
17 we approach or objection or something of the
18 like. I want you to understand what is going on.
19 If I ask the lawyers to the bench or ask you to
20 step from the courtroom for a short while, what
21 is occurring is I am simply having a very short
22 discussion with the lawyers so I can rule on a
23 matter of evidence which has arisen.

24 Ladies and Gentlemen, our rules allow a
25 lawyer to call a possible violation of our rules

1 of evidence to my attention. The way they do
2 that is as I just explained, by saying
3 "objection", "we have a matter of law" or
4 something to that effect. Ladies and Gentlemen,
5 the reason that they approach or I need to ask
6 you to step to your jury room is so I can have a
7 discussion and my words with them would not be
8 perceived as being some sort of comment on the
9 facts. Ladies and Gentlemen, my ruling on
10 matters of evidence, the admissibility of
11 evidence, those are matters of law. Once
12 evidence has been admitted, what weight you give
13 to it, whether you believe it, the inferences you
14 draw from it, all of those matters are for you to
15 determine.

16 Now, Ladies and Gentlemen, in determining
17 what the facts are in this case, you must decide
18 whether or not the testimony of the witnesses is
19 believable. It is my responsibility to rule as
20 a matter of law as to whether certain testimony
21 is admissible at all or not. But once it is
22 admitted, whether or not you believe it is solely
23 for you to determine.

24 In deciding whether to believe a witness, you
25 have the right to consider the interest of any

1 witness, bias of any witness, the prejudice of
2 any witness, the opportunity for the witness to
3 have seen the things and matters about which the
4 witness may testify and the way the witness acts
5 on the witness stand. You have a right to
6 consider anything that is in the record that
7 would help you evaluate the testimony of the
8 witnesses. That means that it is your duty to
9 pay close attention to these witnesses, observe
10 them, listen to them and to pay close attention
11 to the attorneys and to the court. Please do not
12 let your thoughts wonder but gives the strictest
13 attention to the testimony in this case so that
14 at the end of all the testimony, after the
15 arguments of counsel and my charge on the law,
16 you will then be in a position to determine what
17 the true facts are and thus render a true and
18 just verdict.

19 Ladies and Gentlemen, it is important that in
20 order to preserve everyone's rights that I give
21 an opportunity to these attorneys to object to
22 anything that I may have said to this point.
23 From the State?

24 MR. BELL: No objection from the State.

25 THE COURT: From the defense?

1 MR. BISCHOFF: None from the defense, Your
2 Honor.

3 THE COURT: Ladies and Gentlemen, I ask that
4 you please draw close as we listen to the opening
5 statements of our attorneys.

6 MR. BELL: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 MR. BELL: If it please the Court.

9 THE COURT: Yes, sir.

10 MR. BELL: Mr. Bischoff.

11 Ladies and Gentlemen of the jury, putting an
12 eye out. I think most, if not all of us, have
13 been warned about, by our mothers or fathers
14 about doing some activity that would result in us
15 putting our eye out. I've always heard that
16 warning, never seen it. That's what this case is
17 about, Ladies and Gentlemen.

18 Back on the late night of May 18th, early
19 morning May 19th of 2009, the victim in this case
20 Mr. Lance Malmquist lost his eye that night as a
21 result of an assault on him. That's why we're
22 here today. The Defendant, James West, has been
23 charged with Assault and Battery of High and
24 Aggravated Nature. These two gentlemen were
25 roommates at the time. They lived over off of

1 between West Richardson. The address is West-
2 Richardson, but the house is probably closer to
3 Doty Street next to the railroad track in the
4 town of Summerville here in Dorchester county.

5 They had some physical arguments that night.
6 At some point, they had a tussle where the
7 victim, Mr. Malmquist disengaged or started
8 moving away from the Defendant and at some point,
9 the Defendant came at him and either hit him or
10 poked his eye resulting in an injury and he lost
11 his eye. As I said, that's why we're today,
12 Ladies and Gentlemen.

13 As you know, my name is Harrison Bell. I
14 represent the State of South Carolina working the
15 Solicitor's office. It's my duty to present a
16 case where individuals have been charged with a
17 crime as has happened in this case. The State of
18 South Carolina is required to carry the burden of
19 proof in this case. That is, I'm required to
20 prove a defendant guilty beyond all reasonable
21 doubt. He's not required to prove a thing. He
22 doesn't have to put up any evidence. He didn't
23 have to testify. He could force the State to
24 prove him guilty and he's not required to do a
25 thing. That's what our system of justice is in

1 the United States and in South Carolina.

2 As I stated earlier, the Defendant, James
3 West is charged with Assault and Battery of High
4 and Aggravated Nature. The State is required to
5 prove that charge and the elements of that
6 charge, each element beyond all reasonable doubt
7 in order to find Mr. West guilty of that crime.
8 What's an assault? What's a battery? What's an
9 Assault and Battery of High and Aggravated
10 Nature? I think it will be explained at the end
11 of this trial when Your Honor, Judge Goodstein,
12 charges you the law that an assault is an offer
13 to do physical violence to a person.

14 For example, if I raise my hand back at you,
15 that's an assault. It also has to have the
16 present ability to do so. If I raise my hand
17 back at you, I have the present ability to hit
18 you. If I sat here and said I want to shoot you,
19 I don't have a gun. That's not an assault. I
20 don't have the ability to shoot you at this
21 particular time.

22 A battery is the completion of the assault.
23 It's also an offense of touching. That is a
24 touching that you don't allow or you don't want.
25 So an assault and battery is the offer and the

1 completion of that offer to do physical violence
2 to another person.

3 Assault and Battery of High and Aggravated
4 Nature adds one more element. That there is a
5 circumstance of aggravation. In this state, it's
6 a common law crime. Over the years that South
7 Carolina has been a state and the body of law
8 we've had through our courts, there have been
9 many circumstances of aggravation that have
10 developed through the law. One of which is which
11 the State alleges in this case is that the
12 victim, uh, had a serious bodily injury occur as
13 a result of the assault and battery upon him. We
14 would certainly tell you, Ladies and Gentlemen,
15 that losing an eye would be a serious bodily
16 injury as losing any member of the body would be
17 a serious bodily injury.

18 Now, Ladies and Gentlemen, the State will
19 present several witnesses in this case. All we
20 can do is ask you to listen very carefully to the
21 evidence that we present. As I said, we have the
22 burden of proof in this case. We must proof the
23 Defendant guilty beyond all reasonable doubt.

24 Now, as Judge Goodstein told you a little bit
25 about what's going on, she is the judge of the

1 courtroom. She is the judge of the law. You
2 have taken an oath that states you must follow
3 the law that she charges you. What that means is
4 you must follow that law. If you have a problem
5 with it, if you disagree with it, if you think
6 it's wrong, that can't enter into it because you
7 have taken an oath to follow the law that she
8 charges you and you must follow that law.

9 Ladies and Gentlemen, she's not the only
10 judge in the courtroom. You, as individual
11 jurors and as twelve, are a judge in this
12 courtroom. You are the judge of the facts. What
13 you find the facts are, nobody can disagree with.
14 Nobody in this courtroom can tell you how to find
15 those facts. I can't do it. The defense
16 attorney can't do it. Judge Goodstein can't tell
17 you how to find those facts. That's left up to
18 you.

19 You do it by observing the witnesses that are
20 presented, listening to their testimony, weighing
21 their credibility. You observe any evidence that
22 may be presented to you, any exhibits that may be
23 presented to you during the course of the trial.
24 As I just mentioned, you have to weigh the
25 credibility of witnesses. Credibility simply

1 means the believability of witnesses. Are they
2 telling the truth?

3 You're going, oh my gosh, how can I do that?
4 Well, unfortunately, I can't help you there. You
5 have to do it as you do everyday in your life
6 when you talk to family members, when you talk to
7 friends. When they tell you something, you
8 usually have a good idea of whether they are
9 telling you the truth or whether they are not.
10 That's how you use it. You haven't changed
11 coming through these doors in the courtroom. Use
12 that same system that you use everyday in your
13 life.

14 Ladies and Gentlemen, as I think Judge
15 Goodstein told you, what this will be is the
16 State will present its case. At the end of the
17 case, you will be asked to render a verdict.
18 What you do is you take all the evidence, all the
19 facts that you find and you take the law that
20 Judge Goodstein charges you. At the end of the
21 case, you put them together to reach a verdict
22 and you go back and deliberate. All we can ask
23 you, Ladies and Gentlemen, is to listen carefully
24 to all the evidence presented, observe any of the
25 exhibits that are presented. The State believes

1 in the end that we will present more than enough
2 evidence for you to find that the Defendant,
3 James West, is guilty of Assault and Battery of
4 High and Aggravated Nature. Thank you.

5 THE COURT: Thank you.

6 Mr. Bischoff.

7 MR. BISCHOFF: Thank you, Your Honor.

8 Mr. Bell.

9 Ladies and Gentlemen, good afternoon. I
10 appreciate you being here. Uh, as Mr. Bell is
11 saying, this is -- could be all simplified by
12 saying it's a fight between two roommates. Mr.
13 West, my client, and Mr. Malmquist, his roommate
14 both lived at in
15 Summerville. That's where the fight occurred.
16 Nobody else saw the fight except for those two
17 individuals. Only those two individuals were at
18 the scene when the fight took place. You'll have
19 to use your common knowledge of every -- the same
20 way you do in everyday life to determine who is
21 being credible. Who's telling the truth?

22 You're going to hear a lot of other people
23 testify that they were there, the police respond
24 to the scene. You're going to hear a doctor
25 testify about the surgery for Mr. Malmquist. But

1 what it all boils down to are there are two
2 individuals that got into a fight and here we
3 are.

4 The State has their side of the story. We
5 have our side. Our side of the story is that on
6 May 18th, 2009, my client, Mr. West, comes home
7 from work. He's in the business of construction.
8 He's doing some remodeling that day. Actually,
9 he was filling up a trailer with a coworker of
10 his with metal straps and other things from the
11 job site. He took it back to his house,
12 where Mr. Malmquist also lives.

13 They gathered up a couple of empty beer cans.
14 As you can probably imagine, drinking was
15 involved this night on both sides. You will hear
16 evidence to that. You will hear people testify
17 about that. But the afternoon of May 18th, my
18 client gathers up the beer cans, goes to the
19 scrap yard, gets a decent amount of money from
20 selling scrap metal. He returns home.

21 Mr. Malmquist isn't happy that he isn't
22 sharing some of that money that he believes is
23 rightfully his with him. An argument happens.
24 They sort of go their separate ways, but as you
25 may hear, there are some neighbors that overhear

1 the argument. An argument takes place late in
2 the evening and it all comes to a head at about
3 10 p.m.

4 The cops respond out to the scene. You will
5 hear officers testify that both individuals say
6 that Mr. Malmquist was the one that struck Mr.
7 West with his walking stick. My client grabs the
8 stick and hits him back. No injuries seen on
9 either one. Think to yourself. Why would the
10 Summerville Police Department leave after hearing
11 those accusations that someone was seriously
12 hurt? Evidence will prove no one was injured.
13 Both agreed to go their separate ways. Again,
14 the only two individuals we are really concerned
15 with is Mr. West and Mr. Malmquist. They both
16 agree that 10 a.m. -- or 10 p.m. that night to go
17 their separate ways.

18 Another incident occurred some time around 1
19 a.m. The evidence will prove that about an hour
20 after an incident occurred between Mr. Malmquist
21 and Mr. West, 911 is called. Police respond to
22 the scene. You will actually hear testimony, or
23 not testimony, but you will hear recorded
24 statements of Mr. Malmquist right after the
25 incident occurred. He had time to take a shower,

1 do other things, get ready, call 911. You will
2 hear his statement that night about what
3 happened.

4 Mr. West gets arrested. He's in his home.
5 He's asleep when he's arrested. He's basically
6 taken in, goes to the hospital, getting treatment
7 and he's been in jail waiting and now he's here
8 today to tell his story. His story is he was
9 assaulted. He's not the one who started the
10 fight. It was Mr. Malmquist who started the
11 fight. My client went his separate ways, went to
12 sleep, got up in the middle of the night to use
13 the bathroom. You'll hear testimony about how
14 both individuals shared the same bathroom. On
15 his way from the bathroom into the kitchen for a
16 drink of water, it's Mr. West that gets assaulted
17 and blind-sided by Mr. Malmquist. It's Mr. West
18 who defends himself against Mr. Malmquist, not
19 the other way around.

20 You will hear testimony to the contrary by
21 the State. That's normal. That's their side of
22 the story. Our side of the story is that Mr.
23 West was the victim here and he was assaulted and
24 did what he had to do to defend himself from his
25 attacker.

1 Now, as the judge said, you are the jury of
2 the facts. You judge the facts. You base that
3 on the credibility of the witnesses and the
4 evidence presented to you. If you listen
5 closely, use your common knowledge. How is the
6 person telling the truth? Why should I believe
7 them? I'm certain at the end of this that you
8 will find that the State has told you, they are
9 going to prove to you beyond a reasonable doubt
10 that Mr. Malmquist was the victim here and that
11 Mr. West assaulted him with no justification
12 whatsoever and that's not the case.

13 I'm certain if you listen closely, you will
14 come to that same conclusion and find Mr. West
15 not guilty of Assault and Battery of High and
16 Aggravated Nature. Thank you.

17 THE COURT: Thank you, Mr. Bischoff.

18 Call your first witness please.

19 MR. BELL: The State would call Lance.
20 Malmquist to the stand.

21 THE COURT: Yes, sir. Come around please
22 and be sworn.

23 THE CLERK: Please raise your right hand and
24 state your full name for the record and spell
25 your last name.

1 THE WITNESS: My name is Lance Robert
2 Malmquist. M-A-L-M-Q-U-I-S-T.

3 LANCE MALMQUIST
4 having first been sworn, testifies as follows:

5 THE CLERK: Thank you. You may be seated.

6 THE COURT: If you will, pull that
7 microphone just a little bit towards you. Thank
8 you.

9 Your witness, Mr. Bell.

10 DIRECT EXAMINATION

11 BY MR. BELL:

12 Q Thank you, sir. Will you state your name
13 again please for the jury?

14 A My name is Lance Robert Malmquist.

15 Q Mr. Malmquist, where do you live presently?

16 A I live at in
17 Summerville.

18 Q How long have you lived there?

19 A Three years.

20 Q And what kind of place is this?

21 A Uh, it's an older farmhouse. It's a 100-year
22 old house. It's on the edge by the railroad tracks.

23 Q Do you know the Defendant James West?

24 A Yes, I do.

25 Q How do you know him?

1 A I worked with him for a few years. He was my
2 roommate for about a year.

3 Q How did y'all become roommates?

4 A He called me out of the blue. I've known him
5 previously. He moved out. Apparently, he had some
6 problem there. He called me and said that he was
7 homeless and he was needing a place to live. I knew
8 that he had a job because he worked for my former
9 boss. I didn't especially like him or know that I
10 wanted anything to do with him, but out of the
11 goodness of my heart, I said yes. He said can I live
12 under the house. I said no. I'll be home from work
13 soon. You can have the back bedroom. So against my
14 better judgement, obviously, I let him in the house.

15 Q And what kind of arrangement -- who paid the
16 rent on this house?

17 A The house was in my name. I rent the house
18 from Attorney Rutherford Smith. I -- we split the
19 rent and the bills with James. He paid me and then I
20 went and paid the rent money. There was no written
21 agreement whatsoever between me and Mr. West. It was
22 just an honor system. That was the problem. What was
23 what the altercation and the thing was about, was
24 about money, rent and bills that night. Nothing to do
25 with beer cans or any of the sort.

1 Q All right, Mr. Malmquist. Let's talk about
2 that night. It started on the evening of May 18th,
3 2009?

4 A Yes.

5 Q What had you done that day?

6 A Went to work.

7 Q What time did you get home?

8 A I don't know. Six o'clock maybe.

9 Q Did you get to the house first?

10 A Yes.

11 Q What happened after that?

12 A Uh, he came home with his friends. I had my
13 friends probably just watching TV, regular thing. He
14 had been doing his thing. I came up with the idea to
15 ask about the money. We were behind in rent money.
16 He had been drinking all day and the entire weekend.
17 I picked a bad time to be talking about that. He got
18 mad and in my face and was asking me where I spent all
19 my money. I said it's my house, you pay me. Then,
20 uh, we had, uh, the first altercation. Then I
21 defended myself. Then, I called the Summerville
22 Police Department and I was outside.

23 Q What time was this about?

24 A It was a hectic night. I think around 8:30.

25 Q Tell us about the altercation, what went on.

1 A We were arguing about money just like we did.
2 He said I was spending money on my girlfriend. I said
3 that you don't got to worry about that. I'm trying to
4 get the money for the bills. He chases me outside the
5 house, comes from behind me and hits me in the back of
6 the head in the hairline. I had my phone trying to
7 run away from him. I was in the dark in the driveway
8 and I called the Summerville Police Department. They
9 responded to the address. They got out --

10 MR. BISCHOFF: Your Honor, I'm going to
11 object to the continued line of testimony here.
12 I think Mr. Bell can ask the question and have --
13 ask that you have the witness instructed to
14 answer the question, but --

15 THE COURT: The objection is narrative. Ask
16 him a question.

17 MR. BELL: Thanks, Judge.

18 BY MR. BELL:

19 Q You called the Summerville Police. Did they
20 respond?

21 A Yes.

22 Q You recall how many officers?

23 A Maybe three the first time.

24 Q Okay. And when they got to your house, where
25 were you?

1 A I was face down in the driveway in the dirt
2 at the end of the house as I was trying to run away
3 from Mr. West.

4 Q What did you have with you?

5 A I had my cell phone. Nothing else. I don't
6 know.

7 Q And --

8 A Probably my cane probably.

9 Q You have a cane?

10 A I have a VA issued cane that I use at times.

11 Q Okay. And did the police come and talk to
12 you first or what did they do?

13 A Yes, they talked to me first.

14 Q Did any of them go inside and talk to Mr.
15 West?

16 A I don't recall at this time. Probably yes.

17 Q Was he inside, I guess I should have asked?

18 A Yes, at that point, he went inside and let me
19 handle the police.

20 Q Okay. And after talking, the police left, is
21 that correct?

22 A Yes.

23 Q Okay. They didn't do anything.

24 A Well, we came to the agreement that there
25 were no marks on me at that point. He hit me in the

1 back of the hair and there was nothing. I said I just
2 want this guy to go to bed and have all this go away.
3 They said do you want to press charges on him tonight.
4 I said no. They said okay. I said I just want this
5 all to go away. If he would just go to bed,
6 everything would be fine tomorrow. I didn't want to
7 have it go into this. He went to bed. The police
8 went back on their way. In a conflict, you walk away.
9 I knew there was activity in my neighbor's yard, so I
10 went to their backyard right after that.

11 Q Okay. You said that Mr. West had been
12 drinking, is that correct?

13 A Yes.

14 Q Had you had anything to drink that evening?

15 A Yes.

16 Q What?

17 A Beer.

18 Q You recall how many?

19 A Uh, five or six. A six-pack. Sure.

20 Q Okay. You said after the police left, you
21 went to your neighbor's?

22 A Yes.

23 Q Who is your neighbor?

24 A Mary Ashe.

25 Q Who was over there when you went over to that

1 house?

2 A Her boyfriend Carl.

3 Q Okay. Was she there?

4 A Excuse me.

5 Q Was she there?

6 A Yes.

7 Q What did y'all do over there?

8 A Just talked and hung out and I waited for
9 time for him to go to bed and to calm down. I didn't
10 hear anything from him for a while. Then I went back
11 home to make something to eat. I told them that the
12 food was ready. I went back across. He was in the
13 shower. I went back to my neighbor's house hoping
14 that he would go to bed and it would calm down.

15 Q Okay. How long had this been since the
16 police had left?

17 A The first part, the first one was probably
18 8:30. The next time was about 12:00.

19 Q Let me ask you this. You said after the
20 police left the first time, you went over to your
21 neighbor's house, right?

22 A Yes.

23 Q How long did you stay there?

24 A Four hours, three or four hours.

25 Q Then you went back to the house to fix

1 something to eat?

2 A No. I was probably there an hour. Went to
3 put some spaghetti on which took about five minutes
4 and then went back across to my neighbor's house to
5 stay away from him.

6 Q Okay. And how long were you over there?

7 A Another two hours, another hour.

8 Q Okay. Did anything happen while you were
9 over at your neighbor's house?

10 A Yes, it did.

11 Q What?

12 A Mr. West apparently did not go to bed and
13 wasn't finished with me. The next thing I know, I'm
14 in the back yard of my neighbor's house and Mr. West
15 apparently comes out of the shower in his underwear,
16 goes through the hedges and the bushes into my
17 neighbor's backyard screaming and yelling in his
18 underwear and saying that he's going to kill me when I
19 get home.

20 Q Okay.

21 A Then he turned around and apologized to the
22 neighbors. I'm stunned thinking this can't be going
23 on still and now he's really got it going on. He left
24 and went back into the house. I hoped that he was
25 either intoxicated, didn't remember or would go to bed

1 at that point.

2 Q Okay. What did you do?

3 A I stayed there another hour at least, an hour
4 and a half hoping that that would happen, that he
5 would go to bed and forget about this and that I could
6 sneak back into my own house and I could go to bed.

7 Q Did you go back to your house?

8 A Yes, I did.

9 Q What happened when you went back to your
10 house?

11 A I opened the door and the screen door
12 slammed. Within one second, I was trying to get to
13 the kitchen to my bedroom. With one second, he was
14 out of his bedroom and confronted me in the kitchen.

15 Q Okay. When you go back into your house --

16 A Yes.

17 Q -- what do you go into when you first go back
18 into your house?

19 A Through a screen door in a small hallway then
20 to the kitchen, then to my bedroom.

21 Q Which way is your bedroom as you are coming
22 into your house?

23 A To the right.

24 Q Okay. And where is the kitchen?

25 A Straight ahead.

1 Q And where is his bedroom in relation to that?

2 A To the left of the kitchen.

3 Q Okay.

4 A Like a T would be.

5 Q And where did he come from?

6 A His bedroom.

7 Q Is there a door that opens into the kitchen
8 or the dining area?

9 A There is a door that is into the kitchen, but
10 that doesn't open. You could hear somebody coming
11 into the kitchen through his -- his bedroom has three
12 doors. There is a doorway right there. He came all
13 the way around the far door to get me.

14 Q Okay. And where were you when he came
15 around?

16 A In the kitchen.

17 Q Okay.

18 A I walked in for maybe a couple of steps. He
19 heard the screen door and out of his room he came
20 flying.

21 Q Okay. What happened then?

22 A We got into an argument. He was in my face
23 and telling me I was looking at him in the bathroom
24 when he was taking a shower, I recall. It was quite a
25 hectic night. He grabbed me. We got into a fight. I

1 had to protect myself. I thought I would grab him and
2 go to the floor and try to stop this and say just go
3 to bed and tomorrow will be better. We came to an
4 agreement. Put your arms down. We were on the floor.
5 Just get up. This will be over. Let's talk about
6 this tomorrow, the rent money and everything. He
7 signaled yes. I did too.

8 I stood up. I turned around. I thought he
9 was going back to the left of his bedroom. I walked
10 to the right towards mine and took about three steps
11 and something came from behind me and hooked my eye
12 out and down to the floor of the kitchen I went.

13 Q What did you do at that particular incident?

14 A At that time?

15 Q Yes.

16 A I defecated. On the way down, I urinated and
17 defecated in my pants. It was a shock. It hurt a
18 lot. I fell on the ground. I couldn't believe what
19 had just happened. I thought he was far away. I
20 didn't feel any other punches or any other thing
21 except for my eye. I said oh my god, he pulled my eye
22 out.

23 Q How did you go down on the floor?

24 A Face first. Bang, like a ton of bricks.

25 Q What happened next?

1 A I lied on the kitchen floor trying to get
2 myself together and looking out my other eye and
3 trying to look out this one. I said oh my god, he's
4 done it. I'm blind. I was obviously in shock. I
5 started to crawl. He came beside me, said something,
6 but I don't remember what he said. He kicked me in
7 the side three times. I crawled on my stomach through
8 the kitchen to -- a safety would be my bedroom or
9 something there. I got to there. I think my cell
10 phone was in the bedroom too. I didn't have it on me.
11 I got to the bedroom and lied on the bed.

12 Q How long did this process take?

13 A Probably 20 minutes. I was in and out of
14 consciousness and shock. I put my hand on my chin. I
15 felt a ball. I thought maybe -- I hope he punched me
16 in the cheek or the face and that my eye was swollen
17 and that what I'm feeling is a contusion or something
18 like that. I said for crying out loud, I hope not.
19 At this point, I knew something bad had happened. I
20 knew where I was going. I had to call the police and
21 the ambulance.

22 Q Okay. Did you see that whatever it was,
23 punch or grab or whatever you described to your eye,
24 did you see that coming?

25 A I didn't see it coming. I was walking away.

1 I thought he was walking away after we agreed that we
2 would talk about it tomorrow. I didn't see what he
3 hit me with. It was nothing -- there were no other
4 scratches, no anything. It was an eye evisceration on
5 purpose.

6 Q All right. Once you got to your bedroom,
7 what did you do?

8 A I recall sitting there in horror and shock
9 and disbelief. Then, I knew what I had to do to get
10 on the phone and call the ambulance. I knew that
11 there was -- I knew I was going to surgery that night
12 and it was extremely serious. I was in shock. The
13 pain was not as acute --

14 MR. BISCHOFF: Your Honor, narrative.

15 MR. BELL: I think he was responding to the
16 question, Your Honor.

17 THE COURT: Probably now that he's paused,
18 you may need to ask him another question.

19 BY MR. BELL:

20 Q When you got to your bedroom and were
21 deciding this, what did you do next?

22 A I went to the bathroom to look at what the
23 damage had been. I thought it was going to be
24 something, what it was. I looked in the mirror. My
25 eyeball was hanging out and down. Then, uh, -- before

1 that, Mr. West came into the room with some ice kindly
2 enough. He knew that he had done something. I
3 thought he was coming in to finish me. But he didn't
4 say a word, not what the damage he was looking at. He
5 went to the freezer and got some ice for me. So I
6 thanked him and then I knew that he left and went into
7 his room knowing what had happened.

8 I took all my clothes off in the shower. I
9 was full of defecation. That's what happened to me
10 immediately upon this injury. I knew I was going to
11 surgery. I knew the ambulance and I didn't want to
12 present myself for what I had to go through like that.
13 I took all my clothes off, went back to my room, put
14 on some shorts. It was warm out. And some sandals.
15 And I kept the back door open on purpose. I didn't
16 want to call the police when I was in the house
17 because I didn't want him to hear me or kill me or
18 break my bone. I went down -- I went next door and no
19 one was home. I went out the back and called the
20 ambulance.

21 Then they called the police. I told them I
22 left the back door open. They knew what had -- the
23 same police came back a couple of hours later. Then
24 they came in. It was my house. I said you know where
25 he is. He's in the front bedroom. The backdoor is

1 open. I went off to surgery that night. Then that's
2 the last I seen of him.

3 Q How long from the time that you had just saw
4 the injury to your eye about was it when you called
5 911?

6 A To me, it was 20 minutes. I don't know. It
7 was -- I got to my bedroom. Like I said, I assessed
8 what was going on. I knew what was going to happen.
9 I had to clean all that stuff off me, get away from
10 the premises so he couldn't hear me on the phone. I
11 knew I was going to the hospital. The ambulance
12 picked me up down the street. The police took
13 photographs of me. I went to MUSC to the Storm Eye
14 Institute for emergency surgery. I haven't seen him
15 since today.

16 Q My question is you didn't immediately run out
17 and call 911 after you were injured?

18 A No.

19 Q There was some time between.

20 A I couldn't breathe. I couldn't move. I was
21 in shock. My eye was falling off and bleeding. I had
22 no idea what to do. Plus I was still afraid of him.
23 If I -- if he heard what I was doing, I was afraid for
24 my safety. I was trying to get myself together,
25 formulate a plan, clean myself up. What I did was the

1 best, was what I was planning to do at that time.

2 Q Okay. And you went to the -- as you stated,
3 you went to the hospital that night, is that correct?

4 A Yes, I did.

5 Q Okay. The person that was there that night
6 with you who caused that injury, you see him in the
7 courtroom today?

8 A Yes, I do.

9 Q Would you point him out to the jury?

10 A Seated right over there. James West.

11 MR. BELL: Your Honor, we'd ask that the
12 record reflect that the witness has identified
13 the Defendant.

14 THE COURT: Very well.

15 BY MR. BELL:

16 Q What was the result of the injury to your
17 eye?

18 A The result is permanent eye loss and
19 blindness.

20 Q You wear a patch?

21 A Yes.

22 Q You have a prosthetic?

23 A Yes.

24 Q After going to MUSC that night, you had
25 further surgery, is that correct?

1 A Yes, I did.

2 Q Where did that take place?

3 A The first was MUSC Storm Eye Institute
4 emergency to try to regain the sight. We worked on it
5 for a week. That didn't work. That was in May. Then
6 I was transferred to the VA where I have -- I'm a
7 disabled American Veteran. I have all my doctors and
8 100 percent medical at that facility. So they
9 transferred me from MUSC to the VA. I had another eye
10 operation in July to take what was left of the eyeball
11 out, clean out the inside, reattach the muscles, put
12 it back in and to prepare for a permanent prosthetic.

13 Q You recall where you were asking to be taken
14 the night that this injury, what medical facility?

15 A Yes, I talked to the ambulance people and I
16 said take me to the VA, downtown to the VA. I heard
17 them on the radio. They said they had to go to
18 Trident and then MUSC. It was some protocol about
19 they had to go to the closest place. I did end up at
20 the VA where I wanted to be.

21 Q Mr. Malmquist, just -- I want to show you
22 three pictures just for identification purposes. This
23 is what's marked as State's 3 for identification. Do
24 you recognize that photograph?

25 A Yes, I do.

1 Q What is that a picture of?

2 A That's my kitchen.

3 Q And which direction are we looking at in
4 State's 3 for identification?

5 A We are looking at the direction towards the
6 screen door and towards the outside.

7 Q So you came from the top of the photograph
8 into this room?

9 A Yes, I did.

10 Q Let me show you what's been marked as State's
11 4 for identification and ask you what that's a picture
12 of. Is that the same area?

13 A That's the floor of the same kitchen, yes.

14 Q Okay. And if I could get State's 5, can you
15 identify that?

16 A That's the floor of my kitchen, yes.

17 Q That's where you fell ---

18 A Yes.

19 Q --- after he did that to your eye?

20 A Yep.

21 Q That's where you fell face down?

22 A Yes.

23 Q Thank you, Mr. Malmquist. Please answer any
24 questions Mr. Bischoff has for you.

25 THE COURT: Cross-examination?

1 MR. BISCHOFF: Thank you, Judge.

2 THE COURT: Uh-huh.

3 CROSS-EXAMINATION

4 BY MR. BISCHOFF:

5 Q Mr. Malmquist, good afternoon.

6 A Good afternoon.

7 Q You testified to a number of different things
8 that I want to ask you a couple of questions about.
9 Uh, your living situation and especially the night of,
10 but I'll get there if you'll just bear with me. You
11 said that you been at West Richardson for about three
12 years, is that correct?

13 A Yes, I been to West Richardson for three
14 years, uh, December 1st, 2009.

15 Q And you said that, uh, -- have you lived
16 there the entire time?

17 A Yes, I have.

18 Q Never moved out for a brief period?

19 A Oh, I went to my -- it's always the house --
20 the house was always in my name. I went to visit my
21 friends for about a month.

22 Q For about a month. So you were just visiting
23 for a month?

24 A Yes.

25 Q Who paid the rent during that period of time?

1 A No one did.

2 Q You got behind on the rent for about a month?

3 A Yes, I -- no, for quite a while.

4 Q Okay.

5 A I had to go back and make arrears to all
6 that.

7 Q And after you returned, did you make up the
8 difference in the rent?

9 A Yes, I did, and the bills and the electric
10 and the water.

11 Q And Mr. West was living with you at that
12 time?

13 A That's right.

14 Q He'd been there since about June of '08, is
15 that correct?

16 A Yes.

17 Q Was anybody else living in the house at the
18 time?

19 A A guy named Gary, while I was gone, a friend
20 of Mr. West. He put him in there.

21 Q But no one the night of the incident?

22 A No, just the two of us.

23 Q And how many bedrooms are in this house?

24 A Three.

25 Q And would it be safe to say that your bedroom

1 is closest to the kitchen?

2 A No, it's equal. The kitchen is in the middle
3 of his bedroom and mine.

4 Q So in other words, if I'm walking in the
5 kitchen, bedroom to the left, bedroom to the right,
6 equal distance from each other. Mr. West is on the
7 left and you're on the right, is that correct?

8 A Yes.

9 Q And there's one bathroom in that house, is
10 that correct?

11 A Yes.

12 Q Y'all both shared that bathroom?

13 A Yes.

14 Q And if I was to walk into the house, go a
15 little bit towards your room and then straight back
16 away from the entrance of the house, that would be
17 where the bathroom is located, is that correct?

18 A Yes.

19 Q Again, about equal distance from both of your
20 bedrooms, is that correct?

21 A Closer to mine.

22 Q Closer to yours. Okay. And, uh, were you
23 employed at any time during the time that Mr. West
24 lived there?

25 A Yes.

1 Q And where were you employed?

2 A I worked for Taylor Coastal Construction. I
3 do jobs with my friends in Hugee, tile-work type of
4 jobs. And I live on my VA disability compensation.

5 Q Are you currently receiving disability
6 benefits?

7 A Yes, I am.

8 Q When do they start?

9 A September 2009.

10 Q And, uh, Mr. West works as an independent
11 contractor or a construction man, is that correct?

12 A Yes, he does..

13 Q That's sort of how y'all met. I believe you
14 testified earlier that --

15 A Yes, it is.

16 Q Was that company TC Construction?

17 A Yes, it is.

18 Q Okay. And, uh, do you remember what day it
19 was on May 18th, what day of the week?

20 A It was Monday.

21 Q Okay. You went to work that day?

22 A Yes.

23 Q Where did you go to work?

24 A Doing odd jobs with TCC. I worked on and off
25 with them. I'll be in the front yard. I'll be doing

1 stuff at the shed. Sometimes I go out on tile jobs
2 with them, but not permanent work. Like he, he did
3 permanent work for them. I did odd jobs with them.

4 Q You remember if it was raining that day or
5 was it nice out?

6 A No, I don't recall.

7 Q You remember what time you went to work that
8 day?

9 A I don't remember.

10 Q And you testified that -- but you know you
11 came home around 6:00, right?

12 A I was home throughout the day, yes.

13 Q Well, a minute ago, you testified that you
14 came home around 6 p.m. from work that evening.

15 A It was working the front of the house at the
16 shed and then doing odd jobs. It wasn't like a
17 permanent like 9-to-5 type of thing.

18 Q So you didn't do anything with laying tile
19 that day?

20 A No. No. Cleaning up the yard and they have
21 a dumpster up front. Nothing like a real 9-to-5 type
22 of that thing. I was pretty much in my house all day.

23 Q Okay. You don't remember what time you went
24 to work, but you know you came home about 6 p.m.?

25 A Yes. Well, I was home because I was at the

1 shed. That's when I stopped work about.

2 Q Okay. At some point around 6 p.m., you would
3 agree you went back to the house?

4 A Yes.

5 Q And you testified that Mr. West was there
6 with some of his friends?

7 A I think so, yes.

8 Q How many friends?

9 A I don't recall. We didn't, uh, associate.

10 Q Okay. Do you remember their names?

11 A He's got a friend Devlin and the other guys,
12 I don't know.

13 Q Was it two other guys or three other guys?

14 A I don't recall.

15 Q Okay.

16 A He came home. He went with his friends. He
17 was quiet. He went to his room. I went to mine.
18 Somehow, that's why I don't associate with him.
19 Somehow we got together and he got mad at something
20 and then went in on me.

21 Q Okay. Do y'all have a living room in this
22 house?

23 A Yes.

24 Q Is that where the TV is located?

25 A At that time, yes.

1 Q Okay.

2 A There was one in each bedroom and then one
3 there. He goes to his bedroom and watches his TV. I
4 go to mine and watch mine.

5 Q What makes you so certain that friends of his
6 was there? Did you see them?

7 A I guess, yeah. I don't really recall much of
8 that.

9 Q Okay.

10 A We don't hang out much. I go to my stuff and
11 does what he's doing.

12 Q Right. But, I mean, you testified just a
13 second ago that you remember friends being there. I'm
14 trying to get an idea of who may have been around.

15 A I don't recall and I don't know where they
16 went or what they did.

17 Q And you don't know who they are?

18 A No.

19 Q But you know that friends were there?

20 A I think he had Devlin and Gary there.

21 Q Okay.

22 A I don't really know them.

23 Q Okay. And Gary is the guy you were talking
24 about just a second ago who lived in the house while
25 you were in Huges for a month, is that correct?

1 A Yes.

2 Q And do you know where he moved to after he
3 moved out of the house?

4 A No.

5 Q And where were the neighbors at this point in
6 time?

7 A In their back yard.

8 Q Did they sit out there often? They had a
9 deck?

10 A Yes.

11 Q And it was just, uh, I believe you said her
12 name was Mary Ashe, is that correct?

13 A Yes.

14 Q And her husband?

15 A I think it's her boyfriend.

16 Q Okay. Just them two?

17 A Yes.

18 Q And uh, were they drinking with y'all that
19 night?

20 A No.

21 Q And from your recollection, why did the
22 argument start?

23 A It was about money and rent money and the
24 bills. He said I'm giving my money to my girlfriend.
25 I go what are you talking about. It started because

1 of, uh, just crazy alcohol stuff. I said stop, what
2 are you talking about.

