

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Hampton County

Deadra L. Jefferson, Circuit Court Judge

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S.C. Supreme Court

KELVIN MAYS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002649

APPENDIX

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STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
COUNTY OF HAMPTON) FOURTEENTH JUDICIAL CIRCUIT
INDICTMENT NO.: 2008-GS-25-0156

STATE OF SOUTH CAROLINA)
VS.)
KELVIN MAYS,)
DEFENDANT.)

JURY TRIAL

VOLUME 1 OF 2

held before the Honorable Carmen T. Mullen
Mia Perron, Circuit Court Reporter, 14th Judicial Circuit
in the Hampton County Courthouse
Varnville, South Carolina
on Monday, September 8, 2008, Commencing at 2:25 p.m.

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EXHIBITS

[None]

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PROCEEDINGS

1
2 THE COURT: Well, good afternoon, ladies and
3 gentlemen. It's a pleasure to have y'all with us for
4 this term of court. I know Ms. Nettles, your clerk of
5 court, has probably told you a little bit about what we
6 are doing this week, but I am holding a term of
7 criminal court which will last until, at the very
8 latest, on Friday. And I don't really even anticipate
9 going that long, but that's just to let you-all know
10 that your service won't be required for longer than
11 that.

12 My name is Carmen Mullen. I am one of two
13 resident circuit court judges for the fourteenth
14 circuit, which includes Hampton County. I'm actually
15 based out of Beaufort -- that's where my home office
16 is -- but I'm also in charge of Hampton, along with
17 Judge Buckner. And, again, it's my pleasure to be
18 here. We always love coming to Hampton to hold court.
19 It's a very nice place to come, and, on top of all
20 that, everyone seems so nice and reasonable here and we
21 certainly are able to get a lot of business done. And
22 I can tell you that that is a testament, truly, to the
23 people of Hampton because it's not that way throughout
24 the rest of the state, I assure you.

25 With that said, ladies and gentlemen, what we

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1 are going to do here for the rest of this afternoon is
2 I'm going to go ahead and qualify you as a jury panel,
3 and then what we're going to do is we are going to go
4 ahead and pull one, possibly two, juries this afternoon
5 to report -- to start cases either tomorrow morning
6 first thing, or possibly also either tomorrow afternoon
7 or Wednesday. That's my intention right now. Okay?

8 So to let you know, this process -- as you know,
9 Miss Mylinda has taken roll call. I've got to go
10 through a number of questions with you. Once we do
11 that, as soon as I can get you out of here I'm going to
12 get you out of here. Okay? But it's a process we have
13 to go through. Some of the questions I ask you I am
14 required to ask you by statute, so we're just going to
15 have to go through the process. Okay? So today will
16 probably be the hardest day, by far. But I assure you
17 once we get past this, it will be smooth sailing the
18 rest of the week. And, again, I don't think your
19 service is going to last past Friday, so I don't want
20 anyone worried about it. Okay?

21 - - - - -

22 JURY QUALIFICATION

23 THE COURT: So with that said, ladies and
24 gentlemen, I'm going to ask Miss Mylinda to go ahead
25 and swear you in as the jury panel for this week. If

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1 you would?

2 THE CLERK OF COURT: Would you stand and raise
3 your right hand, please.

4 [Whereupon, the jury panel is duly sworn by the
5 clerk of court]

6 THE COURT: Thank you, y'all. Please be seated.

7 Now, ladies and gentlemen, I want to tell you,
8 to start with, the questions that I ask you, as I
9 stated before, I am statutorily required to ask them of
10 you. And I will tell you that some of them, quite
11 frankly, are very personal. Now, I don't want anyone
12 to suffer any embarrassment here. That's not our goal
13 here today. But I want you to understand that it is
14 vitally important that you answer these questions
15 truthfully and fully. Because, again, if it happens
16 that you end up sitting on one of my juries, and you
17 did not respond to a question that you should have, I
18 may have to go through and declare a mistrial in the
19 case and we would have to try the whole thing over
20 again. I would never want that to happen here in
21 Hampton. It has happened throughout the state, so I
22 just want to make sure that everyone understands that.

23 With that said, though, again, I don't want
24 anyone to suffer any embarrassment. If I ask a
25 question that you need to respond to and you do not

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1 want to disclose that information in front of your
2 fellow jurors, what I want you to do is one of two
3 things: I either want you to, first, stand, give me
4 your name and juror number, and ask to come speak to me
5 privately; okay? Which I'm just going to invite you up
6 here with the court reporter, and we're going to have a
7 sidebar, and you can tell me what your concern is or
8 your response to the question. If you don't want to do
9 that, at the very end of my questions I'm going to ask
10 you a question that says: at this time, ladies and
11 gentlemen, if there is anything you need to come talk
12 to me about regarding any of the questions I have asked
13 regarding your jury service or anything along those
14 lines for this week, now is the time to come forward
15 and tell me. And, again, you can approach me and we
16 will have a private conversation. Okay?

17 What I want you to understand is how important
18 it is that you respond to these questions. All right?
19 Because, again, if something happens and you do not
20 respond to the question, it always comes to light at
21 some point and oftentimes I'll either have to declare a
22 mistrial or we'll have to start all over again. And I
23 just don't want that to happen. All right?

24 So with that said, ladies and gentlemen, again,
25 I'm going to go through -- there's two separate sets of
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1 questions. I will ask them. If you need to respond,
2 you're going to stand up, you're going to give me your
3 full name and your juror number, if you know it -- and
4 Ms. Mylinda or Pumpkin up here will probably prompt
5 you, because most people don't know their juror number
6 -- and then I'm going to ask you to respond to the
7 question.

8 The reason why we do that, ladies and gentlemen,
9 is this is a court of record. This is Mia right here.
10 She is my court reporter. She is taking down
11 everything both you and I say. Okay? So I may ask you
12 to speak up. It may be that you've had to stand three
13 or four times, and I may look at you and say, Ms.
14 Jenkins, I know it's you but, again, for the record.
15 We've got to put your name on the record. All right?
16 So please understand that that is what we are doing.
17 All right?

18 So with that said, ladies and gentlemen, is
19 there any member of the jury panel who is not a citizen
20 of the United States? If so, please stand.

21 [Whereupon, there is no response]

22 THE COURT: Is there any member of the jury
23 panel that is not a resident and citizen of Hampton
24 County? If so, please stand.

25 [Whereupon, there is no response]

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1 THE COURT: Ladies and gentlemen, is there any
2 member of the jury panel who is unable to read, write,
3 speak, or understand the English language? If so,
4 please stand.

5 And if you can't understand the English
6 language, I have no idea how you're going to respond to
7 my question. But, again, I'm required to ask it.

8 Again, is there any member of the jury panel
9 unable to read, write, speak, or understand the English
10 language?

11 [Whereupon, there is no response]

12 THE COURT: Ladies and gentlemen, before I go on
13 to the next question, I will also tell you the reason
14 why I am standing up and I appear to be shouting is
15 because we have no microphone here this week. Because
16 of our new courthouse and our expenditures over there,
17 we actually lost some equipment here and we just don't
18 want to spend the money before we move over to the
19 beautiful new courthouse so I just told everybody
20 they're just going to have to speak up this week. So
21 y'all are going to have to do the same. Okay? So at
22 any point anyone cannot hear me, just wave your hand
23 back there, and I will speak up. Okay?

24 All right. Is there any member of the jury
25 panel who has less than a sixth-grade education or its

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1 equivalent?

2 Now, ladies and gentlemen, if you have raised a
3 family, paid your bills, held a job, I believe you have
4 more than a sixth-grade education. But what I want to
5 make sure is that if you sit on one of the juries here
6 this week, that you are able to read and process any
7 evidence and information that comes in on the case. So
8 if anyone has any concern about your ability to read or
9 process or understand what's being put before you, I
10 would encourage you, again, at the end, if you feel
11 like you don't want to disclose this at this time, come
12 up and talk to me, and I can tell you that in talking
13 to you I can -- I'll be able to determine whether or
14 not you'll be able to sit on one of the cases.

15 [Whereupon, there is no response]

16 THE COURT: Is there any member of the jury
17 panel who is unable because of mental or physical
18 infirmities to render efficient jury service?

19 For example, is there any member of the jury
20 panel who has a medical condition that would prevent
21 you from serving on jury duty here this week?

22 Now, ladies and gentlemen, let me explain to you
23 typically how we are going to run. As I told you, we
24 are going to start the trial of the first case tomorrow
25 morning probably at ten o'clock, maybe 9:30, just

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1 depending on when my witnesses are here. We're
2 typically going to run from 10:00 in the morning until
3 about 11:30, and we're going to take a morning break.
4 You're going to have coffee, Cokes, and Nabs, and
5 whatever you need to keep you going. We're going to
6 run until about one o'clock. At that time we're going
7 to go ahead and break for lunch, and y'all are going to
8 be free to go do whatever you need for about an hour,
9 hour and a half or so. You're going to come back about
10 2:30-ish, 2:45, and we're going to run again until
11 close to probably 4:00. We're going to take another
12 afternoon break, and then we're going to run until
13 typically 5:00 or 5:30. Okay?

14 So I need to know is there anyone on the jury
15 panel that has a health condition that does not allow
16 them to sit for an hour or an hour and a half at a
17 time. If so, please stand.

18 [Whereupon, there is no response]

19 THE COURT: Very good.

20 Is there any member of the jury panel that has
21 been convicted by guilty plea or trial, in a state or
22 federal court of record, of a crime punishable by
23 imprisonment for more than one year and your civil
24 rights have not been restored by pardon or amnesty?

25 Now, ladies and gentlemen, punishable by more

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1 than one year does not mean you had to go to prison for
2 more than one year. It simply means that you were
3 either convicted at trial or pled guilty to an offense
4 that carried a possible sentence of more than a year.

5 Now, let me give you some examples. If in your
6 past you were convicted of a charge, say DUI first
7 offense, that doesn't carry more than a year in jail,
8 so you don't need to respond to my question. However,
9 if you were charged in your past say with a burglary,
10 that typically carries more than a year in prison, and
11 I would need you to respond to that.

12 And respectfully, sir, I appreciate you
13 standing. If you would give me your name and juror
14 number.

15 MR. ROWELL: Adam Rowell. And I don't know my
16 juror number.

17 THE COURT: All right. It's Mr. Rowell?

18 MR. ROWELL: Yeah.

19 THE COURT: Okay, sir. What have you either
20 pled guilty or been convicted of?

21 MR. ROWELL: Second offense DUI.

22 THE COURT: Second offense DUI. Okay.

23 THE CLERK OF COURT: He is Number 115.

24 THE COURT: 50?

25 THE CLERK OF COURT: 115.

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1 THE COURT: 115?

2 That only carries up to six months; correct?

3 MR. THORNTON: I think it's up to one year,
4 Judge, but it would not be a disqualified.

5 THE COURT: He would not be disqualified.

6 Sir, I appreciate you bringing that to our
7 attention, but it doesn't carry over a year so you're
8 going to be welcome to stay with us. Okay? Thank you.

9 Anyone else?

10 And, again, ladies and gentlemen, I will tell
11 you this: if you've maybe in your past pled guilty to
12 a charge and you don't know what it carries, if at the
13 very end you want to come forward and ask me, I can
14 tell you whether or not it disqualifies you as a juror.
15 All right?

16 [Whereupon, there is no response]

17 THE COURT: Ladies and gentlemen, is there any
18 member of the jury panel that is a clerk, deputy clerk
19 of court, constable, sheriff, or other commissioned law
20 enforcement officer, magistrate, or other county
21 officer, or employed within the walls of any
22 courthouse? If so, please stand.

23 [Whereupon, there is no response]

24 THE COURT: All right. Is there any member of
25 the jury panel who has previously served on jury duty

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1 in circuit court -- not city court, not magistrate's
2 court, not federal court -- during the last calendar
3 year? If so, please stand. And that would be right
4 here at this courthouse.

5 [Whereupon, there is no response]

6 THE COURT: Ladies and gentlemen, is there any
7 member of the panel that has served as a member of the
8 Hampton County Grand Jury during the past several
9 years? If so, please stand.

10 [Whereupon, there is no response]

11

- - - - -

12

JURY EXEMPTIONS

13 THE COURT: All right. Ladies and gentlemen, we
14 now move to what are called jury exemptions. State law
15 provides for several exemptions to jury service, and
16 basically what this means is that you are qualified to
17 serve; however, you may choose not to serve if you so
18 wish.

19 Ladies and gentlemen, those of you who are
20 sixty-five years of age or older may be exempted from
21 jury service. Now, I'm probably going to implore you
22 to stay with us, because of course people sixty-five
23 and older represent a great pool of talent and I love
24 to have people on the jury with that type of a life
25 experience. However, if you've got something better to

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1 do this week and you want to be elsewhere, I certainly
2 will honor this exemption.

3 So is there anyone on the panel who is sixty-
4 five years of age or older who would like to be
5 exempted this week?

6 [Whereupon, there is no response]

7 THE COURT: Ladies and gentlemen, another
8 exemption concerns prior jury service. No person is
9 required to serve as a juror more often than once every
10 three calendar years. Therefore, if any member of this
11 jury panel has served on jury duty during the last two
12 calendars years, you may be exempted from jury service
13 this week. Is there anyone on the panel that would
14 like to claim this exemption?

15 [Whereupon, there is no response]

16 THE COURT: Ladies and gentlemen, those of you
17 that have served as grand jurors in the last five
18 calendar years may also be exempted from jury service,
19 if you choose.

20 Is there any member of the panel who has been on
21 grand jury here in Hampton County in the last five
22 calendar years that would like to claim this exemption?

23 [Whereupon, there is no response]

24 THE COURT: Ladies and gentlemen, the next
25 exemption deals with those of you who have small

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1 children. Respectfully, I ask that you listen
2 carefully to it. It has four parts, all of which must
3 apply for you to be able to claim this exemption.
4 Ladies and gentlemen, you may be exempted from jury
5 service here this week if you have a small child or
6 small children under the age of seven that you have the
7 legal custody of that child or children, you have the
8 principle care, custody and control of that child or
9 children, and, lastly, you are unable to make
10 arrangements for the adequate care of that child or
11 children while you perform jury duty. All right?

12 So, ladies and gentlemen, this is for parents
13 who are stay-at-home parents who take care of their
14 children, don't take them to day care, don't go to
15 work, and it's for people who don't have anyone else to
16 watch those children while they are here performing
17 jury duty. And, of course, the first question I'm
18 going to ask you is who has got your babies right now.
19 Okay?

20 Is there anyone on the jury panel that needs to
21 claim this exemption?

22 [Whereupon, there is no response]

23 THE COURT: Very well.

24 Ladies and gentlemen, the next exemption
25 involves those of you who may be attending school at

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1 this time or working in some capacity with a school.
2 If this exemption applies to you and you wish to be
3 exempted, what I can do is transfer your jury service
4 to a time that it won't conflict with either your
5 school classes or your school duties; in other words,
6 Christmas break or spring break or summer break. I
7 can't ever permanently excuse a juror, a qualified
8 juror, from duty. But again, I can transfer you to a
9 time where school is not in session.

10 Therefore, ladies and gentlemen, is there any
11 member of the panel who is a full-time student, school
12 teacher, school-crossing guard, school-bus driver, or
13 who serves in any other school-related function, who is
14 unable to serve on jury duty this week because of your
15 school involvement? If so, please stand.

16 [Whereupon, there is no response]

17 THE COURT: Ladies and gentlemen, is there any
18 member of the jury panel who is employed with the
19 Department of Corrections at a penitentiary? If so,
20 please stand.

21 [Whereupon, there is no response]

22 THE COURT: Ladies and gentlemen, is there any
23 juror who performs services for a business or
24 agricultural or commercial enterprise which is so
25 essential to the operation of that business that if you

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1 are required to perform jury duty here this week, that
2 the business would have to close down, stop
3 functioning, and close its doors? Is there any member
4 of the panel that needs to claim this exemption?

5 All right. And I'm going to warn you ahead of
6 time: again, you're a qualified juror, so I'm not
7 going to excuse you permanently, but if you do have a
8 problem this week, I can consider transferring you.
9 But I always say we're just like taxes: we always come
10 back, and you will be called again. Okay?

11 So with that said, sir, if you would give me
12 your name and jury number.

13 MR. MCKENZIE: David --

14 THE COURT: All right. What --

15 MR. MCKENZIE: -- McKenzie. Number --

16 THE COURT: What do you --

17 MR. MCKENZIE: 92, I believe.

18 THE COURT: What do you do, Mr. McKenzie?

19 MR. MCKENZIE: I'm an optometrist.

20 THE COURT: Okay, sir. And you don't have
21 anyone else to cover you at work?

22 MR. MCKENZIE: No, ma'am, I don't. The other
23 doctor is out of town this week.

24 THE COURT: Okay. It's just a bad conflict week
25 for you? All right, sir. What I will do is transfer

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1 your service this week.

2 Miss Mylinda, do you want to just notify him of
3 the time?

4 THE CLERK OF COURT: Yes, ma'am. We'll just
5 notify him. He'll get another --

6 THE COURT: You'll get another notice. And I
7 will tell you, Doctor, that typically when you've been
8 transferred once, the judge won't transfer you again.
9 Okay?

10 MR. MCKENZIE: Sure.

11 THE COURT: So I just wanted to let you know.
12 Make sure -- next time you get your notice, make sure
13 you've got another doctor to cover you. All right?

14 MR. MCKENZIE: Yes, ma'am.

15 THE COURT: I appreciate it, sir. You are
16 excused.

17 MR. MCKENZIE: Thank you.

18 THE COURT: Thank you.

19 [Whereupon, Mr. McKenzie is excused as a member
20 of the jury panel]

21 THE COURT: Anyone else?

22 [Whereupon, there is no response]

23 THE COURT: All right. Ladies and gentlemen,
24 that concludes the statutory list of qualifications and
25 exemptions for jury service. Now, it may be that you

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1 are qualified to serve and no exemption applies to you;
2 however, this is the absolutely worse possible week you
3 could ever serve on jury duty. And I can tell you it
4 has ranged the gamut of what I consider to be a worse
5 possible week. But, again, I want you to understand
6 that it's got to be a compelling reason. I know that
7 many of you have lives, and other things that you would
8 rather be doing, I can assure you of that; however,
9 you're going to have to serve on jury duty at some
10 point.