3 Q So y'all had been drinking a lot that day?

4 A He was, not me.

5 Q Not you. You just had a six-pack?

6 A Or less, yes.

7 Q Okay. And you said that you had a six-pack
8 by early in the evening?

9 A By 10:00.

10 Q Okay. And you testified that the neighbors
11 were also drinking that night, is that correct?

12 A When I got over there, yes, I saw them
13 drinking.

14 Q And you also testified that you spent about
15 four hours over there with them that evening?

16 A I think so, yes, or maybe less. I had one
17 drink over there. That's it.

18 Q Okay. And so you had the six-pack and one
19 drink that night?

20 A Maybe, yes.

21 Q But you don't really remember?

22 A No, I don't because I was in shock and the
23 evening is pretty much hard to recall with my eye
24 hanging out.

25 Q Okay. But that happened later at 2 a.m.,

1 correct?

2 A Yes.

3 Q And the first time that you called the
4 police, I believe you testified that you were face
5 down in the dirt when they responded, is that correct?

6 A Yes.

7 Q Were you on your cell phone at that time?

8 A Yes, I was.

9 Q So you were face down on your cell phone
10 unable to get up?

11 A No, I was able to get up.

12 Q Okay.

13 A I was on -- my cell phone was in my pocket
14 and I was running away from him after the first time.

15 Q You remember telling the police that night
16 that he hit you in the back of the head when you were
17 running away?

18 A Yes, I believe I did say that because that's
19 what happened.

20 Q Okay. And isn't it true that the first time
21 you really mentioned that is today?

22 A No, it's not true.

23 Q You never made a statement to police about
24 your walking stick?

25 A I don't know what that is. I defended

1 myself. It's a cane. He attacked -- he came and
2 attacked me. I didn't attack him with the walking
3 stick. I defended myself when I was there and then he
4 knocked me down. That's all that was. He's trying to
5 say I attacked him with the cane and the walking
6 stick. Negative. I defended myself with that. I was
7 face down in the driveway with my cell phone. He was
8 chasing me and he was hitting me in the back of the
9 head. I called the police. He knew that. 911. He
10 ran in the house.

11 Q Can you tell me about what time that was?

12 A I think 8:30, I think.

13 Q 8:30?

14 A That's what I think.

15 Q That's your best recollection?

16 A Yes.

17 Q But you don't really remember?

18 A Not really.

19 Q Okay. Then after that fight, you remember
20 telling the cops I don't want to leave, I need medical
21 attention?

22 A No, I didn't say that.

23 Q Okay. But today, you are saying that he hit
24 you in the back of the head so hard that you fell down
25 face down in the dirt?

1 A Yeah. I was running away from him.

2 Q Okay. And after the cops came, you remember
3 them asking you any questions?

4 A Yes, I do.

5 Q What did they ask you?

6 A What happened. I told them the same thing I
7 just told you. We looked around. It's not the first
8 time I called the police for this man. They go what
9 do you got going on now. They said there's no marks,
10 no injuries, we can press charges on him now, but
11 there's nothing that will stick. Nobody saw this. I
12 said yeah, he hit me in the back of the hair. They go
13 where is he. He's inside. I said okay, everybody go
14 back their separate ways.

15 They said you want press charges at this
16 time. I said no, just it will go away and everything
17 will be fine tomorrow. There were no marks, nothing
18 and they talked to him. Got my side. The police left
19 the first time. He went to bed. In a conflict, walk
20 away. So I went to the neighbors house so that he
21 would give him time to go to bed and settle down til
22 the next day.

23 Q You explained all of this to the police
24 officers that night?

25 A I believe so.

1 Q You remember the officers names?

2 A No, I don't.

3 Q Were there two of them or three of them?

4 A I think there were three the first time. I
5 don't know.

6 Q Did you give a statement to all three of them
7 at one time?

8 A I don't recall that.

9 Q Okay. And after they left, they left --
10 basically you agree that they left because you both
11 agreed, you and Mr. West, to go your separate ways, is
12 that correct?

13 A I said I don't want to press charges is why
14 they left.

15 Q You are certain you told them that you didn't
16 want to press charges?

17 A I'm positive I said that. I had the last
18 decision in it. I thought that if he would just go to
19 bed and go away, it would be better tomorrow. They
20 stated that if we don't see any marks, we can't keep
21 them. I went let's just go away. Maybe this will
22 stop and be better. Obviously, it wasn't better.

23 Q Okay. And you agree that you would go your
24 separate ways and Mr. West would go his separate ways
25 for the night?

1 A I never agreed to that. No. I agreed that
2 he would say he was going to go to bed and I was going
3 to go to my neighbor's house.

4 Q Okay. And you went to his neighbors and he
5 -- or to your neighbors. I'm sorry. To the Ashe's
6 that lived right next door, is that correct?

7 A Yes.

8 Q And Mr. West went to his bedroom, is that
9 correct, to bed?

10 A Yes. No, he went to the shower.

11 Q Okay.

12 A Yeah, that's right.

13 Q Okay. And about what time was this?

14 A In between that time, 10:00 or 11:00.

15 Q Okay.

16 A It was like 8:30 with the first police to me,
17 then 11:00, then 12:00, 12:30 with the eye incident.

18 Q What happened at 11:00?

19 A He came through the -- he was still looking
20 for me and wasn't finished and didn't obviously want
21 to go to bed. He comes through the hedges to my
22 neighbor's house after the shower in his underwear and
23 says he's going to kill me. Mary Ashe is a witness to
24 that. She's been subpoenaed and will testify to that.
25 He left and I stood there going that's nice. They

1 suggested --

2 Q Were you afraid at that time?

3 A Excuse me?

4 Q Were you afraid at that time?

5 A Yes.

6 Q And you were so afraid that you went back
7 into the house to cook spaghetti later because you
8 were hungry, is that correct?

9 A It was cooking at that time.

10 Q You went to the house to cook spaghetti
11 before the 11 o'clock incident?

12 A Yes.

13 Q You didn't call the police during that
14 altercation?

15 A What?

16 Q You didn't call the police about that
17 incident?

18 A There was no altercation then. He went into
19 his room, uh, took a shower. I was gone. I was at
20 the neighbor's house so I wouldn't have to see him.
21 During that time, I went over and put some spaghetti
22 on and went back. I know he took a shower. When I
23 was in the kitchen, he was taking a shower. He
24 thought I was -- he said you are looking at me in the
25 shower. That's when he was mad.

1 He came through the hedges into my neighbor's
2 yard in his underwear. We said what are you talking
3 about, I'm not looking at you in the shower. That's
4 the state of mind that we saw him. So I went -- he
5 went back home and I was hoping he would go to bed. I
6 stayed at the neighbor's house for another hour and
7 then finally went home and then he wasn't asleep or
8 did he think that that would be the end of it.

9 Q Okay. So it's your testimony that a fight
10 took place about 8:30?

11 A Yes.

12 Q That's when you ended up face down in the
13 dirt and called the police and three officers came out
14 to the scene?

15 A Somebody -- yes.

16 Q And you told those officers that he hit you
17 in the back of the head and that you wanted to press
18 charges?

19 A No, I said I did not want to press charges.

20 Q Okay. But you agreed that you would go your
21 separate ways?

22 A Yes.

23 Q That's when you went to the neighbor's house
24 while Mr. West went inside?

25 A Yes.

1 Q Your testimony is about an hour later, he
2 comes and spooks you in his underwear running through
3 the bushes but then just runs back to the house?

4 A Yes.

5 Q Okay. And that frightened you?

6 A Yes.

7 Q And while you were over there with the
8 neighbors, are they still drinking?

9 A Yes.

10 Q But you are not drinking?

11 A I had one drink while I was over there.

12 Q You were over there for four hours.

13 A Yes, and I had one drink.

14 Q One drink in four hours?

15 A I had one drink.

16 Q Okay.

17 A I didn't want to drink. I just didn't want
18 to go home. I had safety in people. When you have a
19 conflict, walk away.

20 Q Okay.

21 A That's what I was doing.

22 Q Okay. And you go back to the house and then
23 what time would you say that the altercation took
24 place with your eye?

25 A I thought it was about 12:00, 12:30 is what I

1 thought.

2 Q Okay. And you testified a minute ago that he
3 came running into the kitchen when he heard the door.
4 You remember that?

5 A Yes.

6 Q When he came running into the kitchen, was
7 there conflict in the kitchen?

8 A Yes.

9 Q What happened?

10 A He grabbed me. I grabbed him. He started
11 yelling and punching me. I grabbed him in a lock like
12 this as fast as I could and down to the floor we went.

13 Q So y'all are both fighting and tussling?

14 A Yes.

15 Q At this point, are you still afraid of him?

16 A Yes.

17 Q But the altercation ends. Y'all both say
18 we'll break it up?

19 A Yes.

20 Q Okay. And how tall are you?

21 A 6'2.

22 Q How much do you weigh?

23 A 260.

24 Q How big is Mr. West?

25 A I don't know, 5, 6 feet, 5'11.

1 Q Okay. And, uh, this altercation, y'all
2 agreed to go your separate ways, right?

3 A Yes.

4 Q You're in the kitchen at that point?

5 A Yes.

6 Q In the kitchen there, would you say that you
7 are closer to his bedroom or your bedroom?

8 A In the middle.

9 Q Right in the middle?

10 A Yes.

11 Q And then that's where you both agreed we will
12 go our separate ways, he goes to his bedroom, you go
13 to your bedroom, is that correct?

14 A Yes.

15 Q And you are walking towards your bedroom when
16 you say -- you testified to this earlier that he jumps
17 you from behind. You remember that?

18 A That's what happened, yes.

19 Q And that's where you say he gouged your eye
20 out, do you remember that?

21 A Yes, I do.

22 Q That took place right in the entryway of your
23 bedroom, is that right?

24 A No, the entryway of the kitchen, in the
25 middle of the kitchen in between his bedroom and mine.

1 Q But you just testified that as y'all are
2 walking away, the fight has broken up. You testified
3 earlier that you were walking to your bedroom where he
4 gouged you?

5 A Yes.

6 Q Okay. I'm going to show you, Mr. Malmquist,
7 what's been marked as Plaintiff's -- State's Exhibit
8 number 3. You recognize that picture?

9 A Yes.

10 Q And how would you describe that picture?
11 What do you see on the floor?

12 A When was this picture taken?

13 Q That's not what I'm asking. I'm asking what
14 do you see on the floor.

15 A This is not the night of the incident. I see
16 blood here and here. Unless it is and the police took
17 it. I guess it is because all this stuff is here.
18 This is the middle of the kitchen. My room's here.
19 His room's here. That's got to be blood.

20 Q Okay. Can you describe the top of that
21 picture? What is that? That's the hallway outside,
22 right?

23 A Right.

24 Q Okay. Thank you, sir. The blood is close to
25 the hallway that leads to outside, that's what you

1 just testified to, correct?

2 A No. It's in the middle of the kitchen.

3 Q Okay. The middle of the kitchen. Can you
4 tell me what happened after the tussle in your
5 bedroom? Did you shake them off?

6 A No, we were in the bedroom. I was in the
7 bedroom alone. It was in the kitchen. The tussle was
8 in the far side to the left to his bedroom of the
9 kitchen. Fell down in the middle. We grabbed -- I
10 said stop, we'll talk about this tomorrow. He went
11 his way and we agreed I go my way. I took two or
12 three steps and down I went.

13 Q That's not what you testified to earlier.

14 A That's exactly what I said.

15 Q Mr. Malmquist, let me ask the question. Then
16 you can respond.

17 A Okay.

18 MR. BELL: Objection, Your Honor. Let him
19 answer the questions.

20 MR. BISCHOFF: I haven't asked a question.

21 THE COURT: If you have a concern about his
22 response, direct it to the Court, not to him.

23 MR. BISCHOFF: Thank you, Judge.

24 THE COURT: Yes, sir.

25 BY MR. BISCHOFF:

1 Q Mr. Malmquist, you testified earlier that you
2 had a tussle, you went your separate ways and you were
3 in the doorway of your bedroom when you were attacked,
4 is that true?

5 A No, that's not what I said. That's not where
6 the attack took place. The attack took place where
7 the eye is, exactly in the middle of the kitchen where
8 the blood is shown.

9 Q Okay. And you know that now because you just
10 saw the picture?

11 A No, I never saw the picture before in my life
12 until right now.

13 Q Okay.

14 A I know where I was when I fell. I knew where
15 I had to crawl to get to my bedroom.

16 Q Okay.

17 A I got a couple of steps away from the tussle
18 and that was it.

19 Q Okay. And what happened after the tussle?

20 A We agreed to get up, stop, continue this
21 conversation the next day. I took three steps. Down
22 I went. That was it. Then I crawled to my -- he
23 kicked me in the side three times, said something and
24 I crawled to my bedroom.

25 Q And after you got to your bedroom, what did

1 you do next?

2 A I got onto my bed. I realized what had
3 happened to me. I put my hand over my eye. I felt a
4 ball. I said please God, that can't be my eye. I
5 closed my other eye. I didn't see -- I couldn't see.
6 I was like he pulled my eye out. Then I tried to
7 recover there for a short while, maybe 20 minutes. He
8 came in to check on me and gave me a cup of ice to put
9 on it and then left, said nothing and then I went to
10 the bathroom to look at myself and saw what I saw and
11 then got in the shower to clean all the defecation off
12 of me. The minute my eyeball popped out, fell on the
13 ground and then I defecated and peed on myself. I
14 showered all that off.

15 He never came back out. Thank God. He
16 didn't know what I was doing. He thought I was going
17 to bed, I think. I put on some shorts and shirt, got
18 my cell phone, left the back door open so the police
19 could come in and he couldn't hear me on the cell
20 phone because he could either kill me or break the
21 phone. That's why I went outside to call the police
22 because I was afraid of him.

23 Q And you said that your cell phone was in the
24 bedroom?

25 A Yes.

26 Q You showered up and about an hour later, you

1 called the police?

2 A Probably 20 minutes or 30 minutes. I took a
3 -- I got into the shower for a second to wash the
4 stuff off. I got dressed and then went down the
5 street to call them.

6 Q So 20 minutes later?

7 A I think it's 20, 30 minutes. I don't know
8 how long. I laid in shock and bleed in my bed until I
9 got up enough nerve to look at what the damage was.

10 Q You don't really remember exactly what time
11 you called, but some time after the fact, you cleaned
12 up, called the police and that's when they came out to
13 the scene. You remember that?

14 A Yes.

15 Q You told them that night that an altercation
16 happened, correct?

17 A Yes.

18 Q You remember telling them about the fight
19 that you had in the kitchen that night. Right when
20 they arrived, you remember telling them that you had a
21 fight, there was a tussle, you broke it up and then
22 your eye was gouged out. You remember saying that to
23 them that night?

24 A I don't remember that. I was in shock. I
25 went down the street. I called the ambulance first.

1 Then they called the police to take pictures. They
2 said what happened. I said, he pulled my eye out.
3 Into the ambulance I went.

4 Q It's true that that night when the police
5 first responded that you said I thought he punched me
6 in the eye.

7 A That's what I thought he did or I hoped he
8 did. I don't recollect even saying that. I was in
9 shock. I had enough time to call 911 while I was down
10 the street.

11 Q You don't remember saying I thought he
12 punched me in the eye?

13 A No, I don't remember that. I might have said
14 something like I thought he punched me in the eye but
15 then I came to realize or I hoped he punched me in the
16 eye and then I came to realize that he gouged it out
17 with his finger or an object.

18 Q But you weren't sure when you were telling
19 them what happened when they arrived at the scene?

20 A I don't even remember --

21 Q You don't remember?

22 A I was at the street corner in shock. They
23 were taking photographs and pictures. They were
24 trying to get in the ambulance. The police would say
25 what happened. I said JW took my eye out. I don't

1 remember that though. I knew my eye was out because I
2 went to the bathroom to look at it and I went oh, my
3 eye is hanging out down here. That's what I recall
4 happening.

5 Q You remember telling the police when they
6 arrived that night, first people on the scene, do you
7 remember telling them the story you told today about
8 an altercation and him jumping you from behind and
9 gouging your eye out, do you remember saying that?

10 A They didn't wait around long enough. I don't
11 really remember that. I did tell the policemen later
12 -- we went to the hospital and maybe three o'clock in
13 the morning after I was being operated on and he got a
14 -- we didn't have a written statement until after
15 transportation all the way downtown. At this point,
16 it might have been three o'clock when I remember
17 giving a written statement of what had happened in the
18 house.

19 Q So you haven't actually heard the recorded
20 statement from you that night that was recorded by one
21 of the police officers?

22 A No, I haven't.

23 Q You don't remember making any statements
24 about I thought he punched me in the eye, saying
25 nothing about the altercation, the story you just gave

1 today?

2 A I don't remember that, but I remember being
3 asked -- no, because I was whisked away in the
4 ambulance. He said who did it, I go JW did this.
5 They knew where it was. I said the back door is open.
6 I don't recall that. I was asked questions later
7 after the initial surgery, not the surgery, but when
8 they were getting my eye prepped for surgery, then
9 they asked me questions down at the hospital about
10 what had happened. That, I do remember.

11 Q Okay. And in that statement, isn't it true
12 that you describe the fight as a little fight?

13 A Yeah, it was, until the very end.

14 Q Okay. And isn't it true in that statement
15 that basically you said you went to the neighbor's to
16 call 911?

17 A Yes, I did.

18 Q But isn't it true that you called 911 for
19 yourself that night?

20 A Yeah, but nobody was home. I knocked on the
21 window of the same neighbors who was there who saw all
22 this go on with him in the underwear and through the
23 hedges. I went -- that was the first place I went. I
24 knocked on the window. Nobody was home. I continued
25 down to the next crossroads. I called 911 from there.

1 I didn't want to go back to the house to have him hear
2 me. I knew I couldn't get any help from the neighbor.
3 I went to a crossroad and called in my position from
4 there and the ambulance met me there. They called the
5 police and took photographs and then transported me.

6 Q Okay. So you don't remember giving any
7 statements before you were transported?

8 A I don't remember much except for you were
9 here before and who did this to you and JW did that.
10 That's all I remember at that point. I was pretty out
11 of it. I don't know what else I would have said
12 except for JW took my eye out. I don't know what else
13 to tell you. That's exactly what happened. Then I
14 went in an ambulance and went down to the hospital.

15 Q Okay. And he didn't bother you after that,
16 correct?

17 A I haven't seen him since May until now. No,
18 he has not bothered me since then.

19 Q Maybe I asked the wrong question. That's my
20 fault.

21 A Uh-huh.

22 Q But that night after you had the scuffle,
23 something happened with your eye, he didn't touch you
24 after that. All he did was come and bring you,
25 actually it was an ice mug, was it not?

1 A That's correct. That's exactly --

2 Q Not ice. It was a coffee mug that you put in
3 the freezer and you take shots out of it, drink out of
4 it.

5 A No, there was bacon grease in it. That's why
6 it was in the freezer. It wasn't an ice bag. It was
7 a coffee cup with bacon grease. That was the best he
8 could do because it was frozen and cold and he said
9 put that on your eye.

10 Q Okay. So he came to help you out?

11 A Yes, he did.

12 MR. BISCHOFF: Beg the Court's indulgence,
13 Your Honor.

14 THE COURT: All right.

15 BY MR. BISCHOFF:

16 Q Mr. Malmquist, I just have a few more
17 questions about the first officers that responded out
18 there. You testified you don't remember what officers
19 spoke with you, is that correct?

20 A No, I don't remember.

21 Q Could it have been Officer Driscoll?

22 A Possibly yes. It was dark. My head was
23 ringing. I couldn't believe it was going on again.
24 So no, I wasn't really taking a roll call at that
25 point. No, I wasn't.

1 Q You remember him asking you any questions?

2 A Yeah, do you want to press charges. My
3 answer was no, I don't.

4 Q They gave you a chance to tell your side of
5 the story there on the scene before you were
6 transported away, correct?

7 A Are you talking about the first incident or
8 the second incident?

9 Q Second incident.

10 A Did he give me a chance? I don't really
11 recall much of a chance except for get him in the
12 ambulance, take a photograph of the thing. I told
13 them where the back door was and who did this, James
14 West. Then I was transported to MUSC. I had triage
15 and eye stuff going on before the surgery. Now, it's
16 about three o'clock. The officer took a written
17 statement at that point. I was under medication and
18 shock and then that's when the statement came of what
19 had happened the second time with the eye thing.
20 That's what I remember.

21 Q The statement that you remember most vividly
22 is when you were under medication, about to go into
23 surgery. But you don't remember the statement given
24 to the police officers right when they responded to
25 the scene after the incident took place, is that not

1 correct?

2 A . There was no statement given to the police
3 when I responded to the scene, when they responded
4 with the ambulance and the eye. I don't recall
5 anything except for telling them the back door is open
6 and James West did this. That's all I remember.
7 That's all we had time for. It wasn't an interview.
8 I was bleeding and off I went. That's all I remember.

9 Q Mr. Malmquist, I'm going to play you a tape.
10 I ask if you just let me know if you recognize the
11 voices that are on this tape. Okay?

12 THE COURT: You go ahead and mark the tape
13 please.

14 MR. BISCHOFF: Yes, Your Honor. I
15 apologize. The tape is currently marked as
16 Defense Exhibit number 1 just for identification
17 purposes at this point.

18 THE COURT: All right.

19 (WHEREUPON, Defendant's Exhibit 1 is played.)

20 BY MR. BISCHOFF:

21 Q You recognize that voice?

22 A Uh, no.

23 Q The one that just said James West?

24 A I guess that -- yes, that was me.

25 Q Okay. All right. Do you remember the

1 officer going there asking you these questions?

2 A No. I don't remember the names or anything
3 like that.

4 Q I'm not asking you about the name, I'm just
5 asking you you agree that is your voice, correct?

6 A Can I hear it again?

7 Q Sure.

8 (WHEREUPON, Defendant's Exhibit 1 is played.)

9 THE WITNESS: Yes, that's me.

10 MR. BISCHOFF: Okay.

11 (WHEREUPON, Defendant's Exhibit 1 is played.)

12 BY MR. BISCHOFF:

13 Q Do you remember giving that statement, Mr.
14 Malmquist?

15 A Yes, I do recall that. That was in the
16 ambulance, yes.

17 Q Isn't it true it's just outside the
18 ambulance? You were taken in the ambulance at that
19 point to MUSC?

20 A Yes.

21 Q And, uh, didn't hear anything about the story
22 you told today on that videotape, did you?

23 A What story are you referring to?

24 Q The story of the altercation in the kitchen,
25 how you let your guard down and broke it up and then

1 went your separate ways and then he gouged you from
2 behind as you testified here today. You didn't say
3 that --

4 A No, I did say that at that point my eye was
5 hanging out. I was in shock. I wanted to get to some
6 medical aid.

7 Q I understand.

8 A Technically yes, you're right.

9 Q And you also heard on there that it was an
10 altercation, like you said about an hour ago. So
11 basically, when the police responded, that was an hour
12 after the incident, isn't that correct?

13 A Yes, that's good enough. Yes.

14 Q Okay. And, uh, back to the first -- a few
15 more questions about the first altercation. You
16 remember telling the officer that you were actually
17 the one who hit Mr. West first?

18 A No, that's not true. And no, I wouldn't have
19 said that because that isn't true. I'm not the
20 initiator of these conflicts.

21 Q You're sure you didn't tell Officer Driscoll
22 the first time, the incident that happened the first
23 time the police came that night on May 18th that you
24 were the first one to strike Mr. West?

25 A That's wrong. If I said that, it's

1 completely wrong. I was trying to calm it down. I
2 did not say that. And if I did, it -- he either wrote
3 that down wrong or I said something wrong because
4 that's not what happened. I'm not the initiator of
5 these things.

6 Q You know any reason why he would lie about
7 it?

8 A Why who would lie?

9 Q Officer Driscoll?

10 A No, I said he might be making a mistake or
11 misheard me or something went wrong. Because if
12 that's what you're saying, that's not what happened.
13 I never would -- I did not initiate these. I'm the
14 one trying to stop it. I didn't say that or there
15 must be a mistake is all I'm saying to you. If you
16 are saying that to me that he's saying I started that,
17 well then something's very wrong with that.

18 Q It could be possible that you just drink too
19 much that night to remember, isn't that correct?

20 A I don't think that that's true. I would
21 never have said that. I'm not initiating -- I'm still
22 leasing it. It's my own house. I'm trying to stop
23 him.

24 MR. BISCHOFF: No more questions, Your
25 Honor. Thank you.

1 THE COURT: Redirect.

2 MR. BELL: Your Honor, is that CD into
3 evidence, first of all?

4 THE COURT: It's been marked for
5 identification purposes. No, sir. It's not been
6 admitted into evidence.

7 REDIRECT EXAMINATION

8 BY MR. BELL:

9 Q Mr. Malmquist, who is, uh, who is JW that you
10 were talking to earlier?

11 A JW is James West.

12 Q Okay. I believe you testified during cross-
13 examination that you were asked about statements that
14 you had given. We heard the statement that you gave
15 to police at the scene, is that correct?

16 A Yes.

17 Q You said something about a statement later on
18 that early morning, is that correct, that you gave to
19 the police?

20 A I don't follow exactly what you're talking
21 about.

22 Q I think you told Mr. Bischoff that the police
23 came down a couple of hours after you were at MUSC --

24 MR. BISCHOFF: Objection, Your Honor.

25 Leading.

1 MR. BELL: Your Honor, he didn't understand
2 what I was talking about. I was trying to
3 clarify.

4 THE COURT: I understand. Go ahead and ask
5 the question and don't respond until I've had a
6 chance to rule.

7 MR. BELL: My question was, Mr. Bischoff
8 asked you about statements that were given. You
9 said something about the police coming down there
10 a couple of hours after you were at MUSC.

11 THE COURT: All right. Are you directed to
12 that point in time?

13 THE WITNESS: Yes.

14 THE COURT: You may ask your question.

15 BY MR. BELL:

16 Q Did you give a statement?

17 A Yes, sir.

18 Q Did you write a statement?

19 A No, I couldn't write. The officer -- I said
20 I'm going to speak it, could he dictate -- I'll
21 dictate, could he write it.

22 Q Okay.

23 A At that point, I was on medication. I gave
24 him the best of my ability of what had happened. He
25 wrote it down. At this point, it's probably three

1 o'clock in the morning. That's how that happened.

2 Q You observed him writing a statement then?

3 A Yes.

4 Q Let me show you a copy of this and just ask
5 if you could just read over it and ask if that sounds
6 familiar.

7 A Okay.

8 Q Just read it to yourself.

9 A (Reading.) It's almost exactly correct..

10 Q Is that the statement that you gave the
11 police officer that wrote it down that night?

12 A Yes.

13 Q What time was that given? Do you see a time
14 and date?

15 A 5/19/09 and the time is 3:30 in the morning.

16 MR. BELL: Okay. Your Honor, we'd offer
17 this as State's 6.

18 THE COURT: Have you seen it?

19 MR. BISCHOFF: I have, Your Honor. No
20 objection.

21 THE COURT: All right. State's Exhibit 6 in
22 evidence without objection.

23 (WHEREUPON, State's Exhibit 6 is marked for
24 identification and admitted into the record.)

25 MR. BELL: Thank you, Mr. Malmquist.

1 Nothing further.

2 THE COURT: Recross?

3 MR. BISCHOFF: No thank you, Your Honor.

4 THE COURT: All right. You may come down.

5 THE WITNESS: Okay.

6 THE COURT: All right. Call your next
7 witness.

8 MR. BELL: Your Honor, could we just have a
9 brief break?

10 THE COURT: We can take our break. I was a
11 little bit concerned about your witness.

12 MR. BELL: He's here. I think he's here. I
13 just wanted a brief break.

14 THE COURT: Ladies and Gentlemen, we're
15 going to take our afternoon break. Please step
16 to your jury room. Do not discuss this matter.
17 Do not allow anyone to discuss it with you.
18 We'll take 15 minutes. Thank you.

19 (WHEREUPON, the jury exits at approximately
20 4:26 p.m.)

21 (WHEREUPON, a short recess is taken from
22 approximately 4:27 p.m. to 4:44 p.m.)

23 THE COURT: All right. Ready on behalf of
24 the State?

25 MR. BELL: State's ready, Your Honor.

1 THE COURT: Defense?

2 MR. BISCHOFF: Yes, Your Honor.

3 THE COURT: Let's have our jury.

4 (WHEREUPON, the jury enters at approximately

5 4:45 p.m.)

6 THE COURT: Is that a sign? Ladies and
7 Gentlemen, at this time, we will continue with
8 the State's case. If you will, please call your
9 next witness.

10 MR. BELL: The State will call Dr. Ronald
11 Teed to the stand.

12 THE COURT: All right, sir. If you could
13 come along please and be sworn.

14 THE CLERK: Please raise your right hand and
15 state your full name for the record and state
16 your last name.

17 THE WITNESS: My name is Ronald Teed. T as
18 in Thomas, E, E, D as in David.

19 RONALD TEED, MD
20 having first been sworn, testifies as follows:

21 THE CLERK: Thank you.

22 THE COURT: Your witness.

23 DIRECT EXAMINATION

24 BY MR. BELL:

25 Q State your name again please for the record.

1 A Ronald Teed, T-E-E-D.

2 Q And Dr. Teed, where are you employed?

3 A I'm employed at the Medical University of
4 South Carolina. I'm an assistant professor in
5 Opthamology..

6 Q And could you please tell the jury a little
7 bit about your educational background.

8 A Sure. University of Arizona followed by the
9 medical school at the University of Michigan, did a
10 residency in Opthamology at Vanderbilt in Nashville,
11 Tennessee and a pediatric opthamology special training
12 at the Medical University. I've been employed by the
13 Medical University for two and a half years.

14 Q Are you licensed to practice opthamology in
15 the State of South Carolina?

16 A Yes, I am.

17 Q You have any board certifications?

18 A Yes, board certified by the American Board of
19 Opthamology.

20 Q And how long have you been an opthamologist?

21 A Four two and a half years.

22 MR. BELL: Uh, Your Honor, at this point, I
23 would offer Dr. Teed as an expert in Opthamology
24 as a medical doctor.

25 THE COURT: Is there any voir dire?

1 MR. BISCHOFF: No, Your Honor.

2 THE COURT: Is there any objection?

3 MR. BISCHOFF: None, Your Honor. To him
4 being designated as an expert in opthamology?

5 THE COURT: Yes, yes.

6 MR. BISCHOFF: None, Your Honor.

7 THE COURT: Very well. Ladies and
8 Gentlemen, normally under our rules, individuals,
9 witnesses are not allowed to testify regarding
10 their opinions or the reasons for those opinions.
11 There is an exception when by virtue of someone's
12 knowledge, training, occupation, education or
13 experience or profession that they have become an
14 expert in the field, typically of science or
15 otherwise, then they are permitted to testify
16 regarding their opinions within that field and
17 give the reasons for those opinions.

18 Ladies and Gentlemen, I have, uh, found this
19 witness, Dr. Teed to be an expert in the field
20 of opthamology. He will certainly be allowed to
21 testify within his expertise regarding his
22 opinions and the reasons for those opinions.
23 When I give you the concluding charge on the law,
24 I will charge you regarding experts. In short,
25 expert opinion is given for the purpose of

1 helping you understand the evidence. It is not
2 given for controlling your judgements. It's not
3 given for that purpose.

4 All right. Mr. Bell, you may continue.

5 MR. BELL: Thank you, Your Honor.

6 BY MR. BELL:

7 Q Dr. Teed, what is an opthamologist?

8 A An opthamologist is a medical doctor who is
9 specializes in the eye and the structures around the
10 eye.

11 Q And as an opthamologist at MUSC, did you have
12 an occasion to see an individual named Lance
13 Malmquist?

14 A Yes, I did.

15 Q You recall when that was?

16 A It was the morning of May 19th, 2009.

17 Q And why were you there to -- why were you
18 there to see Mr. Malmquist?

19 A I take trauma call for our department, an
20 significant ocular trauma in the areas referred to the
21 Medical University of South Carolina and all of the
22 attending physicians, including myself, rotate trauma
23 call. Early in the morning on the 19th of May, I was
24 paged by two of the opthamology residents who had a
25 particular trauma case that they needed my assistance

1 with.

2 Q And when you went to see Mr. Malmquist, what
3 did you find?

4 A I went in to see Mr. Malmquist. It was some
5 time around 4:00 or 5:00 in the morning. I don't
6 recall exactly. He had suffered significant trauma to
7 the right eye and the soft tissue around the right
8 eye.

9 Q Dr. Teed, let me show you what's been marked
10 as State's 1 for identification at this point and ask
11 if you recognize that picture.

12 A Yes, this is an image that, uh, looks very
13 similar to the presentation that I saw with Mr.
14 Malmquist on the morning of the 19th.

15 Q And is that picture an accurate reflection of
16 what you did see? That wasn't how you saw him but of
17 the injury that you saw?

18 A Yes.

19 MR. BELL: Your Honor, we'd offer this as
20 State's 1.

21 THE COURT: Have you seen it?

22 MR. BISCHOFF: No objection, Your Honor.

23 THE COURT: No objection? Very well.

24 BY MR. BELL:

25 Q Doctor, I would ask you would this be helpful

1 to kind of explain the injury as well?

2 A Yes.

3 Q Okay. First of all, let me ask you what did
4 you find. What was the injury that you found on Mr.
5 Malmquist.

6 A So on presentation, he had no vision in the
7 right eye. He had a pupillary abnormality in relation
8 to the right eye versus the left suggesting some
9 significant injury to the visual system of the right
10 eye. I found them like this. He had a lot of
11 swelling and bruising of the eyelids around the right
12 eye and the soft tissues around the right eye, the
13 skin of the eye was all red. Underneath, there was a
14 lot of blood.

15 The cornea, the clear part of the eye that
16 allows us to see clearly was hazy, suggesting some
17 trauma to the cornea. And the anterior chamber, which
18 I'm going by my model here real quick. This is just a
19 model of the eye. The cornea, which I've taken off
20 here, that falls off, would be the transparent tissue
21 right here. It's the clear part of our eye.

22 Q I'm sorry to interrupt you. It might be a
23 little better for the jury if you came down at the
24 front. I'd ask you to speak up so the court reporter
25 can hear.

1 A So the soft tissue. The cornea was hazy. He
2 could see through it. The front surface of the eye,
3 the front space of the eye, that's what we call the
4 anterior chamber which is between the cornea and the
5 iris, the color part of the eye. There is a space
6 there which normally is filled with clear fluid. It
7 was full of blood. He couldn't move the eye in any
8 direction.

9 The other thing that's notable on the image
10 was that the eye was proptotic or bulged out. The eye
11 was pushed out and pushed down. You can kind of see
12 how that eye is pushed downward. Whenever you see
13 something like this, the concern is is there some
14 injury to the soft tissue behind the eye causing
15 bleeding and the eye is bulging forward. If that
16 happens, all that swelling doesn't have anywhere to
17 go. So it pushes on the eyeball. It raises the
18 pressure inside the eye. If the pressure goes to
19 high, it can injure the eye significantly.

20 So the first management step here is to get
21 rid of that pressure. The way that we do this is we
22 have to give some space to the tissue around the eye.
23 The eye sits in what we call the orbit, which is a
24 complex of hard tissue. The orbit exists to protect
25 the eye. The downside is if the tissue around the eye

1 gets injured and blood starts flowing, there's no
2 where for the blood to go. All it's going to do is
3 push on the eye.

4 So then the two residents on call know that
5 this is a potentially vision threatening thing
6 immediately. So what they did to start was make a
7 little incision and basically try to separate your
8 lower eyelid. They made a little cut right there.
9 There's a little ligament. That had happened within a
10 half hour previous. That had just happened. You got
11 to do this immediately.

12 When I got there, the pressure was still
13 high. There's another ligament you can cut to
14 essentially further get that eyelid off. I did that
15 and did release some of the pressure. So that was
16 issue number one. You have to get rid of that
17 pressure or else it can cause injury to the artery
18 that goes to the eye. If that happens, the vision is
19 lost.

20 The other -- the next issue is, and I just
21 had this much trauma, probably has an injury to the
22 eyeball itself. Sometimes the eyeball is injured from
23 either blunt or sharp trauma. That's bad news because
24 then the inside contents of the eye can come forward.
25 That, in and of itself, can cause lost of vision. The

1 first thing we have to do is make sure that we relieve
2 any pressure behind the eye and look to see if it has
3 a ruptured globe.

4 When you see an eye like this, the front of
5 his eye, you can see there is no evidence of rupture.
6 But the suspicion is strong that the rupture is of the
7 back of the eye. It is behind. So then the plan was
8 to take him to the operating room where I can remove
9 and open up all that soft tissue and go explore and
10 see if indeed the eye was ruptured.

11 Q Did you do that?

12 A Yes.

13 Q What did you find?

14 A We took him to the operating room. We cut
15 through the skin of the conjunctiva, the skin of the
16 eye, the part that's covered. Open things up. Then
17 we found a very large full thick laceration, full
18 thickness cut through the wall of the eye. That was
19 basically, you will see these little bumps here.
20 Those depict where the muscle of the eye attach. The
21 eye has muscles. This was -- there was a cut or an
22 opening that extending from about this position here.
23 Basically if you imagine the eye as a clock, about the
24 two o'clock position, wrapping around full thickness
25 straight into the inside of the eye all the way to six

1 o'clock. That's a total of about eight clock hours.

2 If you look at the equator, the midline of
3 the eye this way extending for eight clock hours, we
4 even had to remove the muscle to find the laceration.
5 So when you find that, the first step is you've got to
6 close it. If there's a big hole in the eye, you've
7 got to close the hole.