11 So I will tell you in my experience, having
12 traveled all over the state holding court in every
13 county in the state, this is a very good week to serve.
14 We're not going to run late, we're not going to run
15 long. I can tell you that we just recently in Hampton
16 finished a three-week trial, and obviously that would
17 put a little more pressure on potential jurors. But I
18 will tell you this: it does not look like we're going
19 to run late this week at all, and I do think it is a
20 good time to serve.

21 So, ladies and gentlemen, provided you
22 understand that, again, if it is just absolutely not a
23 good week for you to serve and you would like me to
24 consider transferring your service this week, I am
25 happy to consider it. But, again, I've got to pick a

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1 couple of juries, at least, today and I need to make
2 sure I have enough people. So with that said, ladies
3 and gentlemen, I want you to understand that I'm going
4 to do everything I can if I need to transfer your
5 service, but, again, I've got certain constraints.

6 Additionally, ladies and gentlemen, this is also
7 the time that if you needed to respond to one of my
8 earlier questions and you just didn't feel comfortable
9 in front of your fellow jurors, or if you have a
10 specific question you need to ask me regarding maybe
11 some of the questions, or, lastly, if you have a
12 doctor's appointment or something that you absolutely
13 have to be at this week, there's a chance that I can
14 kind of schedule which jury I put you on, or which
15 panel I put you on, based on that schedule. Okay? So
16 you would need to disclose that to me at this time
17 because if I don't know, I can't have you sitting over
18 here in my box and telling me that you've got to be
19 somewhere at two o'clock tomorrow if I'm in the middle
20 of trying a case. Okay?

21 So with that said, ladies and gentlemen -- which
22 side do you want them to line up on? Over here.

23 Anyone that needs to speak with me privately,
24 again, now is the time to do it, and I'll address
25 whatever concerns you have and try to do my very best

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1 for you. Okay? So just go ahead and form a line right
2 here.

3 THE BAILIFF: Number 84.

4 THE COURT: Number 84. What is your name?

5 MS. KENNEDY: Shirley Kennedy.

6 THE COURT: Ms. Kennedy, come over here.

7 [Whereupon, Ms. Kennedy complies]

8 THE COURT: When I say we do this in private, we
9 call it relative private --

10 MS. KENNEDY: Okay.

11 THE COURT: -- because it has to be on the
12 record.

13 So what can I do for you?

14 MS. KENNEDY: I don't know.

15 THE COURT: You stood in line. I just wanted to
16 make sure that --

17 MS. KENNEDY: Oh. I thought we were all just
18 standing in line.

19 THE COURT: No. You don't have to be up here.
20 Just did you need to respond --

21 MS. KENNEDY: No, no. I want to -- I want to be
22 on jury duty.

23 THE COURT: You want to stay on jury duty?

24 MS. KENNEDY: Yeah.

25 THE COURT: Thank you.

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1 MS. KENNEDY: I thought all of us were standing
2 in line.

3 THE COURT: No. You're good. You're fine.

4 THE BAILIFF: Laverne Williams, number --

5 THE COURT: Ms. Williams, come on up.

6 [Whereupon, Ms. Williams complies]

7 THE COURT: Ms. Williams, how are you?

8 MS. WILLIAMS: I'm disqualified. I got one --

9 THE COURT: What was it for? Do you know?

10 MS. WILLIAMS: Uh-huh.

11 [Whereupon, the Court and counsel confer]

12 THE COURT: Magistrate's court.

13 You're staying with me. You're good, Ms.

14 Williams. Thank you.

15 THE BAILIFF: Joyce Frederick.

16 THE COURT: Hello, Ms. Frederick. What can I do
17 for --

18 MS. FREDERICK: I take care of a two-year-old.

19 Works at night. But I --

20 THE COURT: So you've got to be with her right
21 now?

22 MS. FREDERICK: Yes.

23 THE COURT: Okay. Who's with her right now?

24 MS. FREDERICK: My --

25 THE COURT: He is? Okay. All right. I'll go

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1 ahead and excuse you. But I appreciate your being
2 here. You can go ahead and go. Okay.

3 MS. FREDERICK: Thank you so much.

4 THE COURT: Thank you.

5 THE BAILIFF: Louretta Busby, Number 18.

6 THE COURT: Yes, ma'am?

7 [Off the record momentarily]

8 THE COURT: How are you, Ms. Busby? What can I
9 do for you?

10 MS. BUSBY: I take fluid on a lot, so I'm
11 constantly on fluid tablets. I'm constantly back and
12 forth to the bathroom.

13 THE COURT: I understand that. Do you think you
14 can sit for an hour at the time? Are you okay?
15 Because I can, you know, give you breaks. If you sit
16 on my jury, if you just want to go like this
17 [indicates], I'll give you a restroom break.

18 MS. BUSBY: Okay.

19 THE COURT: Is that okay?

20 MS. BUSBY: Yeah. Okay.

21 THE COURT: Are you sure?

22 MS. BUSBY: Yes.

23 THE COURT: Is that all right?

24 MS. BUSBY: Yes. I'm back and forth to the
25 bathroom a lot.

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1 THE COURT: I know. All right.

2 MS. BUSBY: I don't want to be a problem.

3 THE COURT: No. That's all right. I'm not too
4 worried about you. You feel okay just to sit there?

5 MS. BUSBY: Yes, ma'am.

6 THE COURT: You're okay sitting? Okay. I'm
7 going to keep you because I'm going to work with you.
8 If you end up sitting on one of my juries, like I said,
9 you just give me a little hand, and I'll go ahead and
10 take a break right then. Okay?

11 MS. BUSBY: Thank you.

12 THE COURT: So we're going to keep you. Thank
13 you, Ms. Busby. I appreciate it.

14 THE BAILIFF: Mr. Duncan, Number 44.

15 THE COURT: All right. How are you, Mr. Duncan?

16 MR. DUNCAN: [No response]

17 THE COURT: You've got a good grip.

18 MR. DUNCAN: My wife just had a baby, and she
19 had surgery, and I'm kind of helping her out.

20 THE COURT: Are you helping her?

21 MR. DUNCAN: Yeah, helping her.

22 THE COURT: Are you being a good husband?

23 MR. DUNCAN: I'm a good husband.

24 THE COURT: Poor thing. All right. When did
25 she have the baby?

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1 MR. DUNCAN: My little man is three weeks old.

2 THE COURT: Congratulations. All right. I'm
3 going to have to transfer your service. You know that;
4 right? So you're going to have to come back. Are you
5 sure you want to do that? Is anyone with her right
6 now?

7 MR. DUNCAN: No.

8 THE COURT: Is she staying -- is she walking?

9 MR. DUNCAN: She can walk a little bit. She had
10 surgery, too.

11 THE COURT: The reason why I say this is that I
12 can transfer your jury service. But you're going to
13 have to come back up again, so it just means it may be
14 a worse week. And I can tell you right now we're going
15 to pull probably two, maybe three juries. They're all
16 going to be quick cases. So chances are if you sit on
17 one, you'll only need to be here maybe a day and a
18 half, and you will have taken care of your service for
19 the next three years. So you need to kind of pick and
20 choose what you want to do. I don't know what kind of
21 shape she's in. I'm happy to transfer you, if you want
22 me to. It's up to you.

23 MR. DUNCAN: I'll work around it.

24 THE COURT: Are you sure?

25 MR. DUNCAN: Yeah.

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1 THE COURT: Are you sure?

2 MR. DUNCAN: I'll get my sister. I'll get my
3 sister.

4 THE COURT: Okay. I want to make sure she's
5 taken care of and the baby is covered, though. Okay?

6 MR. DUNCAN: I'll get my sister.

7 THE COURT: Do you want to do that? Okay. All
8 right.

9 THE CLERK OF COURT: Is he staying? Is he
10 staying?

11 THE BAILIFF: Ms. Anderson, Number 2.

12 THE COURT: Come on. How are you? How are you?

13 MS. ANDERSON: [No response]

14 [Whereupon, the Court and Ms. Anderson confer]

15 THE BAILIFF: Order in the court.

16 [Whereupon, the Court and Ms. Anderson confer]

17 MS. ANDERSON: I just went back to work.

18 THE COURT: Okay. So you want your service
19 transferred --

20 MS. ANDERSON: Yes.

21 THE COURT: All right. I'll go ahead and
22 transfer you. Give me your name again.

23 MS. ANDERSON: Catina Anderson.

24 THE COURT: Thank you. You are now excused.

25 [Whereupon, Ms. Anderson is excused from the

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1 jury panel]

2 THE CLERK OF COURT: Judge, what was her name?

3 THE COURT: I released her. Just transfer her
4 service.

5 THE BAILIFF: Ms. Sims.

6 THE COURT: Hey. How are you?

7 MS. SIMS: I'm Ms. Sims, and I have two very
8 small children. I'm a single mom, and my job takes
9 time during the week, but I could possibly serve in the
10 evening. I think I'm --

11 THE COURT: There is no evening service. I can
12 cover you from work. And where do you work?

13 MS. SIMS: At Burger King, and I'm --

14 [Whereupon, the Court and Ms. Sims confer]

15 THE COURT: Is there anyone else -- do you have
16 anyone else to cover you tomorrow?

17 MS. SIMS: I don't know, because they just fired
18 a bunch of people and we're really very short-staffed.
19 If you can cover my job, I can serve.