8 With a big rupture of the eye, and this has
9 to be posterior, the risk of significant vision loss
10 is high. The back of the eye is where all the
11 important stuff is. The back lining of the eye is the
12 retina. That retina gets injured, the likelihood of
13 good vision afterwards is very low. So when we were
14 in there exploring, the rupture was so big that the
15 retina and the back of the eye, the back cavity of the
16 eye, that all came pouring out. We knew that the
17 likelihood of any significant vision was essentially
18 nil. But whenever you have a rupture you can repair,
19 you do. There is the chance that you can save the
20 actual structure of the eye.

21 Q Take your seat, Doctor. Once you did all
22 this, it was your opinion to a reasonable degree of
23 medical certainty that he had significant vision loss
24 and not total vision loss?

25 A Yes. The likelihood of any significant

1 vision after this injury is very close. It's never
2 necessarily zero. That's why you do everything you
3 can to try to restore the structure of the eye.

4 Q Again, based on your opinion, you didn't see
5 him much further than this particular trauma, is that
6 correct?

7 A Correct.

8 Q And in your opinion, based on your knowledge
9 and the injury you saw, to a reasonable degree of
10 medical certainty, would the loss of the eye to be
11 expected from that injury?

12 A Yes.

13 Q So that would not be unusual?

14 A Yes, exactly. Although the goal in the acute
15 setting is to try to save the structural integrity of
16 the eye, the understanding is that you may end up
17 ultimately having to remove the eye anyways.

18 Q Now, you say there was soft tissue injury,
19 was there any injury to the bone, the orbit as you
20 stated?

21 A Not significant to cause any long-term
22 effect.

23 Q And based on your expertise and what you saw
24 that night, do you have an opinion to a reasonable
25 degree of medical certainty as to what caused or what

1 would cause this type of injury?

2 A Ruptured globes can be caused by a lot of
3 different mechanisms or injury. It can either be
4 blunt or sharp trauma. A rupture like this where it
5 is located posteriorly on the back of the eye and it
6 splits along the midline, the equator, it is more
7 likely to reflect some sort of blunt trauma. The
8 issue though is with the eye, since it's so small and
9 relatively fragile, it's hard to predict what kind of
10 force that requires. But somehow, blunt trauma has to
11 get to the eyeball itself. The pressure is
12 transmitted -- force is transmitted through the eye
13 and it kind of finds the weak spot. In this case, the
14 weak spot was in the equator of the eye.

15 Q Okay. What are the protective measures for
16 the eye?

17 A Yeah. So like we were talking about, the eye
18 has the boney orbit around it which tries to protect
19 it. Blunt force from a relatively large object can
20 sometimes be deflected from the eye because the orbit
21 -- it hits the orbit and the force is transmitted to
22 the bone. If things don't, if you have a smaller
23 object or just the wrong kind of, uh, uh, injury, if
24 the whatever object is hitting the eye is able to kind
25 of fit within the boney orbit, then the pressure goes

1 right to the eye and the eye can't withstand much
2 force and it ruptures.

3 Q Generally, in your opinion, are you talking
4 like maybe the difference between a fist and a finger?

5 A Either one can cause a ruptured globe. It
6 really depends on if the orbit acts to protect the eye
7 or it doesn't. A finger could definitely get in there
8 and rupture the eye. A fist could as well if most of
9 the force is transmitted to the eye instead of being
10 deflected from the boney orbit.

11 Q Thank you, Dr. Teed. Please answer any
12 questions Mr. Bischoff has.

13 THE COURT: Cross-examination.

14 MR. BISCHOFF: Doctor, just a couple of
15 questions.

16 (WHEREUPON, Defendant's Exhibit 2 is marked for
17 identification purposes.)

18 MR. BISCHOFF: Your Honor, may I approach
19 the witness?

20 THE COURT: You may.

21 CROSS-EXAMINATION

22 BY MR. BISCHOFF:

23 Q Doctor, I want to show you what's been marked
24 as Defense Exhibit number 2 for identification
25 purposes. You recognize that document?

1 A No, I do not.

2 Q In your profession before you perform
3 surgery, is it common to review ER notes for surgery?

4 A It's nice to have a general knowledge of
5 medical history. But in my field, the examination
6 findings basically preclude the history. If there's
7 injury into the eye requiring exploration and/or
8 repair, I just do it. It doesn't really matter what
9 the mechanism was.

10 Q Okay. So you are not familiar with this
11 document?

12 A Correct.

13 Q But you would agree that triage is basically
14 short for ER, is that correct?

15 A Yeah. In this setting, the triage usually
16 refers to the initial person who assesses the patient,
17 usually a nurse in the emergency room.

18 Q And the night that you performed surgery, was
19 it your understanding that Mr. Malmquist was at the ER
20 before he's transported to the eye center?

21 A Correct.

22 Q You remember what time you started performing
23 surgery?

24 A Well, the procedure where I severed the
25 eyelid was in the early morning which was I think

1 around 5 a.m. The actual surgery I don't think
2 happened until the afternoon.

3 Q And it's standard or typical for someone to
4 spend a little bit of time in the triage unit before
5 being transported for surgery?

6 A You mean before being admitted to the eye
7 clinic?

8 Q Well, someone has to go to the ER first, is
9 that correct?

10 A Yes.

11 Q And then an emergency is noted by the doctors
12 in the ER?

13 A Yes.

14 Q And then you're notified?

15 A Correct.

16 Q And it takes you some time to prep and you do
17 surgery later, as quick as possible?

18 A Right.

19 Q But you don't review ER notes before surgery?

20 A It doesn't influence my surgical approach.

21 Q If you were to see ETOH on a report, what
22 would that state to you?

23 A That would suggest that there was a history
24 or a lab record of alcohol use.

25 Q Okay. Are you familiar with your report, uh,

1 after you did surgery, I believe you said that you
2 were working with two interns that night, is that
3 correct?

4 A Yes. So in the morning, it was two residents
5 actually in our department. And once we went to the
6 operating room, it was a different resident who was
7 there with me.

8 (WHEREUPON, Defendant's Exhibit 3 is marked for
9 identification purposes.)

10 MR. BELL: Your Honor, may I approach the
11 witness?

12 THE COURT: You may.

13 BY MR. BISCHOFF:

14 Q Let me show you what's been marked as Defense
15 Exhibit number 3. You recognize that?

16 A Yes, this is the operative note. I'm sorry.
17 This is the, uh, -- yeah, this is the operative note
18 from the surgery, the repair of the ruptured globe.

19 Q Your note's basically what you did to repair
20 the eye?

21 A Correct. In the operating room.

22 Q In the operating room. And you see your name
23 there on that piece of paper?

24 A Yes.

25 Q You remember reviewing this and essentially

1 submitting it with your signature?

2 A Yeah. Yeah. This, uh, you will notice that
3 there's a little blank spot here. This is the initial
4 note. It's dictated and it comes to the resident and
5 myself and edit it. But yeah.

6 Q But you signed off on it as legitimate,
7 valid?

8 A This is what we did, yes.

9 Q You remember remarking that 50-year old white
10 male that you performed surgery on had blunt trauma to
11 the right eye?

12 A Yes.

13 MR. BISCHOFF: Thank you, Your Honor. No
14 more questions.

15 THE COURT: All right. Redirect?

16 REDIRECT EXAMINATION

17 BY MR. BELL:

18 Q Blunt trauma could be a fist or a finger, is
19 that correct?

20 A Blunt trauma in the setting of --

21 MR. BISCHOFF: Objection, Your Honor.
22 Leading.

23 THE COURT: Sustained.

24 BY MR. BELL:

25 Q Please tell us what you mean by blunt trauma.

1 A Blunt trauma in the setting of an ocular
2 injury is any type of force that did not have a
3 piercing or penetrating injury. So the substance of
4 that force could be anything. You know that because
5 it influences the prognosis afterwards. It's a
6 piercing injury -- if the injury is in the front of
7 the eye, then ophthalmologists understand that there's a
8 better likelihood of visual recovery versus blunt
9 trauma causing what was a posterior rupture.

10 Q Another question that you stated earlier that
11 his eye was proptotic. I'm sorry if I'm
12 mispronouncing that term.

13 A No, it's perfect.

14 Q You say it was bulging out and down. Is that
15 like it was hanging out, in layman's terms?

16 A Well, I would prefer not to use that term
17 "hanging out". Hanging out would refer to, uh, it
18 would only be seen in the setting of injury of the
19 structures that basically tether the eye in its place
20 which would namely be the soft tissue, the muscle of
21 the eye and the optic nerves. So an eye that's really
22 hanging out basically, the general rule of the optic
23 nerve is severed. The nerve that connects the eye to
24 the brain. Proptosis just reflects that the eye
25 itself is bulging out of its normal spot.

1 MR. BISCHOFF: Objection, Your Honor. This
2 is outside the scope of cross -- direct
3 examination. I apologize.

4 THE COURT: Very -- you may proceed.

5 THE WITNESS: Proptosis implies something
6 behind the eyeball pushing it forward. That
7 could be many different things.

8 MR. BELL: Thank you, Doctor. Nothing
9 further.

10 THE COURT: All right. Any recross?

11 MR. BISCHOFF: No questions, Your Honor.

12 THE COURT: Is this witness free to leave?

13 MR. BELL: This witness may be excused. We
14 thank you, Dr. Teed, for being here.

15 THE COURT: Any objection?

16 MR. BISCHOFF: No objection, Your Honor.

17 THE COURT: You are free to go. Thank you.

18 THE WITNESS: Thank you.

19 THE COURT: Ladies and Gentlemen, that is
20 going to conclude the work that we're going to do
21 this evening. I do need to give you some
22 instruction before we leave each other. It is
23 this, Ladies and Gentlemen, you're going to be
24 going home. Presumably, there's going to be
25 somebody curious about what you have been up to

1 today. You certainly can say I did not need one
2 of those chauffeured driven rides down to the
3 courthouse. You can say that you have been
4 selected to serve on a jury and that is a
5 criminal matter as opposed to a civil matter.
6 Beyond that though, Ladies and Gentlemen, you
7 must not discuss this matter or allow anyone to
8 discuss it with you.

9 Again, the reason for that is to support your
10 ability to listen open-mindedly to all of the
11 evidence that is presented and you must receive
12 all the information from which you will make up
13 your mind here in court while court is in
14 session. Therefore, you must not discuss this
15 matter or allow anyone to discuss it with you.

16 Ladies and Gentlemen, I do not know, I do not
17 believe there is publicity surrounding this
18 matter but there certainly may be. Therefore, I
19 give you the instruction to do not read anything,
20 do not listen to anything about this matter, the
21 radio, television, newspaper, internet and the
22 like. Don't do any investigation. Don't go on
23 line and do investigations about any number of
24 matters. Don't try to define things. Don't try
25 to learn things outside of the court. Don't go

1 to Facebook or My Space or whatever and have
2 communications about this matter. To do that
3 would be inappropriate, Ladies and Gentlemen.

4 We are going to begin in this matter, not
5 tomorrow, we're going to be off tomorrow. We're
6 going to reconvene at 9:30 on Thursday morning.
7 9:30 on Thursday morning. For your informational
8 purposes, my presence is required by the
9 legislature because my re-election for hopefully
10 my third term is tomorrow at noon. I'm required
11 to be in Columbia for that purpose. That's the
12 reason why we're taking our break tomorrow.

13 Now, it's going to be tempting no doubt
14 tomorrow but again, you must not discuss this
15 matter or allow anyone to discuss it with you.
16 Anyone that's going to need something for your
17 employer tomorrow so they will know where you
18 have been, what you've been up to, we certainly
19 can get those for you in the back. If you will,
20 just let George know. Those of you that need
21 something, he'll be happy to get that for you.

22 Let me ask of you, does anyone work, uh, the
23 evening or graveyard shift? All right. What is
24 your normal working hours?

25 THE JUROR: 4:00 to 12:30.

1 THE COURT: 4:00 to 12:30. And what is your
2 plan with regards to going in this evening?

3 THE JUROR: (inaudible).

4 THE COURT: Wonderful. So I don't have to
5 worry about you tomorrow night because I don't
6 want you to go in tomorrow night.

7 THE JUROR: Yeah. Okay.

8 THE COURT: Cause I want you to be rested.

9 THE JUROR: Yeah. I didn't know.

10 THE COURT: Exactly. There you go.

11 Tomorrow night: If you need any assistance for
12 me to explain that, I'll be happy to do that but
13 I don't want you to go in tomorrow night. I want
14 you to rest. Anyone else?

15 THE JUROR: I'm on a 24-hour shift.

16 THE COURT: You're on a 24-hour shift? Not
17 tomorrow. We got you tomorrow. The reason for
18 that is you are a fireman. You are 24 hours on
19 and 24 hours off.

20 THE JUROR: 48 off.

21 THE COURT: 24 on, 48 hours off.

22 THE JUROR: Yes, ma'am.

23 THE COURT: Is this an on day or off day?

24 THE JUROR: Today is an on day.

25 THE COURT: Today is an?

1 THE JUROR: On day.

2 THE COURT: An on day. You have been on all
3 day, by George, you have been on. Tomorrow then
4 you will be off?

5 THE JUROR: Yes, ma'am.

6 THE COURT: Wonderful. Wonderful.

7 Understand, I want you rested. It's not fair for
8 you or these litigants for you to be exhausted.
9 Again, if you need anything for your employer,
10 just let me know. I am happy to communicate that
11 to them. Wonderful.

12 Very well. Ladies and Gentlemen, we are
13 going to begin Thursday morning at 9:30. Those
14 of you who are Wheatie-eaters, I'm just telling
15 you Ms. Salisbury is going to have something for
16 you Thursday morning. You don't want to eat your
17 Wheaties and then get here and Ms. Salisbury has
18 something for you. You'll be double-
19 breakfasting. So please keep that in mind as
20 well. I believe that will conclude my comments.
21 I'll just remind you do not discuss this matter
22 or allow anyone to discuss it with you. I look
23 forward to seeing you Thursday morning at 9:30.
24 Have a wonderful evening.

25 (WHEREUPON, the jury exits at approximately

1 5:14 p.m.)

2 THE COURT: All right. Anything before we
3 take our break?

4 MR. BELL: Nothing from the State, Your
5 Honor.

6 THE COURT: From the defense?

7 MR. BISCHOFF: Judge, I just move to have
8 Defense Exhibit number 1 moved into evidence.
9 It's marked for identification earlier with Mr.
10 Malmquist. I'd like to move it into evidence at
11 this time.

12 MR. BELL: No objection.

13 THE COURT: Very well.

14 (WHEREUPON, Defendant's Exhibit 1 is admitted into
15 the record.)

16 MR. BISCHOFF: Nothing further, Your Honor.

17 THE COURT: Great. Very well. All right.
18 I will see you all Thursday morning at 9:30.

19 MR. BISCHOFF: Thank you, ma'am.

20 THE COURT: All right. Y'all have a good
21 evening.

22 MR. BISCHOFF: Thank you, Judge. You too.

23 (WHEREUPON, the Court recesses for the day at
24 approximately 5:15 p.m.)

25

P R O C E E D I N G S

(WHEREUPON, the Court resumes on the 4th day of February, 2010 at approximately 10:34 a.m.)

THE COURT: All right. We had an in camera meeting and, uh, there was a juror, Ms. Dodds -- that's not right -- Gunn. She was kind enough to relay to George Taylor this morning that she had some association, she thought some memory of having heard these events.

We had her come in chambers. Counsel was present in my chambers. And what she relayed was that she was to go out with a group of people and the group wasn't able to go out because one member or a couple could not go because they had some association with someone in their life who had had their eye gouged out and therefore could not go.

I think it is in all candor a close question. She certainly said that she believed it wouldn't make -- have an effect on her ability to be fair and impartial. However, uh, first of all, is that a pretty fair rendition of what she told us? Anything you need to add to that, either of you?

MR. BELL: Nothing from the State.

THE COURT: Okay. How about from the

1 defense?

2 MR. BISCHOFF: Nothing from the defense,
3 Your Honor.

4 THE COURT: Okay. My concern is that while
5 I certainly think that she was very candid and I
6 think her knowledge is very vague, because the
7 way that her, uh, the way that she knows the
8 information and the way that she holds the
9 information, if you will, is through a
10 characterization that someone had their eye
11 gouged out and because that's the way that the
12 information is held by her, I have some concerns
13 about that.

14 As I understand the defense in the cross-
15 examination of Dr. Teed yesterday, the day
16 before yesterday, the part of the defense is was
17 it a gouging or was it the result of lost of Mr.
18 Malmquist by virtue of just fisticuffs, fighting.
19 Because that is how this juror holds that
20 information, I am concerned about that. I don't
21 want to have to overcome that, uh, the way that
22 information is held with this particular jury,
23 juror. So I think it is appropriate that I
24 excuse her and seat the alternate.

25 I shared that with counsel in chambers. The

1 State understandably, uh, maintains that this
2 juror said that she can be fair and impartial and
3 her knowledge is so vague that they hold and
4 believe that she could go forward and may very
5 well be right. My concern is that the burden is
6 and remains on the state. I am concerned that
7 the defense may find themselves now with a
8 previously held characterization that they have
9 to overcome. That would not be appropriate. So
10 I'm going to excuse her. I'm going to try to
11 explain it to her that way. Then I'm going to
12 excuse her, noting the State's exception.
13 Anything from the defense?

14 MR. BISCHOFF: Nothing, Your Honor.

15 THE COURT: Okay.

16 (WHEREUPON, the Juror Number 66, Deborah Gunn,
17 enters at approximately 10:39 a.m.)

18 THE COURT: Come on in. Have a seat, Ms.
19 Gunn. I want you to understand my ruling and I
20 want you to understand it because it has to do,
21 uh, with -- I want you to understand it fully.
22 The first thing I want to do is I want to tell
23 you how much I appreciate how much you have
24 honored your oath that you have taken. Secondly,
25 I want to tell you that you have done wonderful

1 things. Everything you have done throughout this
2 process has been absolutely perfect. Thank you.
3 Thank you for it.

4 I want to explain to you my ruling because
5 I'm ruling as I have to be absolutely certain
6 that I have preserved the rights of everybody. I
7 want to explain it to you. It doesn't have to do
8 -- insomuch as you are concerned, you have done
9 everything perfectly right. I have nothing but
10 gratitude and respect for you. Because you have
11 that information, because you have that
12 information and it's vague. It may not even be
13 the circumstance, and one of the things that we
14 were chatting about is if you remember these
15 events didn't happen until very late in the
16 night, early in the morning. You were going out
17 with a group. You know what I mean.

18 Your information is very vague clearly, but
19 because you hold that information and when we
20 hold information as people, we hold -- we have
21 information how we have it. That's the way.
22 Because you hold that information, uh, and
23 because we have an alternate, I'm going to opt to
24 have the alternate sit who doesn't have that
25 information. That's it. I mean, you know, to --

1 it's a very careful ruling that I'm making. It's
2 a very careful ruling that is based on only one
3 thing. It's only based upon the fact that you
4 have this little piece of information and the
5 characterization of that information as you hold
6 it in your mind.

7 Because this is a criminal matter, I am
8 opting to seat the alternate who -- I don't have
9 any information that any of these other folks
10 have any information, but it's very important to
11 me and to these other folks that you understand
12 that my ruling is based upon my being very
13 careful. It has nothing to do with anything
14 other than you have honored your oath. You have
15 been fantastic. That's the reason I wanted to go
16 through that explanation with you.

17 I want to tell you, number one, how grateful
18 I am and, number two, you have done nothing. You
19 have only done everything right. I wanted you to
20 understand that I just think that it's best under
21 these circumstances and hope you can understand
22 that.

23 **THE JUROR:** That's why I mentioned it. I
24 want to make sure that it's fair. I don't want
25 anything to happen at the end.

1 **THE COURT:** I can't tell you how grateful I
2 am. When people do what you have done, it just
3 reconfirms to me how magnificent, how perfect,
4 how marvelous our jury system is and that people
5 on juries just do the absolute best. You are an
6 example of that. I am so grateful to you for it,
7 which is why I wanted to take the time to get you
8 to understand that your conduct has been perfect.
9 And this is going to conclude your work for the
10 week.

11 **THE JUROR:** Okay.

12 **THE COURT:** So I wanted to just do a couple
13 of things. You need something for work or
14 whatever you need it for. I want to remind you
15 you are not eligible to serve for the rest of
16 2010. Keep that in mind. Also, you've got an
17 exemption for 2011 and 2012 if you choose to
18 exercise those. Your check is not in the mail.
19 I used to tell people that, but your check is not
20 in the mail, but you'll get it pretty soon.
21 Anyway, we all wanted to express our gratitude to
22 you. Have a great day.

23 **THE JUROR:** Thank you very much.

24 **THE COURT:** Thank you so much for being on
25 the jury.

1 (WHEREUPON, the juror exits at approximately
2 10:44 a.m.)

3 THE COURT: Now, uh, I would intend to tell
4 the jury that I am seating the alternate just
5 because one of their number believe that she may
6 have some information. And while it was vague
7 and her conduct was marvelous that, in an
8 abundance of caution, I'm seating the alternate.
9 Any objection to that from the State?

10 MR. BELL: No objection to that.

11 THE COURT: From the defense?

12 MR. BISCHOFF: No, Your Honor.

13 THE COURT: Anything further before I bring
14 the jury out?

15 MR. BELL: Nothing from the State.

16 MR. BISCHOFF: Nothing from the defense.

17 THE COURT: All right. Jury. You ready
18 with your next witness?

19 MR. BELL: Yes, Your Honor.

20 THE COURT: All right.

21 (WHEREUPON, the jury enters at approximately
22 10:46 a.m.)

23 THE COURT: Let me tell y'all, I apologize
24 for this cough that I decided that I'm going to
25 have. Please, as you go through your

1 examination, if you need me to repeat and,
2 Bonnie, if you need them to repeat because I have
3 a cough, please feel free to do that. I
4 apologize. I promise I will keep a Ricola on
5 board.

6 Ladies and Gentlemen, I apologize for keeping
7 you in your jury room. There was a matter that
8 we needed to deal with. It took us a little bit
9 of time to do. We are about to continue with
10 this case. I'm happy to report to you that the
11 legislature was very kind, very kind yesterday
12 and I have been reelected. So I hopefully will
13 be here for another six years. I report back to
14 you. Thank you for your patience yesterday to
15 allow me that time to go to Columbia and attend
16 to that matter.

17 Now, Ladies and Gentlemen, I want to report
18 to you the result of what we have been doing
19 while you have been in your jury room. One of
20 your number, Ms. Gunn, in absolute honor of her
21 oath that she has taken as a juror, shared with
22 us this morning that she had a memory of these
23 events maybe. It was -- in all candor, her
24 memory was very vague. But when she began to
25 hear the testimony, she began to remember maybe

1 having heard something about these matters. In
2 absolute perfect honor of her oath, she shared
3 that with us. I am so grateful to her for doing
4 that. She did a wonderful thing. She honored
5 her oath. She honored our system. I truly am
6 grateful to her for doing that.

7 I have explained to her my gratitude and how
8 marvelous she was for honoring her oath.
9 Ofttimes that does happen to people. Typically,
10 what can happen to a juror is they'll hear a name
11 of a witness and the witness isn't here because
12 they are not going to be called immediately, so
13 they'll come later. When the juror sees the
14 witness testify, they remember the name, they put
15 the name with the face. That's why I'll ask the
16 witnesses if they are here, please stand and
17 allow the juror, at that point, to look at their
18 faces. This is a similar circumstance, but it
19 had to do with the testimony about these events.

20 In an abundance of caution, in an abundance
21 of caution, I have excused Ms. Gunn which means,
22 Ms. Hammond, I'm going to change your status from
23 an alternate to one of our jurors. I did want to
24 explain that to you because I want you all to
25 understand that Ms. Gunn honored her oath

1 beautifully. Her conduct was perfect. She
2 certainly has not been excused for having done
3 anything inappropriate at all. I would be hurt
4 if you all thought that. She's actually been
5 marvelous and, as a result of that, sharing that
6 with us.

7 Ms. Hammond, I'm going to seat you as our
8 alternate. Yeah, come on down. Hop out that
9 alternate seat. Thank you so much. Now, you are
10 now -- rather than an alternate, Ms. Hammond, you
11 are one of our twelve jurors. And at this time,
12 we will continue with the State's case.

13 Mr. Bell, if you will, call your next witness
14 please.

15 MR. BELL: Thank you, Your Honor. Please
16 the Court. The State would call Mary Ashe to the
17 stand.

18 THE COURT: Anybody else got a cough? I
19 have developed a terrible cough. I have told
20 these folks to please forgive me my cough. They
21 may have to repeat a little bit if I cough. I
22 got a Ricola on board. I'm going to keep a
23 Ricola on board. Anybody else got a cough and
24 need a Ricola or cough drop? Let me know. We've
25 got plenty. One of the many things that Ms.

1 Kelly does is she keeps us all with cough drops
2 and sore throat drops. So she's taking care of
3 me.

4 All right. Good morning. Thank you, Ms.
5 Jeffers. Thank you.

6 THE CLERK: Please raise your right hand and
7 state your full name for the record and spell
8 your last name.

9 THE WITNESS: Mary Ann Ashe. A-S-H-E.

10 MARY ASHE

11 having first been sworn, testifies as follows:

12 THE CLERK: Thank you.

13 MR. BELL: Your witness.

14 You might need to pull that microphone up
15 just a little bit towards you.

16 Your witness, Mr. Bell.

17 DIRECT EXAMINATION

18 BY MR. BELL:

19 Q Please state your name again for the record.

20 A Mary Ann Ashe.

21 Q I think everybody can hear you. Just speak
22 to me and hopefully all the jurors can hear what you
23 say. Ma'am, where do you live?

24 A 1002 West Doty Avenue.

25 Q Okay. Do you have neighbors there?

- 1 A Yes.
- 2 Q Who are your neighbors?
- 3 A Lance and JW.
- 4 Q Is that Mr. Malmquist seated here?
- 5 A Yes.
- 6 Q Front row. Which side do they live, if you
- 7 are looking at your house?
- 8 A On the right.
- 9 Q Do you know either gentleman well?
- 10 A No.
- 11 Q How do you know them?
- 12 A I speak to them. We're neighbors.
- 13 Q I want to direct your attention back to last
- 14 year. You remember a time when there was an
- 15 altercation at their house?
- 16 A Yes.
- 17 Q How do you remember that?
- 18 A Lance came over to the house, to my house.
- 19 JW came over through the hedges arguing with Lance
- 20 about coming into the shower.
- 21 Q What were you doing at the time?
- 22 A Sanding my fender.
- 23 Q Were you alone at your house?
- 24 A No, I wasn't.
- 25 Q You stated that Mr. Malmquist came over to

1 your house?

2 A Yes.

3 Q What time of day was this? Do you recall?

4 A Between 4:00 and 5:00.

5 Q And what was going on?

6 A Lance walked over. JW came through the
7 hedges and was arguing with Lance about coming into
8 the bathroom while he was in the shower.

9 Q How was JW dressed?

10 A He was in his boxers.

11 Q What all did he say to Lance? Was it to
12 Lance or to you or who was it to?

13 A He argued with Lance and said I'm going to
14 kill you. You know better than to come into the
15 shower -- or into the bathroom while I'm in the
16 shower. He apologized to me for arguing and he left.

17 Q What happened after that?

18 A I went in the house and took a shower. When
19 I came back out, the police were next door.

20 Q Did you go immediately inside to take a
21 shower or did you stay out a little while longer?

22 A I stayed out maybe five or ten more minutes.

23 Q What did Mr. Malmquist do after that
24 happened?

25 A He smoked a cigarette.

1 Q What did you do?

2 A Took a shower.

3 Q How long did that take?

4 A About 20 or 30 minutes.

5 Q When you came out, what were you doing?

6 A I was leaving and I saw the police next door.

7 Q Okay. Was it light or dark at that time?

8 A It was dark.

9 Q Did you go over to see what was going on with
10 the police next door?

11 A No.

12 Q What did you do?

13 A I went to my mom's house.

14 Q How long did you stay there?

15 A About a couple of hours.

16 Q Did you see anything else that went on that
17 night?

18 A No.

19 Q Did you ever see JW after that night?

20 A No, I haven't.

21 Q What about Mr. Malmquist? Did you see him
22 after that night?

23 A The next morning, my mom called me and told
24 me it was on the news that my neighbor eye was ripped
25 out. She said it was on the news. I walked next door

1 and checked on him.

2 Q What was his condition when you saw him?

3 A His eye was stitched close.

4 Q All this happened that night when his eye was
5 hurt, is that correct?

6 A Yes.

7 Q You said that JW came through -- what
8 separated your house from their house?

9 A Some thick hedges.

10 Q How did he come to your house?

11 A A little hole. He got caught up in it.

12 Q What was his demeanor? How as he acting?

13 A He was very upset.

14 Q How was Mr. Malmquist acting?

15 A He was calm.

16 Q Anybody have any alcoholic beverages at your
17 house to drink?

18 A Not that I know of.

19 Q Did either gentleman appear to be under the
20 influence of alcoholic beverages to you?

21 A No.

22 Q And the person that came through the hedges,
23 you see him in the courtroom today?

24 A Yes.

25 Q Could you please point him out for the jury?

1 A (Pointing.)

2 MR. BELL: Your Honor, we'd ask that the
3 record reflect that the witness has pointed out
4 the Defendant.

5 THE COURT: Very well.

6 MR. BELL: Thank you, ma'am. Please answer
7 any questions.

8 THE COURT: Cross-examination.

9 MR. BISCHOFF: Thank you, Your Honor.

10 THE COURT: Uh-huh.

11 CROSS-EXAMINATION

12 BY MR. BISCHOFF:

13 Q Ms. Ashe, good morning.

14 A Good morning.

15 Q Anyone else live with you at the house next
16 door?

17 A My cousin.

18 Q Was he there with you that night?

19 A No, he wasn't.

20 Q And you said that, uh, Mr. West came through
21 the hedges around 4:00 or 5:00 p.m.?

22 A Correct.

23 Q Was Mr. Malmquist at your house at that time?

24 A He was already over there. He just walked
25 over.

- 1 Q Y'all were outside, correct?
- 2 A Yes.
- 3 Q You remember how warm it was that day?
- 4 A Uh, it was pretty warm.
- 5 Q Did y'all have a barrel, a fire going?
- 6 A No.
- 7 Q Nothing like that?
- 8 A No.
- 9 Q And were you hanging out on the deck of your
10 house drinking drinks?
- 11 A No, I was in my driveway sanding my fender.
- 12 Q And, uh, you said that -- did you see the
13 altercation between the two?
- 14 A I left. They were arguing and he apologized
15 for coming over and fussing and he left. I went in
16 the house.
- 17 Q And, uh, you said that, uh, you went to your
18 mother's house. Is that correct?
- 19 A Yes.
- 20 Q About what time did you go to your mother's
21 house?
- 22 A Around 6:00.
- 23 Q Okay. You said it was dark, correct?
- 24 A Yes.
- 25 Q And, uh, did Mr. Malmquist come back over to

1 your house that night?

2 A He said he did, but I wasn't there so I don't
3 know.

4 Q So he wasn't there hanging out with you for
5 four hours. You would have remember that, correct?

6 A Right.

7 Q You would have remembered if you were
8 drinking with somebody else that night, correct?

9 A Right.

10 Q Did you speak with the police officers?

11 A No, I didn't.

12 Q Were you in the house of Mr. Malmquist and
13 Ms. West at any time?

14 A No.

15 Q Did you ever see a physical fight between the
16 two?

17 A No.

18 Q You just talked about somebody apologizing,
19 would you say that Mr. West was apologize --

20 A He apologized.

21 Q Who did he apologize to?

22 A He apologized to me.

23 Q Okay. Thank you.

24 MR. BISCHOFF: No more questions, Your
25 Honor.

1 THE COURT: Redirect.

2 REDIRECT EXAMINATION

3 BY MR. BELL:

4 Q Didn't apologize to Mr. Malmquist?

5 A No.

6 Q Thank you, ma'am. I have nothing further.

7 THE COURT: All right. Recross?

8 MR. BISCHOFF: No, Your Honor.

9 THE COURT: And is this witness free to

10 leave?

11 MR. BISCHOFF: She's free to be excused.

12 MR. BELL: Yes, Your Honor.

13 THE COURT: Thank you. Call your next

14 witness please.

15 MR. BELL: We would call Officer Driscoll.

16 (WHEREUPON, there is a pause.)

17 THE COURT: You want to step outside? Here

18 he comes.

19 THE CLERK: Raise your right hand and state

20 your full name for record and spell your last

21 name.

22 THE WITNESS: My name is Ken Driscoll with

23 the Summerville Police Department. The last name

24 is spelled D-R-I-S-C-O-L-L.

25 KENNETH DRISCOLL

1 having first been sworn, testifies as follows:

2 THE CLERK: Thank you.

3 DIRECT EXAMINATION

4 BY MR. BELL:

5 Q State your name again please.

6 A Uh, Kenneth Driscoll.

7 Q You stated you were with the Summerville
8 Police Department?

9 A Yes, sir.

10 Q How long have you been with that
11 organization?

12 A A little bit over two years.

13 Q And how long have you been in law
14 enforcement?

15 A Total 16 -- 18 years.

16 Q And, uh, what are your duties with the
17 Summerville Police Department?

18 A I'm assigned to patrol division -- I'm sorry.
19 Patrol Division Team 1. I'm working nights.

20 Q What is the night shift?

21 A Uh, routine patrol, patrol neighborhoods,
22 traffic stops, I respond to calls for service.

23 Q How long have you been on that?

24 A Uh, since March of last year.

25 Q And were you working as such back on the

1 evening of May 18th, 2009?

2 A Yes, sir.

3 Q Did you have an occasion to respond to an
4 address of ?

5 A Yes, sir.

6 Q Where approximately is that located?

7 A It's between -- it's located within the town
8 of Summerville.

9 Q What's it near?

10 A As far as physical locations?

11 Q Yeah.

12 A It's near railroad tracks, near Mabel, West
13 Doty.

14 Q What county is it located in?

15 A Dorchester county, sir.

16 Q And when you got there, were you alone in
17 responding?

18 A No, sir.

19 Q Other officers responded?

20 A Yes, sir.

21 Q You recall how many?

22 A Uh, the first incident or the second
23 incident, sir?

24 Q First.

25 A The first incident would be Officer Graves

1 and myself.

2 Q And when you arrived there, what did you
3 find?

4 A Initially, we were dispatched for a
5 disturbance. Upon arrival, we were met by Mr. West at
6 the front door. There was a verbal altercation,
7 possibly a physical one. I broke off from Mr. West
8 and from Mr. Malmquist in the front yard of the
9 residence.

10 Q What time was this at first?

11 A I believe it was roughly 22:00.

12 Q Which is in --

13 A I'm sorry. 10 p.m. at night.

14 Q And the person you met at Doty, you see him
15 in the courtroom?

16 A Yes, sir. I do.

17 Q Please point him out.

18 A (Pointing.) Mr. West.

19 MR. BELL: Your Honor, ask the record
20 reflect the witness has identified the Defendant.

21 THE COURT: Very well.

22 BY MR. BELL:

23 Q And when you met him at the door, what did
24 you do?

25 A We spoke with him concerning what brought us

1 out there, all of us, what was transpiring.

2 Q What did he tell you?

3 A He said he had a -- do you mind if I review
4 my notes here a little bit, sir? He said a verbal
5 argument with his roommate, Mr. Malmquist. He said
6 during the argument that he was struck by Mr.
7 Malmquist.

8 Q He said what?

9 A He said he was struck once and that he took
10 his stick from him and proceeded to strike him once.

11 Q And that's -- who told you that?

12 A Mr. West.

13 Q Could you tell us his physical condition at
14 that point?

15 A He was obviously intoxicated, slurred about
16 his speech, odor of alcohol.

17 Q See any injuries?

18 A No, sir. I did not.

19 Q How was he dressed?

20 A The first incident, I can not recall exactly
21 what he was wearing, sir. I believe he was clothed
22 though.

23 Q You said after talking to him, what did you
24 do?

25 A I went back to Mr. Malmquist.

1 Q And could you describe him?

2 A Yes, sir. He was fully clothed. He was
3 talking on his cell phone. I can't recall who he was
4 talking to at the time.

5 Q Did he have anything with him?

6 A He had a walking stick with him, sir.

7 Q And you asked him what he said happened or
8 did you talk to him about that?

9 A I did talk to him about that. Their stories
10 relatively matched. They had an argument with each
11 other. They hit each other. That was pretty much the
12 end of it. I believe he said he was hit in the head.
13 I don't know exactly where he was struck at.

14 Q And did Mr. Malmquist have any injuries at
15 that point?

16 A We asked both parties if they had any
17 injuries to them. They requested medical attention.
18 They both denied that.

19 Q What did y'all end up doing?

20 A We tried to calm the moment down. They are
21 both somewhat intoxicated. Pretty much, go your
22 separate ways and call it a night. They denied any
23 formal police intervention as far as that and declined
24 any medical attention.

25 Q Okay. At this time, let me show you what's

1 been marked as State's 1 into evidence and ask you
2 look at that. Did Mr. Malmquist look like that at the
3 first incident?

4 A No, sir. He did not.

5 Q Okay. I want to show you what's been marked
6 as State's 2 for identification and ask if you saw
7 these injuries at the first altercation.

8 A No, sir. I did not.

9 Q Did you look or do you recall?

10 A Uh, we asked when he said he was struck in
11 the head.

12 Q Now, you talk about the first incident, did
13 you have the occasion to go back out this address
14 again?

15 A Yes, sir.

16 Q What time was that?

17 A Approximately two o'clock in the morning,
18 sir.

19 Q How did you come to go to that?

20 A We were dispatched for an assault. Dispatch
21 advised us that Mr. Malmquist was on the corner of, I
22 believe, Maple and West Doty. He was just down the
23 street from his house. Upon arrival there, Lieutenant
24 Wright was already on the scene.