20 THE COURT: I mean, I can cover you. I mean,
21 they can't fire you for doing service. I just don't
22 want to put them in a big bind if you say they just
23 laid off a bunch of people. But I really would like
24 you to stay and serve, if you can. I don't --

25 MS. SIMS: I can -- if you can cover my job, I

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1 can serve.

2 THE COURT: Okay. You said you have two little
3 children. What time do you have to get them from
4 either day care or whoever you get to keep them?

5 MS. SIMS: Not a problem. My sister-in-law.

6 THE COURT: She keeps them? So you're okay.
7 Perfect. I'm going to have you stay with us. Okay? I
8 appreciate it.

9 THE BAILIFF: Michelle Davis.

10 THE COURT: Ms. Davis, come on. How are you?

11 MS. DAVIS: I'm fine.

12 THE COURT: Good. What can I do for you?

13 MS. DAVIS: I have a cousin, that's up for
14 trial, over there.

15 THE COURT: What's his name?

16 MS. DAVIS: I don't know his last name, but his
17 mama's last name is Gardner.

18 [The Court and counsel confer]

19 THE COURT: He's not up for trial this week.
20 Okay.

21 All right. It's my understanding he's on the
22 roster but they do not intend on trying him this week,
23 so you would not have a conflict. Okay?

24 MS. DAVIS: Okay.

25 THE COURT: But I'm going to tell you to stay

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1 with us. Okay? But I appreciate bringing it to my
2 attention.

3 MS. DAVIS: Okay.

4 THE COURT: All right. Thank you.

5 Anyone else?

6 [Whereupon, there is no response]

7 THE COURT: All right. Anyone else?

8 [Whereupon, there is no response]

9 THE COURT: All right. I find this jury panel
10 qualified.

11 Ladies and gentlemen, it's my understanding from
12 the solicitor that we need to just take a very quick
13 break. And when I say a quick break, there is no such
14 thing in a courtroom, I assure you. I will tell you
15 this: we will all be working while y'all will take a
16 little bit of a break. But I also need to ask that all
17 my jurors leave the courtroom, because there is some
18 business that I need to conduct outside of your
19 presence before I come back and pull this first jury.
20 Okay?

21 So with that said, ladies and gentlemen, I am
22 going to need probably fifteen minutes or so, maybe
23 twenty, to do what I need to do. And, unfortunately,
24 and I hate telling you this: because we are in a
25 temporary facility, I don't have anywhere to keep y'all

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1 cool so I'm going to, unfortunately, have to invite you
2 all to kind of go either this way or this way
3 [indicates].

4 You can go out in the parking lot, make phone
5 calls, do whatever you need to do, but, again, Murphy
6 will probably call y'all back and let y'all back in
7 when we have our business finished and I'm going to go
8 ahead and I will strike, like I said, at least the
9 first, if not the first two, juries. And then I assure
10 you I'm going to get you out of here. Okay? As you
11 notice, I talk pretty fast. And that may be annoying
12 sometimes, but jurors usually like it when it moves us
13 along.

14 So anyway, y'all, we're going to take about a
15 twenty-minute break, fifteen-minute break, and I'll
16 bring y'all back and we'll finish up. Okay? Thank
17 you, y'all.

18 [Whereupon, the jury panel exits the courtroom
19 at 2:48 p.m.]

20 [Whereupon, a recess is taken from 2:48 p.m. to
21 3:50 p.m.]

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JURY VOIR DIRE

THE COURT: Solicitor, are you ready?

MR. MURDAUGH: Yes, ma'am. The State is ready in indictment 2008-GS-25-156, State against Kelvin Mays, charged with burglary in the second degree.

THE COURT: Okay. Mr. Plexico, are you ready to go?

MR. PLEXICO: Yes, Your Honor.

THE COURT: All right. Why don't we go ahead and bring the jury pool back in, Murphy.

[Whereupon, the jury panel enters the courtroom at 3:50 p.m.]

THE COURT: All right. Ladies and gentlemen, if you would please give me your attention. We are about to pull the jury in the case entitled the State of South Carolina versus Mr. Kelvin Mays, who is charged in the bill of indictment by the grand jury of Hampton County with the offense of burglary in the second degree.

Ladies and gentlemen, the State in this case is represented by Randolph Murdaugh. If you would, sir, face the panel.

[Whereupon, Mr. Murdaugh complies]

THE COURT: Thank you. And Ms. Legette, are you trying this with him? Yes, ma'am? Yes? No?

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1 MS. LEGETTE: Yes, Your Honor.

2 THE COURT: Okay. If you would just face the
3 panel. Thank you.

4 [Whereupon, Ms. Legette complies]

5 MS. LEGETTE: Good afternoon.

6 THE COURT: All right. Thank you.

7 Ladies and gentlemen, the defendant in this case
8 is Mr. Kelvin Mays.

9 Mr. Mays, if you would turn and face the panel,
10 sir. Right behind you, sir.

11 [Whereupon, Mr. Mays complies]

12 THE COURT: Thank you, Mr. Mays. You may be
13 seated.

14 [Whereupon, Mr. Mays complies]

15 THE COURT: And Mr. Mays is being represented by
16 Mr. Steve Plexico.

17 Mr. Plexico, if you would turn and face the
18 panel, sir.

19 [Whereupon, Mr. Plexico complies]

20 MR. PLEXICO: Good afternoon.

21 THE COURT: Thank you.

22 Ladies and gentlemen of the jury panel, my
23 question to you is is there any member of the jury
24 panel that is related by blood or connected by marriage
25 with the defendant in this case, Mr. Kelvin Mays? If

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1 so, please stand.

2 [Whereupon, there is no response]

3 THE COURT: Is there any member of the jury
4 panel a close personal friend or share a special
5 relationship with the defendant in this case, Mr.
6 Kelvin Mays? If so, please stand.

7 [Whereupon, there is no response]

8 THE COURT: Ladies and gentlemen, potential
9 witnesses in this case are as follows: Eddie Bryant,
10 Ricky Cook, Brad Drawdy, Shedron Williams, and Gwen
11 Bamfield.

12 Again, my question to you is the same as I asked
13 before. Is any member of the jury panel related by
14 blood, or connected by marriage, or a close personal
15 friend, or share a special relationship with any of
16 these potential witnesses in this case? If so, please
17 stand.

18 [Whereupon, there is no response]

19 THE COURT: Additionally, ladies and gentlemen,
20 you have been introduced to the attorneys in this case.

21 Yes, ma'am. Would you give me your name and
22 juror number for the record.

23 MS. WILLIAMS: I don't know my jury number, but
24 I'm Laverne Williams and I'm related to Shedron
25 Williams by marriage.

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1 THE COURT: Okay. Mr. Williams is a potential
2 witness in this case; is that correct?

3 MR. MURDAUGH: Yes, ma'am.

4 THE COURT: Okay. How is he related to you?
5 You said by marriage, but what is the relation?

6 MS. WILLIAMS: My husband and him are first
7 cousins.

8 THE COURT: Are first cousins. Okay. I need to
9 go ahead -- all right. As a result of that, I'm going
10 to go ahead and disqualify you from the trial of this
11 case. But stay seated, okay? Thank you.

12 All right. Anyone else?

13 [Whereupon, there is no response]

14 THE COURT: Ladies and gentlemen, as I told you,
15 I have introduced you to the attorneys that are going
16 to be trying this case. Again, it's Randolph Murdaugh,
17 Tameaka Legette, and Mr. Steve Plexico.

18 The question is is there any member of the jury
19 panel related by blood, or connected by marriage, or a
20 close personal friend, or share a special relationship
21 with any of these attorneys in this case? If so,
22 please stand.

23 Ma'am, your name and juror number.

24 MS. LAWTON: I don't know my juror number. Anne
25 Lawton.

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1 THE COURT: You're Anne Lawton? Yes, Ms.
2 Lawton.

3 MS. LAWTON: Randolph Murdaugh is a friend --

4 THE COURT: Okay.

5 MS. LAWTON: I'm sorry --

6 THE COURT: Is a close personal friend; is that
7 correct?

8 MS. LAWTON: [Indicates affirmatively]

9 THE COURT: Do you socialize with Mr. Murdaugh
10 or --

11 MS. LAWTON: Yes.

12 THE COURT: Yes? Okay. That's okay. That's
13 okay. All right, ma'am. Respectfully, I'm going to go
14 ahead and excuse you from the trial of this case, but I
15 appreciate it. And once again, stay with us, okay?
16 I'll let you go shortly.

17 Anybody else?

18 [Whereupon, there is no response]

19 THE COURT: All right. Ladies and gentlemen,
20 again, I know you know -- I know you know very little
21 about this case, so my question is is there any member
22 of the jury panel that has seen, heard, or read
23 anything about this case or have any knowledge about
24 this case whatsoever? If so, please stand.