25 Q In Dorchester county?

1 A In Dorchester county, yes, sir. I'm sorry
2 about that.

3 Q So y'all went to where Mr. Malmquist was
4 first?

5 A Yes, sir.

6 Q And did you talk with him at that time?

7 A Lieutenant Wright was talking to him. I was
8 over here.

9 Q Did you see any injuries at that time?

10 A Yes, sir. I did.

11 Q What injuries did you see?

12 A His eye, his right eye.

13 Q As you just saw in State's 1?

14 A Yes, sir.

15 Q Okay. Was there any other officers that
16 came?

17 A Officer Graves.

18 Q What did y'all do after y'all made contact
19 with Sergeant Wright, then Sergeant Wright?

20 A It was Sergeant Wright then. I'm sorry about
21 that. Uh, we, uh, Sergeant Wright, Lieutenant Wright
22 now, spoke with, uh, Mr. Malmquist and he directed us
23 over to Mr. West.

24 Q And how far down the street was that, was the
25 house?

1 Q But you were definitely the first on the
2 scene for both, for the first altercation?

3 A Myself and Officer Graves and Wright pretty
4 much simultaneously.

5 Q And again, getting back to you put down
6 everything important in your report, you stated it was
7 actually Mr. Malmquist who agreed with the assessment
8 that he was the one who struck Mr. West first?

9 A Just starting with the first incident or the
10 second one?

11 Q Yes, sir, during the first incident.

12 A I believe with Mr. West, based on what he was
13 telling us at that time, that Malmquist was the
14 aggressor.

15 Q And Mr. Malmquist concurred with that and
16 that's what you indicated in your report?

17 A Yes, sir.

18 Q And you didn't actually see what happened on
19 either of these incidents?

20 A No.

21 Q You couldn't have been in the house at the
22 time there was an altercation at 2 a.m.?

23 A No, sir.

24 Q You weren't there on the grounds to the house
25 four hours earlier at 10 p.m.?

1 A To actually witness it, no, sir..

2 Q And if the situations had been reversed and
3 you responded to the scene the second time and it was
4 indeed Mr. West who was out on the street, had called
5 911, needed medical attention that it would be Mr.
6 Malmquist who would be placed under arrest and
7 awaiting trial, is that correct?

8 MR. BELL: Objection, Your Honor.
9 Speculation.

10 MR. BISCHOFF: Your Honor, I believe he
11 testified that's what he would have done had the
12 situation been different.

13 THE COURT: Very well. Sustained.

14 MR. BISCHOFF: Beg the Court's indulgence
15 one second.

16 THE COURT: Sure.

17 (WHEREUPON, there is a pause.)

18 MR. BISCHOFF: No more questions, Your
19 Honor.

20 THE COURT: Redirect?

21 MR. BELL: Yes, Your Honor. Thank you.

22 REDIRECT EXAMINATION

23 BY MR. BELL:

24 Q Officer Driscoll, referring to your
25 report, ---

1 A Yes, sir.

2 Q --- when was your report written?

3 A I believe that night.

4 Q Was it after --

5 A I generally don't like to go home with a
6 report not completed.

7 Q After which incident?

8 A After this incident.

9 Q The first one or the second one?

10 A The second one.

11 Q Did you write a report directly after the
12 first incident?

13 A No, sir.

14 Q Why not?

15 A (Inaudible.)

16 Q So what you wrote about the first incident
17 was from your memory after the second incident
18 occurred, correct?

19 A Yes.

20 Q Thank you.

21 THE COURT: Recross?

22 RE CROSS-EXAMINATION

23 BY MR. BISCHOFF:

24 Q And from your memory, it was Mr. Malmquist
25 who agreed with the statement that he struck Mr. West

1 first?

2 A Yes.

3 MR. BISCHOFF: No more questions, Your
4 Honor.

5 THE COURT: All right. Is this witness free
6 to leave?

7 MR. BELL: He's excused, Your Honor.

8 THE COURT: All right. Any objection?

9 MR. BISCHOFF: No, Your Honor.

10 THE COURT: All right. You are free to go.
11 Call your next witness please.

12 MS. KIMMONS: The State calls Officer
13 Graves.

14 THE CLERK: Please raise your right hand,
15 state your full name for the record and spell
16 your last name.

17 THE WITNESS: Officer John Graves. G-R-A-V-
18 E-S.

19 JOHN GRAVES

20 having first been sworn, testifies as follows:

21 THE CLERK: Thank you.

22 THE COURT: Your witness.

23 DIRECT EXAMINATION

24 BY MS. KIMMONS:

25 Q State your name again.

1 A John Graves.

2 Q And you work for the Summerville Police
3 Department?

4 A I do.

5 Q How long have you worked there?

6 A Eight years as -- five years as a reserve
7 officer, three years as a full-time officer.

8 Q How long have you been in law enforcement?

9 A Eight years.

10 Q So the whole time, you've been with
11 Summerville?

12 A Yes, ma'am.

13 Q All right. What are your duties?

14 A Patrol.

15 Q What does that consist of?

16 A We patrol neighborhoods, we run traffic, we
17 answer calls of service.

18 Q Were you working on the night of May 18th,
19 2009?

20 A I was.

21 Q Do you remember having contact with the
22 Defendant, Mr. West?

23 A I do.

24 Q Could you tell me about that?

25 A We answered a call to service around ten

1 o'clock at night about a disturbance. We arrived at
2 the incident location. We met with Mr. West and we
3 met with Mr. Malmquist. They stated they had an
4 argument or something.

5 Q Okay. Is the residence that you responded to
6 in Dorchester county?

7 A Yes, it is.

8 Q When you got there, what did you see?

9 A Mr. West was in the house. We didn't see Mr.
10 Malmquist at first. We made initial contact with Mr.
11 West and then Mr. Malmquist came walking up the
12 driveway.

13 Q Did the men appear intoxicated?

14 A They did.

15 Q Were they falling down drunk?

16 A No, ma'am.

17 Q Neither one of them was?

18 A No.

19 Q All right. And, uh, what did you gather that
20 happened there?

21 A They had an argument and they had separated.
22 Then, uh, we didn't see any evidence of any marks of
23 anything. We didn't see where they had an actual
24 physical altercation. We asked if they could get
25 along for the rest of the evening in separate sides of

1 the house. They said yes, they were going to call it
2 a night. They were both going to go to bed. They
3 were done.

4 Q Is this what Mr. Malmquist looked like when
5 you saw him?

6 A Not the first call.

7 Q Okay. Did you have an occasion to rerespond
8 to that incident location?

9 A Yes, ma'am.

10 Q At what time?

11 A Around two o'clock in the morning.

12 Q And where did you respond to on the second
13 occasion?

14 A We were responding to Doty at the tracks and
15 North Maple initially is where I was responding to.
16 Once I got there, my sergeant already arrived there
17 and directed us to go to the residence and take Mr.
18 West into custody.

19 Q When you got to the first incident location
20 near the railroad tracks, what did you see?

21 A Sergeant was talking to Mr. Malmquist. I
22 really didn't see -- he was holding his eye, I
23 believe. I didn't stay there very long. He directed
24 me to go to the incident location.

25 Q Did you see if Mr. Malmquist had any injury?

1 A He was holding his eye. I didn't see his eye
2 at that time.

3 Q Okay. Did he appear intoxicated?

4 A I couldn't tell.

5 Q Okay. So then you went back to the incident
6 location?

7 A Yes, ma'am.

8 Q And what did you do when you got there?

9 A We knocked on the door and tried to get Mr.
10 West to come to the door. I don't believe he came to
11 the door. It took him a minute or two and then he
12 finally called us into the house, into the residence.
13 We went inside. He was sitting in his bedroom
14 watching TV.

15 Q Okay. Did he appear injured?

16 A No, ma'am.

17 Q Didn't have any visible marks?

18 A No. I didn't see anything.

19 Q Okay. All right. You said he was sitting on
20 his bed. What happened next?

21 A He was sitting in a chair.

22 Q I'm sorry.

23 A I believe he was, uh, wearing like boxer
24 shorts or something. We told him to get up and get
25 his clothes on, we were going to -- he was being

1 placed under arrest.

2 Q Okay. Did he appear intoxicated?

3 A Yes, ma'am.

4 Q How intoxicated?

5 A Uh, --

6 MR. BISCHOFF: Objection, Your Honor.

7 Speculation.

8 MS. KIMMONS: I'll rephrase, Your Honor.

9 THE COURT: Very well. Yes.

10 BY MS. KIMMONS:

11 Q Was he falling down drunk?

12 A No, ma'am.

13 MR. BISCHOFF: Objection.

14 THE COURT: You may proceed.

15 BY MS. KIMMONS:

16 Q Was he slurring speech?

17 A I believe his speech was slurred.

18 Q Did he have the odor of alcohol?

19 A Yes, ma'am.

20 MR. BISCHOFF: Objection, Your Honor. She's
21 leading the witness.

22 MS. KIMMONS: I'll move on, Your Honor.

23 THE COURT: It was a leading question. You
24 can rephrase if you wish.

25 MS. KIMMONS: I'll just move on.

1 THE COURT: All right.

2 BY MS. KIMMONS:

3 Q All right. What did you do after Mr. West
4 was placed under -- after you saw Mr. West?

5 A Uh, we got him dressed, took him into custody
6 and Officer Driscoll transported him.

7 Q Okay. And what did you do?

8 A I went back to the initial scene where Mr.
9 Malmquist was at.

10 Q What did you see there?

11 A EMS, I believe the first responders were
12 there. I believe EMS were there. They were putting
13 him into the ambulance.

14 Q Did you get a chance to see Mr. Malmquist's
15 eye?

16 A Not until at MUSC.

17 Q Okay. So you went to MUSC too?

18 A Yes, ma'am.

19 Q What did you do when you got there?

20 A We had him checked into the hospital. He got
21 the place where they were going to examine his eye.
22 While they were waiting to examine his eye, uh, I took
23 a written statement from him, took dictation from him.

24 Q Okay. And when you say you took dictation
25 from him, what do you mean by that?

1 A I asked him what happened. I wrote it down
2 the best I could.

3 Q Okay. Is this the statement you wrote for
4 him that evening?

5 A It is.

6 Q I'm sorry. That's Plaintiff's Exhibit --
7 State's Exhibit 6. Did you get a chance to look at
8 Mr. Malmquist's eye while you were at MUSC?

9 A Yes, ma'am.

10 Q And did it look like State's Exhibit 1?

11 A Yes, ma'am.

12 Q Did it look like that? Okay. While you were
13 having contact with Mr. Malmquist at MUSC, did he
14 appear intoxicated?

15 A He was pretty sober at the hospital.

16 Q Okay. All right. When you arrested Mr.
17 West, did he complain of any injury?

18 A I don't recall. I don't recall.

19 Q You didn't see any injuries?

20 A No, ma'am. None.

21 Q Okay. Great. Thank you. Please answer any
22 questions Mr. Bischoff might have for you.

23 THE COURT: Cross-examination.

24 MR. BISCHOFF: Thank you, Your Honor.

25 THE COURT: Uh-huh.

1 CROSS-EXAMINATION

2 BY MR. BISCHOFF:

3 Q Sergeant Graves, is that correct?

4 A It's PFC.

5 Q PFC Graves. You also still work the night
6 shift?

7 A Yes, sir.

8 Q Thank you also for being here. The 10 p.m.
9 observance, you said that when you arrived, you didn't
10 see Lance Malmquist at the moment that you arrived, is
11 that correct?

12 A Yes, sir.

13 Q He came walking up the driveway?

14 A Yes, sir.

15 Q Did you ask him where he had been?

16 A I think he said -- yes, sir. He went next
17 door to call, to call the police or whatever.18 Q He's also talking on a cell phone you said,
19 is that correct?20 A Uh, I didn't say a cell phone or not. I
21 thought he went next door, to the house next door.22 Q Okay. You also stated that they were both
23 intoxicated at 10 p.m.?24 A Yes, sir. You could smell alcohol on both
25 subjects.

1 Q You didn't observe any marks on either
2 individual?

3 A No, sir.

4 Q Despite Mr. Malmquist insisting that he was
5 hit in the head.

6 A We didn't see any marks of that.

7 Q You would agree that both said that they
8 would separate for the evening, call it quits?

9 A Yes, sir.

10 Q And at that time, if Mr. Malmquist or Mr.
11 West was standing there in their yard begging and
12 pleading don't leave them, you wouldn't have left,
13 would you?

14 A No, sir.

15 Q There's nothing in your report about Mr.
16 Malmquist begging you not to leave, is there?

17 A No, sir.

18 Q So you left, so did Officer Driscoll and you
19 came back at 2 a.m.?

20 A Yes, sir.

21 Q And once you got there, you were told to
22 arrest Mr. West?

23 A Yes, sir.

24 Q And you didn't see the altercation?

25 A No, sir.

1 Q And you were just there to arrest Mr. West
2 and follow orders?

3 A Yes, sir.

4 MR. BISCHOFF: Beg the Court's indulgences,
5 Your Honor.

6 THE COURT: Yes.

7 BY MR. BISCHOFF:

8 Q You said you transported Mr. Malmquist to
9 MUSC?

10 A Uh, I was directed to get a statement and
11 serve a notification of protective measures after the
12 ambulance left. I believe the ambulance was there
13 before I arrived. He was transported by EMS, not
14 myself.

15 Q Before he was transported, do you have any
16 occasion to speak with him?

17 A No, sir.

18 Q Were you around when he was making any
19 statements?

20 A No, sir.

21 MR. BISCHOFF: No more questions, Your
22 Honor.

23 THE COURT: Redirect?

24 MS. KIMMONS: No, Your Honor. Thank you.

25 THE COURT: All right. Very well. Is this

1 witness free to leave?

2 MS. KIMMONS: Yes, Your Honor.

3 THE COURT: Any objection?

4 MR. BISCHOFF: No, Your Honor.

5 THE COURT: Very well. You are free to go.

6 Call your next witness please.

7 MR. BELL: The State would call Officer Mike
8 Graham.

9 THE CLERK: Please raise your right hand.
10 State your full name for the record and spell
11 your last name please.

12 THE WITNESS: Michael Graham. G-R-A-H-A-M.

13 MICHAEL GRAHAM

14 having first been sworn, testifies as follows:

15 THE CLERK: Thank you. Have a seat.

16 THE COURT: Your witness.

17 DIRECT EXAMINATION

18 BY MR. BELL:

19 Q Officer Graham, where are you employed?

20 A Summerville Police Department.

21 Q And how are you employed there?

22 A As an officer.

23 Q How long have you been with Summerville
24 Police Department?

25 A Almost eight years.

1 Q Excuse me?

2 A Almost eight years.

3 Q Speak up a little bit so everybody can hear
4 you. You're kind of mumbling over there. You work a
5 particular shift?

6 A I usually work night shift.

7 Q And what is that time frame?

8 A 5:30 to 5:30.

9 Q How long have you been working that?

10 A I'm actually a reserve officer so I been
11 primarily that shift most of the time.

12 Q Were you working back on the late night of
13 May 18th, early morning hours of May 19th, 2009?

14 A I had some stuff to do at the station. I met
15 with the lieutenant earlier. I was in the vicinity of
16 the incident when the lieutenant got -- well, sergeant
17 at the time got out.

18 Q Which sergeant?

19 A Sergeant Wright, now Lieutenant Wright.

20 Q And where did you go?

21 A Maple and Doty. It was the street corner
22 about two blocks from the house.

23 Q And were you directed to do anything at that
24 time?

25 A Yes, Sergeant Wright knew I was in the area.

1 He asked me if I had my camera with me and would I
2 come take pictures of the victim and also the incident
3 scene.

4 Q And did you do that?

5 A Yes, sir.

6 Q Were did you take the pictures first?

7 A First, at Maple and Doty, of the victim.

8 Q I'm going to show you a series of
9 photographs. First, I'm going to show you what's been
10 marked into evidence as State's 1. Is that the
11 picture you took?

12 A Yes, sir.

13 Q That's the picture of who?

14 A The victim.

15 Q Is that how he appeared that night?

16 A Yes, sir.

17 Q I'm going to show you what is marked as
18 State's 2 for identification and ask you if you
19 recognize that.

20 A Yes, sir.

21 Q What is that a picture of?

22 A That was one of the (inaudible)

23 THE COURT: Keep your voice up please.

24 BY MR. BELL:

25 Q And that was from who?

1 A The victim.

2 Q Speak up just so all the jurors can hear you.

3 A (inaudible)

4 MR. BELL: Your Honor, we would offer this
5 into evidence as State's Exhibit 2.

6 THE COURT: Any objection?

7 MR. BISCHOFF: No, Your Honor.

8 THE COURT: Very well.

9 (WHEREUPON, State's Exhibit 2 is admitted into the
10 record.)

11 BY MR. BELL:

12 Q Let me show you what's been marked as State's
13 3 for identification and ask if you can identify that.

14 A That's was inside the house. I took -- I
15 believe that was the area where the kitchen was.

16 Q And you see a blood stain?

17 A Yes, sir. There on the carpet, excuse me,
18 the press wood floor.

19 MR. BELL: Okay. We would offer State's 3
20 into evidence.

21 MR. BISCHOFF: No objection.

22 THE COURT: Very well.

23 (WHEREUPON, State's Exhibit 3 is admitted into the
24 record.)

25 BY MR. BELL:

1 Q I'm going to show you State's 4 and ask if
2 you can identify.

3 A I believe that's the same blood stain.

4 Q That was taken that night?

5 A Yes, sir.

6 Q That's how it appeared that night?

7 A Yes, sir.

8 MR. BELL: We would offer State's 4 into
9 evidence.

10 MR. BISCHOFF: No objection.

11 THE COURT: Very well.

12 (WHEREUPON, State's Exhibit 4 is admitted into the
13 record.)

14 BY MR. BELL:

15 Q Finally, State's Exhibit 5 is for
16 identification there. Can you identify that?

17 A Blood stain in the same room.

18 Q Is that how it appeared that night?

19 A Yes, sir.

20 MR. BELL: Your Honor, we would offer that
21 as State's 5 into evidence.

22 THE COURT: Any objection?

23 MR. BISCHOFF: None, Your Honor.

24 THE COURT: Very well.

25 (WHEREUPON, State's Exhibit 5 is admitted into the

1 record.)

2 MR. BELL: Thank you, Officer Graham.

3 Please answer any questions that Mr. Bischoff may
4 have for you.

5 THE COURT: Cross-examination?

6 MR. BISCHOFF: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. BISCHOFF:

9 Q Officer Graham, I just have a brief question.
10 Uh, the pictures that you took, do you remember what
11 room that was in?

12 A It was near what I believe was the kitchen.
13 If I'm not mistaken, when you are facing Richardson
14 Avenue from the house, it's the front right room, I
15 believe, or the second room back from the front right.

16 Q Is it true that it's basically right when you
17 walk in the side door?

18 A When you come in the side door, if I'm not
19 mistaken, it was straight ahead.

20 Q Straight ahead and that's the kitchen area
21 where the blood stains were.

22 A I believe so. Yes.

23 Q And, uh, you remember where the location of
24 the blood stain was? Was it closer to the back right
25 corner, was it near the entranceway of the house? You

1 remember exactly where?.

2 A It was closer to the center part of the house
3 there. It was one of, I think, three blood stains
4 total. That particular one in the photograph, if I
5 remember correctly, when you approach the room, it was
6 within a few feet of entering the room.

7 Q It was near the door to the side of the
8 house? Just upon entering, correct?

9 A Well, it's a good ways from that door, but
10 it's closer to the door then -- in that particular
11 room, it's closer to the door than the opposite wall.

12 Q It's in the entryway to the kitchen.

13 A Correct.

14 Q And you weren't at the scene when the
15 altercation took place. You were just there to
16 photograph after?

17 A I was there -- by the time I got to the
18 scene, they were already transporting Mr. Malmquist
19 and Mr. West, I believe, was already in the patrol
20 car.

21 Q You just showed up afterwards?

22 A Yes, sir.

23 MR. BISCHOFF: No more questions, Your
24 Honor.

25 MR. BELL: Nothing further from this

1 witness.

2 THE COURT: Is this witness free to leave?

3 MR. BELL: This witness is free.

4 THE COURT: You are free to go.

5 Call your next witness please.

6 MR. BELL: One moment, Your Honor.

7 THE COURT: All right.

8 MR. BELL: Your Honor, it appears that all
9 the exhibits the State has presented are in. The
10 State would rest at this time.

11 THE COURT: Very well. Do not discuss this
12 matter. Don't allow anyone to discuss it with
13 you. We will take our morning break. Please
14 step to your jury room. Do not discuss this
15 matter or allow anyone to discuss it with you.
16 We will take our morning break about 15 minutes.
17 We'll take about 20 minutes. There's a matter I
18 must handle outside your presence. Thank you.

19 (WHEREUPON, the jury exits at approximately
20 11:45 a.m.)

21 THE COURT: All right. Do y'all want to
22 take a break or do you want to do your motions
23 first? What do y'all want to do? Everybody
24 okay? You need to take a comfort break? All
25 right.

1 MR. BISCHOFF: We would request a short
2 recess.

3 THE COURT: Of course. Absolutely. Y'all
4 go ahead and take your comfort break and just
5 come back and we will address motions.

6 MR. BISCHOFF: Thank you.

7 (WHEREUPON, a short recess is taken from
8 approximately 11:46 a.m. to 12:06 p.m.)

9 THE COURT: Okay. Mr. Bischoff.

10 MR. BISCHOFF: Yes, Your Honor. Your Honor,
11 we move for directed verdict at this time. We
12 don't believe the State has presented sufficient
13 evidence that even in the light most favorable to
14 them the jury could reasonably conclude that Mr.
15 West is guilty of the crime for which is in the
16 indictment.

17 THE COURT: Thank you so much. As you know,
18 it is not for the court to weigh the evidence but
19 to establish whether or not there is evidence on
20 each and every element from which the jury could
21 determine guilt. I would therefore respectfully
22 deny your motion. There is evidence on each and
23 every element of the offense from which the jury
24 could make a determination of guilt. I would
25 respectfully deny your motion noting your

1 exception thereto.

2 MR. BISCHOFF: Thank you, Your Honor.

3 THE COURT: Uh, now, really two things.
4 First of all, do you intend to call witnesses?

5 MR. BISCHOFF: We do, Your Honor.

6 THE COURT: Very well.. Do you intend to
7 call Mr. West?

8 MR. BISCHOFF: Mr. West will be our only
9 witness, Your Honor.

10 THE COURT: Very well. Very well. You
11 know, uh, interestingly, the examination you give
12 defendants doesn't presume that a defendant will
13 not testify but that is typically when we give
14 the instruction. Would you like me to give -- is
15 there any reason or would you like me to give the
16 instruction to Mr. West in that he does intend to
17 testify?

18 MR. BISCHOFF: Judge, I would request
19 instruction.

20 THE COURT: Very well. Very well. I think
21 that is probably appropriate. All right.

22 Raise your right hand for me please and be
23 sworn.

24 Ms. Jeffers, I turn it over to you.

25 (WHEREUPON, the Defendant is first duly sworn.)

1 **THE COURT:** Thank you. You may be seated.
2 Thank you, Mr. West. Mr. West, at this time, I'm
3 going to explain to you certain of your rights.
4 If you do not understand anything that I say,
5 please let me know. All right?

6 **MR. WEST:** Yes, ma'am.

7 **THE COURT:** All right. If you want me to
8 explain anything in more detail, please also let
9 me know that and I will be happy to attempt to
10 explain it to you in more detail. Now, we've
11 reached the stage of the trial where you may
12 present your defense. You have the right to plan
13 the protections given to you by the Fifth
14 Amendment to the Constitution of the United
15 States, which amendment states, in part, no
16 person shall be compelled in any criminal case to
17 be a witness against himself. This means that
18 you can not be required to testify in this case.
19 You have the right to testify in your own behalf.
20 However, no one can make you testify. This is a
21 personal right. No one can waive this right
22 except you.

23 If you decide to testify, you will be subject
24 to the same rules that govern other witnesses and
25 you may be examined and cross-examined on any

1 relevant issue in this case. In addition, if you
2 have any convictions involving dishonesty or
3 false statement or for crimes punishable by
4 imprisonment for more than one year and this
5 court determines that the probative value of
6 admitting the evidence outweighs its prejudicial
7 effect to you, the Solicitor will be able to
8 introduce your record to attack your credibility.

9 If you decide to testify, this decision on
10 your part must be freely, voluntarily and
11 intelligently made with knowledge of the
12 protections given to you by the Fifth Amendment
13 and consequences of your decision to testify. If
14 you decide not to testify, I will instruct the
15 jurors that they can not give the fact that you
16 did not testify any consideration whatsoever and
17 that there is to be absolutely no prejudice to
18 you because you did not testify.

19 It is left entirely up to you whether or not
20 you testify. You may talk with your attorney,
21 your family or friends or anyone else, but the
22 final decision will be left entirely up to you.
23 Do you understand what I have explained to you?

24 MR. WEST: Yes, ma'am.

25 THE COURT: Do you have any questions about

1 what I've explained to you?

2 MR. WEST: No, ma'am.

3 THE COURT: Have you discussed with your
4 attorneys whether you should or should not
5 testify? Have you talked about it?

6 MR. WEST: Yes, ma'am.

7 THE COURT: Okay. Do you need to talk to
8 them any further?

9 MR. WEST: No, ma'am.

10 THE COURT: All right. And are you prepared
11 at this time to make up your mind whether you
12 wish to testify or not?

13 MR. WEST: Yes, sir.

14 THE COURT: Understanding your rights under
15 the Fifth Amendment, Mr. West, do you wish to
16 testify?

17 MR. WEST: Yes, ma'am.

18 THE COURT: Very well. Very well. All
19 right. I'll tell you what, why don't we just let
20 -- why don't we just let, Mr. West -- unless
21 y'all would rather he walk while the jury comes
22 back, we can just have him come on up now. What
23 you want to do?

24 MR. BELL: Your Honor, before that -- I'm
25 sorry to interrupt.

1 THE COURT: No.

2 MR. BELL: The State would inquire. He does
3 have -- what the State would offer as to
4 convictions that under the statute we could offer
5 as impeachment, I'm sure the court is required to
6 do a balancing test on whether the State would be
7 allowed to question him under impeachment under
8 609 crimes. He has a June 24, 1998 conviction of
9 Assault and Battery of High and Aggravated Nature
10 which was pled apparently off of Criminal Sexual
11 Conduct with a minor which he received a
12 sentence, according to the RAP sheet, 10 years
13 suspended to 30 months probation and 200 hours of
14 public service. We would contend that the
15 sentence was not finished within the 10 years
16 from today's date. 30 months, by my record,
17 would put it about 2001 when the sentence would
18 be finished.

19 THE COURT: You said 2001, you meant 2011?
20 You said 2001, you mean 2011?

21 MR. BELL: I think the probation term would
22 have ended around 2001 from 1998.

23 THE COURT: Uh-huh. I understand.

24 MR. BELL: He has a 2006 conviction for
25 Pointing and Presenting a Firearm which he

1 received two years suspended to 18 months
2 probation. I think both of those carry more than
3 one year in prison. We would intend to use it is
4 the State's position.

5 THE COURT: Okay. Yes, sir.

6 MR. BISCHOFF: Your Honor, as far as the
7 1998 conviction, I believe it's outside the scope
8 of the 10-year rule that prohibits, uh, any
9 mention of a conviction unless there is some
10 compelling reason. I don't think there's any
11 compelling reason here. Again, he was convicted
12 in 1998. The Pointing and Presenting, Your
13 Honor, I do believe is more prejudicial than
14 probative. And, uh, as such --

15 THE COURT: The other way around. We know
16 it's prejudicial. In other words, the probative
17 value doesn't outweigh ---

18 MR. BISCHOFF: Outweigh the prejudicial
19 effect.

20 THE COURT: --- prejudicial effect.

21 MR. BISCHOFF: Correct, Your Honor. I ask
22 that you deny their motion.

23 THE COURT: Okay. Yes, sir. Yes, sir. Let
24 me tell you what my concern is. Obviously, you
25 know, I do not remember the site. I know you do,

1 Mr. Bell. I know it was the case of Judge
2 Cottingham where he allowed the cross-examination
3 on -- I think it was two prior cases that are
4 either similar or identical to the matter that
5 the person was standing trial for. It was
6 reversed. So which, of course, is in a rarity,
7 in and of itself, for Judge Cottingham to ever be
8 reversed. Assault and Battery of High and
9 Aggravated Nature, because that is the same
10 charge here, I'm not inclined to allow cross-
11 examination because of the closeness of it even
12 assuming that the probation would have been
13 ended. That one's out.

14 On the Pointing and Presenting, my concern is
15 that it is also -- it's -- it concerns me in that
16 it is -- of course and for the record, the only
17 reason that the pointing and presenting would be
18 admissible for impeachment purposes goes to the
19 truth and not for any other reason, certainly
20 none for compensity. The question is whether or
21 not, under rules, whether or not the probative
22 value regarding, uh, the Defendant's capacity to
23 tell the truth would be impeached on truth
24 telling, whether or not the prejudicial effect to
25 him, whether or not the probative value outweighs

1 it substantially. I find it does not outweigh
2 the substantial value and therefore would not
3 allow you to cross-examine him on pointing and
4 presenting. All right. Anything further in that
5 regard? Nope? Nope?

6 MR. BISCHOFF: No, Your Honor.

7 THE COURT: All right. Let us have the jury
8 please.

9 MR. BISCHOFF: Your Honor, can we --

10 THE COURT: You want to hold them?

11 Hold them just a second please. Hi. I need
12 to hold them. Sorry. Something just arose. I
13 don't know what it is. Hold them outside the
14 door just a moment.

15 MR. BISCHOFF: Your Honor, we'll let him
16 take the stand now. I apologize.

17 THE COURT: Okay. Just come on up here.
18 Mr. West, I want you to come on up and stand
19 right there. We'll have to pull the microphone
20 back.

21 I'm going to have you call your first
22 witness. Okay?

23 MR. BISCHOFF: Thank you, Your Honor.

24 THE COURT: Uh-huh.

25 (WHEREUPON, the jury enters at approximately

1 12:19 p.m.)

2 **THE COURT:** Ladies and Gentlemen, you have
3 now heard the witnesses and received the evidence
4 which you will from the State in the State's case
5 in chief. We now turn to the Defendant.

6 Mr. Bischoff, if you will, call your first
7 witness.

8 **MR. BISCHOFF:** Thank you, Your Honor. We
9 call Mr. James West.

10 **THE COURT:** All right. If you will swear
11 Mr. West in for me please.

12 **THE CLERK:** Yes, Your Honor. Please raise
13 your right hand and state your full name for the
14 record and spell your last name.

15 **THE WITNESS:** James West, W-E-S-T.

16 **JAMES WEST**

17 having first been sworn, testifies as follows:

18 **THE CLERK:** Have a seat.

19 **THE COURT:** There you go.

20 Mr. Bischoff, your witness.

21 **MR. BISCHOFF:** Thank you, Your Honor.

22 **DIRECT EXAMINATION**

23 **BY MR. BISCHOFF:**

24 Q Mr. West, again, please state your full name
25 for the record.

1 A James West.

2 Q And Mr. West, what do you do for a living?

3 A I'm a carpenter.

4 Q And how old are you?

5 A 47.

6 Q You have any kids?

7 A Two, sir.

8 Q And any family members in the area?

9 A I got a niece.

10 Q Tell me about your kids. You said you have
11 two?

12 A Yes, sir. I've got a daughter, Jessica.
13 She'll be 31, October the 19th. I've got a son that
14 will be 21, October the 19th.

15 Q How long have you been working in
16 construction?

17 A 17, 18 years.

18 Q Any particular company?

19 A Uh, Amark Construction and TCC.

20 Q And, uh, how long do you think you been
21 working for that particular company?

22 A TCC, approximately three years.

23 Q How long have you been in the Summerville
24 area?

25 A 20 years.

1 Q And where have you been living during that
2 time?

3 A Summerville.

4 Q Location, addresses.

5 A Uh, Abbie Lane, , uh, --

6 Q How long you been at that location?

7 A Two years.

8 Q And have you had any roommates?

9 A Yes, sir. Lance Malmquist and Gary Miller.

10 Q And, uh, where is West Richardson located?

11 A By Westvaco saw mill. Beside it.

12 Q Uh, I want to go back and talk a little bit
13 about your job as the construction man. What kind of
14 jobs did you have within the realms of being a
15 construction worker?

16 A I specialized in underneath repairs. I'm the
17 one that goes down to the spiders and snakes and what
18 have you underneath the house to assess mold damage,
19 termite damage, water damage.

20 Q Do you build houses?

21 A Yes, sir.

22 Q What about do you do anything else with
23 houses?

24 A Remodels. I do electrical. I do plumbing,
25 heating and air ducts, mainly all of it, painting,

1 drywall.

2 Q And you been doing that with TCC
3 Construction?

4 A For three years, sir.

5 Q And who was your boss?

6 A Mike Taylor.

7 Q And, uh, did Mr. Malmquist work with you?

8 A Yes, sir.

9 Q And is that how you two met?

10 A I was working with Amark Construction when I
11 originally met Mr. Malmquist. He was working for TCC
12 at that time, sir.

13 Q And how did y'all come to start to live
14 together and be roommates?

15 A Uh, back in June of '08, I needed a place to
16 live. I called Mr. Malmquist up and asked if he could
17 use a roommate.

18 Q Did anybody else live with y'all at that
19 time?

20 A No, sir.

21 Q And did Mr. Malmquist own the home?

22 A No, sir. He rented.

23 Q Who did y'all rent the house from?

24 A Richard Rutherford, I do believe.

25 Q And you remember how much you paid in rent?

1 A \$265 a month.

2 Q And how was rent paid to Mr. Rutherford?

3 A Uh, I gave the money and Gary gave the money
4 to Lance.

5 Q And did you have bills?

6 A Yes, sir, electric and water.

7 Q And you and Mr. Malmquist split those evenly,
8 is that correct?

9 A Yes, sir.

10 Q And, uh, was Mr. Malmquist employed
11 throughout the time that y'all were living together?

12 A No, sir. I moved in in June of '08. He got
13 fired July of '08.

14 Q Okay. Were you constantly employed during
15 that time?

16 A Yes, sir. I worked five or six days a week.

17 Q And, uh, did you have -- what did you do for
18 fun? Did you have any friends in the area?

19 A No, sir. I basically worked. I worked. I
20 come home. I do not drive. I stay at home.

21 Q Do you have any hobbies?

22 A Reading and watching TV.

23 Q You're an avid reader?

24 A Yes, sir.

25 Q I want to direct you now and let's move to

1 the night of May 18th and on into May 19th. Do you
2 remember that day?

3 A Yes, sir.

4 Q You remember how you started that day?

5 A Yes, sir.

6 Q How did you start May 18th?

7 A Everyday, I get up at 5:30. I have coffee,
8 bathroom break. A lot of times on job sites, we don't
9 have water toilets. I called my boss. At that time,
10 I was sub -- my boss and another gentleman had a deal
11 that Mike Taylor was my labor force for Mark Normwell.
12 The job was on James Island.

13 Q Let me stop you for a second. Could you
14 explain a little bit more about the job. What did you
15 do that day?

16 A I called Mark. He said it was raining. I
17 called Mike. Mike told me that he would have a co-
18 worker pick me up to do a bathroom remodel.

19 Q And did that take you all day?

20 A It took me until about 3:30.

21 Q You remember what you did during the remodel?

22 A When I first got there, it was a family still
23 in there, a male, female and grandchild. I proceeded
24 to go underneath the house to assess the damage that
25 my boss wanted me to look at to confirm his

1 assessment.

2 Q And in the process of destroying, can you
3 explain what you did with the items that were removed?

4 A Yes, sir. It was approximately a five by
5 twelve bathroom tile. An inch and a half thick tile,
6 cast iron tub surrounded by two bathrooms. We had to
7 simply remove the stuff where you wouldn't beat the
8 walls. Sludge hammer the tub out because it was cast
9 iron. Took the floor up, the sink, the toilet, took
10 it all the way everything down.

11 Q Did you (inaudible)

12 A I had Dale Law and a Mexican laborer.

13 Q And what did y'all do with the materials that
14 you removed?

15 A We had a duel trailer that was out in the
16 yard. We loaded all the trash on the trailer.

17 Q About what time was that?

18 A It took us all day. We got finished about
19 3:30, a quarter to 4:00.

20 Q That's in James Island?

21 A No, sir. This house is on Bakers Ridge and
22 Dorchester in Summerville.

23 Q All right. And what did you do after you
24 removed everything and you left the jobsite?

25 A We took it to a dump site on Central Avenue.

1 Q What did you do after you left there?

2 A I discussed it with Dale. Told him we had a
3 bunch of scrap at the house. We had time to take it
4 to the scrap yard. We proceeded to go to my house and
5 load up the trailer with scrap.

6 Q And what kind of scrap?

7 A We had several hot water heaters, washers,
8 dryers, stainless steel from Wendy's, metal roofing,
9 beer cans, uh, metal basically. All metal.

10 Q And after you went to the, you said you went
11 to the dump and unloaded some of the other trash and
12 you loaded up the scrap, where did you go next?

13 A We went to, I think it's called Tobashi, a
14 scrap yard.

15 Q And explain a little bit about what happens
16 there. Who does the process work?

17 A You go in, they direct you to the scales, a
18 big scale where trucks and everything go on. We drove
19 up, weighed it. Then you go down, you get all the
20 heavy stuff off. You come around. You drive back on
21 the scales. They weigh you. You come out. We had
22 bags of beer cans and soda cans, aluminum. We took
23 them to the small scale. They weighed them. Then you
24 go inside and receive your money.

25 Q And was this your first time at this scrap

1 yard?

2 A No, sir.

3 Q You done this before?

4 A Yes, sir.

5 Q After you leave the scrap yard or actually
6 just before you leave, what do they do in exchange for
7 all this metal?

8 A About 180-something, 160-something dollars.

9 Q And what did you do with the money? Did you
10 keep it yourself?

11 A I split it with Dale. It was Dale's truck
12 and Dale help me load it and unload it.

13 Q And after you left the scrap yard, where did
14 you go?

15 A We come down 78. I stopped at the Hess right
16 there. I went into Hodge's liquor store and brought
17 me a --

18 Q Let me stop you for a second. The Hess is?

19 A A gas station.

20 Q Okay. Go ahead.

21 A I proceeded into Hodge's. I bought me a pint
22 of Black Velvet. I proceeded in the Hess mart and I
23 got me three Hurricane beers and a Blimpy's sub shop
24 or whatever is connected. I got me a footlong
25 meatball sub.

1 Q From the Hess, where did you go next?

2 A I went home.

3 Q Did you go to a bar?

4 A No, sir.

5 Q Did you go anywhere else after the Hess
6 station?

7 A No, sir. I don't visit bars.

8 Q And you went into the house, the house where
9 you and Lance live, is that correct?

10 A Yes, sir. We got home. Dale said he had to
11 go somewhere. We proceeded to the front shop or shop,
12 our wood shop where we do our cabinets and store
13 material is in front of . We had
14 locked the padlock.

15 Q Let me stop you there for a second. This is
16 at the location where you live, is that correct?

17 A Yes, sir.

18 Q And you live in a house?

19 A Yes, sir.

20 Q How large are the grounds that this house is
21 on?

22 A It takes six hours to push cut. It's very --
23 an acre maybe, two quarters acre.

24 Q Are there other buildings on this property?

25 A Yes, sir. We got a huge wood shop that sits

1 right up on Richardson.

2 Q Okay.

3 A That house sits back closer to Doty Street.

4 Q Explain a little bit about the wood shop.

5 What goes on there or why is it there?

6 A We got our wood making, cabinet making
7 equipment in there, our table saws, grinders,
8 material, plumbing material. It's a storage shed but
9 it's huge. We got a big eight-foot privacy fence
10 around it.

11 Q Would you describe -- how would you describe
12 the door?

13 A You got a roll up door that you padlock
14 inside and the only other entrance is a doorway that
15 has a master lock padlock on it. To get to that, you
16 got to come to our privacy fence. It has a padlock on
17 it. The doors has a padlock.

18 Q And do you and Lance equally use this shed?

19 A Lance don't have the keys to it no more since
20 he got fired. If he needs to get in there, he has to
21 get keys from me or from somebody else to get into it.

22 Q Was he in the shed that day when you got
23 home?

24 A No, sir.

25 Q Uh, and after you went to the shed, what did

1 you do next?

2 . A We unloaded the trailer. Dale left. I went
3 in the house. I opened my beer, took me a shot of
4 liquor and we were watching TV. I just brought one of
5 them antilog boxes you had to get for your TV. The
6 reception, you got to constantly mess with the little
7 rabbit ears to try to get it to come in.

8 Q You didn't have a regular cable box?

9 A No, sir.

10 Q Did Dale stay with you long?

11 A No, sir. He didn't. As soon as he dropped
12 the trailer, he left.

13 Q And where was Mr. Malmquist at that time?

14 A He wasn't at home at the time.

15 Q And what time, if you remember did you first
16 see Mr. Malmquist after you got home?

17 A Probably about 6:30 or so.

18 Q Was he alone?

19 A Yes, sir.

20 Q And did y'all hang out together that night?

21 A No, sir. We don't hang out.

22 Q Okay.

23 A He came in the room wanting one of my beers.
24 I told him no. He asked about the scrap that was
25 outside and wanting his money. I asked him what

1 money. I said you didn't contribute nothing to the
2 scrap. I said the only thing you contributed to was
3 the beer cans and I brought the beer.

4 Q So the argument was about money?

5 A Yes, sir.

6 Q Just the scrap material?

7 A No, sir. The water had been shut off. The
8 bills, I asked him what -- he was intoxicated. I
9 asked him where he had been. He said him and his girl
10 went out to the bar, Lacey's bar in Summerville. I
11 asked him --

12 Q Did y'all continue to argue?

13 A Yes. I asked him how could he afford to go
14 out and drink when he can't afford the bills. I been
15 paying all the bills for almost a year.

16 Q All right. And where did he go after you had
17 this discussion?

18 A He left. I stayed in the bedroom and drank.

19 Q What was the temperature like that day?

20 A It was wet, muggy. It was May. It was just
21 starting to get warm, but it was wet. It was cooling
22 down. The night was coming.

23 Q Did you have air conditioning in your house?

24 A Yes, but I got a little air conditioner in
25 the window. It wasn't hot enough to use it. I just

1 had the windows up.

2 Q Okay. And, uh, after Mr. Malmquist left,
3 what did you do next?

4 A I was sitting there. It got late, 9:30, a
5 quarter to 10:00 or so. I heard Mr. Malmquist next
6 door at Mary's house.

7 Q Let me stop you there for a second. This is
8 your neighbor?

9 A Yes, sir.

10 Q And if you're facing your house, is her house
11 on the left or the right of your house?

12 A If you're facing from Richardson, it would be
13 on the right. If you are facing from Doty, it would
14 be on your left.

15 Q Okay. And do a group of hedges separate your
16 house and her house?

17 A My window sits right here. Then you got a
18 little small driveway and hedges.

19 Q Okay. Go ahead. You were saying?

20 A I was sitting there. Mr. Malmquist was
21 sitting there telling Mary and I do believe her
22 husband or her boyfriend was there that I was going to
23 have to move. I was going to have to stay there.
24 Gary was going to have to move. He was wanting to
25 move in his fiancé or girlfriend. I got kind of mad.

1 I went over there and told Lance if he had something
2 to say to me to say it to my face. I apologized to
3 Mary and I left.

4 Q What happened next?

5 A He followed me out to the driveway. We was
6 arguing. He took his metal cane and struck me on the
7 top of my head. I proceeded to take it away from him
8 and waived it in his face and I told him I'm not
9 dealing with this. I threw it down and proceeded to
10 go in the house.

11 Q And, uh, after you went in the house, did Mr.
12 Malmquist follow you?

13 A Uh, no, sir. He stayed outside. A few
14 minutes later, police officer showed up.

15 Q You remember how many officers arrived?

16 A It was two.

17 Q And what happened?

18 A I met him at the front door and told him that
19 he struck me. I didn't want no trouble. I just
20 wanted it calm. They talked to Mr. Malmquist. They
21 asked me if I needed medical. I told them no. They
22 left. I proceeded to go in my room and get ready to
23 take my shower and go to bed. Five o'clock comes
24 awful early.

25 Q And did the police ask you if you wanted to

1 press charges?

2 A Yes, sir. I did not.

3 Q The police ask you if you needed medical
4 attention?

5 A Yes, sir. I did not.

6 Q Do you know if they asked Mr. Malmquist the
7 same thing?

8 A I do not know, sir.

9 Q After you went back into the house, did you
10 take a shower?

11 A Yes, sir.

12 Q About what time do you believe you got in
13 bed?

14 A Probably a quarter after 10:00, 10:30.

15 Q And then tell me, an altercation happens
16 later?

17 A Yes, sir. I got up. I slept probably an
18 hour and a half, an hour and 45 minutes or something
19 like that. I looked at my clock. It was twelve
20 o'clock or somewhere close to that area.

21 Q What caused you to get up?

22 A I had to use the bathroom.

23 Q Go ahead.

24 A I proceeded to go to the bathroom. I come to
25 the bathroom. I was coming to the kitchen.

1 Q Let me stop you right there. Where is your
2 bedroom in relation to the bathroom?

3 A It faced, well, my bedroom faces Richardson.
4 The bathroom is closer to Doty. It faces, if you're
5 looking from Doty Street, the bathroom is to your
6 right. My bedroom is all the way to the front to the
7 left.

8 Q Where is Mr. Malmquist bedroom?

9 A His is to the left in the front of the house
10 closest to Doty street.

11 Q Would you say each of your bedrooms are equal
12 distance to the bathroom?

13 A No, his is closer.

14 Q By how much?

15 A The living room, 12 by 14.

16 Q After you go to the bathroom, what happened?

17 A I proceeded to come out of the bathroom. I
18 was coming to the short hallway where we keep our
19 pantry for dishes and our can goods. When I come into
20 the doorway, I was blind-sided with, uh, -- by Lance
21 with his metal cane.

22 Q What happened next?

23 A I grabbed him by his wrist, his elbow and
24 spun him. When I spun him, I connected with a left
25 hook and he went down.

1 Q Where in the kitchen are you?

2 A Almost, say, a foot from the side entrance.

3 The side entrance, you come in, you got a laundry

4 room, four-foot opening; then you come into another

5 doorway. He was laying right there at the door

6 basically.

7 Q Mr. West, I'm going to show you what's been

8 marked as Defense Exhibit number 4. Do you see that?

9 A Yes, sir.

10 Q What is that?

11 A It looks close to a diagram of our house.

12 Q Okay. And does this accurately reflect the

13 layout of the house on the night of May 18th and May

14 19th?

15 A Basically, yes, sir.

16 Q All right.

17 MR. BISCHOFF: Your Honor, may the witness

18 step down?

19 THE COURT: He may.

20 Keep your voice up because you don't have

21 benefit of the microphone.

22 THE WITNESS: Yes, ma'am.

23 BY MR. BISCHOFF:

24 Q Mr. West, come on up here if you don't mind.

25 I'm going to have you mark where your bedroom is.

- 1 A My bedroom is right here.
- 2 Q And Lance's bedroom would be?
- 3 A Right here.
- 4 Q And the bathroom that you are referring to?
- 5 A Right here. We only got one.
- 6 Q And where is the entryway to the house?
- 7 A We've got several. We got one here.
- 8 Q There's a door right there?
- 9 A A door right here.
- 10 Q Okay.
- 11 A A door right here and a doorway right there.
- 12 Q What door is closest to Ms. Ashe's house?
- 13 A Probably would be this one that comes right
- 14 out to the driveway.
- 15 Q Okay. And if you walk right through that
- 16 doorway, where do you end up in the house?
- 17 A This would be the kitchen. The stove is
- 18 right here. The sink is right here. The microwave is
- 19 right here. The kitchen table is here. We got a
- 20 little table over here. We got cabinets, refrigerator
- 21 right here. Cabinet is right here.
- 22 Q Okay. I'd like you, if you don't mind, to
- 23 map exactly your, where you walked when you woke up as
- 24 you testified to earlier.
- 25 A Come through here to here to use the

1 bathroom. Then I come through this doorway right
2 here.

3 Q What were you doing on -- what was the point
4 of walking from the bathroom in that direction?

5 A To get a drink of water.

6 Q Okay.

7 A As soon as I come through this area right
8 here, I got blind-sided by Mr. Malmquist.

9 Q Where was he standing when you walked through
10 that door?

11 A Behind this wall and door.

12 Q And then?

13 A When I spun him around, I hit him. He was
14 laying like in a fetal position like right in this
15 area here.

16 Q Okay. You can take your seat. Mr. West, as
17 you just testified, does this mapping of where you
18 walked accurately depict what you did the night of the
19 18th and the 19th?

20 A Yes, sir.

21 MR. BISCHOFF: Your Honor, at this time,
22 I'd offer Defense Exhibit number 4 into evidence.

23 THE COURT: Any objection?

24 MR. BELL: No objection, Your Honor.

25 THE COURT: Very well.

1 (WHEREUPON, Defendant's Exhibit 4 is admitted into
2 the record.)

3 BY MR. BISCHOFF:

4 Q Now, Mr. West, you may not be able to see
5 this. I'm also going to show you what's been marked
6 as Defense Exhibit number 5 for identification
7 purposes only.

8 MR. BISCHOFF: Your Honor, may I approach
9 the witness?

10 THE COURT: You may.

11 BY MR. BISCHOFF:

12 Q Do you recognize that photo?

13 A Yes, sir.

14 Q What is that a photo of?

15 A Standing by the kitchen sink, the stove is
16 behind you.

17 Q And is that an accurate depiction of the
18 layout of the house on the night of the incident?

19 A Yes, sir.

20 Q And can you say where Mr. Malmquist was
21 standing?

22 A He was standing right behind this wall.

23 MR. BISCHOFF: Your Honor, I would offer
24 this as Defense Exhibit number 5 into evidence.

25 MR. BELL: No objection.

1 THE COURT: Very well.

2 (WHEREUPON, Defendant's Exhibit 5 is admitted into
3 the record.)

4 BY MR. BISCHOFF:

5 Q And, Mr. West, let me show you what's been
6 marked as Defense Exhibit number 6. You recognize
7 that photograph?

8 A Yes, sir. That's Mr. Malmquist's bedroom.
9 Right here is the hallway that I was coming through.
10 Back over in this area over here would be the
11 entranceway that we come in. My bedroom is on this
12 side.

13 Q And can you tell me what room that's taken
14 from?

15 A This is in the kitchen.

16 Q Okay. And does that accurately reflect the
17 condition of the house, the layout of the house on the
18 night of the 18th and 19th?

19 A Yes, sir.

20 MR. BISCHOFF: Your Honor, I'd also offer
21 Defendant's Exhibit number 6 into evidence at
22 this time.

23 MR. BELL: No objection.

24 THE COURT: Very well.

25 (WHEREUPON, Defendant's Exhibit 6 is admitted into

1 the record.)

2 MR. BISCHOFF: Your Honor, may I publish
3 these for the jury?

4 THE COURT: You may publish these to the
5 jury.

6 Ladies and Gentlemen, I just want you to be
7 mindful that these exhibits will certainly be
8 present with you in your jury room for your
9 deliberations. I just wouldn't want you to allow
10 the examination or review of these to keep you
11 from being able to listen to the witness.

12 MR. BISCHOFF: Thank you, Your Honor.

13 THE COURT: Uh-huh.

14 BY MR. BISCHOFF:

15 Q Mr. West, you just stated that the
16 altercation occurred right at the entryway there in
17 the kitchen, is that correct?

18 A Yes, coming from the bathroom.

19 Q Would you tell me exactly what you were
20 thinking when you were walking through that entryway?

21 A I didn't think. I just reacted.

22 Q What were you reacting to?

23 A Getting hit blind-sided with a cane, a metal
24 cane.

25 Q Is that the cane that Mr. Malmquist carried

1 around on a regular basis?

2 A Yes, sir. That's the one he previously hit
3 me with earlier.

4 Q And when you reacted, what did you do?

5 A I just grabbed him by his wrist and his
6 elbow. Dug my hand in, swung around and then stepped
7 in and hit him one time with my right or my left and
8 he fell.

9 Q And after he fell, do you remember what you
10 did next?

11 A I went in my bedroom, smoked a cigarette,
12 calmed down. I went back in the kitchen. He was
13 laying in like a fetal position. His head was facing
14 towards the side door. I kind of shoved him in the
15 butt with my foot. I said come on, fat boy, get up.
16 That was my nickname for him. He helped him. Put him
17 in bed. I looked in the freezer for some ice. We
18 don't have no ice trays. I had -- there was a black
19 coffee mug in there that I keep for my liquor. That
20 way, when I come home and it's hot, I can use it. I
21 gave it to him. I asked him if he was alright. He
22 said yes. I said are you sure. He said yes. I
23 proceeded to go to bed.

24 Q Let's go back a little bit too. As you are
25 walking from the bathroom to the kitchen, do you

1 remember exactly where you were standing when you were
2 struck?

3 A You got the refrigerator right here to the
4 right. You have no where to go. You are in a two-
5 foot by eight-foot doorway. You have no where to go.
6 I went back up against the refrigerator. I just
7 grabbed him and spun him.

8 Q Did he strike you in the face?

9 A On the left side of my jaw.

10 Q All right. After you spun him around?

11 A I hit him one time and he fell on the ground.
12 He didn't try to stop himself. He just went down.

13 Q Did you continue to beat him?

14 A No, sir.

15 Q Did you continue to attack him?

16 A No, sir.

17 Q Did, uh, -- from what you understood, was Mr.
18 Malmquist in any condition that needed emergency
19 attention?

20 A No, sir. When I come back out, I didn't --
21 his eye didn't swell up like that. I mean, it was
22 swollen up the way I see in the pictures. It might
23 take time. I don't know.

24 Q Did you proceed to go to bed?

25 A Yes, sir. After I help him to put him in the

1 bed.

2 Q At what point were you awoken later?

3 A Uh, I heard the police cars cruising down the
4 driveway. I got up. I sit in my chair cause when the
5 police come, I figure something's up.

6 Q Did they come into your house?

7 A Yes, they knocked on the door. My window was
8 open. The side door was right there close to my
9 window.

10 Q You were able to hear them knocking?

11 A Yes.

12 Q They announced their presence?

13 A Yes. I offered them -- I told them to come
14 in and directed them to my bedroom.

15 Q What did you tell them?

16 A They told me I was under arrest. I said, you
17 know, I said why, the man attacked me, he struck me
18 with a weapon, why am I under arrest.

19 Q Did they believe your story?

20 A Evidently no, sir.

21 Q And they placed you under arrest after that?

22 A Yes, sir.

23 Q And do you remember being read your Miranda
24 rights?

25 A No, sir. I don't. I don't remember. I was

1 asleep. I was a little bit intoxicated.

2 Q Where did you go next? Where did they take
3 you?

4 A We proceeded to Summerville Police
5 Department. They had EMS there. They felt around my
6 glands and told me everything was fine and put me in a
7 cell.

8 Q Did you tell them that you feel everything
9 was fine?

10 A No, sir. My jaw hurt.

11 Q All right. Did you ask them to take you to
12 the emergency room?

13 A Yes, sir. They asked to take my pictures and
14 fingerprint me. I told them I would go with their
15 request as soon as they took me to see a doctor.

16 Q And what happened next?

17 A They took me to Summerville Medical. I was
18 x-rayed. They gave me a Tylenol and Demerol or
19 something. It started with a D. A narcotic, but they
20 would not allow it into the Summerville jail.

21 Q Okay. And, uh, after you left the emergency
22 room, where were you transported?

23 A We went back to Summerville. They booked me
24 in, gave me an ice pack. I think on the way to
25 Summerville, I asked Officer Graves, no Driscoll, if I

1 could put a warrant out for Mr. Malmquist. He told me
2 something about summons court or some kind of warrant,
3 a courtesy summons.

4 Q And you end up filing one of those?

5 A I didn't know what a courtesy summon is.

6 Q All right.

7 MR. BISCHOFF: Beg the Court's indulgence,
8 Your Honor.

9 THE COURT: Okay.

10 MR. BISCHOFF: No more questions. Thank
11 you, Mr. West. Please answer any questions that
12 Mr. Bell ---

13 THE COURT: Cross-examination.

14 MR. BISCHOFF: --- may have for you.

15 MR. BELL: Your Honor, may we approach?

16 THE COURT: Sure.

17 (WHEREUPON, a bench conference is held off the
18 record.)

19 THE COURT: We're going to take our lunch
20 break. Ladies and Gentlemen, please remember not
21 to discuss this matter or allow anyone to discuss
22 it with you. We're going to reconvene at two
23 o'clock. If you are driving back and you're
24 scared you're going to be two minutes late, don't
25 speed. Take your time and come on back. We're

1 going to try to start around two o'clock. Don't
2 read anything, don't listen to anything, don't
3 communicate with anything about this matter. You
4 must receive all of the information from which
5 you will make up your mind here in court while
6 court is in session. Have a very pleasant lunch.
7 Go with Mr. Taylor.

8 (WHEREUPON, the jury exits at approximately
9 12:50 p.m.)

10 THE COURT: Mr. West, the only thing I'm
11 going to ask you to do is please do not
12 communicate with anyone over lunch. All right?

13 THE WITNESS: Yes, sir.

14 THE COURT: Now, having said that if Mr.
15 Bischoff or this lawyer needs to speak with you
16 about something else, it's fine to talk with
17 them, just don't talk about your testimony.
18 Okay? Very well.

19 And George, I know we're a little bit short
20 on time, but if you could just tell them
21 downstairs we do want to be ready to go right at
22 2:00. I know they got a bit to do to get Mr.
23 West down and back for lunch, but 2:00 would be
24 when we would like to start.

25 Anything before we break for our lunch from
26 the State?

1 MR. BELL: Nothing from the State.

2 THE COURT: From the defense?

3 MR. BISCHOFF: No, Your Honor.

4 THE COURT: Do you all mind, uh, I know
5 y'all need to -- about an hour, that will give us
6 about 10 minutes, would y'all come on and give us
7 an opportunity to go over the charge. I would
8 like to do that.

9 MR. BISCHOFF: About what time? Now or?

10 THE COURT: No, go get your lunch. I want a
11 break.

12 MR. BISCHOFF: Thank you, Your Honor.

13 THE COURT: Come on back at ten until 2:00.
14 Okay.

15 (WHEREUPON, a lunch recess is taken from
16 approximately 12:52 p.m. to 2:16 p.m.)

17 THE COURT: All right. Anything before we
18 bring the jury up from the State?

19 MR. BELL: Nothing from the State, Your
20 Honor.

21 MR. BISCHOFF: From the defense?

22 MR. BISCHOFF: Nothing from the defense,
23 Your Honor.

24 THE COURT: Let us have the jury.

25 (WHEREUPON, the jury enters at approximately

1 2:17 p.m.)

2 THE COURT: Ladies and Gentlemen, I
3 certainly hope that you all had a very pleasant
4 lunch. At this time, we will continue with the
5 defense's case and the cross-examination of Mr.
6 West.

7 Mr. Bell.

8 MR. BELL: Thank you, Your Honor.

9 THE COURT: Uh-huh.

10 CROSS-EXAMINATION

11 BY MR. BELL:

12 Q Now, your testimony was that you been out
13 working and you took some scrap metal off to whatever
14 the scrap yard was, is that right?

15 A Yes, sir.

16 Q And you got money from it. And on the way
17 home, you stopped at Hodge's and got you some brown
18 velvet -- Black Velvet, I'm sorry, right?

19 A Yes, sir.

20 Q What is that? Whiskey?

21 A Yes, sir.

22 Q And then you stopped at the Hess station
23 next?

24 A We pulled into the parking lot at Hess. It
25 connects right next door to each other.

1 Q Then you got some Hurricane beer, three
2 Hurricane beers, right?

3 A Yes, sir.

4 Q Then you went home, back to
5

6 A I got a meatball sub at the gas station.

7 Q Right. You did testify to that. You said
8 when you got home, nobody was home, right?

9 A No, sir.

10 Q And the fellow you were with, Dale, is that
11 right?

12 A Yes, sir.

13 Q He went on home. He didn't stay around?

14 A As soon as he dropped the trailer off, sir,
15 yes, sir.

16 Q Okay. And you said that Lance come home some
17 point after that, right?

18 A Yes, sir.

19 Q How long was that?

20 A 30, 45 minutes.

21 Q Okay. And where are we talking about? You
22 said he got home about 6:30, is that what you
23 testified to?

24 A I got home at about 6:00, a quarter after.

25 Q So Lance got home 6:30 or something to 7:00?

1 A Yes, sir.

2 Q And you stated y'all started arguing at that
3 point?

4 A Yes, he come into my room.

5 Q And you argued about money and something
6 about spending money on his girlfriend, right?

7 A Yes, sir.

8 Q What happened after that?

9 A I told him I had an agreement with Mark, that
10 he was willing to pay me an extra \$100 a week. I told
11 Lance if he would get a job doing anything to help
12 with the bills, then I would pay \$200 a week until we
13 got everything caught up.

14 Q And he left at that point, right?

15 A Yes, sir.

16 Q He left and you were in your bedroom, is that
17 what you said?

18 A Yes, sir.

19 Q And he went -- you think he went next door?

20 A I don't know where he went, sir.

21 Q I think your testimony was the next time you
22 remembered something, you were sitting there drinking
23 your beer and liquor, right?

24 A Yes, sir.

25 Q Watching TV in your bedroom?

- 1 A Yes, sir.
- 2 Q And the window was open?
- 3 A Yes, sir.
- 4 Q And you say you heard Lance talking about
5 you?
- 6 A Yes, sir.
- 7 Q And you went next door?
- 8 A Yes, sir.
- 9 Q You went through the hedges?
- 10 A Yes, sir.
- 11 Q You told Lance you were going to kill him?
- 12 A No, sir.
- 13 Q You didn't say that?
- 14 A No, sir.
- 15 Q What did you say?
- 16 A I said if you have something to say to me,
17 say it to my face and we'll discuss it.
- 18 Q You didn't accuse him of watching you in the
19 shower?
- 20 A No, sir.
- 21 Q You didn't say I was going to kill you?
- 22 A No, sir.
- 23 Q You went back home then?
- 24 A Yes, sir.
- 25 Q Did Lance come home right then?

1 A Uh, very shortly after.

2 Q When he came back, is that when you said he
3 hit you with his cane?

4 A We was, uh, -- we went out to the driveway
5 and was talking. That's when he hit me, sir.

6 Q Where did he hit?

7 A On top of the head.

8 Q On top of the head. What did you do?

9 A I grabbed the cane and waved it at him and
10 threw it on the ground.

11 Q Okay. And what did you do then?

12 A I went back into the house.

13 Q Okay. You didn't call the police?

14 A No, sir.

15 Q Okay. And, uh, but the police came?

16 A Yes, sir.

17 Q Lance called the police?

18 A More than likely, sir.

19 Q Okay. Now, you talked to the police, right?

20 A Yes, sir.

21 Q You talked to Officer Driscoll?

22 A Yes, sir.

23 Q You talked to the other officer, Officer
24 Graves?

25 A I do not believe so.

1 Q And you didn't tell him that he struck you
2 with a walking stick and you took it away from him and
3 hit him?

4 A Yes, I told him that, sir.

5 Q You told him that?

6 A Yes, sir.

7 Q Which was it? Did you take it and throw it
8 away or did you take it and hit him?

9 A I misunderstood you. I didn't hit him with
10 it. I waved it at him because he hit me on the top of
11 the head, sir.

12 Q The police reported that you told him that
13 you hit him.

14 A No, sir. I did not hit.

15 Q So if the police said that, they'd be wrong?

16 A Yes, sir.

17 Q At that point, the police didn't do anything
18 right?

19 A No, sir.

20 Q You didn't go to jail at that point?

21 A No, sir.

22 Q Lance didn't go to jail?

23 A No, sir.

24 Q They just said go your separate ways?

25 A Yes, sir.

1 Q And you went to sleep, is that what you
2 testified to?

3 A I went in and got ready and took a shower
4 then, sir.

5 Q Okay. And then you went to bed?

6 A Yes, sir.

7 Q And at some point, you got up and used the
8 bathroom?

9 A Yes, sir.

10 Q That's when you said you went back to the
11 bathroom and used the bathroom?

12 A Yes, sir.

13 Q And you walked back straight into the
14 kitchen, is that right?

15 A Yes, sir.

16 Q With these photographs, which is marked as
17 Defendant's 6. I'll show you that. That's a picture
18 of Lance's bedroom door?

19 A Yes, sir.

20 Q Okay. Did you come through the kitchen door?

21 A I came through this door right there.

22 Q Where was Lance?

23 A He was standing beside this wall. The door
24 was wide open, I guess.

25 Q Right there in that corner?

1 A He was standing. The door was shut all the
2 way open where it would be by this lamp.

3 Q Okay.

4 A He come up and hit me with cane.

5 Q That's a little corner, right?

6 A Yes, sir.

7 Q There's a corner from that doorway and a
8 corner where that other doorway?

9 A Yes, sir.

10 Q Was the door open or closed?

11 A It was open, all the way against this wall.

12 Q He was back in that corner?

13 A No. He was by the door blocking the corner.

14 Q Okay. It was all the way back and he was by
15 the door.

16 A Yeah.

17 Q And how did he hit you?

18 A He come upward.

19 Q Where did he hit you?

20 A Left jaw.

21 Q Left jaw. So your testimony now is he hit
22 you in the jaw with the cane?

23 A Yes, sir.

24 Q When did you tell the police that?

25 A When I was getting arrested.

1 Q You told them that he hit you with a cane?

2 A I do not understand, sir. First incident or
3 second incident?

4 Q Second incident. Right now, right after the
5 police came, after this incident, when did you tell
6 the police that he hit you with the cane?

7 A When they came at two o'clock in the morning
8 and arrested me.

9 Q You didn't tell them that he hit you in the
10 face and you hit him four times?

11 A No, sir. I said I swung and hit him.

12 Q But the police put it down that he hit you
13 once in the face and you hit him four times. You're
14 saying that didn't happen?

15 MR. BISCHOFF: Your Honor, objection. This
16 is asked and answered.

17 THE COURT: I will allow it. You may
18 proceed.

19 BY MR. BELL:

20 Q You didn't say that?

21 A No, sir. I told him I hit him.

22 Q Where was the cane?

23 A I don't know, sir.

24 Q Was it in the floor?

25 A I didn't pay attention. When I grabbed him,

1 spun him around, I hit him. When he fell on the
2 floor, I walked back into my bedroom.

3 Q How did you spin him around?

4 A I grabbed him by his wrist and his elbow.

5 Q Okay.

6 A And just spun like that.

7 Q Spun like that?

8 A Yes, my back was against the refrigerator. I
9 had no where to go.

10 Q You are right-handed, aren't you, Mr. West?

11 A No, sir. I'm left-handed.

12 Q You were writing with your right hand, I
13 think, earlier, weren't you?

14 A No, sir.

15 Q But then you stated on your direct that you
16 swung a left hook, right?

17 A Yes, sir.

18 Q A left hook?

19 A Yes, sir.

20 Q Not a left upper cut?

21 A Just swung like that.

22 Q And came around.

23 A Yes, sir.

24 Q Sweeping. That's a left hook.

25 A Yes, sir.

1 Q Okay. And then you went to bed?

2 A I went back into my bedroom.

3 Q Where was Lance?

4 A He was still laying on the floor.

5 Q And you went back to your bedroom? For how
6 long?

7 A Smoke a cigarette.

8 Q How long does it take you to smoke a
9 cigarette?

10 A A couple of minutes.

11 Q You came back and he's still on the floor?

12 A Yes, sir.

13 Q Is he in pain?

14 A I don't know, sir. I helped him up, took him
15 to his bed, put him in his bed. As soon as you come
16 to his bedroom, his bed is right to the right. I went
17 in and got the black mug that was sitting in the
18 freezer for a few days. I gave it to him and asked
19 him if he was alright. He said yes. I asked him are
20 you sure. He said yes and I went back to bed.

21 Q Where was the cane?

22 A I didn't look for it, sir.

23 Q You weren't concerned about a cane after you
24 had been hit by it?

25 A I was half asleep.

1 Q And you got him the mug for his eye, is that
2 right?

3 A Yes, sir.

4 Q You testified you just kind of nudged him?

5 A Yes, sir.

6 Q Was he conscious or unconscious?

7 A He was conscious.

8 Q Was he moaning or anything, making any noise?

9 A Not that I can recall, sir.

10 Q And you saw his eye?

11 A Yes, sir.

12 Q You said it's not as bad as this picture,
13 State's 1?

14 A No, sir.

15 Q It wasn't that bad?

16 A No, sir.

17 Q And then you went to bed?

18 A Yes, sir.

19 Q You didn't call the ambulance?

20 A No, sir.

21 Q Wasn't your jaw hurting?

22 A Yes, sir.

23 Q You didn't call the ambulance for your jaw?

24 A No, sir.

25 Q You wanted to go to the hospital after the

1 police arrested you.

2 A I was under arrest, sir.

3 Q You were under arrest. Your jaw was still
4 hurting the same, wasn't it, Mr. West?

5 A I wanted it documented where the man struck
6 me with his cane.

7 Q When did you tell the police you got struck
8 with the cane?

9 A When I was getting arrested.

10 Q We haven't heard that testimony, Mr. West.

11 MR. BISCHOFF: Objection, Your Honor.

12 That's not a question, a proper question.

13 THE COURT: Sustained.

14 BY MR. BELL:

15 Q But you didn't go. When the police came to
16 talk to you right after all this, after Lance had
17 left, is that right? You were asleep, right?

18 A Yes, sir.

19 Q Then the police came at some point?

20 A Yes, sir.

21 Q When they arrested you, I'm talking about
22 that time, that time, after you went and helped Lance
23 in the bedroom. I'm not trying to confuse you, Mr.
24 West. After you helped Lance, you went back to your
25 bedroom, right?

1 A Yes, sir.

2 Q You went to sleep?

3 A Yes, sir.

4 Q The police came some point after that?

5 A Yes, sir.

6 Q You don't know how long it was?

7 A No, sir.

8 Q And they came in, talked to you --

9 A Pardon me?

10 Q They came in and asked you what happened?

11 A No, sir. They come in and told me I was
12 under arrest..

13 Q And you told them right then "my jaw is
14 hurting, I got to go to the hospital"?

15 A No, sir. I said the man struck me in the jaw
16 with his cane and I hit him back.

17 Q That's right. That's when you told the
18 police that you got hit by a cane.

19 MR. BISCHOFF: Objection, Your Honor. Form
20 of the question. Mr. Bell is testifying.

21 THE COURT: That was a comment. Just ask
22 your question.

23 BY MR. BELL:

24 Q Mr. West, that's when you told the police you
25 got struck by a cane?

1 A Yes, sir.

2 Q Okay. Then when they placed you under
3 arrest, put you in the back of the police car, that's
4 when you wanted to go to the hospital?

5 A Yes, sir.

6 Q At that point in time?

7 A In the house when I was getting arrested, I
8 told them my jaw hurt.

9 Q You didn't wake up when they first came in
10 and say oh, my jaw hurts, take me to the hospital?

11 A I was awake when they pulled down the
12 driveway. I was sitting in chair. I seen one officer
13 drove into the back of the driveway. One officer
14 pulled into the front of the driveway. I was sitting
15 in my chair. They knocked and I offered them to come
16 in.

17 Q Okay. Immediately?

18 A Not immediate, immediate, but in the very
19 minute or so.

20 Q And the only time you went to the hospital is
21 after they placed you under arrest and put you in the
22 patrol car?

23 A Yes, sir.

24 Q And you went in the hospital, right?

25 A Yes, sir.

1 Q You didn't have any injuries, right?

2 A A contusion.

3 Q Contusion, that's bruise, right?

4 A Yes, sir.

5 Q The police see it? You showed the police
6 your bruise?

7 A They gave me an ice pack.

8 Q The police did or who?

9 A The police brought it to the cell in
10 Summerville.

11 Q Okay. Because you were complaining your jaw
12 hurt, right?

13 A I guess so.

14 Q And you never threatened to kill Mr.
15 Malmquist at Mary Ashe's house?

16 A No, sir.

17 Q Were you in your boxer shorts?

18 A No, sir. I was in shorts.

19 Q You were in shorts. Okay. Thank you, Mr.
20 West. I have nothing further.

21 THE COURT: All right. Redirect?

22 MR. BISCHOFF: None, Your Honor.

23 THE COURT: All right. You can come down.

24 All right. Call your next witness please.

25 MR. BISCHOFF: Your Honor, the State has no

1 -- the defense, Your Honor, has no more
2 witnesses. The defense rests.

3 THE COURT: Very well. Will there be any
4 reply or rebuttal?

5 MR. BELL: None from the State, Your Honor.

6 THE COURT: All right. Ladies and
7 Gentlemen, you have now heard all the witnesses
8 and received the evidence with which you will in
9 this case. That signifies to me that there are
10 matters which I must take up outside your
11 presence. In a moment, I'm going to send you to
12 your jury room.

13 Ladies and Gentlemen, you've not heard the
14 arguments of counsel, nor my charge on the law,
15 therefore, Ladies and Gentlemen, I continue to
16 advise you and instruct you not to discuss this
17 matter or allow anyone to discuss it with you.
18 When you return, you will hear the arguments of
19 counsel and my charge on the law. Please step to
20 your jury room. Do not discuss this matter. Do
21 not allow anyone to discuss it with you.

22 (WHEREUPON, the jury exits at approximately
23 2:31 p.m.)

24 THE COURT: All right. Are there any
25 motions?

1 MR. BELL: None from the State.

2 MR. BISCHOFF: None from the defense, Your
3 Honor.

4 THE COURT: Okay. Very well. Counsel, let
5 me go over what I have. Y'all approach.

6 (WHEREUPON, a bench conference is held off the
7 record.)

8 (WHEREUPON, the jury enters at approximately
9 2:52 p.m.)

10 THE COURT: I want to tell you how we are
11 going to be proceeding: We are going to first
12 hear from Mr. Bell in his opening statement on
13 behalf of the State. You are then going to hear
14 from Mr. Bischoff in his closing argument on
15 behalf of the defense. Then you are going to
16 hear from Mr. Bell in his rebuttal closing
17 argument.

18 Ladies and Gentlemen, once the closing
19 arguments are concluded, I will deliver the
20 instruction or the charge on the law to you. We
21 will have a very brief break after that, which I
22 will explain when we reach that point. Then you
23 will receive this case for your deliberation.

24 Ladies and Gentlemen, I ask that you please draw
25 close as we listen to the closing arguments of

1 our attorneys.

2 Mr. Bell.

3 MR. BELL: Thank you, Your Honor. May it
4 please the Court.

5 THE COURT: Yes, sir.

6 MR. BELL: Mr. Bischoff.

7 Mr. Foreman, Ladies and Gentlemen of the
8 jury, before I start, I will have two arguments
9 in this case as Your Honor said. At this point,
10 I'm going to argue the law, what the law is. I
11 will sit down. The defense will argue the facts.
12 And at the end of their argument, I'll be back to
13 give the State's prospective on the facts.