25 [Whereupon, there is no response]

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1 THE COURT: And, again, I know I asked you this
2 before, and you are my same panel, but I have to ask it
3 in each of the cases.

4 Is there any member of the jury panel who is a
5 member of, or a contributor to, any group which has as
6 its primary concern the promotion of law enforcement or
7 victims' rights? And, again, these are such groups as
8 CAVC, which is Citizens Against Violent Crime, or MADD,
9 Mothers Against Drunk Driving, or SADD, Students
10 Against Drunk Driving.

11 [Whereupon, there is no response]

12 THE COURT: Ladies and gentlemen, is there any
13 member of the panel that has formed or expressed an
14 opinion as to the guilt or innocence of the defendant
15 in this case, Mr. Kelvin Mays? If so, please stand.

16 [Whereupon, there is no response]

17 THE COURT: Is there any member of the jury
18 panel that is conscious of any interest, any bias, or
19 any prejudice for or against the defendant in this
20 case, Mr. Kelvin Mays? If so, please stand.

21 [Whereupon, there is no response]

22 THE COURT: Ladies and gentlemen of the panel,
23 is there any reason whatsoever that you cannot give
24 both the State and the defendant, Mr. Mays, a fair and
25 impartial trial? If so, please stand.

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1 [Whereupon, there is no response]

2 THE COURT: Is there any further inquiry
3 requested of this panel? From the solicitor?

4 MR. MURDAUGH: If Your Honor please, I would
5 like for you to ask the members of the jury if they or
6 any member of their family have been represented by Mr.
7 Plexico or another member of the Hampton, Allendale,
8 Jasper Public Defenders Office.

9 THE COURT: All right. Ladies and gentlemen of
10 the jury panel, you heard the question that he's going
11 to ask, but I'm going to go ahead and ask it again.

12 Is there any member of the jury panel who is
13 either personally -- or a member of their family --
14 been represented by Mr. Steve Plexico or any other
15 person on behalf of the public defender's office in
16 either Allendale, Hampton, or -- you're in Jasper, as
17 well -- or Jasper County? Anyone on the jury panel?

18 Yes, sir. If you would please stand for me, and
19 I'm going to call on you.

20 Sir, my latecomer, give me your name and juror
21 number, if you know it.

22 MR. DEVORE: Leroy Devore, 41.

23 THE COURT: Yes, Mr. Devore?

24 MR. DEVORE: I have a son who was represented by
25 Mr. Plexico.

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1 THE COURT: Okay. Sir, is he currently being
2 represented by Mr. Plexico, or was this in the past?

3 MR. DEVORE: It was in the past.

4 THE COURT: It was in the past?

5 MR. DEVORE: It was in the past.

6 THE COURT: All right. Mr. Devore, I appreciate
7 you bringing that to our attention. Thank you.

8 Yes, ma'am. Your name and juror number?

9 MS. FENNEL: Etta Fennell, Number 49. He
10 represented my son.

11 THE COURT: Okay.

12 MS. FENNEL: Recently.

13 THE COURT: Recently?

14 MS. FENNEL: Yes, ma'am.

15 THE COURT: Okay. But has that case been
16 concluded at this point?

17 MS. FENNEL: Yes, ma'am.

18 THE COURT: It has been concluded?

19 MS. FENNEL: Yes, ma'am.

20 THE COURT: All right, ma'am. Again, your name
21 and jury number?

22 MS. FENNEL: Etta Fennell, Number 49.

23 THE COURT: All right. Yes, ma'am.

24 Yes, sir?

25 MR. EADIE: Number 48. Harold Eadie. I was

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1 represented by Mr. Murdaugh in a case.

2 THE COURT: By the solicitor, Mr. Murdaugh, or
3 the Murdaugh firm, sir?

4 MR. EADIE: All of them.

5 THE COURT: Okay. All of them? Okay. Sir, has
6 that case been concluded?

7 MR. EADIE: Ma'am?

8 THE COURT: Has that case been concluded or
9 finished?

10 MR. EADIE: No. It's settled out.

11 THE COURT: It's settled and done. All right,
12 sir. I appreciate you bringing that to my attention.
13 Anybody else?

14 [Whereupon, there is no response]

15 THE COURT: Yes, Mr. Plexico? Yes, sir?

16 MR. PLEXICO: Your Honor, if you would inquire
17 if anyone has been represented by any of the members
18 of -- or associates in the Murdaugh Peters firm over
19 there, also, Judge.

20 THE COURT: All right. Ladies and gentlemen of
21 the jury panel, is there any member of the panel who
22 has been represented -- either in the past or is
23 currently being represented -- by the Murdaugh firm,
24 either here in Hampton or in Jasper or anywhere else,
25 for that matter? Ladies and gentlemen, the question is

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1 going to be this: who was it that has been represented
2 by the firm, and whether or not the case has been
3 concluded. All right? I appreciate that.

4 All right. Ms. Williams; right?

5 MS. WILLIAMS: Alexander Murdaugh. It was in
6 the past. And attorney Claude Detrick, and it was in
7 the past.

8 THE COURT: Okay. So it's concluded? That --

9 MS. WILLIAMS: It's concluded --

10 THE COURT: -- matter is over --

11 MS. WILLIAMS: Yes.

12 THE COURT: -- with; right?

13 MS. WILLIAMS: Yes.

14 THE COURT: All right. Thank you, Ms. Williams.
15 I appreciate it.

16 Yes, sir? Your name and juror number, if you
17 know it.

18 MR. BISHOP: Archie Bishop, Number 9. I have a
19 case pending with Mark Ball in the Murdaugh law firm.

20 THE COURT: Okay. And he's currently handling
21 that case; is that --

22 MR. BISHOP: Yes, ma'am.

23 THE COURT: -- correct, sir?

24 MR. BISHOP: Yes, ma'am.

25 THE COURT: All right, sir. I'm going to go

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1 ahead and dismiss you from this case, but take a seat
2 and I'm going to keep you around. All right?

3 Sir, your name and juror number?

4 MR. MOODY: Raymond Moody, 99.

5 THE COURT: Yes, sir.

6 MR. MOODY: I've been represented by Mr. Parker,
7 and that firm, in the past.

8 THE COURT: Okay. Nothing going on right now?

9 MR. MOODY: No.

10 THE COURT: All right, sir. I appreciate that.
11 You're going to stay with us.

12 Anybody -- yes, sir?

13 MR. CROSBY: James Crosby. I don't remember my
14 number. I'm being represented by Danny Henderson.

15 THE COURT: Okay. In Jasper?

16 MR. CROSBY: A civil case. Yeah.

17 THE COURT: Okay, sir. And Danny is handling
18 that right now?

19 MR. CROSBY: Yeah.

20 THE COURT: Okay. All right, sir. I'm going to
21 go ahead and excuse you from the trial of this case
22 because Mr. Henderson is currently representing you.

23 Anybody else?

24 [Whereupon, there is no response]

25 THE COURT: Anybody else?

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1 [Whereupon, there is no response]

2 [Off the record momentarily]

3 THE COURT: Any further questions from the
4 solicitor?

5 MR. MURDAUGH: None.

6 THE COURT: From the defense?

7 MR. PLEXICO: No, Your Honor.

8 - - - - -

9 STRIKING OF THE JURY

10 THE COURT: All right. Let's go ahead. Strikes
11 are five and ten.

12 Gentlemen, how many alternates? Ms. Legette,
13 how many alternates for y'all?

14 MS. LEGETTE: I believe one, Your Honor.

15 THE COURT: One? Mr. Plexico?

16 MR. PLEXICO: One is fine. We won't go to -- we
17 would not want to go to a verdict without a jury of
18 twelve, Judge.

19 THE COURT: Okay.

20 THE CLERK OF COURT: 97, Emma Jane Mole.

21 [Whereupon, Ms. Mole comes forward]

22 THE CLERK OF COURT: What says the State?

23 MR. MURDAUGH: Present the juror.

24 THE CLERK OF COURT: What says the defense?

25 MR. PLEXICO: Please swear the juror.

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1 [Whereupon, Ms. Mole is seated in the jury box]

2 THE CLERK OF COURT: Number 70, William C.

3 Harper.

4 [Whereupon, Mr. Harper comes forward]

5 THE CLERK OF COURT: What says the State?

6 MR. MURDAUGH: Present the juror.

7 THE CLERK OF COURT: What says the defense?

8 MR. PLEXICO: Please excuse the juror from the
9 trial of this case.

10 [Whereupon, Mr. Harper returns to the audience]

11 THE CLERK OF COURT: Number 58, Herbert S.

12 Godley, Jr.

13 [Whereupon, Mr. Godley comes forward]

14 THE CLERK OF COURT: What says the State?

15 MR. MURDAUGH: Present the juror.

16 THE CLERK OF COURT: What says the defense?

17 MR. PLEXICO: Please swear the juror.

18 [Whereupon, Mr. Godley is seated in the jury
19 box]

20 THE CLERK OF COURT: Number 145, James M.

21 Wooten.

22 [Whereupon, Mr. Wooten comes forward]

23 THE CLERK OF COURT: What says the State?

24 MR. MURDAUGH: Present the juror.

25 THE CLERK OF COURT: What says the defense?

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1 MR. PLEXICO: Please excuse the juror from the
2 trial of this case.