14 At this time, first of all, I'd like to take
15 this opportunity on behalf of the State of South
16 Carolina in thanking you for being here on the
17 jury. I hope you understand one thing. Our
18 criminal justice system in the United States and
19 in South Carolina would not function without your
20 willingness to be here to serve on a jury. You
21 are the basis of the criminal justice system.
22 Without you, nothing else would happen. Nobody
23 would plea guilty. Nobody would go to trial
24 because you are not here to do that. I hope you
25 understand how important you are in this process.

1 I also hope that you've learned something
2 this week about how criminal court and how
3 courtrooms actually operate, not how they operate
4 on TV. That the cases aren't wrapped up in an
5 hour and people aren't jumping up in the back of
6 the courtroom admitting that they did it instead
7 of the person on trial. This is reality. This
8 is what happens. It lasts a little longer than
9 TV. I hope you've learned something and I hope
10 you understand how much appreciative we are for
11 your being here and how much of your time that
12 you've taken to be here.

13 Ladies and Gentlemen, as stated, the
14 defendant is James West. He is charged with
15 Assault and Battery of High and Aggravated
16 Nature. That's the only charge that you will
17 consider when you go back to your jury to
18 deliberate. The elements of Assault and Battery
19 of High and Aggravated Nature, as I explained to
20 you a little bit in the opening about an assault
21 and a battery, that an assault is the offer to do
22 bodily injury or the offer to an offensive
23 touching with the present ability to do so, such
24 as, if I draw back my fist to you within arm's
25 reach, that's an assault. When I hit you, that's

1 the battery. That's the unlawful act of violent
2 injury. That's element one.

3 With Assault and Battery of High and
4 Aggravated Nature, it must be to another and
5 accompanied by circumstances of aggravation. One
6 of which, the one that we have alleged in this
7 case is the infliction of serious bodily injury.
8 I would argue to you, Ladies and Gentlemen, that
9 losing an eye is certainly a serious bodily
10 injury or losing any member of the body is
11 serious bodily injury in this case.

12 Now, as I stated in my opening as well and as
13 you will be charged, the State has the burden of
14 proving the Defendant guilty beyond all
15 reasonable doubt. You will hear that term
16 throughout. You will hear the term throughout my
17 argument, the defense argument and through Judge
18 Goodstein's charge to you on the law. Reasonable
19 doubt is an important element in criminal law.
20 It's the burden of the State always to prove a
21 defendant guilty beyond all reasonable doubt.
22 He's under no burden to prove anything. He
23 didn't even have to testify even though he
24 testified in this particular case.

25 Some definitions that are given -- you will

1 hear a couple of definitions. One that I will
2 ask you to focus on is that proof beyond all
3 reasonable doubt is proof that leaves a juror
4 firmly convinced of the Defendant's guilt. I
5 will remind you too that reasonable doubt does
6 not mean beyond all doubt or beyond a shadow of a
7 doubt or beyond 100 percent doubt. The State
8 doesn't have to prove that far. We have a high
9 burden. It's a high burden. It's the highest
10 burden of proof in the law. But we don't have to
11 prove to the existence of everything else.

12 I would also tell you that you may go back
13 and deliberate and you may hear -- get to some
14 facts and you may have a reasonable doubt as to a
15 fact in the case. Because you have a reasonable
16 doubt to a fact in the case does not mean that
17 necessarily that you have a reasonable doubt as
18 to guilt. I mean, you can find that a fact
19 doesn't exist and find that other facts exist and
20 still find the person guilty beyond all
21 reasonable doubt. So that's how I will explain
22 reasonable doubt to you, what the burden is.

23 You will also be charged, Ladies and
24 Gentlemen, on the defense of self-defense. That
25 is the Defendant acted in self-defense in

1 inflicting the bodily injury. Now, he is under
2 no burden to prove that. The State must overcome
3 the self-defense defense beyond all reasonable
4 doubt. There are basically four elements that
5 must be established in order to establish the
6 defense of self-defense. First of all, the
7 Defendant must not be or be without fault in
8 bringing on the difficulty. That means he can't
9 start it and then have the benefit of self-
10 defense. Somebody else has got to start it and
11 he has to finish it basically is what that's
12 saying.

13 He must have an actual belief that he was in
14 imminent danger of losing his life or sustaining
15 serious bodily injury. That's the second element
16 of it. You've got to have that belief, that he
17 was about to die or he was about to be seriously
18 injured. The third element is that a reasonable
19 person under the same circumstances would have
20 that belief that you were about to die or about
21 to have serious bodily injury upon you.

22 The fourth one is there was no other means of
23 avoiding the danger. What that means is
24 generally, if you are out in public and somebody
25 comes up and hits you or offers to do some act to

1 you, you first have a duty to retreat if you can
2 safely do so. However, in this case, both
3 individuals were at their house. In your house,
4 you have no duty to retreat. The Defendant does
5 not have a duty to retreat. Likewise, the victim
6 does not have a duty to retreat in their house.
7 That's what the law says. You can basically
8 throw out the fourth element. I mean, it exists
9 because they have no duty to retreat. They don't
10 have the duty of avoiding the act if they are in
11 their own residence.

12 Now, as stated earlier, Ladies and Gentlemen,
13 Judge Goodstein is the judge of the law. And
14 what she tells you about the law, you must
15 follow. You have taken an oath that you will
16 follow the law as given. You can't deviate from
17 it. If you don't like it, that can't enter into
18 it. You must follow the law that she gives you.
19 Likewise, you are the judges of the jury as I
20 told you in my opening statement. Nobody in this
21 courtroom can tell you how to find those facts.
22 You've heard testimony. There are exhibits here
23 for you to look at. You must take all that, put
24 it together and find those facts.

25 What happens is, you will go back into your

1 jury room after Judge Goodstein charges you the
2 law, after we argue to you, you have all this
3 evidence that has been placed into evidence and
4 you discuss and you take those facts and you
5 apply the law and you reach a verdict. A verdict
6 is from Latin, it means to speak the truth.
7 That's what we're trying to do here, Ladies and
8 Gentlemen. And when you decide what the truth is
9 and come out and render your verdict, nobody can
10 argue with that.

11 Ladies and Gentlemen, I will finally say, and
12 you will be told by Her Honor Judge Goodstein
13 that your verdict must be unanimous. All twelve
14 of you must agree on a verdict. So at this
15 point, that is the law that's in this case from
16 the State's prospective. At this point, I'm
17 going to sit down. Mr. Bischoff is going to get
18 up and talk to you about the facts and I'll be up
19 a little later to give you the State's
20 prospective on the facts. Thank you very much.

21 THE COURT: Thank you, Mr. Bell.

22 Mr. Bischoff.

23 MR. BISCHOFF: Thank you, Your Honor.

24 THE COURT: Yes.

25 MR. BISCHOFF: Ladies and Gentlemen,

1 remember I told you during opening statement that
2 this was a fight between two roommates. It's a
3 fight that involved self-defense. I think that
4 clearly was established during the evidence that
5 you heard, the testimony that you heard in this
6 trial. Just because one man wins the fight
7 doesn't make him a criminal. In South Carolina,
8 the law of self-defense is clear that if someone
9 is without fault in bringing on the difficulty,
10 if they believe they were in imminent danger or
11 they actually were in imminent danger and there
12 were no other probable means but to react the way
13 they did in that split second, then that's self-
14 defense.

15 Mr. West testified to you that he was
16 attacked as he was going through the entryway of
17 his kitchen. He got up here. He diagramed
18 exactly where his bedroom was, where he went,
19 went to the bathroom. On his way into the
20 kitchen, he was attacked. He was attacked by Mr.
21 Malmquist. He also testified that these were the
22 pictures that show exactly where he was attacked.
23 You got to consider to yourselves, do I believe
24 him? Is he credible? Does that make sense? And
25 if it doesn't, do I believe Mr. Malmquist? Does

1 his story makes sense or does his three stories
2 make sense? I argue no, they don't.

3 My client has testified that he was acting in
4 self-defense when he landed that left hook. You
5 have to be firmly convinced that he was not
6 acting in self-defense or else you must find Mr.
7 West not guilty. As stated, that's the law on
8 self-defense in South Carolina.

9 What's important, remember, is that there is
10 a standing, it's one of the bedrock principles of
11 criminal defense work and criminal law in
12 general. It's the right to the presumption of
13 innocence. Mr. West, as he sits over there, he
14 sits in what Your Honor will most likely tell you
15 is the cloak of innocence. He doesn't have to do
16 anything to prove that he's not innocent.

17 The State, the burden is on the State to
18 prove beyond a reasonable doubt, as Mr. Bell put
19 it, all reasonable doubt. All reasonable doubt
20 would be, do you hesitate to act, do you hesitate
21 for a second to know whether or not Mr. West was
22 acting in self-defense. And if you hesitated in
23 the slightest bit, that satisfies the standard.
24 Mr. West is innocent until proven guilty.

25 The State picked this case to try this week.

1 They told you they presented the indictment, the
2 indictment is a bit of information. They told
3 you that without question they were going to
4 prove to you that Mr. West was guilty beyond all
5 reasonable doubt. You would have no hesitation
6 whatsoever in being firmly convinced that Mr.
7 West attacked Mr. Malmquist that night. They
8 simply haven't done it.

9 What do you have to work with? You heard
10 testimony from a number of different witnesses.
11 Remember, there were only two people that were
12 actually there. There were only two people that
13 actually really know what happened. Just like
14 any dispute, you're going to have two sides to
15 the story. That's why we're here. This is our
16 chance to present to you evidence that, the State
17 present to you evidence that suggests we are
18 right in our belief about what happened. The
19 burden is on the State. They haven't met that
20 burden. They haven't proven that Mr. West
21 attacked Mr. Malmquist in his home. They haven't
22 done it.

23 What else do you have to consider? Who do
24 you believe? You have to believe Mr. Malmquist
25 or Mr. West. You have to also consider the other

1 people that were out there that night. Remember,
2 they weren't there when the fight happened. They
3 can only tell us what they saw, what they heard,
4 what they were doing, the attributes of the two
5 individuals that night.

6 You heard two police officers, Officer
7 Driscoll and Officer Graves. They both testified
8 that they went out there during an altercation
9 about 10 p.m. on May 18th. They testified that
10 without question, Mr. Malmquist agreed, in their
11 statement, in their report that Officer Driscoll
12 testified he filled out right after the evening
13 had concluded. He filled it out and wrote his
14 notes about what happened. He said without
15 question both of them agreed Mr. Malmquist was
16 the one who hit Mr. West with a walking stick.
17 Mr. West took it from him and he defended himself
18 in that situation.

19 He said in his report that it was undisputed.
20 They both agreed Mr. Malmquist was the one that
21 strike that first blow with his walking stick.
22 They both agreed Mr. Malmquist was complaining
23 about being hurt, complaining about needing
24 medical attention. He wasn't taken to the
25 hospital. He declined medical intervention. He

1 declined pressing charges against Mr. West. They
2 both agreed to go their separate ways.

3 You heard Mr. West testify, my client testify
4 that he went to his bedroom, got a shower, he was
5 going to bed. You heard him testify about how
6 hard he works. He was a little rough around the
7 edges. He's man and he's a construction guy. He
8 was doing a remodeling that day.

9 He talked about how he came home. Yeah, he
10 bought a few beers, bought a little bit of
11 liquor, some dinner, but he kept to himself.
12 That was who he was. That's what he testified
13 about. He's a reader. He was watching
14 television that night and there was some arguing.
15 There was some arguing because Mr. Malmquist owed
16 some money and was falling behind on the rent.
17 The argument ensued. You heard what happened at
18 10 p.m. And later, the police were called back
19 out there.

20 You also heard testimony from a neighbor.
21 Mr. Malmquist, when he was testifying, he told
22 you she will testify. She'll come in here and
23 tell you, without question, he was threatening me
24 and attacking me. None of that happened. He
25 said, oh, yeah, we were hanging out there for

1 four hours. It was cold that night. We had --
2 the neighbors had a barrel fire going. You heard
3 her, no, it was warm. They weren't hanging out
4 drinking. I wasn't hanging out with Mr.
5 Malmquist for four hours. I was working in my
6 driveway. Then I went to see my mom and I came
7 back. But you heard the testimony. She wasn't
8 hanging out with Mr. Malmquist.

9 Then you heard the testimony from the doctor.
10 The doctor said there's an injury. He described
11 exactly what happened with the eye. He talks
12 about how the swelling was sustained in the
13 situation and would cause the eye to be
14 proptotic. He talked about -- in his report, he
15 read it to you. He said blunt trauma to the eye.
16 He said he couldn't tell whether or not it was a
17 fist or some sort of penetrating object. That's
18 hesitation to act. We're not sure what happened.
19 The doctor certainly wasn't there. He can only
20 testify that it was his belief that it was a
21 blunt force trauma to the eye. Nothing
22 penetrating about it.

23 Certainly nothing like Mr. Malmquist
24 testified about the situation. Remember what he
25 testified to. He said, you know, I was -- we

1 fought in the kitchen. We had an altercation. I
2 was walking to my bedroom. He denied it after I
3 asked him about it. Then he said I was walking
4 to my bedroom when I was attacked from behind.
5 Then he talked about he saw the pictures and
6 where the blood was, the blood being in the
7 kitchen on the floor by the entryway, by the
8 entryway to the door. That's not his bedroom.
9 Who do you believe? Who is more credible?

10 You heard him testify too that for ten
11 minutes, during that ten-minute conversation he
12 had with the police officers, right when they
13 responded, I thought he punched me in the eye, I
14 thought he punched me in the eye, I thought he
15 punched me in the eye. He said it five more
16 times. He said it eight times in a matter of ten
17 minutes. I thought he punched me in the eye
18 because that's exactly what happened. The cops
19 came out. They responded. They met with them.
20 That's exactly what happened.

21 Mr. West testified that's what happened. He
22 was blind-sided in the doorway. You can use the
23 pictures to see he had no where to go. He
24 reacted in a split second and did what he had to
25 do to defend himself. He wasn't going to kill

1 Mr. Malmquist. He helped him up. He helped him
2 to bed. He got that coffee mug, that frozen
3 coffee mug. It wasn't any ice in the freezer as
4 Mr. Malmquist testified, but there was that
5 coffee mug. Mr. Malmquist agreed later, oh,
6 yeah, it was a coffee mug. He helped him to bed.
7 He didn't think anything was wrong. The next
8 thing he knows, he's being taken, placed in
9 handcuffs, placed in the car and taken away.

10 What is the law? The law is self-defense.
11 My client has testified that he acted to him
12 being assaulted, to him being attacked. He
13 wasn't at fault in bringing about the difficulty.
14 He believed based on his perception from earlier
15 in the night, based on the size and
16 characteristics of Mr. Malmquist, based on the
17 situation being half asleep, he reacted. He
18 reacted in defending himself. He didn't stay
19 there and continue to throw blows. He landed one
20 punch. Mr. Malmquist goes down. The cops come
21 later and here we are.

22 The evidence presented in this case does not
23 amount to beyond all reasonable doubt. Ask
24 yourself, am I hesitating to act here? If I'm
25 hesitating to act on whether or not the

1 Defendant's guilty, that's not guilty. You
2 believe Mr. West's story or you believe the story
3 of -- three stories of Mr. Malmquist?

4 Mr. West did what he did that night to defend
5 himself. In the State of South Carolina, the law
6 is on his side in that regard. He can sit there
7 and defend himself in his home. He doesn't have
8 to retreat. He was attacked first. He defended
9 himself and that's what the evidence has proven.
10 When you go back there and you consider the
11 evidence, the law, what Your Honor charges you,
12 I'm firmly convince you will come back with the
13 appropriate verdict of not guilty.

14 THE COURT: Thank you, Mr. Bischoff.

15 Mr. Bell.

16 MR. BELL: Thank you, Your Honor.

17 THE COURT: Uh-huh.

18 MR. BELL: Please the Court.

19 Mr. Foreman, Ladies and Gentlemen of the
20 jury, as stated, the Defendant is charged with
21 Assault and Battery of High and Aggravated
22 Nature. He claims that he acted out of self-
23 defense. The State has brought -- we brought
24 five or six witnesses to you. We brought Mr.
25 Malmquist who testified to what happened. If you

1 think about it, before I get into that, how the
2 stories kind of go like this and then go like
3 that and then come back to being about the same.
4 They diverged when the assaults start and then
5 they come back at the end of it.

6 Mr. Malmquist stated, if you will recall,
7 that he came in the house. Mr. West was
8 drinking. They had an argument about money and
9 something about a girlfriend. What did Mr. West
10 say? We argued about money and about a
11 girlfriend. I was drinking. I was drinking my
12 beer and I was drinking my whiskey that I stopped
13 to get. Believe me, Ladies and Gentlemen, both
14 individuals had been drinking. We're not going
15 to sit here and say nobody was drinking or what
16 have you. They were both drinking. I think the
17 testimony is clear on that.

18 Mr. Malmquist said all of a sudden, he struck
19 me and I went outside and called the police. Mr.
20 Malmquist called the police. Why would he call
21 the police if he went in and started the thing?
22 That makes absolutely no sense. He called the
23 police and nobody argued about that. When the
24 police came, who did they talk to first?
25 Remember? Who did they talk to first? Remember?

1 Who did they talk to first? They talked to Mr.
2 West first. What did he tell the police? What
3 did the police testify? They are the police.
4 They came to figure out what was going on and how
5 can we solve the situation.

6 Mr. West told them at that time, what they
7 said, that Mr. Malmquist, and this is Mr. West
8 talking, struck me in the head with his walking
9 cane. I took it away from him. I then struck
10 him and he went out. Fine, except that doesn't
11 make a whole lot of sense because if you
12 remember, also the same officer who talked to
13 him, Driscoll, said when I came up, Mr. Malmquist
14 had his cane. If he took it away from him, why
15 did he give it back to him if he was concerned
16 about it? That makes absolutely no sense. Of
17 course, Mr. West gets up and testified oh, no,
18 no, I didn't say that. I just dropped the cane,
19 so that's how I got it. Remember that.

20 Then he agreed to go separate ways. The
21 officers couldn't find any injury. There was no
22 evidence of anything. They just hopefully, to
23 keep the peace, didn't write a report. They
24 thought it was over with for the night and went
25 their separate ways. Mr. Malmquist states he

1 went over to talk to Ms. Ashe, go over there to
2 kind of chill out and let things calm down. At
3 some point during the night, Mr. Malmquist
4 testifies that all of a sudden; here comes Mr.
5 West through the bushes that separate the
6 property saying something about you were watching
7 me in the shower, I'm going to kill you,
8 something to that effect. Then he goes back
9 home. Okay. I think Mr. West's testimony was I
10 came over and I didn't like what he was saying.
11 If you got to say something, say it to my face.
12 So we have two different stories again.

13 But this one, we have a witness. We have an
14 independent witness. We have Ms. Ashe who came in
15 here. While all the times of everybody are off,
16 I mean, I defy you to give the times of where you
17 were a year ago or eight months ago, the exact
18 times of what you were doing. They agreed,
19 everybody agrees that Mr. Malmquist was at Ms.
20 Ashe's house and Mr. West came through the hedge
21 row and said something.

22 Who's the independent witness? Ms. Ashe, who
23 came here and testified just as Mr. Malmquist
24 said she would to you. What did she say?
25 Besides not hanging out, the important thing,

1 what did she tell you? She told you that he came
2 through and he said something about watching him
3 in the shower and I'm going to kill you. That's
4 how you figure out who to believe. You have to
5 see how the evidence, what corroborates what?
6 That corroborates what Mr. Malmquist said. And
7 guess who denied that? I asked him that on the
8 stand. Mr. West, did you say that you were going
9 to kill him? No, I didn't say that. Okay. Just
10 remember that.

11 So at some point, Mr. Malmquist testifies
12 that he goes back and fixes his food and he goes
13 back in -- comes out and goes back in. And all
14 of a sudden, he was jumped by Mr. West. He says,
15 I thought he punched me, but it seem like he got
16 me from behind and got my eye and I went down.
17 Where did he go down? You see the blood in the
18 middle of the kitchen. He said he went down --
19 he said I was over the kitchen. I came in the
20 room. I turned. I took three steps towards my
21 room. Towards my room. He didn't say he was in
22 his room. He said I took three steps towards my
23 room and he grabbed me and I went down. I laid
24 there.

25 The story comes back some. He was in

1 agonizing pain. He didn't know what to do. He
2 had -- his wits wasn't about him. He said Mr.
3 West kicked me, kicked me a couple of times. Of
4 course, Mr. West said I just kind of nudged him.
5 He kind of downplayed that. Gave me something to
6 hold to my eye and I made it to my bedroom. I
7 was able to clean up. And finally after I
8 figured out I was concerned, I was scared. I had
9 to get out. I went out the bedroom door which
10 was seen here. My bedroom door and went up to
11 the street. Tried to go to Ms. Ashe's. She
12 wasn't home. I called the police at the corner.

13 You heard his testimony. You heard the
14 recording. You have his statement. He's
15 consistent. There's not three different stories.
16 The story is consistent throughout. Think about
17 it, Ladies and Gentlemen, if you could write down
18 what was said ten minutes ago, if you could tell
19 what was said ten minutes ago and think about 30
20 minutes, write down what was said 30 minutes ago
21 and have to testify to it eight months later, how
22 consistent are you going to be? If he had been
23 100 percent consistent, everything was exact, the
24 defense would be up saying he had been coached.
25 We can't have it either way. He was giving what

1 he remembered.

2 You have to remember, Ladies and Gentlemen,
3 he wasn't in a rational state of mind that night.
4 His eye was put out. His eye was gouged out. He
5 was in tremendous pain. Trying to get his wits
6 about him, what to do besides somebody that just
7 committed a violent injury to him. He finally
8 got to the hospital and we had Dr. Teed testify.

9 What's significant about Dr. Teed? A, the
10 man, Mr. Malmquist, lost his eye, which is
11 certainly a serious injury. But he said blunt
12 trauma to the eye, not to the orbit, not to the
13 face, not to the cheek, but the blunt trauma has
14 to be to the eye. Why is that important? He
15 punches him. The Defendant punches Malmquist.
16 He punches him straight on. You can't do it
17 yourself. You could get in there and cause maybe
18 some damage. But as Dr. Teed said, the orbit is
19 here protecting it.

20 What did Mr. West testify to to set up his
21 self-defense argument? That the man hit him, did
22 something with a cane and I spun him around.
23 What -- how did he describe how he hit him? I
24 threw a left hook. Some of you may know what I'm
25 about to say. Some of you may not. But think

1 about it, Ladies and Gentlemen, a left hook. And
2 I asked Mr. West, that's a sweeping motion, isn't
3 it? Left hook, you come around here. It's not
4 an upper cut. It's not a straight out. It's a
5 sweeping motion.

6 Where is he going to land the blow? Not to
7 the eye. If Ms. Kimmons would stand up here,
8 I'll show you. I'll hopefully don't hit her too
9 hard. But your sweeping motion is to the side,
10 the side of the head, not to the eye. That
11 doesn't cause the injury. Thank you. That's not
12 going to cause the injury. He's trying to
13 minimize. He's trying to look out for himself.

14 That's the State's case. You have the
15 injury, the picture. Oh, the picture of the
16 injury. I know y'all hate seeing it... I hated
17 seeing it. But even, what does the Defendant
18 say? It didn't look that bad when I saw it.
19 Can't even agree that the injury is that bad.
20 Looking at it, it's that bad.

21 There is no self-defense in this, Ladies and
22 Gentlemen. Yes, they both been drinking, but he
23 was the aggressor. How do we know that? He came
24 through saying he was going to kill him, kill Mr.
25 Malmquist. Does that sound like somebody that's

1 afraid? He hadn't complained of any injury. He
2 didn't complain of any injury when the police
3 came there the first time. He didn't tell the
4 police he was scared of Mr. Malmquist when they
5 got there the first time. He didn't say I'm
6 scared he's going to kill me or I'm scared that
7 he's going to hurt me bad. He didn't say that.
8 He said everything's cool.

9 The second time, what scenario is more
10 likely? What he's saying, and this is the
11 defense, he testified that Malmquist was waiting
12 for him here at the door with the door closed.
13 Number one, how does Mr. Malmquist, you know,
14 he's sitting there all night waiting for him to
15 go to the bathroom with his cane? I mean, that's
16 what has to be done. You can't anticipate
17 somebody going to the bathroom. He has to be
18 sitting there all night for him. I'm going to
19 sit here and wait and get the jump on him. How
20 did he know he was going to come back in through
21 the kitchen? How would he know that? That's
22 ludicrous.

23 And then, in order to hit him, he's in a
24 confined space. How does he get any leverage
25 with a cane? How does he swing it or try to move

1 it? It's a confined space. You can see how
2 confined it is. Look how confined -- how does he
3 go to swing it? That's just -- it doesn't make
4 any sense.

5 What makes sense is that he got the drop on
6 Mr. Malmquist. Generally, if you throw a punch,
7 you're going to see it coming. You're going to
8 close your eyes, you're going to blink. You're
9 going to crouch or something. He didn't see it.
10 He got a good blow, a finger or whatever to get
11 in there and cause that damage.

12 Then, when the police came, after Mr.
13 Malmquist went out and called the police and they
14 came to the residence, did he complain of
15 anything there? Did he jump up and say oh, my
16 jaw's hurting? He hit me with a cane. What did
17 the police say? He didn't report that to the
18 police. That's the first anybody heard about him
19 getting hit with a cane on the second occasion.
20 I asked the police officer what did Mr. West say
21 happened. He said he punched me once and I hit
22 him four times. That's the testimony from
23 Officer Driscoll. Nothing about a cane. Nobody
24 says there was a cane lying out in the kitchen.

25 Certainly, if this guy is floored and has a

1 cane, he's dropping it. I mean, there's nothing
2 there. There's nothing there. There's no cane
3 there. If he goes down, where is the cane? The
4 police didn't say anything, that they saw a cane.
5 Where is the cane? If he had a cane with him and
6 hit Mr. West, where is it? He spun him around
7 and knocked him and put him on the floor, where
8 is the cane? It should have fallen somewhere.
9 He doesn't know because it never existed. The
10 police didn't know anything about it. He never
11 told them about it. He said I hit him once, he
12 hit him four times in self-defense.

13 Ladies and Gentlemen, isn't it interesting
14 that everybody that said something different than
15 what Mr. West's story is? It's not right what
16 the police testified to about what he told them
17 at the first incident about the cane, about being
18 hit with the cane and taking it and hitting. So
19 that's changed. That's wrong.

20 Ms. Ashe is wrong about what he said when he
21 came through the bushes. I didn't have my boxers
22 on. I had shorts on. Had to disagree with that.
23 Disagreed with what the police said later on.
24 Everybody's wrong but him. Everybody has
25 conspired against Mr. West. Everybody's lying

1 but him. No, Ladies and Gentlemen, everybody's
2 telling the truth but him.

3 Ladies and Gentlemen, the final analysis the
4 State has presented you with more than enough
5 evidence. We have proven beyond all reasonable
6 doubt that this man lost his eye as a result of
7 an attack by his roommate for whatever reason.
8 He was in an aggressive state. Mary Ashe,
9 remember Mary Ashe's testimony. I'm going to
10 kill you. He meant to do some harm to Mr.
11 Malmquist that night. He did harm to Mr.
12 Malmquist that night.

13 There is no self-defense. Can't be. No way.
14 Left hook doing that damage? No way. The State
15 has proven to you that the Defendant committed an
16 assault and battery of a high and aggravated
17 nature beyond all reasonable doubt. We've also
18 disproved self-defense beyond all reasonable
19 doubt. There's only one way it could have
20 happened as Mr. Malmquist described. I admit he
21 probably fudged some things too. I'm not saying
22 he's 100 percent truthful. He wants to look good
23 too. Mr. West wants to look good. But the
24 evidence, corroboration backs up Mr. Malmquist's
25 story beyond all reasonable doubt.

1 Ladies and Gentlemen, in the end, go back and
2 find the truth of this case. Do justice in this
3 case because the truth in this case is that James
4 West is guilty of Assault and Battery of High and
5 Aggravated Nature. Thank you.

6 **THE COURT:** Thank you so much, Mr. Bell.

7 Little break. Just stand up where you are
8 and stretch a minute. Get some oxygen
9 circulating. Ladies and Gentlemen, it's going to
10 take me about 20 minutes to deliver the charge
11 and instruction to you. Obviously, I want
12 everybody to be alert for 20 more minutes.
13 That's why I wanted you to move. Sit down when
14 you all are ready to sit down. All right.

15 Mr. Presiding Juror and Ladies and Gentlemen
16 of the jury, you've now heard the evidence and
17 the arguments of both sides. It is now my duty
18 to instruct you regarding the law applicable to
19 this case.

20 Now, Ladies and Gentlemen, the indictment in
21 this case charges the Defendant -- and when I say
22 Defendant, I am referring to Mr. James West. He
23 is the Defendant in this case. If I say
24 defendant, I mean, James West and vice versa. I
25 may refer to him as James West and when I do

1 that; I am referring to the defendant.

2 Ladies and Gentlemen, the indictment in this
3 case states as follows, this is indictment 2009-
4 GS-18-1000 and the indictment alleges that the
5 Defendant, James West, did in Dorchester county
6 on or about May the 18th, 2009 unlawfully commit
7 an assault and battery on the victim, Lance
8 Malmquist, accompanied by circumstances of
9 aggravation, to wit: causing serious bodily
10 injury to the victim by beating him with his
11 hands, thereby violating the common law of the
12 state of South Carolina. Ladies and gen -- this
13 is the indictment.

14 Ladies and Gentlemen, I remind you that the
15 fact that the Defendant, Mr. West, was arrested,
16 charged and indicted in this case is not evidence
17 in this case and can not be considered by you as
18 evidence of guilt in this case. Nor does it
19 create any presumption or inference of guilt.
20 This document is simply the formal written
21 instrument by which the charge is made against
22 the Defendant. It is the formal document by
23 which the case is brought into court. It's the
24 notice to the Defendant, it's notice to Mr. West
25 that the State maintains that he has violated the

1 criminal law of the State of South Carolina.

2 The Defendant, Mr. West, has pled not guilty
3 to this indictment. That plea puts the burden on
4 the State of South Carolina to prove the
5 Defendant guilty. A person charged with
6 committing a criminal offense in South Carolina
7 is never required to prove himself or herself
8 innocent. I charge you that it is an important
9 rule of law that the Defendant in a criminal
10 trial, no matter what the seriousness of the
11 charge may be, will always be presumed to be
12 innocent of the crime for which the indictment
13 was issued unless guilt has been proven by
14 evidence satisfying you of that guilt beyond a
15 reasonable doubt.

16 This presumption of innocence does not end
17 when you begin your deliberations, but it
18 accompanies the Defendant throughout the trial
19 until you reach a verdict of guilt based on
20 evidence satisfying you of that guilt beyond a
21 reasonable doubt. The presumption of innocence
22 is like a robe of righteousness placed about the
23 shoulders of the Defendant which remains with him
24 until it has been striped from him by evidence
25 satisfying you of the Defendant's guilt beyond a

1 reasonable doubt.

2 The presumption of innocence is not mere
3 legal theory. It is just a legal phrase. It is
4 a substantial right to which every Defendant is
5 entitled unless you, the jury, are satisfied from
6 the evidence of the Defendant's guilt beyond a
7 reasonable doubt.

8 What is reasonable doubt in the law? A
9 reasonable doubt is the kind of doubt that would
10 cause a reasonable person to hesitate to act.
11 The State has the burden of proving the Defendant
12 guilty beyond a reasonable doubt. Some of you
13 may have served as jurors in civil cases where
14 you were told that it was only need to prove that
15 a fact is more likely true than not true such as
16 by the greater weight or the preponderance of the
17 evidence.

18 The greater weight or preponderance of the
19 evidence, Ladies and Gentlemen, and judges will
20 talk about the scales of justice. To me, the
21 greater weight or the preponderance of the
22 evidence applicable in civil cases must tip the
23 scale ever so slightly. That is by the greater
24 weight or the preponderance of the evidence.
25 This is not that burden of proof. In criminal

1 cases, the State's proof must be more powerful
2 than that. It must be beyond a reasonable doubt.

3 Proof beyond a reasonable doubt is proof that
4 leaves you firmly convinced of the Defendant's
5 guilt. There are very few things in this world
6 that we know with absolute certainty. In
7 criminal cases, the law does not require proof
8 that overcomes every possible doubt. If, based
9 on your consideration of the evidence, you are
10 firmly convinced that the Defendant is guilty of
11 the crime charged, you must find the Defendant
12 guilty. If, on the other hand, you think there
13 is a real possibility that the Defendant is not
14 guilty, you must give the Defendant the benefit
15 of the doubt and find him not guilty.

16 I remind you that during this trial, you and
17 I have had certain duties to perform. As the
18 trial judge, it is my responsibility to preside
19 over the trial of this case. I also had the duty
20 to rule on the admissibility of the evidence
21 offered during the trial. You are to consider
22 only the competent evidence before you. You are
23 to consider only the testimony which has been
24 presented from this witness stand and any
25 exhibits which have been made a part of the

1 record in this case. Those exhibits, of course,
2 will be delivered to you in your jury room when
3 you are ready to deliberate.

4 I have the additional duty to charge you the
5 law applicable to this case. As the presiding
6 judge, I am the sole judge of the law in this
7 case and it is your duty as jurors to accept and
8 apply the law as I now state it to you. If you
9 already have an idea as to what the law is or
10 what the law ought to be and it does not agree
11 with what I now tell you the law is, you might
12 want to go have a conversation with your
13 legislator one day, might want to go to law
14 school, something like that. But you are -- by
15 your duty for this case in order for our system
16 to work correctly, you must abandon that
17 preconceived idea because you are sworn to accept
18 and apply the law exactly as I state it to you.

19 Ladies and Gentlemen, in every case tried in
20 this case before a jury, the jury becomes the
21 sole and exclusive judge of the facts in the
22 case. Trial judge can not intimate, state,
23 comment on or make any statement to a trial jury
24 about the facts of the case. Since you, the
25 jury, are the sole judges of the facts in this

1 case, you are not to infer from what I may have
2 said during the progress of this trial, in ruling
3 on the admissibility of evidence or otherwise or
4 anything that I say now during the course of this
5 instruction to you that I have any opinion about
6 the facts in this case. The law does not allow
7 me to have an opinion about the facts in this
8 case. This is a matter solely for you, our jury,
9 to determine. As jurors, it is your duty to
10 determine the affect, the value, the weight and
11 the truth of the evidence presented during the
12 trial.

13 Now, Ladies and Gentlemen, necessarily then,
14 you must determine the credibility of the
15 witnesses who have testified in this case.
16 Credibility simply means believability,
17 believability. It becomes your duty, as jurors,
18 to analyze and evaluate the evidence and
19 determine which evidence convinces you of its
20 truth.

21 In determining the believability of witnesses
22 who have testified in this case, you may believe
23 one witness over several witnesses, several
24 witnesses over one witness. You may believe a
25 part of the testimony of a witness and reject the

1 remaining part of the testimony of that same
2 witness. You may believe the testimony of a
3 witness in its entirety or you may reject the
4 testimony of a witness in its entirety.

5 You may consider whether you believe a
6 witness' -- whether a witness has exhibited to
7 you any interest, bias, prejudice or other motive
8 in this case. You may also consider the
9 appearance and the manner that the witness acted.
10 How did the witness act while on the witness
11 stand.

12 Ladies and Gentlemen, in this case, you have
13 heard testimony by a witness who has been deemed
14 to be an expert. Our rules of evidence
15 ordinarily do not permit witnesses to testify
16 regarding their opinions or conclusion. An
17 exception to this rule exist for witnesses who we
18 call expert witnesses. That's a person who by
19 education and experience has become an expert in
20 some art, science, profession or calling and
21 those individuals may state an opinion as to
22 relevant and material matter to which the witness
23 claims to be an expert. They may also state
24 their reasons for the opinion.

25 You should consider expert opinion received

1 in evidence in this case and like any other
2 evidence, you give it what you think it deserves.
3 If you decide that the opinion of an expert
4 witness is not based on sufficient education and
5 experience or if you conclude that the reasons
6 given in support of the opinion are not sound or
7 that the opinion is outweighed by other evidence,
8 you may disregard the opinion in its entirety.

9 An 'expert witness' is to be given no greater
10 weight than that of other witnesses simply
11 because the witness is an expert and you are not
12 required to except an expert's opinion even
13 though it is not contradicted. Ladies and
14 Gentlemen, expert opinion is given for the
15 purpose of helping you understand the evidence
16 and not for the purpose of controlling your
17 judgement.

18 Now, Ladies and Gentlemen, there are
19 generally two types of evidence which are
20 generally presented during the trial. One is
21 called direct evidence and circumstantial
22 evidence. Direct evidence is the testimony of a
23 person who claims to have actual knowledge of a
24 fact, such as an eyewitness. It is evidence
25 which immediately establishes the main fact to be

1 proved. Circumstantial evidence is proof of a
2 chain of facts and circumstances indicating the
3 existence of a fact. It is evidence which
4 immediately establishes collateral facts from
5 which the main fact may be inferred.

6 Circumstantial evidence is based on inference and
7 not on personal knowledge or observation.

8 I'll give you an example. It's February the
9 4th. It's supposed to get cold over the next
10 couple of days, real cold. Let's say Friday
11 night, it's 11 o'clock. It's real cold and it's
12 supposed to snow. And you are standing outside
13 letting your favorite canine go out visit the
14 bushes one more time before you can turn in. All
15 of a sudden, this white stuff, sprinkly stuff
16 starts coming down from the sky and the previous
17 dried crunchy grass becomes layered with white
18 stuff, frozen. It's snowing. That is direct
19 evidence that it's snowing. You are an eyewitness
20 to the snowing.