3 [Whereupon, Mr. Wooten returns to the audience]

4 THE CLERK OF COURT: Number 41, Leroy Devore.

5 [Whereupon, Mr. Devore comes forward]

6 THE CLERK OF COURT: What says the State?

7 MR. MURDAUGH: Present the juror.

8 THE CLERK OF COURT: What says the defense?

9 MR. PLEXICO: Please swear the juror.

10 [Whereupon, Mr. Devore is seated in the jury
11 box]

12 THE CLERK OF COURT: Number 84, Shirley Kennedy.

13 [Whereupon, Ms. Kennedy comes forward]

14 THE CLERK OF COURT: What says the State?

15 MR. MURDAUGH: Present the juror.

16 THE CLERK OF COURT: What says the defense?

17 MR. PLEXICO: Please excuse the juror from the
18 trial of this case.

19 [Whereupon, Ms. Kennedy returns to the audience]

20 THE CLERK OF COURT: Number 125, Beulah Speaks.

21 [Whereupon, Ms. Speaks comes forward]

22 THE CLERK OF COURT: What says the State?

23 MR. MURDAUGH: Excuse the juror.

24 [Whereupon, Ms. Speaks returns to the audience]

25 THE CLERK OF COURT: Number 33, Kenyatta Davis.

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1 [Whereupon, Mr. Davis comes forward]
2 THE CLERK OF COURT: What says the State?
3 MR. MURDAUGH: Present the juror.
4 THE CLERK OF COURT: What says the defense?
5 MR. PLEXICO: Please swear the juror.
6 [Whereupon, Mr. Davis is seated in the jury box]
7 THE CLERK OF COURT: Number 139, Mike A. Wilson.
8 [Whereupon, Mr. Wilson comes forward]
9 THE CLERK OF COURT: What says the State?
10 MR. MURDAUGH: Present the juror.
11 THE CLERK OF COURT: What says the defense?
12 MR. PLEXICO: Please swear the juror.
13 [Whereupon, Mr. Wilson is seated in the jury
14 box]
15 THE CLERK OF COURT: Number 121, Gwen Smith.
16 [Whereupon, Ms. Smith comes forward]
17 THE CLERK OF COURT: What says the State?
18 MR. MURDAUGH: Present the juror.
19 THE CLERK OF COURT: What says the defense?
20 MR. PLEXICO: Please excuse the juror from the
21 trial of this case.
22 [Whereupon, Mr. Smith returns to the audience]
23 THE CLERK OF COURT: Number 61, Melisha Grant.
24 [Whereupon, Ms. Grant comes forward]
25 THE CLERK OF COURT: What says the State?

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1 MR. MURDAUGH: Just one minute.
2 [Off the record momentarily]
3 MR. MURDAUGH: Present the juror.
4 THE CLERK OF COURT: What says the defense?
5 MR. PLEXICO: Please excuse the juror from the
6 trial of this case.
7 [Whereupon, Ms. Grant returns to the audience]
8 THE CLERK OF COURT: Number 53, Lonzo Forester.
9 [Whereupon, Mr. Forester comes forward]
10 THE CLERK OF COURT: What says the State?
11 MR. MURDAUGH: Present the juror.
12 THE CLERK OF COURT: What says the defense?
13 MR. PLEXICO: Please swear the juror.
14 [Whereupon, Mr. Forester is seated in the jury
15 box]
16 THE CLERK OF COURT: Number 99, J.R. Moody.
17 [Whereupon, Mr. Moody comes forward]
18 THE CLERK OF COURT: What says the State?
19 MR. MURDAUGH: Present the juror.
20 THE CLERK OF COURT: What says the defense?
21 MR. PLEXICO: Please excuse the juror from the
22 trial of this case.
23 [Whereupon, Mr. Moody returns to the audience]
24 THE CLERK OF COURT: Number 49, Etta Fennell.
25 MR. MURDAUGH: What number?

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1 THE CLERK OF COURT: 49.
2 [Whereupon, Ms. Fennell comes forward]
3 THE CLERK OF COURT: What says the State?
4 MR. MURDAUGH: Excuse the juror.
5 [Whereupon, Ms. Fennell returns to the audience]
6 THE CLERK OF COURT: Number 57, Kevin Ginn.
7 [Whereupon, Mr. Ginn comes forward]
8 THE CLERK OF COURT: What says the State?
9 MR. MURDAUGH: Present the juror.
10 THE CLERK OF COURT: What says the defense?
11 MR. PLEXICO: Court's indulgence.
12 [Off the record momentarily]
13 MR. PLEXICO: Swear the juror.
14 [Whereupon, Mr. Ginn is seated in the jury box]
15 THE CLERK OF COURT: Number 148, Loretta
16 Youmans.
17 [Whereupon, Ms. Youmans comes forward]
18 THE CLERK OF COURT: What says the State?
19 MR. MURDAUGH: Present the juror.
20 THE CLERK OF COURT: What says the defense?
21 MR. PLEXICO: Please excuse the juror from the
22 trial of this case.
23 [Whereupon, Ms. Youmans returns to the audience]
24 THE CLERK OF COURT: Number 35, Michelle Davis.
25 MR. MURDAUGH: What number?

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1 THE CLERK OF COURT: 35.
2 [Whereupon, Ms. Davis comes forward]
3 THE CLERK OF COURT: What says the State?
4 MR. MURDAUGH: Excuse the juror.
5 [Whereupon, Ms. Davis returns to the audience]
6 THE CLERK OF COURT: Number 18, Louretta Busby.
7 [Whereupon, Ms. Busby comes forward]
8 THE CLERK OF COURT: What says the State?
9 MR. MURDAUGH: Present the juror.
10 THE CLERK OF COURT: What says the defense?
11 MR. PLEXICO: Swear the juror.
12 [Whereupon, Ms. Busby is seated in the jury box]
13 THE CLERK OF COURT: Number 72, Jennifer Harris.
14 [Whereupon, Ms. Harris comes forward]
15 THE CLERK OF COURT: What says the State?
16 MR. MURDAUGH: Present the juror.
17 THE CLERK OF COURT: What says the defense?
18 MR. PLEXICO: Please excuse the juror from the
19 trial of this case.
20 [Whereupon, Ms. Harris returns to the audience]
21 THE CLERK OF COURT: 123, Terry Smoak.
22 [Whereupon, Mr. Smoak comes forward]
23 THE CLERK OF COURT: What says the State?
24 MR. MURDAUGH: Present the juror.
25 THE CLERK OF COURT: What says the defense?

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1 MR. PLEXICO: Please excuse the juror from the
2 trial of this case.
3 [Whereupon, Mr. Smoak returns to the audience]
4 THE CLERK OF COURT: Number 22, Beverly Carter.
5 [Whereupon, Ms. Carter comes forward]
6 THE CLERK OF COURT: What says the State?
7 MR. MURDAUGH: Present the juror.
8 THE CLERK OF COURT: What says the defense?
9 MR. PLEXICO: Swear the juror.
10 [Whereupon, Ms. Carter is seated in the jury
11 box]
12 THE CLERK OF COURT: Number 17, Gervais Burison.
13 [Whereupon, Mr. Burison comes forward]
14 THE CLERK OF COURT: What says the State?
15 MR. MURDAUGH: Excuse the juror.
16 [Whereupon, Mr. Burison returns to the audience]
17 THE CLERK OF COURT: 122, Michael Smith.
18 [Whereupon, Mr. Smith comes forward]
19 THE CLERK OF COURT: What says the State?
20 MR. MURDAUGH: Present the juror.
21 THE CLERK OF COURT: What says the defense?
22 MR. PLEXICO: Please swear the juror.
23 [Whereupon, Mr. Smith is seated in the jury box]
24 THE CLERK OF COURT: 106, Dan Peeples.
25 [Whereupon, Mr. Peeples comes forward]

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1 THE CLERK OF COURT: What says the State?

2 MR. MURDAUGH: Present the juror.

3 THE CLERK OF COURT: What says the defense?

4 MR. PLEXICO: Swear the juror.

5 [Whereupon, Mr. Peeples is seated in the jury
6 box]

7 THE CLERK OF COURT: Number 48, Harold Eadie.

8 [Whereupon, Mr. Eadie comes forward]

9 THE CLERK OF COURT: What says the State?

10 MR. MURDAUGH: Present the juror.

11 THE CLERK OF COURT: What says the defense?

12 MR. PLEXICO: Swear the juror.

13 [Whereupon, Mr. Eadie is seated in the jury box]

14 THE CLERK OF COURT: Number 78, Nellie H.
15 Jackson.

16 [Whereupon, Ms. Jackson comes forward]

17 THE CLERK OF COURT: What says the State?

18 MR. MURDAUGH: Present the juror.

19 THE CLERK OF COURT: What says the defense?

20 MR. PLEXICO: Please swear the juror.

21 [Whereupon, Ms. Jackson is seated in the jury
22 box]

23 THE COURT: All right. Are there any matters we
24 need to put on the record regarding the jury-selection
25 process? From the State?

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1 MR. MURDAUGH: None from the State, if Your
2 Honor please.

3 THE COURT: From the defense?

4 MR. PLEXICO: Nothing, Your Honor.

5 THE COURT: All right. Gentlemen, if you will
6 come talk to me for a brief moment.

7 MR. MURDAUGH: Yes, ma'am.

8 [Whereupon, an off-the-record bench conference
9 is held]

10 THE COURT: Ladies and gentlemen of this jury
11 panel, I say to you welcome because, of course, as you
12 understand, you are my jury for this second case that
13 we are going to try after the first one we just picked.
14 What we were talking about was the scheduling, because
15 I certainly don't want to delay this case in any way,
16 but, additionally, I don't want y'all sitting here
17 waiting on the first case. So with that said, ladies
18 and gentlemen, what we are going to do is ask that you
19 be back here bright and early Wednesday morning at 9:00
20 a.m. where we're going to go ahead and begin the trial
21 of this second case.

22 Again, I will caution you, just like I cautioned
23 the other members of the last jury, you are not to
24 gather any independent information about this case.
25 You are also not to read anything. I don't believe

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1 there's going to be anything in the newspaper or on the
2 radio or anywhere else, but out of an abundance of
3 caution, if you pick up the newspaper tomorrow or you
4 turn on the news and it says something about this case,
5 of course you are just to turn it off, disregard it.
6 You can go home and tell a family member or friends or
7 loved ones that you have been chosen for a criminal
8 jury up here in Hampton this week, but that is all you
9 are allowed to say. And, again, that's all you're
10 allowed to discuss with each other. And the reason why
11 is you haven't heard the evidence in this case. You
12 haven't heard the closing arguments from all the
13 lawyers, and you haven't heard my charge on the law and
14 it just simply wouldn't be appropriate to do so until
15 you've heard all that. Okay?

16 So with that said, ladies and gentlemen, I am
17 going to go ahead and dismiss y'all until Wednesday
18 morning at 9:00 a.m. And I say the same thing to y'all
19 that I said to the last jury: I can't start until
20 every one of you are here. So if for some reason you
21 have a problem with transportation or you have a flat
22 tire, call me because I've got to send someone to go
23 get you, okay? Because, again, I can't start until all
24 thirteen of you are here.

25 Additionally, y'all, when you come back on

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1 Wednesday, I'm going to ask that you choose a
2 foreperson. Again, the foreperson doesn't have any
3 more say than anybody else. They're just the person
4 that facilitates the conversations, the deliberations,
5 and it's also the person that talks with me. And,
6 again, I would ask them to take that front seat. All
7 right?

8 So with that said, ladies and gentlemen, you
9 have a wonderful evening. I'm going to go ahead and
10 dismiss you-all. We'll see you Wednesday morning, 9:00
11 a.m. All right? Thank you.

12 [Whereupon, the jury exits the courtroom at 4:23
13 p.m.]

14 THE COURT: All right. Ladies and gentlemen,
15 obviously, those of you out there, you were not chosen
16 as jurors in these first two cases; however, they tell
17 me there's a third case out there that we possibly will
18 try this week. But the good news is I get to send
19 you all home for the balance of today, which isn't
20 much, and also all day tomorrow. But respectfully,
21 what I need you to do, ladies and gentlemen, you were
22 given a --

23 Is it on the card, Mylinda?

24 THE CLERK OF COURT: Yes, ma'am.

25 THE COURT: You were given a phone number when

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1 you first came in this morning. What I want you to do
2 is call that phone number after six o'clock tomorrow
3 night, and it will give you directions of whether or
4 not you need to report back. If it says you don't need
5 to report back, don't report back. Go about your
6 business. But if it says be here either Wednesday
7 morning or Thursday morning at a specific time, please
8 be here because that means we're going to pull the jury
9 in another case. All right?

10 Ladies and gentlemen, don't call before six
11 o'clock, because there will be no message on there --
12 because we simply won't know what's going on to be able
13 to put the message on there -- to tell you whether or
14 not you need to come back. Okay?

15 So with that said, ladies and gentlemen, I
16 appreciate y'all being here. Go about your business.
17 Just follow whatever it tells you to do on the recorded
18 message. And we appreciate y'all's patience today and
19 being here. Y'all are excused. Thank you.

20 [Whereupon, the jury panel exits the courtroom
21 at 4:25 p.m.]

22 [JURY TRIAL ADJOURNS AT 4:26 P.M.]
23
24
25

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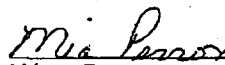
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 14th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the jury trial held before the Honorable Carmen T. Mullen, on Monday, September 8, 2008.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 12th day of December, 2008.



Mia Perron, CCR, CVR-CM
Circuit Court Reporter
14th Judicial Circuit

MIA PERRON, CCR, CVR-CM

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STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
) FOURTEENTH JUDICIAL CIRCUIT
 COUNTY OF HAMPTON) INDICTMENT NO.: 2008-GS-25-0156

STATE OF SOUTH CAROLINA)
)
 VS.)
)
 KELVIN MAYS,)
)
 DEFENDANT.)
 _____)

JURY TRIAL

VOLUME 2 OF 2

held before the Honorable Carmen T. Mullen
 Mia Perron, Circuit Court Reporter, 14th Judicial Circuit
 in the Hampton County Courthouse
 Varnville, South Carolina
 on Wednesday, September 10, 2008, Commencing at 9:05 a.m.

SUSAN "MIA" PERRON, CCR, CVR-CM
 Circuit Court Reporter - 14th Judicial Circuit
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MARKED/ADMITTED

State's

State's Exhibit Number 1
[Receipt from Lowe's]

6 / 27

State's Exhibit Number 2
[Letter dated 1/28/08]

6 / 27

Court's

Court's Exhibit Number 1
[Note from the jury]

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PROCEEDINGS

[State's Exhibit Number 1, receipt, is marked by
court reporter before proceedings commence]

[State's Exhibit Number 2, letter of cost, is
marked by court reporter before proceedings commence]

THE COURT: Solicitor, are we ready to go this
morning?

MR. MURDAUGH: Yes, ma'am.

THE COURT: Mr. Plexico, are you ready?

MR. PLEXICO: Yes, ma'am. I think I do have a
matter to bring before we bring the jury out.

THE COURT: And where is your client?

MR. PLEXICO: I'm sorry. He's still in -- I'll
go get him, Judge.

[Off the record momentarily]

[Whereupon, Mr. Mays enters the courtroom at
9:05 a.m.]

THE COURT: Solicitor Murdaugh, are you going to
do the opening statement, sir?

MR. MURDAUGH: I'm sorry?

THE COURT: Are you going to do the opening
statement, sir?

MR. MURDAUGH: Yes, ma'am.

THE COURT: All right. I just wanted to make
sure.

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1 All right. Mr. Plexico, what do you need to put
2 on the record?

3 MR. PLEXICO: Yes, Your Honor. I have a motion
4 under Rule 609 to limit any -- to limit the evidence
5 that the State may use from -- concerning my client's
6 prior record. He has an extensive record and, as I
7 understand the rule, they -- you can go back ten years,
8 with the exception that if you're on parole or
9 probation, I believe. I'm not sure about the
10 probation. I would concede -- I think I need to
11 concede that point. For instance, 2000, 1998 --

12 THE COURT: I understand what the rule is. If
13 he's still on probation, then it would still be within
14 the time period. Okay.

15 MR. PLEXICO: I wouldn't argue -- if they had
16 proof of something like that, I wouldn't argue against
17 that. But I understand they want to use a burglary
18 that goes back to 1982, and I just need some
19 clarification on the record. One -- that would be
20 under State v. Green.

21 THE COURT: Okay. I understand what the rule
22 is.

23 Solicitor, what do you intend on using as far as
24 his prior record?

25 MR. MURDAUGH: The shoplifting in 2007.

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1 THE COURT: And that's it?

2 MR. MURDAUGH: No, ma'am.

3 THE COURT: Okay. Sorry. Keep going.

4 MR. MURDAUGH: That's a start.

5 THE COURT: That's a start. Okay.

6 MR. MURDAUGH: A larceny -- no, that's too far
7 back. Excuse me. Got a petty larceny in 2005, a petty
8 larceny in '99, a petty larceny in '99, petty larceny
9 in 2003, a petty larceny in 2003, possession of
10 burglary tools in 2004, petty larceny in 2000, a petty
11 larceny in -- no, that's too old -- a petty larceny in
12 '99, a petty larceny in '99, a petty larceny in '91 --
13 that's too old, that one is too old -- a burglary --

14 [Whereupon, Mr. Murdaugh, Ms. Legette and Mr.
15 Plexico confer]

16 MR. MURDAUGH: And that looks like that's it.

17 THE COURT: All right, sir.

18 MR. MURDAUGH: Oh, excuse me. Yeah. I said
19 grand larceny.

20 MR. PLEXICO: Well, I didn't hear a grand
21 larceny.

22 MR. MURDAUGH: I said larceny.

23 MS. LEGETTE: There's a 2004 grand larceny.

24 MR. PLEXICO: What year was that?

25 MS. LEGETTE: 2004.

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1 THE COURT: That would be an additional one,
2 because I have a larceny in 2005, as well.