21 Turn the page. It's 11 o'clock. It's real
22 cold. Snow is forecast. You take your trusty
23 canine out to visit the bushes for the last time.
24 He or she does so. He comes in. You come in.
25 Across your lawn is your famous dry crunchy

1 grass. Fido comes in. You go to sleep. You
2 wake up the next morning. It's still real cold.
3 You walk out to take your trusty canine out to
4 visit the bushes again and, low and behold,
5 there's white stuff frozen all across what was
6 previously the brown crunchy grass. And when
7 your pup goes to the bushes, there are footprints
8 across this white frozen stuff. Circumstantial
9 evidence that it snowed over the night.

10 It's February. It's really cold. It's
11 forecast. It's brown grass. Go to sleep. Wake
12 up. White snow all over your grass.
13 Circumstantial evidence that it snowed overnight.
14 By inference, that is proven that it snowed
15 overnight.

16 All right. Now, Ladies and Gentlemen, Mr.
17 West is charged with the common law criminal
18 offense of Assault and Battery of High and
19 Aggravated Nature. I'm now going to charge you
20 the elements applicable to this charge. Assault
21 and battery of a high and aggravated nature is an
22 unlawful act of violent injury to the person of
23 another accompanied by circumstances of
24 aggravation. Assault and battery of a high and
25 aggravated nature is an unlawful act of violent

1 injury to the person of another accompanied by
2 circumstances of aggravation.

3 Ladies and Gentlemen, an assault occurs when
4 a person unlawfully attempts or offers to commit
5 a violent injury upon another person and had the
6 present ability to complete the attempted injury.
7 An assault is the intentional creation of a
8 reasonable fear of immediate bodily harm. It is
9 not necessary that the attempted injury or harm
10 actually take place.

11 For example, for example, if I walk up to you
12 and when we are within arm's reach, I reach back
13 to hit you, that is an assault. I walk up to you
14 and when I am with arm's reach, I reach back to
15 hit you, that is the assault. A battery is the
16 unlawful, is the unlawful touching of another
17 person by a person who has committed the assault.
18 An unlawful touching can be caused by a part of
19 the accused body or by any object the accused
20 puts in motion.

21 A battery is the completion of the assault by
22 using or applying force to another person,
23 however slight, in a rude, angry or resentful
24 manner without legal justification for doing so.
25 Remember, I've walked up and pulled my arm back

1 when I was within arm's reach. We had the
2 assault. Using my earlier example, if I carry
3 through the assault by hitting you, that is the
4 battery. Assault. Battery.

5 Now, the State must prove assault, battery,
6 but the State must also prove a circumstance of
7 aggravation. Aggravation. Circumstances of
8 aggravation include but, Ladies and Gentlemen, by
9 no means would be limited to the following: use
10 of a deadly weapon, the intent to commit a
11 felony, a great disparity between the ages or
12 physical conditions of the parties, a difference
13 in the genders of the parties, the taking of
14 indecent liberties or familiarities with a female
15 through the use of force, the purposeful
16 infliction of shame and disgrace, the resistance
17 of lawful authorities. These are only examples
18 of circumstances of aggravation. Obviously, the
19 circumstances depend on those of each case.

20 Now, I'm going to shift and talk to you about
21 criminal intent. What is that? In order to
22 establish criminal liability, criminal intent is
23 required. For example, the mental state required
24 to be proven by the State for a particular crime
25 might be purpose, knowledge, recklessness and the

1 like. Criminal intent must be proven by the
2 State beyond a reasonable doubt.

3 Criminal intent is always a matter that must
4 be determined by the jury from the circumstances
5 surrounding the situation. There is no way to
6 prove intent to a mathematical certainty and
7 there certainly isn't a way that medical science
8 can dissect a person's brain and determine what a
9 person had in mind. The law says that criminal
10 intent may be inferred from the circumstances
11 shown to have existed.

12 This is how you make a determination of
13 whether or not the element requiring intent was
14 present. It is not necessary to establish intent
15 by direct and positive evidence. But intent may
16 be established by inference in the same way as
17 any other fact by taking into consideration the
18 acts of the parties and all the facts and
19 circumstances of the case. Criminal intent is a
20 mental state, a conscious wrongdoing, conscious
21 wrongdoing. It is up to you to determine what
22 the Defendant intended to do based on the
23 circumstances shown to have existed. Criminal
24 intent can arise from action or failure to act.

25 It can arise from negligence, reckless

1 indifference to duty or consequences that are
2 considered by the law to be the equivalent of
3 criminal intent.

4 Now, Ladies and Gentlemen, I want to talk to
5 you about the theory of self-defense. You see,
6 the issue of self-defense has arisen in this
7 case. Self-defense is a complete defense. If
8 you find that self-defense existed in this case,
9 you must find the Defendant not guilty. The
10 State, the State has the burden of disproving
11 self-defense by proof beyond a reasonable doubt.
12 If you have a reasonable doubt of the Defendant's
13 guilt after you have considered all the evidence,
14 including evidence of self-defense, then you must
15 find the Defendant not guilty. On the other
16 hand, if you have no reasonable doubt of the
17 Defendant's guilt after considering all the
18 evidence, including the evidence of self-defense,
19 then you must find the Defendant guilty.

20 The following elements are required for there
21 to be self-defense. These are the elements of
22 self-defense. Element number one, the Defendant
23 must be without fault in bringing on the
24 difficulty. If the Defendant's conduct was the
25 type which was reasonably calculated, if provoked

1 an assault, then the Defendant would be at fault
2 in bringing on the difficulty and would not be
3 entitled to an acquittal, then he could be found
4 not guilty based on self-defense.

5 The second element of self-defense is that
6 the Defendant was actually in imminent danger of
7 death or serious bodily injury or that the
8 Defendant actually believed that the Defendant
9 was in imminent danger of death or serious bodily
10 injury. If the Defendant was actually in
11 imminent danger, it must be shown that the
12 circumstances would have warranted a person of
13 ordinary firmness and courage to strike the fatal
14 blow to prevent death or serious bodily injury.
15 Fatal blow or the striking blow, the act.

16 If a defendant believes that he or she was in
17 imminent danger of death or serious bodily
18 injury, it must be shown that -- and it is an
19 element -- that a reasonably prudent person of
20 ordinary firmness or courage would have had the
21 same belief. In deciding whether the Defendant
22 actually was or believed that he was in imminent
23 danger of death or serious bodily injury,
24 consider all the facts and circumstances
25 surrounding the incidents including physical

1 condition and characteristics of the Defendant
2 and the victim.

3 Now, Ladies and Gentlemen, a person has a
4 right to act on whether they believed or when
5 they believed that they are in imminent danger
6 and when they believe that they are in imminent
7 danger, they are entitled to act as though they
8 are in imminent danger if a reasonably prudent
9 person of ordinary firmness and ordinary courage
10 would have had the same believe. A defendant has
11 the right to act on appearances even though, even
12 though they may have been wrong. It is for you
13 to decide whether the Defendant's fear of
14 immediate danger of death or serious bodily
15 injury was reasonable and would have been felt by
16 a person of ordinary firmness and courage in the
17 same situation.

18 Now, evidence of prior difficulties between
19 the Defendant and the victim may be considered in
20 deciding whether the Defendant had a reason to
21 believe that a threat existed and the seriousness
22 of that threat. The relative sizes, ages,
23 weights of the Defendant and the victim may be
24 considered in deciding the apparent or actual
25 need for force and self-defense and the amount of

1 force needed. The intoxication of the victim may
2 be considered in deciding whether the Defendant's
3 fear of death or bodily harm was reasonable.

4 The final element of self-defense is that the
5 Defendant had no other probable way to avoid the
6 danger of death or serious bodily injury than to
7 act as the Defendant did in this particular
8 circumstance or instance. If a defendant is on
9 his or own premises, a defendant has no duty to
10 retreat before acting in self-defense. A person
11 can not be required to make an exact calculation
12 as to the degree or amount of force which may be
13 needed to avoid death or serious bodily harm.

14 Therefore, in self-defense, a defendant has
15 the right to use the force needed to avoid death
16 or serious bodily harm. The force used in self-
17 defense does not have to be limited to the degree
18 or amount of force used by the victim. A
19 defendant has the right to use so much force as
20 appeared to be necessary for complete self
21 protection and which a person of ordinary reason
22 and firmness would have believed to be needed to
23 prevent death or serious bodily harm.

24 Now, Ladies and Gentlemen, the State has the
25 burden of proving each and every element of the

1 offense of ABHAN and to disprove self-defense.
2 The burden of the State is beyond a reasonable
3 doubt. Ladies and Gentlemen, once you have
4 considered all the facts and circumstances of
5 this case, if you are firmly convinced that the
6 Defendant is guilty of the crime charged, you
7 must find the Defendant guilty. If, on the other
8 hand, you think there is a real possibility that
9 the Defendant is not guilty, you must give the
10 Defendant the benefit of the doubt and find him
11 not guilty.

12 Now, Ladies and Gentlemen, I am going to go
13 over with you the verdict form. Two things I
14 want to tell you before we go over the verdict
15 form. The first thing that I want to tell you is
16 that your verdict must be unanimous. This must
17 be the verdict of each and every one of you, all
18 twelve of you. This is not the verdict of any
19 one of you or the majority of you but it must be
20 the verdict of each and every one of you.

21 Secondly, on this piece of paper, the verdict
22 form, I have listed two possible verdicts. One
23 is not guilty. The other is guilty. Now, Ladies
24 and Gentlemen, you must not take any hidden
25 meaning by the order in which these possible

1 verdicts have been placed on paper. It's just
2 reality, if you're going to put something on a
3 piece of paper and it's more than one word, one's
4 got to be first. The other one has got to be
5 next. So please don't take any hidden meaning in
6 the order in which these matters have been placed
7 on paper.

8 I don't know that you can see it, but you can
9 see it a little bit. Ladies and Gentlemen, the
10 verdict form reads as follows, it's got what's
11 called the caption that this is the State of
12 South Carolina in Dorchester county and this is
13 in the court of General Sessions, First Judicial
14 Circuit. And it has the indictment number here.
15 It states as follows: as to the charge of Assault
16 and Battery of High and Aggravated Nature, we,
17 the jury, unanimously find the Defendant, and
18 then two possible verdicts, guilty or not guilty.

19 Irrespective of what the unanimous verdict of
20 the jury is, once the jury has completed this
21 deliberation, Mr. Presiding Juror, you will
22 circle the verdict so there will be no question
23 which of these two possible verdicts is the
24 verdict of the jury. It has a line here for the
25 presiding juror. And you know who you are. Once

1 deliberations are finished and you have indicated
2 the verdict of the jury on the verdict form, you
3 will sign where it says presiding juror and then
4 you will date the verdict form. Today, just for
5 your informational purposes, is February the 4th.
6 And you just fill in the date.

7 Now, in a moment, in a moment, I'm going to
8 be asking you please step to your jury room for
9 this instruction. Do not discuss this matter or
10 allow anyone to discuss it with you. You would
11 be 100 percent correct that I have told you that
12 now is when you may begin your deliberations.
13 You've heard the evidence and you've heard the
14 arguments of counsel and my charge on the law.

15 I'm going to tell you what's going to happen
16 when you step back to your jury room on this
17 occasion. I'm going to turn to these lawyers and
18 I'm going to ask two questions. I'm going to
19 take advantage of their fine minds and I'm going
20 to ask them whether or not I have told to you all
21 of the law that you need for your deliberations
22 and have I stated it for you correctly. Now,
23 sometimes I need to bring jurors back in because,
24 while it is certainly unintended, something could
25 just pop out wrong and I need to bring jurors

1 back out so that I can correct my error.

2 In the event that I need to bring you back
3 out for that reason, I ask you in advance, please
4 allow me to correct my error in your minds.

5 Sometimes I fail to give jurors an instruction
6 that they may need for their deliberation. So in
7 the event that I need to bring you back out for
8 that reason, please do not consider that
9 instruction with any emphasis. Just know that
10 this is my one opportunity to get this right to
11 give you all the law that you may need for your
12 deliberations and to state it for you correctly.

13 Now, in the event that I do not need to bring
14 you back out, in the event that I do not need to
15 bring you back out, then Mr. Taylor will bring
16 for you the verdict form and the exhibits and an
17 instruction to begin your deliberations. Now,
18 Mr. T and I been doing this a long time. In the
19 event, if he found the first time in 13 years to
20 give you that instruction, just know you will not
21 have this verdict form and these exhibits unless
22 you ready to begin your deliberations.

23 Now, Ladies and Gentlemen, all twelve of you
24 must be together for you to deliberate. So if
25 you need to take a break, stop your

1 deliberations, take your break and then reconvene
2 your deliberations when all twelve of you are
3 together again. Just remember all twelve of you
4 must be present for you to deliberate.

5 Now, when you have finished your deliberation
6 and you have filled out your verdict form, you
7 will knock on the door, you will return to the
8 courtroom and you will hand the verdict form, no
9 doubt to Mr. Taylor and Mr. Taylor will in turn
10 pass it to me. You do not publish your verdict.

11 Ladies and Gentlemen, I do want to leave you
12 with one concluding thought. It is this, the
13 word verdict, the word verdict comes from the
14 Latin phrase "veredicto", which means, which
15 means "to speak the truth". To speak the truth.
16 That is now your task. I ask of you step to your
17 jury room. Do not discuss this matter. Do not
18 allow anyone to discuss it with you. We will be
19 with you very shortly.

20 (WHEREUPON, the jury exits at approximately
21 4:05 p.m.)

22 THE COURT: Any additions or exceptions from
23 the State?

24 MR. BELL: Yes, Your Honor. The State would
25 ask that you recharge the circumstances of

1 aggravation and include the infliction of serious
2 bodily injury. I think that's a matter of law.
3 I don't think it's a comment on the facts. I
4 think the comment on the facts would be whether
5 this conduct allege it's a serious bodily injury.
6 But I think that by you excluding it, the jury is
7 going to consider it. I know you said it's not
8 limited to that. I think they need to hear that
9 it's a matter of law.

10 THE COURT: All right.

11 MR. BISCHOFF: Judge, I think the charge is
12 adequate. I think you covered it.

13 THE COURT: Very well. I'll bring them back
14 out.

15 MR. BISCHOFF: I do have an addition also.
16 Under duty to retreat, I think you said exactly
17 what I wanted to hear with regard to premises.
18 But I would ask that you charge that premises
19 doesn't mean a house that they own or a house
20 with their name on the lease but rather it's the
21 place where they reside.

22 THE COURT: Let me look at what I said.
23 Tell me what I said.

24 MR. BISCHOFF: You said exactly like it is
25 here. If the Defendant was on his own premises,

1 the Defendant had no duty to retreat before
2 acting in self-defense.

3 THE COURT: I did say premises.

4 MR. BISCHOFF: Yes, Your Honor. I just ask
5 that you further clarify premises, that it
6 doesn't mean they own the house or your name is
7 on the lease but that he lives there. In this
8 case, I think --

9 THE COURT: All right. Mr. Bell, what about
10 that?

11 MR. BELL: I would object. I think premises
12 speaks for itself. I think there's testimony he
13 was living there. If you going to recharge them,
14 I ask that you recharge that nobody has the duty
15 to retreat their own premises as well.

16 MR. BISCHOFF: I'm not quite sure what the
17 disagreement is but if you want to say that
18 premises means a place where he's living, that
19 would be fine.

20 THE COURT: One's own premises is the place
21 where individuals reside.

22 MR. BISCHOFF: I don't think it needs
23 clarification. I think it speaks for itself.
24 That's my point.

25 THE COURT: In other words, the concern is

1 to say that you own premises that -- Mr. Bischoff
2 is concerned that there be no indica of
3 ownership. It's possession and residing there is
4 sufficient. Okay. All right.

5 MR. BISCHOFF: I think the place where they
6 reside and live is perfectly fine, Your Honor.

7 THE COURT: Okay. If I do that, I'm not
8 going to just say it for the Defendant, you
9 understand that?

10 MR. BISCHOFF: Sure. You're just going to
11 define premises.

12 THE COURT: Yeah, I'm going to say premises
13 is a place where an individual resides. I will
14 recharge circumstances of aggravation.

15 MR. BELL: Thank you, Your Honor.

16 THE COURT: All right. Let us have our
17 jurors.

18 You just want circumstances of aggravation.

19 MR. BELL: Yeah, I --

20 THE COURT: And I'm not going to do the
21 whole thing.

22 MR. BELL: Yeah. I mean, I didn't want you
23 to come back and charge and just charge that one
24 thing. I just wanted it included in the
25 circumstances of aggravation.

1 THE COURT: Circumstances of aggravation.
2 I'll do that. I had an ongoing debate up here
3 about that.

4 (WHEREUPON, the jury enters at approximately
5 4:09 p.m.)

6 THE COURT: Two very brief matters, Ladies
7 and Gentlemen. Ladies and Gentlemen, as part of
8 Assault and Battery of High and Aggravated
9 Nature, the State must prove a circumstance of
10 aggravation. We talked earlier about proving,
11 uh, assault and battery. Now, I'm just going to
12 talk about the element of the circumstance of
13 aggravation that the state must prove beyond a
14 reasonable doubt.

15 Circumstances of aggravation include, but by
16 no means would be limited to, the following: the
17 use of a deadly weapon, the intent to commit a
18 felony, the infliction of serious bodily injury
19 or great disparity between the ages or physical
20 conditions of the parties, a difference in the
21 genders of the parties, a taking of indecent
22 liberties or familiarities with a female through
23 the use of force, the purposeful infliction of
24 shame and disgrace and the resistance of lawful
25 authorities. These are only examples of

1 circumstances of aggravation.

2 I further charge you, Ladies and Gentlemen,
3 in reference to what is one's own premises, one's
4 own premises would be the place where a person
5 resides. I'm now going to ask you to please
6 retire to your jury room. In just a moment, you
7 will be brought the exhibits in this case, the
8 verdict form. And when they have arrived, that
9 will be your signal to begin your deliberations.
10 They'll be with you in two to three minutes.
11 Please retire to your jury room.

12 (WHEREUPON, the jury exits at approximately
13 4:11 p.m.)

14 (WHEREUPON, jury deliberation begins at
15 approximately 4:12 p.m.)

16 (WHEREUPON, a recess is taken from approximately
17 4:12 p.m. to 5:18 p.m.)

18 (WHEREUPON, the Court resumes at 5:18 p.m.)

19 (WHEREUPON, the jury enters at approximately
20 5:19 p.m.)

21 THE COURT: Thank you. Ladies and
22 Gentlemen, took us a little bit of time because
23 we had to preserve the testimony and put it on a
24 disk and we will play it back in the morning,
25 9:30, 9:30. And we have a juror meltdown, is

1 that what I'm seeing? Oh my goodness.

2 But Ladies and Gentlemen, when you are home
3 this evening, the curiosity is going to be
4 enhanced. Please remember not to discuss this
5 matter or allow anyone to discuss it with you.
6 No Colombo. No investigation. You must receive
7 all the information from which you will make up
8 your mind here in court while court is in
9 session. No newspaper, internet, radio,
10 television and the like.

11 When you return, Ladies and Gentlemen, I have
12 your questions. We are -- we will be prepared to
13 play back the testimony you indicated that you
14 need and have that for you in the morning and you
15 will continue your deliberations. Have a
16 wonderful evening. I look forward to seeing you
17 in the morning at 9:30.

18 (WHEREUPON, the jury exits at approximately
19 5:20 p.m.)

20 (WHEREUPON, Court's Exhibit 1 is marked for
21 identification purposes.)

22 THE COURT: All right. Anything before we
23 adjourn for this evening from the State?

24 MR. BELL: Nothing from the State.

25 MR. BISCHOFF: Nothing from the defense.

Remarks

333

1 THE COURT: Very well.

2 (WHEREUPON, the Court recesses for the day at
3 approximately 5:21 p.m.)

4

5 (END OF PROCEEDING)

6

CERTIFICATE

334

1 I, the undersigned, Teresa B. Johnson, Official
2 Court Reporter for the Thirteenth Judicial Circuit of
3 the State of South Carolina, do hereby certify that
4 the foregoing is a true, accurate and complete
5 Transcript of Record of all the proceedings had and
6 evidence introduced in the trial of the captioned
7 case, relative to appeal, in the Court of General
8 Sessions for Dorchester, South Carolina, on this 27th
9 day of May, 2011.

10 I do further certify that I am neither of kin,
11 counsel nor interest to any party hereto.

12
13
14
15
16 _____
Teresa B. Johnson

17 Official Court Reporter
18
19
20
21
22
23
24
25

State of South Carolina	)	Court of General Sessions
	)	
County of Dorchester	)	First Judicial Circuit
	)	
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2009-GS-18-1000
	)	
James West,	)	
	)	
Defendant.	)	

ORIGINAL

TRANSCRIPT OF RECORD

February 5, 2010

St. George, South Carolina

B E F O R E:

The Hon. Diane S. Goodstein, Judge, and a Jury

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

B. Harrison Bell, Jr., Esq.
Mandy Kimmons, Esq.
Attorneys for the State

Scott Bischoff, Esq.
Attorney for the Defendant

Brenda Cooley
Circuit Court Reporter

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E X H I B I T S

COURT'S	DESCRIPTION	I.D.	REC'D
4	Note from the Jury - Testimony of Ms. Mary Ashe	3	

(The exhibit is retained by the Clerk of Court.)

1 (On Friday, February 5, 2010, the defendant
2 being present with counsel, the trial reconvenes at
3 approximately 9:30 a.m., and the following proceedings
4 were had:)

5 (Whereupon, the jury continues deliberation.)

6 (At approximately 10:00 a.m., the defendant
7 being present with counsel, the following proceedings
8 were had:)

9 (Court's Exhibit No. 4, note from the jury,
10 is marked for identification.)

11 THE COURT: All right. They want to hear
12 Ms. Ashe's testimony, Ms. Mary Ashe. That's very short.
13 We'll just play it in its entirety for them.

14 All right. Anything before we bring the jury
15 out, from the state?

16 MR. BELL: Nothing from the state, Your
17 Honor.

18 MR. BISCHOFF: Nothing from the defense, Your
19 Honor.

20 THE COURT: Very well. All right. Let's
21 have the jury.

22 (Whereupon, the jury enters the courtroom at
23 approximately 10:05 a.m.)

24 THE COURT: Good morning, ladies and
25 gentlemen of the jury.

1 (Members of the jury reply good morning.)

2 THE COURT: Let me tell you how we're going
3 to be proceeding. In a moment we are going to be
4 playing the testimony of -- of Ms. Ashe. When you hear
5 the -- the quality is actually pretty good, and what you
6 will notice, though, is that you hear what sounds like a
7 little bit of whispering in the background. What that
8 is, is this is a two-track recording, and the whispering
9 that you're hearing is just the recording picked up a
10 little bit of -- of Bonnie's stenograph work product.
11 So if you hear that little bit of whispering, try not to
12 focus on that. Just focus on what you're hearing.
13 That's actually what that is. Nobody's actually trying
14 to whisper to you, and -- and your hearing is fine and
15 everything. But what we are going to do is that we're
16 going to play Ms. Ashe's testimony, and then you all
17 will retire to your jury room and continue your
18 deliberation. All right. Thank you.

19 Yes, ma'am, Ms. Kimmons.

20 (The recorded testimony of Ms. Mary Ashe
21 begins playback at approximately 10:08 a.m. and
22 concludes playback at approximately 10:15 a.m.)

23 THE COURT: Thank you, ladies and gentlemen.
24 If you will retire to your jury room and continue your
25 deliberations. Thank you very much.

1 (Whereupon, the jury goes to the jury room at
2 approximately 10:15 a.m.)

3 (The trial reconvenes at approximately
4 10:35 a.m., the defendant being present with counsel,
5 and the following proceedings were had:)

6 THE COURT: All right. We have a verdict so
7 we're going to pause and then take the verdict and get
8 right back to probation revocation, folks.

9 Very well. Anything before we bring the jury
10 out, from the state?

11 MR. BELL: Not from the state.

12 THE COURT: Anything from the defense?

13 MR. BISCHOFF: Nothing from the defense, Your
14 Honor.

15 THE COURT: Let's have the jury, please.

16 (Whereupon, the jury enters the courtroom at
17 approximately 10:35 a.m.)

18 THE COURT: All right. My understanding is
19 that the jury has reached a verdict. Is that right?

20 THE FOREMAN: We have.

21 THE COURT: If you'd pass it to me.

22 (The verdict form is tendered to the Court.)

23 THE COURT: Thank you, ma'am. Thank you very
24 much.

25 All right. I find the verdict is in due

1 form.

2 The State of South Carolina, County of
3 Dorchester, in the Court of General Sessions, First
4 Judicial Circuit, indictment number 2009-GS-18-1000, as
5 to the charge of assault and battery of a high and
6 aggravated nature, we the jury unanimously find the
7 defendant guilty. Signed by our presiding juror,
8 Mr. William -- wait a minute now -- Sokula (phonetic).

9 THE FOREMAN: Right.

10 THE COURT: Got it. Very well.

11 Ladies and gentlemen, if this was your
12 verdict in your jury room and it continues to be your
13 verdict here in the courtroom, please indicate by
14 raising your right hand.

15 (Whereupon, each member of the jury raises
16 their right hand.)

17 THE COURT: All jurors have raised their
18 right hand. Thank you so much.

19 Anything from the state before we dismiss our
20 jury?

21 MR. BELL: Nothing from the state, Your
22 Honor.

23 THE COURT: From the defense?

24 MR. BISCHOFF: No, Your Honor.

25 THE COURT: Ladies and gentlemen, I want to

1 thank you so much for your service on this jury and on
2 this panel this week. I certainly hope that you have
3 found your -- your time here and your service to be
4 enjoyable and informative. I can certainly tell that
5 you've given an awful lot to our system, an awful lot of
6 your time, your energy, your effort, and I'm so very
7 grateful to you for every tick of the clock.

8 Let me tell you that you are now at liberty
9 to talk about this case if you wish. However, if you
10 don't want to talk about it, that's perfectly fine.
11 It's completely up to you. It's your choice.

12 And, also, ladies and gentlemen, let me tell
13 you that you have certainly earned your exemption for
14 2011 and 2012 if you choose to exercise that exemption
15 for your jury service, and you are now not eligible to
16 serve on a jury in a court of record for the balance of
17 2010. I know you're upset, I feel your pain, but
18 there's hope in magistrate court and municipal court.

19 I used to tell jurors that the check was in
20 the mail; and then Ms. Graham said you can't tell people
21 that, that's not true and -- we haven't sent it out yet,
22 and you shouldn't say things that aren't true. I
23 thought the check was in the mail.

24 The check is not in the mail, but the check
25 will be in the mail very, very soon. It really -- with

1 the new case management system it doesn't take but about
2 seven days, seven to ten days. Your jury check is sent
3 to you through Jedburg. So, ladies and gentlemen, it is
4 a very small token of all that you have given to us.

5 If now any of you need anything for your
6 employer because you're dashing off to work, remember
7 we'll be happy to get that in the Clerk's Office, first
8 floor, all the way at the end of the building.
9 Delighted to get that for you. You'll certainly get a
10 little certificate and some information when your check
11 does arrive, just a reminder that you did perform your
12 jury duty.

13 And I believe that is all of what I need to
14 tell you.

15 Let me share with you, jurors who serve on
16 criminal matters oftentimes just want to stay present
17 for the sentencing which I'm going to conduct at this
18 time. You're welcome to stay, welcome to go, ladies and
19 gentlemen. It is completely up to you. I'm going to
20 now return you all to your status as public -- members
21 of the public, to use the proper form.

22 Again, thank you all so very much. Those of
23 you that wish to stay, please feel free to stay where
24 you are, and those of you that wish to dash...

25 Thank you so much.

1 All right. Are there motions?

2 MR. BISCHOFF: Your Honor, I just want to
3 renew my motions for directed verdict at this time.

4 THE COURT: Very well. And, respectfully, on
5 the basis as stated earlier, I would deny your motion,
6 noting your exception.

7 MR. BISCHOFF: Thank you, Judge.

8 THE COURT: Yes, sir. Yes, sir.

9 All right. I need a record, please.

10 MR. BELL: His entire record, Your Honor?

11 THE COURT: Yes. I do.

12 MR. BELL: He has out of Indiana in 1983 a --
13 it's called hurling a bomb and arson that he got six
14 years in Indiana.

15 He has a -- he has a driving under the,
16 influence in '91. He got a \$248 fine. Illegal
17 possession of illegal liquor, he got five days.

18 '92, public drunk, time served. '92, public
19 drunk, fine. Resisting arrest, a fine. A driving under
20 the influence second in 1992, one year and \$5,000
21 suspended on fifteen days and a fine and probation.

22 Disorderly conduct in '94. He got forfeited
23 bond.

24 Criminal domestic violence in '96. It says
25 conviction, with a sentence unknown. Simple assault in

1 1996.

2 He was convicted of an assault and battery of
3 high and aggravated nature in 1998. He got ten years
4 suspended to 30 months, 200 hours, and \$250 public
5 defender fund.

6 2006, he got pointing and presenting a
7 firearm. He got two years suspended on 18 months'
8 probation.

9 And I believe that is the balance of his
10 record, Your Honor.

11 THE COURT: All right.

12 MR. BELL: And I believe the victim has
13 stated he would like to address the Court.

14 THE COURT: I'll be happy to hear from him,
15 certainly.

16 Mr. Marquest (phonetic).

17 MR. MARQUEST: Lance Marquest.

18 THE COURT: Yes, sir.

19 MR. MARQUEST: I'd like to say thank you,
20 Your Honor, and I appreciate everyone's coming here.

21 In a case like this, nobody wins. He'll be
22 going to prison for a long time.

23 THE COURT: Mr. Marquest, up here.

24 MR. MARQUEST: And I will never see again out
25 of this eye.

1 And I do not ask for lenience, but I do tell
2 James West: I forgive you. Go and sin no more.

3 And that's all I have to say.

4 THE COURT: Thank you. You may take your
5 seat. Thank you, Mr. Marquest.

6 Yes, sir.

7 MR. BISCHOFF: Thank you, Judge.

8 Mr. West is 48 years old, and as you heard in
9 the testimony, he does have two children that live up in
10 Indiana.

11 I will point out, Your Honor, that while his
12 record is not a great record, in the last ten years the
13 only conviction that he has in addition to this one now
14 is the pointing and presenting.

15 He's been in, Your Honor, since May 19th, and
16 that's eight months and 17 days from what I can tell.

17 I will point out to the Court, Your Honor,
18 that just like you heard in direct testimony, my client
19 is a hard working guy. I think he could use some --
20 some alcohol counseling, and he understands that.

21 But we don't believe that in preparing for
22 this trial this was a frivolous trial in any way. We
23 believe we had some strong defenses based on the
24 situation, and he wishes that Mr. Marquest and him had
25 never gotten into that sort of a scuffle that it did,

1 and he certainly didn't wish any -- any harm on him and
2 the amount that actually resulted. He told me numerous
3 times in our talks, you know, I like Lance, we probably
4 didn't get along like we should have.

5 But I don't think he's a bad guy today. I
6 think he was in a bad situation. He knows he probably
7 needs to get the drinking under control, and that's
8 certainly what he plans to do.

9 He doesn't plan to live here anymore, Your
10 Honor. He said regardless of what happens, when he gets
11 done he wants to go back up to Indiana. There's nothing
12 keeping him here. Just like you heard, he really is a
13 simple guy, doesn't have a lot of friends. He can
14 certainly get construction work up in Indiana. That's
15 where he plans on going. He doesn't plan on staying
16 here.

17 I ask that you give him all the consideration
18 you can under the circumstances. I know that you can
19 sentence him up to ten years today. However, I hope
20 that you take into consideration that we didn't waste
21 the Court's time here. We really did believe that we
22 had some valid defenses, but the jury unfortunately did
23 not see it our way today.

24 But, again, Mr. West accepts responsibility
25 for the verdict, and I ask that you give him the

1 consideration that I believe he deserves.

2 THE COURT: Thank you so much.

3 Anything further from anyone prior to
4 sentencing?

5 MR. BELL: Nothing from the state.

6 THE COURT: Very well.

7 (Mr. Bischoff and the defendant confer.)

8 MR. BISCHOFF: Nothing from the defense, Your
9 Honor.

10 THE COURT: All right.

11 Mr. West, I'm going to commit you, sir, to
12 the South Carolina Department of Corrections for a
13 period of eight years. I'm giving you credit for the
14 time that you have served, which is eight months and 17
15 days, and asking that the South Carolina Department of
16 Corrections please assist you in placing you in the ATU,
17 the alcohol treatment unit, while you are with the South
18 Carolina Department of Corrections as space is
19 available.

20 Good luck to you, sir.

21 MR. BISCHOFF: Thank you, Your Honor.

22 THE DEFENDANT: Thank you, Your Honor.

23 MR. BELL: Thank you, Your Honor.

24 THE COURT: Ladies and gentlemen, that
25 concludes that case. Delighted, again, to have you

1 remain as long as you will stay with us, but I thought I
2 certainly owed it to you to let you know that matter is
3 now concluded. Thank you so much.

4 (Whereupon, the trial concludes at
5 approximately 10:45 a.m.)
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1 CERTIFICATE OF THE COURT REPORTER

2
3 I, the undersigned, Brenda Cooley, Circuit
4 Court Reporter for the Ninth Judicial Circuit of the
5 State of South Carolina, do hereby certify that the
6 foregoing is a true and accurate transcript of record
7 of the proceedings had and the evidence introduced in
8 the hearing of the captioned case, pages 3 through 14,
9 inclusive, relative to appeal, in the Court of General
10 Sessions for Dorchester County, St. George, South
11 Carolina, on the 5th day of February 2010.

12 I do further certify that I am neither of
13 kin, counsel, nor interest to any party hereto.
14

15
16 December 22, 2010

17
18 Brenda Cooley

19 Brenda Cooley

20 Circuit Court Reporter
21
22
23
24
25

WITNESSES

J Rodriguez

DOCKET NO. 2009GS18-1000

The State of South Carolina

County of DORCHESTER

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Summerville Police Department

09041192

COURT OF GENERAL SESSIONS

August 3, 2009 TERM

ARREST WARRANT NUMBER

H619217

Arrested: May 20, 2009

THE STATE

vs.

James West

ACT OF GRAND JURY
TRUE BILL

DATE

7/30/09

Foreperson of Grand Jury

Date: August 3, 2009

VERDICT

Indictment for

**ASSAULT AND BATTERY OF A HIGH
AND AGGRAVATED NATURE (ABHAN)**

SC Code: Common Law

Foreperson of Petit Jury

Date:

350

FILED-RECORDED
2009 JUL 31 AM 9:23
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

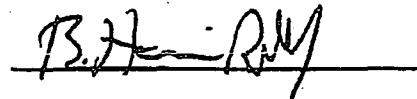
INDICTMENT
2009GS18-1000

At a Court of General Sessions, convened on August 3, 2009 the Grand Jurors of
Dorchester County present upon their oath:

**ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE
(ABHAN)**

The defendant, James West, did in Dorchester County on about May 18, 2009 unlawfully
commit an assault and battery on the victim, Lance Malmquist, accompanied by
circumstances of aggravation, to wit: causing serious bodily injury to the victim by
beating him with his hands, thereby violating the Common Law of the State of South
Carolina.

Against the peace and dignity of the State, and contrary to the statute in
such case made and provided.

A handwritten signature in dark ink, appearing to read "B. H. Bell", is written over a horizontal line.

Harrison Bell, Solicitor

STATE OF SOUTH CAROLINA

COUNTY OF Dorchester
 STATE VS.
James West

AKA: _____
 Race: _____ Sex: _____ Age: 47
 DOB: _____ SS#: _____
 Address: _____
Summerville, SC 29483

DL#: _____ SID#: _____

In disposition of the said indictment comes now the Defendant who was:

TO: Assault and battery of a high and aggravated nature (ABHAN)

In violation of § Common Law of the S.C. Code of Laws, bearing CDR Code #

0013

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
 The charge is: ☒ As indicted, ☐ Lesser included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant Initial)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

B. Harrison Bell, Harrison SC Bar# 7363 James West Attorney for Defendant SC Bar# _____

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of 3 days/months/years ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Dept. of Corrections

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135. (3 months; 1 day)

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1)(Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-285 (DUI Breath Test)	\$25	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
§ 90.11 TP (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

Craig Harman
 Clerk of Court/ Deputy Clerk

Brenda Cooper

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009GS18-1000

AW#: H619217

Date of Offense: 5/19/2009

S.C. Code § Common Law

CDR Code #: 0013

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

2011 JAN 30 PM 4:32
 CLERK OF COURT

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ Beginning _____

\$ _____ paid to Public Defender Fund

Other: Please place in the file with SCDC

☐ Appointed PD or appointed other counsel, § 35.13 TP requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE Diane [Signature]

Judge Code: 2112

Sentence Date: 2-5-2010

FORM 5

STATE OF SOUTH CAROLINA)

County of Dorchester)JAMES West #339200)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2010-CP-18-2806

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 Allendale Correctional Institution (S.C.D.C.) P.O. Box 1151 Fairfax, S.C. 29827
2. Name and location of Court which imposed sentence Dorchester County Court 5200 East Jim Bilton Blvd. St. George, S.C. 29477
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009 GS 18-1000
 - (b) _____

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2010 OCT -7 PM 2:55
CERYL GRAMM
CLERK OF COURT
DORCHESTER COUNTY

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 2-5-2010 8 yrs.
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty was found guilty in jury trial
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
no
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Did not understand and was not instructed that I could do so
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Was not represented properly by my attorney
- (b) Witnesses were not subpoenaed
- (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) I feel that my attorney did not defend me by failing to adhere to my request.
- (b) When I informed my attorney of the witnesses that could testify on my behalf, my attorney did not have my witnesses in court.
- (c) My attorney forced me to relinquish my constitutional rights and I was forced to take the stand leaving me open for examination and cross-examination.
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. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- 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?

NO

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) ONLY recently discovered my options
 (b) NO ATTORNEY
 (c) COULD NOT AFFORD AN ATTORNEY

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes - Public Defender
 (b) your trial, if any? yes - Public Defender
 (c) your sentencing? yes - Public Defender
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

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. Mr. Scott Bischoff
office of the Public Defender
 ii. First Judicial Circuit
107 West 6th North Street, Suite 100
 iii. Summerville, South Carolina 29483
 (b) the proceedings at which each such attorney represented you:
 i. SAME AS ABOVE
ONLY ONE CASE
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:

Retrial AND/OR Overturned sentence AND/OR
Sentence reconsideration

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of Allendale)

VERIFICATION

I, JAMES West # 339200, 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 West

SWORN to and subscribed before me this _____
 day of _____.

 Notary Public (L.S.)

My Commission Expires: _____

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, JAMES West #339200, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this

28 day of September, 2010.


Notary Public

My Commission Expires: 5/18/14

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2010-CP-18-2806
	)	
James West, #339200,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	(Appointment of Counsel Requested)
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed October 7, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. The Applicant was indicted at the August 2009 Term of the Dorchester County Grand Jury for Assault and Battery of a High and Aggravated Nature (2009-GS-18-1000). He was represented by Scott Bischoff, Esquire. On February 5, 2010, the Applicant proceeded to jury trial before the Honorable Diane S. Goodstein. He was found guilty and sentenced to eight (8) years imprisonment for Assault and Battery of a High and Aggravated Nature. The Applicant did not appeal his guilty plea or sentence.

Attached herewith and incorporated herein are the records of the Dorchester County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina

Department of Corrections, and the trial court transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.

- a. "Was not represented properly by my attorney";
- b. "Witnesses were not subpoenaed... I feel that my attorney did not defend me by failing to adhere to my request when I informed [him] of the witnesses that could testify on my behalf and [he] did not have them in court"; and
- c. "My attorney forced me to relinquish my Constitutional rights, and I was forced to take the stand, leaving me open for examination and cross-examination."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 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, 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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).

V.

Each and every allegation contained within the application not herein before either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

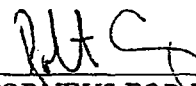
Respectfully submitted,

ALAN WILSON
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By: 
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July 7, 2011.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2010-CP-18-2806
	)	
JAMES WEST, 339200.	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Charles T. Brooks, III, Esquire
 Law Office of Charles T. Brooks, III
 309 Broad Street
 Sumter SC 29150

DATED this 7th day of July, 2011.


 Lauren Meara, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT

2010-CP-18-2806

James West,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	PCR Hearing
State of South Carolina	)	
	)	
Defendant.	)	
	)	
	)	

May 24, 2012
Orangeburg, South Carolina

B E F O R E:

The Honorable DeAndrea G. Benjamin, Judge

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

Sally Elliott, Esquire
Attorney for the State

Charles Brooks, Esquire
Attorney for the Defendant

Hilda M. Jordan, CVR-M
Circuit Court Reporter

I N D E XWITNESS/DESCRIPTIONPAGE NO.

PCR HEARING

TESTIMONY:

James West direct..... 3

James West cross..... 11

Jonathan Bischoff direct..... 18

Jonathan Bischoff cross..... 21

EXHIBITS:

No exhibits were marked to this proceeding.

Certificate of Court Reporter 30

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3

1 MS. ELLIOTT: Mr. James West. He was indicted on
2 assault and batter of a high and aggravated nature. He had
3 a jury trial, Judge Goodstein presiding. He was convicted
4 of ABHAN. He was sentenced to eight years. He did not
5 appeal. He timely filed an application for post conviction
6 relief in which he is claiming ineffective assistance of
7 counsel, did not subpoena the witnesses and did not adhere
8 to his requests and forced him to testify.

9 THE COURT: All right. Yes, sir. Call your first
10 witness.

11 MR. BROOKS: We call Mr. West to the stand.

12 CLERK OF COURT: Could you put your left hand on the
13 Bible and raise your right hand and state your name for the
14 record.

15 MR. WEST: James West.

16 (WHEREUPON, James West was sworn to tell the truth.)

17 THE CLERK: Thank you. You may be seated.

18 JAMES WEST DIRECT EXAMINATION

19 BY MR. BROOKS:

20 Q. Mr. West, how are you today?

21 A Fine.

22 Q All right. I'm gong to ask you a couple little
23 background stuff that we kind of talked about. You were
24 found guilty of assault and battery of a high and aggravated
25 nature. You got eight years; is that correct?

1 A Yes, sir.

2 Q As a matter of fact you were scheduled to get out next
3 year?

4 A Yes, sir.

5 Q About a little over a year from now you'll be on the
6 street.

7 A 13 months.

8 Q Okay. And we talked about this, and we talked about if
9 we win, what that means?

10 A Yes, sir.

11 Q And that means you go back and face this trial all over
12 again?

13 A Yes, sir.

14 Q And even though you've got maybe around a year to do
15 you said you still wanted to go forward?

16 A Yes, sir.

17 Q All right. You understand all those risks that I
18 explained to you?

19 A Yes, sir.

20 Q Okay. Now, you brought this PCR against your former
21 lawyer in your trial, Mr. Bischoff; is that correct?

22 A Yes, sir.

23 Q He was Court appointed?

24 A Yes, sir.

25 Q And you spent the entire time in jail between the time

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5

1 you were arrested and the time you went to trial?

2 A Yes, sir. I asked him for a bond adjustment. He never
3 went for a bond adjustment or nothing.

4 Q Okay.

5 A So I had to stay there.

6 Q All right. In your trial you testified; is that right?

7 A Yes, sir.

8 Q And you said you didn't want to testify?

9 A He said the only way -- for the self-defense that we
10 was going, he said I'd have to testify.

11 Q Okay.

12 A You know, he didn't want me to tell about the drugs
13 that was involved, because that's what the fight started
14 over was the drugs.

15 Q Okay, but now you understand that self-defense would
16 have been your defense to this situation?

17 A Yes, sir.

18 Q Is there some other way that could have come out other
19 than you testifying?

20 A No, sir, it was just me and him there. So I was going
21 to have to testify.

22 Q Okay. And the jury heard from you and they convicted
23 you; is that right?

24 A Yes, sir.

25 Q Now, what complaints do you have of Mr. Bischoff?

1 A Well, sir, I mean, he never -- the initial officer that
2 was on the case, Sgt. Wright, was never introduced -- I
3 mean, he never testified, and in his police reports it state
4 when he got to the scene he seen a white man holding his eye
5 having a metal cane. The police reports was never
6 introduced into evidence. I asked to get several people
7 subpoenaed. He told me he wasn't going to subpoena them. I
8 showed him a thing that I seen the law book, Ake verses
9 Oklahoma.

10 Q Who did you want to subpoena, first, now?

11 A Well, my boss, because people was coming in the jail
12 telling me what Lance was going to testify and he's
13 testified that he come home from work or he was working in
14 the front yard.

15 Q Now, when you say Lance, you're talking about the
16 victim?

17 A The victim.

18 Q Okay. Go ahead.

19 A Mike could testify he no longer worked for the company.
20 He ain't worked for the company in a year.

21 Q Mike would have been the boss?

22 A Yes. Gary Miller, he was our other roommate at the
23 time.

24 Q Where is Gary now?

25 A Gary, I don't know where he's at now.

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1 Q He's got a life sentence?

2 A Oh, no, no. Gary was -- Gary was in jail at the time
3 of the trial and I wanted him because at the trial Lance
4 testified that Gary was in the house.

5 Q Okay. Now, who else you want?

6 A It was -- and Gayle Law. Gayle Law was the gentlemen
7 who brought me home that day from work.

8 Q Okay.

9 A Lance states that he was out in the yard working and
10 doing this at the shop. The trailer that we pulled has to go
11 in the shop. Only certain people has a key to the eight foot
12 fence.

13 Q Okay.

14 A He was no where around. All right. He testified he
15 was at the house all day.

16 Q Okay. And you also wanted him to get the police
17 officer in to talk about the cane?

18 A Yeah, that's Sgt. Wright.

19 Q Okay.

20 A That even in the police reports states that when he
21 rode up to West Dottie Street and Maple that the subject was
22 holding his eye with a metal cane.

23 Q Now, did they offer you anything to try to keep you
24 from going to trial?

25 A 10 years suspended to seven and probation.

1 Q Okay, and you turned that down, obviously.

2 A Yes, sir.

3 Q Okay. And you went to trial. What else are you saying
4 Mr. Bischoff did wrong other than subpoenaing these
5 witnesses.

6 A After I got to Allendale I learned I had the right,
7 since I took a jury trial that I had a right to a direct
8 appeal.

9 Q And you didn't get your chance to do that?

10 A No. He never told me nothing.

11 Q He didn't explain any of that to you?

12 A When we got downstairs, I shook his hand. I said, we
13 rolled the dice, we lost.

14 Q Okay.

15 A When I got to Allendale I wrote him and asked him what
16 he was going to do about it. He was the 10 was over. He
17 said we had talked about this, which we didn't. And by the
18 way the Judge told you. The Judge didn't tell me nothing.
19 I got the transcripts. Judge said nothing about no appeal.
20 Nobody told me nothing about no appeal.

21 Q 18 years, have a nice day?

22 A 18 years, have a nice day.

23 Q So you didn't get your appeal?

24 A Right.

25 Q And so you didn't subpoena the people you just named,

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9

1 and he didn't do that appeal. Is there anything else you
2 want to tell --

3 A I wanted a certain amount of police documents
4 subpoenaed where Travis has a record of calling the police
5 saying I beat him up. And it's always been found false.

6 Q The victim had prior allegations against you?

7 A Several.

8 Q And you wanted the police officers to, at least,
9 testify about that; is that right?

10 A Yes.

11 Q So other than that, we've covered the witnesses, we've
12 covered the prior allegations, and we've covered not getting
13 your direct appeal?

14 A Yes.

15 Q Is there anything else about Mr. Bischoff's
16 representation that you want to tell Judge Benjamin here
17 today?

18 A I just don't think he represented me to the best of his
19 knowledge. I mean, he -- you know, the trial, the day we
20 went to trial he come tell me, I got a doctor that's going
21 to testify it's blunt trauma and all that. I get in the
22 Court and it's the prosecutor's doctor.

23 Q Okay.

24 A But he wouldn't subpoena nobody. To me he just didn't
25 do his job.

1 Q Okay. Is there anything else? I believe we done put
2 it out there?

3 A I showed him a statement, Ake verses Oklahoma, that
4 states that he's supposed to --

5 Q Well, listen, the Judge know the law. What you're
6 saying is he didn't subpoena the people and even though
7 you're indigent he had the ability to do so; am I right?

8 A He said the State didn't have to pay for that --

9 Q Okay.

10 A -- because it wasn't a capital case.

11 Q And that's one of your points of contention about his
12 representation?

13 A Yes.

14 Q We've covered -- I believe we've covered it all now,
15 Mr. West. Is there anything else we hadn't covered?

16 A Also there was a change in my indictment.

17 Q A change in your indictment?

18 A Yeah. I got the different -- it was -- the grand jury
19 indictment was changed, and I was I was never notified about
20 that. It's got some writing on my paper work, but I was
21 never notified of that, and --

22 Q How so was it changed?

23 A I don't know. It just say Judge did not see new version
24 of something, in somebody's handwriting. I've got it over
25 there.

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1 Q Now --

2 A Nobody told me nothing about no changed indictment or
3 nothing.

4 Q Okay. That didn't have anything to do with the trial
5 now did it?

6 A Well, I don't know. I didn't know you can change your
7 indictment without going through a grand jury indictment and
8 everything again. I asked for the transcripts of my grand
9 jury indictment and my pre-trial.

10 Q Okay.

11 A No. I was never at my pre-trial hearing. He said I
12 didn't have to be there.

13 Q Okay.

14 A Did it even happen?

15 Q Okay. And what you've told the Judge, these are
16 reasons why you think you should get a new trial; is that
17 right?

18 A Yes, sir.

19 Q Is there anything else, Mr. West?

20 A Not that I can remember. I'm kind of nervous.

21 Q I understand, I understand. You done put it all out
22 there. All right. Go ahead and answer any questions from
23 Ms. Elliott.

24 JAMES WEST - CROSS-EXAMINATION

25 BY MS. ELLIOTT:

1 Q Hi, Mr. West. What changes were to your indictment?

2 Was it where they blacked out some stuff?

3 A Yeah, it was blacked out and --

4 Q Okay, and that stuff that you got, I guess was an
5 attachment to our return from our office?

6 A Yes, ma'am.

7 Q Okay, and you probably don't know -- and that's
8 probably what you're talking about --

9 A No, no, no. This was lined. It was on the bottom --
10 I've got a copy of it over there. It's not blacked out,
11 it's just lined out. About beating with hands or weapon or
12 something, upon the hands. Says on the top, May 18 or 19 in
13 writing and then there's a line on the bottom that was
14 crossed out.

15 Q Okay. Do you understand the indictment that's been
16 filed in your case does not have that information on it and
17 the indictment that we're proceeding on does not have that
18 information?

19 A Yeah, see, the one I don't have that.

20 Q And then that is because we're required to redact
21 victim names and addresses --

22 A Yeah, no, this was just a pencil cross. It wasn't a
23 black-out.

24 Q And that's just on some document, the indictment that
25 you got from somebody?

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1 A Well, it's from my Motion to Discovery. The term -- I
2 had to file to get a case file, to have a judge get me
3 copies.

4 Q Pencil --

5 A Well, it's pen line through.

6 Q Okay.

7 A And on the bottom it was wrote in pen.

8 Q So it could be something your lawyer or somebody else
9 wrote on there, you don't know where it came from?

10 A Well, the Judge didn't see the new version. I guess it
11 was my lawyer.

12 Q Which -- okay. Did you tell your attorney you wanted
13 Sgt. Wright to come and testify before trial; did you tell
14 him that?

15 A Well, I figured he was my lawyer he would tell me that
16 I needed -- who needed to come.

17 Q Okay. So you didn't tell him that you wanted Sgt.
18 Wright to come and testify?

19 A Well, I figured all police officers. The other two was
20 there.

21 Q Okay. So you didn't tell him you wanted Wright there
22 to testify?

23 A I said witnesses.

24 Q Okay, but you didn't specify Sgt. Wright?

25 A Well, the ones I did set aside didn't get.

1 Q You just think he should have had him there, you didn't
2 tell him that?

3 A As an officer of the court I should think so. They had
4 his tape there as a representative of him.

5 Q But he wasn't somebody you had asked your lawyer to
6 subpoena?

7 A No, I figured they had his tape there and his video.

8 Q Okay. So they did have the tape and video in the
9 courtroom?

10 A They had the -- voice video. The copy of the tape
11 didn't come out so good.

12 Q That's right. And that was played for the jury wasn't
13 it?

14 A Yes, ma'am.

15 Q Okay. So the jury had that information?

16 A They had what the officers responding to the scene
17 said.

18 Q Okay. And you're boss Mike -- what's his last name?

19 A Taylor.

20 Q What?

21 A Mike Taylor.

22 Q Taylor.

23 A ECC Construction.(sp)

24 Q Okay. Did you ask your attorney to subpoena Mike
25 Taylor?

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1 A Yes.

2 Q And what did he say?

3 A He said he talked to Mike and Mike said that I was a
4 hot-head. That was the only thing he said.

5 Q And he was concerned that that might come out on
6 cross-examination; isn't that true?

7 A I guess.

8 Q That wouldn't be a good thing for the jury to hear
9 would it?

10 A Well, it wouldn't be a good think when people's lying
11 and ain't nobody done nothing about it.

12 Q And Gary Miller would have said that -- And I do
13 remember in the transcript that the victim at one point said
14 that Mr. Miller might have been there when he got home?

15 A No. He said he was there and Devon was there.

16 Q Okay. Then later he back-tracked and didn't say that;
17 isn't that true?

18 A No. He said that at first and then he back-tracked and
19 then he said that Gary and Devon was there.

20 Q Okay. All right. So the jury already knew he was kind
21 of back and forth on that issue; isn't that true?

22 A He said he was working and Dale Law (sp) could have
23 testified that he wasn't working.

24 Q Well, he said he was doing odd jobs?

25 A He said he was working in the front of the house and in

1 the shed.

2 Q Yeah.

3 A He can't get in the shed without a key.

4 Q And I believe you testified that when you got home with
5 Dale Law, no one was there; is that correct?

6 A No one was there.

7 Q Also the jury heard that?

8 A Yes.

9 Q Okay. And did you ask your attorney to subpoena Dale
10 Law for the trial?

11 A Yes, I did.

12 Q And what did he tell you?

13 A He didn't say nothing. We had one of these little
14 talks when the time when I brought up Ake verses Oklahoma,
15 he said, you know, State don't have to do it because I'm
16 indigent. That Ake verses Oklahoma specified for capital
17 crimes and didn't concern -- pertain to me. I can't
18 remember what it was.

19 Q And it is a capital crime case. And didn't one of the
20 officers that during trial that there had been a lot of
21 calls that they had been out to the house frequently because
22 of calls from the victim?

23 A I think previously was about the earlier call that day
24 that when he hit me with the weapon previous.

25 Q Did they not talk about -- one of the officers talk

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1 about having -- that there was a history of calls -- maybe
2 that was a different case?

3 A Yeah, I do not believe so.

4 Q Okay. All right. But ultimately the issue is what
5 happened in the kitchen or right outside the kitchen that
6 night, isn't that true? All this other stuff is surface
7 stuff but really what's important is what happened outside
8 the kitchen?

9 A No, I don't believe it's surface stuff. It's probably
10 deeper than that, because that's what pertaining to me
11 self-defending myself. He's got a record of hitting me with
12 his cane and I was protecting myself.

13 Q Okay.

14 A So I don't think that would be surface.

15 Q So -- and your defense was self-defense, that you
16 walked through there and he whopped you and you hit him in
17 self-defense; is that correct?

18 A Yes, ma'am. He just kind of brushed over the
19 self-defense and the judge gave the directions, I guess you
20 would call them, on self-defense.

21 Q You got to testify and tell your version of what
22 happened; is that true?

23 A Yes, ma'am.

24 Q And you presented to the jury what happened to you that
25 night?

1 A Yes, ma'am.

2 Q And why you did what you did?

3 A Yes, ma'am.

4 Q And you're the only one who knew that?

5 A Me and Lance.

6 Q Okay. All right.

7 MS. ELLIOTT: That's all I have, Your Honor.

8 THE COURT: Anything else?

9 MR. BROOKS: No further questions, Judge.

10 THE COURT: All right. You may step down.

11 MR. BROOKS: We call Mr. Bischoff to the stand.

12 THE CLERK: State your name for the record, please?

13 MR. BISHOFF: Jonathan Scott Bischoff, II.

14 (WHEREUPON, Jonathan Scott
15 Bischoff, II. was sworn to tell the truth.)

16 THE CLERK: Thank you. You may be seated.

17 JONATHAN SCOTT BISCHOFF - DIRECT EXAMINATION

18 BY MR. BROOKS:

19 Q Mr. Bischoff.

20 A Mr. Brooks.

21 Q You represented Mr. West?

22 A I did.

23 Q And you were court appointed?

24 A I was.

25 Q Okay. Can you give a brief summary of what the case

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1 was against him?

2 A Sure. Mr. West was accused of violating the common law
3 statute with ABHAN for a fight with his roommate. The
4 allegations were the two were bickering back and forth and
5 drinking throughout the day and that sometime later in the
6 evening there was an altercation whereby I believe Mr.
7 West's story was that he had gotten up in the night after
8 they had gone to their separate bedrooms and gone to the
9 bathroom. And then from the bathroom was walking towards
10 the kitchen when he was attacked by his roommate and he
11 defended himself and there was an injury to Mr. Malmquist
12 eye occurred and I think Mr. West left the house. Mr.
13 Malmquist called 911 and the cops came and, of course, he
14 was arrested that evening, if I remember correctly,

15 Q Matter of fact, Mr. Malmquist, I think that's how --

16 A I think it's Lance Malmquist.

17 Q Now, --

18 A We didn't know that at the time, actually, I have
19 pictures of the injury from the night of the incident, but I
20 believe he came to trial with an eye patch, if I remember
21 correctly and stated he had lost vision in that eye as a
22 result of the altercation.

23 Q And Mr. West told you it was self-defense?

24 A Correct.

25 Q And did you bring the officer, Sgt. Wright, did you

1 think to subpoena him to come to trial?

2 A I do not remember subpoenaing him. In going through my
3 file, I see that I read over his report and that I had
4 prepared notes for cross-examination of him. But I don't
5 remember subpoenaing him. No.

6 Q Now what about -- did Mr. West talk about Mr. Malmquist
7 boss named Mike?

8 A I remember something about a Mike. I don't really
9 remember how it would have been relevant to the trial at the
10 time and I don't remember Mike being in the house or --

11 Q Did Mr. West tell you something about Mr. Malmquist
12 statement was he was at work and it was Mr. West's
13 expectation that this Mike would testify that Lance no
14 longer worked there?

15 A I don't remember that.

16 Q Okay. And the other roommate, I believe his name is
17 Gary, did you think to subpoena to testify?

18 A I did not. To be honest with you I don't even remember
19 another roommate until I was sitting here in court. I don't
20 remember another roommate being involved.

21 Q All right. And you explained to Mr. West in order to
22 get self-defense he had to testify; is that correct?

23 A Correct. When he rejected the plea offer that was 10
24 years suspended to three years with probation on the 26, I
25 believe, of January, 2010. We went to trial a few weeks

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1 later and maybe even less than that and I remember telling
2 him that we were going to go to trial and the claim was
3 self-defense that I would need him to testify.

4 MR. BROOKS: Beg the Court's indulgence, Your Honor.

5 THE COURT: Okay.

6 MR. BROOKS: No further questions, Your Honor.

7 THE COURT: Please answer any questions Ms. Elliott
8 has.

9 MS. ELLIOTT: Thank you, Your Honor.

10 JONATHAN SCOTT BISCHOFF - CROSS-EXAMINATION

11 BY MS. ELLIOTT:

12 Q I believe Mr. West testified on cross-examination that
13 his boss would have testified that he was a hot-head. That
14 you informed him that his boss would testify that he was a
15 hot-head. Would you have wanted to use him as a witness?

16 A No. And the idea was not for him to be the aggressor.

17 Q Okay.

18 A But I don't remember that exchange.

19 Q All right. I guess -- what was your trial strategy
20 overall, did you want to pick through every word that came
21 out of the victim's mouth about whether he was working that
22 day or not, leading up to it and whether someone was home or
23 not when he first arrived there, when the indictment
24 occurred hours later?

25 A No. I mean, it was my understanding and what I believe

1 was that, if I remember correctly, there was drinking by Mr.
2 West and drinking by Mr. Malmquist throughout the day. Maybe
3 somebody else was involved. I do remember something about a
4 shed. But then there was an altercation that took place
5 early in the night and the cops came and then Mr. West and
6 Mr. Malmquist went their separate ways.

7 Q And was there anyone else present at that earlier
8 altercation?

9 A I don't think so. I don't remember. When they went
10 their separate ways and another altercation took place. So,
11 no, I didn't think it was important to give the jury an idea
12 of specifics regarding the entire day. I was trying to focus
13 them in on my client was attacked in the kitchen as he told
14 me he was.

15 Q Documents show that there has been numerous prior calls
16 by the victim complaining about the defendant's assaults
17 upon him. Would you have wanted to present that to the
18 jury?

19 A I --

20 Q And did he ask you --

21 A -- don't remember that being discussed. I really
22 don't.

23 Q And when you say you don't remember do you think it was
24 likely that it was not discussed?

25 A I mean, I -- for example, Mr. West asked me to

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1 investigate the situation and we had an investigator who we
2 employed at the public defender's office and we went out to
3 the house and I got a lay-out of the rooms and the house
4 itself. If he had told me about that, I'm pretty sure I
5 would have looked into it.

6 Q Okay. And as to all of these witnesses, you would have
7 looked into it had he told you about it?

8 A Yes, ma'am.

9 Q And tell me if you could -- and you were appointed to
10 represent him; correct?

11 A Correct.

12 Q You were in the public defender's office at the time?

13 A I was.

14 Q Okay. And how long had you been practicing law at that
15 time?

16 A Just over a year.

17 Q Okay. You had opportunities to sufficiently confer
18 with your client in preparation for trial?

19 A Yeah. We spoke many times.

20 Q Okay. He gave you his version of the facts?

21 A He did, and when he rejected the plea offer, I remember
22 going to him and meeting with him a couple of times. I
23 believe with the assistance of Mr. Loy in discussing our
24 trial strategy and went over it with him at least two or
25 three times.

1 Q And Mr. Loy was senior attorney in your office?

2 A He was.

3 Q And he sat second chair during the trial?

4 A He did.

5 Q And you conferred with him about trial strategy and
6 other matters?

7 A Repeatedly. Correct.

8 Q So he assisted you in your preparations as far as
9 strategy and the issues and the facts?

10 A He did.

11 Q Okay. Did you tell you client the evidence the state
12 would present against him at trial?

13 A Yes.

14 Q And you discussed with him the defense of self-defense?

15 A I did.

16 Q And what you would present and how you would present
17 it?

18 A We did.

19 Q And how was that going to happen?

20 A Well, it was only a fight between my client and the
21 victim in the case. Nobody else that I remember was
22 eye-witness to the event or was in the house at the time,
23 that I was going to need him to tell his story in order to
24 get self-defense as a defense presented to the jury.

25 Q And did he understand that that was his only

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25

1 opportunity, really, to present that defense of
2 self-defense?

3 A Yes. Mr. Loy and I discussed that with him.

4 Q Okay, and in order to do that he would have to waive
5 his right against self-incrimination and agree to testify?

6 A Right.

7 Q Okay. And he concurred in that trial strategy?

8 A Yes. That was the strategy going in was self-defense.

9 Q That was the only way you could get it to the jury?

10 A Correct, because the victim was claiming that my client
11 had stuck his fingers in his eye and that he was not the
12 initial aggressor, and so we had to get it in somehow.

13 Q And did you -- he alleges you forced or coerced him
14 into testifying. Did you do that?

15 A No.

16 Q And who's decision ultimately to decide to testify at
17 trial?

18 A Mr. West.

19 Q And he understood that he had the right not to do it
20 but chose to testify?

21 A Right. I told him that he does not have to testify and
22 the judge had instructed him that he does not have to
23 testify and that that decision is solely up to him, but I
24 explained to him that there's no way we can get self-defense
25 to a jury without him testifying.

1 Q Okay.

2 A He had a choice, but --

3 Q And what do your notes show that you planned to elicit
4 from Sgt. Wright?

5 A That he responded to a call at the time, 5/19/2009 at
6 2:00 a.m. That he saw Mr. Malmquist standing with a metal
7 cane, that he saw him standing with a fresh shirt with no
8 blood on it, that he had taken a shower, that his eye was
9 injured, that it happened about an hour before they arrived
10 at the house the second time. That he could smell beer on
11 him. That the officer, Wright, could smell beer on
12 Malmquist. That there were scratches on his forearms, that
13 he was aware of a prior incident around 10:00 p.m. And that
14 basically on his report it indicated that there was no
15 follow-up investigation done.

16 Q What information that you planned to elicit from Sgt.
17 Wright was crucial to self-defense, if any, that wasn't
18 already presented.

19 A I mean, maybe the scratches on his forearms, but that
20 would really be about it.

21 Q Okay, and there is no dispute that there was an initial
22 altercation and then a later altercation; is that correct?

23 A It's my understanding --

24 Q Okay.

25 A -- correct, yes.

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1 MS. ELLIOTT: I believe that's all I have. Thank you,
2 Your Honor.

3 THE COURT: Anything else?

4 MR. BROOKS: Nothing, Your Honor.

5 THE COURT: You may step down.

6 MR. BROOKS: That's the petitioner's case.

7 MS. ELLIOTT: Oh, I'm sorry. I do have something I do
8 need to ask, him, is that all right. I apologize. I'm
9 sorry. I completely forgot to ask him about the appeal. I
10 think, didn't he raise an issue about the appeal?

11 JONATHAN SCOTT BISCHOFF - CONTINUED REDIRECT EXAMINATION

12 BY MS. ELLIOTT:

13 Q Did you discuss with your client the right to appeal
14 after his conviction?

15 A I did.

16 Q And what did you tell him?

17 A I met with him at the lower level of the Dorchester
18 County Courthouse and explained to him that he's got a right
19 to appeal within 10 days. That if he wants to appeal he
20 should tell me and I'll follow through with that appeal.
21 But we did. I remember shaking hands with him through the
22 small cut-out and he said, no, we gave it a good run. I'm
23 not interested in an appeal.

24 MS. ELLIOTT: That's all the questions I have.

25 THE COURT: All right.

1 MR. BROOKS: No other questions, Your Honor.

2 Judge, that's the petitioner's case.

3 THE COURT: All right. Anything else from the state?

4 MS. ELLIOTT: That's all, Your Honor. Thank you.

5 THE COURT: All right. Based on the testimony I have
6 before me the transcript, I guess to the issue regarding the
7 attorney making him testify, I think -- well, I find -- back
8 on page 221 that the Court thoroughly went into his -- Mr.
9 West's constitutional rights, and regarding his decision to
10 testify and on page 225, 226, that after hearing the through
11 colloquy regarding his right to testify that Mr. West
12 informed the Court that he understood his right and was
13 giving that right up and that he did wish to testify.

14 Also that it was timely explained to him his right not
15 to testify. So as to that issue I find there's not a
16 deficiency or prejudice to the applicant. As to the issue
17 regarding the witnesses to subpoena. Based on the testimony
18 that's before the Court I find that that -- there is no
19 deficiency or prejudice to the applicant. As to the issues
20 of witnesses to subpoena, based on testimony before the
21 court I find that there is no deficiency or prejudice to the
22 applicant based on the attorney strategy for trial. As to
23 the issue of direct appeal, based on testimony that I have
24 here before me, I find that Mr. West was informed of an
25 appeal in the time period of -- regarding that appeal. And

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1 finally the issue regarding indictment. It's not raised in
2 the application and therefore I will consider it. I don't
3 even have a copy of the indictment or the allegations he's
4 making regarding an alteration of the indictment.

5 All right. And I'll have Ms. Elliott prepare me an
6 order.

7 All right. Thank you.

8 MS. ELLIOTT: Thank Your Honor.

9 (This proceeding was concluded.)
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C-E-R-T-I-F-I-C-A-T-E

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I, THE UNDERSIGNED HILDA M. JORDAN, CVR-M, OFFICIAL COURT

3

REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF

4

SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A

5

TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE

6

HEARING IN THE CAPTIONED CAUSE, IN THE COURT OF COMMON

7

PLEASE FOR ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE 24 DAY

8

OF MAY, 2012.

9

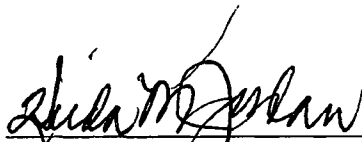
I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL,

10

NOR INTEREST IN ANY PARTY HERETO.

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Hilda M. Jordan, CVR-M

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October 4, 2013

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STATE OF SOUTH CAROLINA
 COUNTY OF DORCHESTER

JAMES WEST, 339200,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFIED COPY
 2012 AUG 21 AM 8:37
Charles T. Brooks, III
 CLERK OF COURT
 DORCHESTER COUNTY

2010-CP-18-2806

ORDER OF DISMISSAL

2012 AUG 15 AM 10:19
 JEANETTE W. McBRIDE
 C.C.P. & G.S.
 RICHLAND COUNTY
 FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 7, 2010. The State made Return dated July 7, 2011. An evidentiary hearing into the matter was convened on May 24, 2012, at the Orangeburg County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. The Respondent was represented by Salley W. Elliott, Senior Assistant Deputy Attorney General.

The Applicant and his trial attorney, J. Scott Bischoff, Esquire, testified at the hearing. This Court also had before it a copy of the transcript of the Applicant's trial, the records of the Dorchester County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment. Applicant was indicted for Assault and Battery of a High and Aggravated Nature (2009-GS-18-1000). He was represented by J. Scott Bischoff, Esquire. Applicant proceeded to trial before the Honorable Diane S. Goodstein and a jury. He was found guilty as charged and was sentenced to eight (8) years imprisonment. He did not appeal the conviction or sentence.

RECEIVED

AUG 27 2012

S.C. SUPREME COURT

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

Ineffective assistance of counsel in that:

- a. Applicant "was not represented properly by my attorney";
- b. "Witnesses were not subpoenaed . . . I feel that my attorney did not defend me by failing to adhere to my request when I informed [him] of witnesses that could testify on my behalf and [he] did not have them in court";
- c. "My attorney forced me to relinquish my Constitutional rights, and I was forced to take the stand, leaving me open for examination and cross-examination."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

In a post-conviction relief proceeding, 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 ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 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).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. at 668. 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. Where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel. Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006); Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006). This Court finds that all allegations to be without merit and are denied and dismissed as set forth below.

A. Failure to Present Documents and Witnesses

Applicant first asserts that he received ineffective assistance of trial counsel for counsel's failure to use a police report, present documents to show the victim's prior allegations against Applicant and present Officer Wright, Mike Taylor, Gary Miller, and Dale Law as witnesses at trial. This Court finds Applicant's allegations respecting witnesses and evidence Applicant now states he wanted presented at trial to be without merit.

First, this Court finds that prejudice from trial counsel's failure to present the report and documents or call the witnesses cannot be shown where the report and documents are not produced and witnesses do not testify at the post conviction relief hearing. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992);

Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991).

Applicant's mere speculation as to what a witness' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the post-conviction relief hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant did not produce the report and documents, present the witnesses at the post-conviction relief hearing or properly establish their testimony in accordance with the rules of evidence. Therefore, the Applicant did not establish the requisite prejudice.

Alternatively, this Court finds that trial counsel articulated a valid strategic reason for the treatment of the report and failure to subpoena the witnesses about which Applicant complains. This Court will not second-guess defense counsel's reasonable trial tactic. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Trial counsel articulated valid strategic reasons and Applicant has not shown that counsel was deficient in that choice of tactic or that he suffered the requisite prejudice. Moreover, this Court does not find Applicant's testimony that he asked counsel to present documents to establish prior allegations between the victim and Applicant to be credible. The allegations are without merit and are denied and dismissed.

B. Forced Testimony

Applicant also contends that counsel forced him to testify at trial despite his opposition to

doing so. Applicant testified at the post-conviction relief hearing that he did not want to testify at trial but was advised by his attorney that he would have to testify to successfully present the defense of self-defense in view of the fact that only Applicant and the victim were present when the incident occurred. This Court finds Applicant's complaint to be without merit.

This Court finds that trial counsel advised of his right to testify at trial and his right to remain silent as well as the advantages and disadvantages related to his decision to testify or waive the right to testify. This Court also finds that the trial court informed Applicant of the right to testify at trial, the right to remain silent, and the fact that Applicant would be subject to examination and cross-examination if he elected to testify at trial. (Tr. pp. 221, line 10 – p. 223, line 1). The trial court also informed Applicant that the decision whether to testify or exercise the right to remain silent was a decision that only Applicant could make. (Tr. pp. 222, line 17 – p. 223, line 22). Applicant informed the trial court that he understood the explanations provided, had no questions, had discussed the matter with trial counsel, did not need additional time to confer with counsel, and indicated a desire to testify at trial. (Tr. p. 223, line 23 – p. 224, line 17).

Based upon the testimony offered at the post-conviction relief hearing and a review of the trial transcript, this Court finds that Applicant made a voluntary and intelligent decision to waive his right to remain silent and to testify at trial. This Court finds that counsel did not force Applicant to testify but explained to Applicant his rights in this regard, the options available to Applicant respecting the exercise of his rights and the possible consequences depending upon the option the Applicant chose. Applicant thereafter made a knowing and voluntary decision to waive the right to remain silent and to testify at trial. His complaint about trial counsel in this respect is without merit and is denied and dismissed.

C. Failure to Advise of Right to Appeal

Applicant further contends that trial counsel failed to advise him of the right to appeal.

At the post-conviction relief hearing, trial counsel testified that he advised Applicant of the right to appeal from the conviction and sentence and that Applicant had ten (10) days within which to appeal. Counsel stated that he also advised Applicant that he must notify counsel within that time period if he wanted to appeal so that an appeal could be timely pursued. Counsel testified that Applicant instructed him not to appeal.

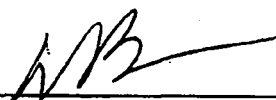
After conviction, trial counsel has a duty to make certain his client is aware of the right to appeal and give his or her judgment as to whether an appeal should be taken. In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991). If the post-conviction relief judge determines an applicant did not freely and voluntarily waive the right to appeal, the applicant may petition the appellate court for review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). However, based upon the testimony before it, this Court finds that Applicant was advised of and understood the right to appeal and the time frame within which appeal must be taken but knowingly and voluntarily relinquished or waived the right to appeal. See Janasik v. Fairway Oaks Villas, 307 S.C. 339, 415 S.E.2d 384 (1992) (stating waiver is the voluntary and intentional relinquishment of a known right). The allegation is without merit and is denied and dismissed.

D. Indictment Change

Lastly, Applicant alleged for the first time in his testimony at the post-conviction relief hearing that his indictment was changed. This Court refuses to consider this allegation because Applicant failed to plead the allegation in his application, by way of amended application or otherwise provide advance notice of the issue to the State. The State's Return to the application

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15 day of Aug, 2012.


DEANDREA G. BENJAMIN
Presiding Judge
First Judicial Circuit

Columbia, S.C.