3 MR. MURDAUGH: Okay. A grand larceny in 2004:

4 THE COURT: So another larceny in 2004.

5 MR. PLEXICO: Your Honor, the Court's
6 indulgence.

7 Could you show me the grand larceny in 2004?

8 [Off the record momentarily]

9 MR. MURDAUGH: Do you have the indictment?

10 THE COURT: Yes, sir, I do.

11 [Whereupon, the Court proffers documents to Ms.
12 Legette]

13 MR. PLEXICO: Could I see the indictment,
14 please?

15 [Whereupon, Ms. Legette proffers documents to
16 Mr. Plexico]

17 [Off the record momentarily]

18 MR. MURDAUGH: Judge?

19 THE COURT: Yes, sir.

20 MR. MURDAUGH: The record is so extensive, we're
21 having difficulty finding it. We won't need that until
22 he would take the witness stand, so --

23 THE COURT: Right.

24 MR. MURDAUGH: -- let us hunt, and we can go
25 ahead.

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1 THE COURT: I appreciate that. We've got
2 supposedly -- I've written these down that you've
3 already listed, and I understand Ms. Legette is now
4 going through it to make sure that she is including it
5 all. Okay?

6 Mr. Plexico, they will let you know, before he
7 takes the stand, any additional. Okay?

8 MR. PLEXICO: Yes, Your Honor.

9 Your Honor, they have a -- another matter now?

10 THE COURT: Yes, sir.

11 MR. PLEXICO: They have a new indictment for a
12 burglary second that is a violent burglary. He was
13 served a -- as I understand, a nonviolent burglary. I
14 believe he needs to be arraigned on the new -- on the
15 new indictment, Judge.

16 MR. MURDAUGH: I can arraign him real quick.

17 THE COURT: You can arraign him right now.

18 MR. MURDAUGH: If you answer to the name Kelvin
19 Mays, sir, hold up your right hand.

20 [Whereupon, Mr. Mays complies]

21 MR. MURDAUGH: You stand charged that you, said
22 Kelvin Mays, did enter a building, ACCESS Network,
23 located at 109 First Street East, Hampton, South
24 Carolina, without the consent and with the intent to
25 commit a crime therein, and did enter -- and that the

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1 entering did occur in the nighttime, against the peace
2 and dignity of the State and contrary to the statute as
3 such cases may provide. How do you plead to the
4 charges you stand indicted?

5 MR. MAYS: Not guilty.

6 MR. MURDAUGH: We're ready to go to trial.

7 THE COURT: Thank you.

8 All right. Anything further, Mr. Plexico?

9 MR. PLEXICO: No, Your Honor. We're ready to go
10 forward.

11 THE COURT: Anything further, solicitor?

12 MR. MURDAUGH: [Indicates negatively]

13 THE COURT: All right. Let's bring the jury in.

14 [Whereupon, the jury enters the courtroom at
15 9:13 a.m.]

16 THE COURT: Good morning, ladies and gentlemen
17 of the jury, and welcome back.

18 Ladies and gentlemen, at this time we are going
19 to begin the case of the State of South Carolina versus
20 Mr. Kelvin Mays. What I'm going to say to you now,
21 ladies and gentlemen, is intended to serve as an
22 introduction to the trial of this case. These are not
23 remarks on the law. I will instruct you on the law,
24 that's applicable to this case, at the end of the
25 trial. Ladies and gentlemen, this is merely an

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1 explanation of the procedure that we're going to follow
2 during the trial of this case so you can better
3 understand what's happening.

4 Ladies and gentlemen, the defendant, Mr. Kelvin
5 Mays, is charged by an indictment filed in this Court
6 with the crime of burglary in the second degree, the
7 elements of which I will explain to you later. Now,
8 ladies and gentlemen, the indictment is simply the
9 charge by which the case is brought into court, and it
10 is not in any sense evidence of any of the allegations
11 it contains. Now, the defendant, Mr. Mays, has pled
12 not guilty to this indictment. The State, therefore,
13 has the burden of proving the elements of the
14 indictment beyond a reasonable doubt. Now, ladies and
15 gentlemen of the jury, it is your duty to decide
16 whether the State has met that burden.

17 Ladies and gentlemen, your purpose as jurors is
18 to find and determine the facts of the case. You are
19 the sole judge of the facts. If at any time I make any
20 comment regarding the facts of the case, you must
21 disregard it. You are only to determine the facts of
22 this case, ladies and gentlemen, from the testimony of
23 the witnesses right here on the witness stand, as well
24 as any other evidence that's introduced into evidence.

25 Ladies and gentlemen, it is especially important

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1 that you perform your duty of determining the facts in
2 this case diligently and conscientiously, because
3 ordinarily there is no way to correct an erroneous
4 determination of the facts by a jury. On the other
5 hand, and with equal emphasis, the same law that makes
6 you the judges of the facts of the case makes me the
7 judge of the law. You must accept and follow the law,
8 even if you disagree with it. I cannot tell you what
9 the facts of this case are, and you cannot disagree
10 with me what the law is or what you think the law
11 should be. Ladies and gentlemen, your job is to take
12 the law as I give it to you, and apply it to the facts
13 as you find them, and render a true and just verdict.

14 Now, ladies and gentlemen, until I advise you to
15 begin your deliberations, you must not discuss this
16 case with anyone, and that includes fellow jurors,
17 friends, family members, or anyone involved in this
18 case. And, ladies and gentlemen, once the case is
19 submitted to you, you may not discuss it outside the
20 presence of all of your fellow jurors.

21 Now, ladies and gentlemen, I have also
22 instructed the attorneys, the parties, and any
23 witnesses in this case not to speak to you. So if you
24 pass them during the trial of this case, out in the
25 hallway or out in the parking lot, and they don't even

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1 say hello to you, don't be offended. They're just
2 simply following my instructions. And the reason for
3 this, ladies and gentlemen, is even an innocent
4 conversation can be misconstrued, and I would never
5 want that to happen.

6 Additionally, as I told y'all, ladies and
7 gentlemen, it is important that you keep an open mind
8 and not decide any issue in this case until you have
9 heard all of the evidence, you've heard the parties'
10 arguments or the lawyers arguments, as well as my
11 charge on the law. Ladies and gentlemen, it is your
12 solemn responsibility to determine the guilt or
13 innocence of the defendant, and your verdict must be
14 based solely on the evidence as it is presented to you
15 in this trial, and on the law as I instruct you at the
16 close of this case.

17 Now, in just a moment Solicitor Murdaugh is
18 going to make an opening statement in which he is going
19 to explain to you what he believes the issues are in
20 this case. Then Mr. Plexico, on behalf of the
21 defendant, is going to also make an opening statement;
22 however, he is not required to. Ladies and gentlemen,
23 what the attorneys tell you in their opening statements
24 is not evidence. It is only their contention as to
25 what the issues are in this case. Again, as I told

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1 you, the evidence in this case is going to come right
2 here from the witness box through testimony, as well as
3 any other exhibits or evidence that are entered into
4 the case.

5 Now, ladies and gentlemen, from time to time you
6 may hear the attorneys ask for a bench conference or
7 say, Judge, we need to discuss something with you, or
8 may we approach, and sometimes I might find it
9 necessary to send you back to your jury room. What I
10 want you to know and understand is we are not hiding
11 anything from you. Oftentimes when I have to make a
12 ruling on a matter of law, I may need to make a comment
13 on the facts of the case, and I would never want
14 anything I say in regards to the facts of this case to
15 influence you in any way, because, of course, the facts
16 are solely for you to judge. All right?

17 Ladies and gentlemen, in determining what the
18 true facts of the case are, you must decide whether or
19 not the testimony of the witnesses is believable. It's
20 my responsibility to rule, as a matter of law, whether
21 or not certain testimony is admissible or comes in but,
22 once the testimony is admitted, whether or not you
23 believe it is solely for you to determine. Now, ladies
24 and gentlemen, in deciding whether to believe a
25 witness, you have the right to consider the interest of

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1 any witness, the bias of any witness, the prejudice of
2 any witness, the opportunity for the witness to have
3 seen the matters and things about which they are
4 testifying, and you can look at the way the witness
5 acts here on the witness stand. Ladies and gentlemen,
6 you have the right to consider anything that is in the
7 record that will help you evaluate the testimony of the
8 witness. That means it's your duty to pay close
9 attention -- or pay close attention, to observe the
10 witnesses, to listen carefully to the lawyers as they
11 present their cases so at the very end of the trial you
12 can go back into your jury room, and, again, render a
13 true and just verdict.

14 Now, ladies and gentlemen, as I told you on
15 Monday -- I swore you in a number of times. At this
16 time, I'm going to go ahead and swear you in as the
17 jury of this case. So if you would all please stand
18 and raise your right hand.

19 [Whereupon, the jury is duly sworn by the Court]

20 THE COURT: Thank you, ladies and gentlemen.

21 Respectfully, from the solicitor, anything
22 additional that you would like me to comment on to the
23 jury?

24 MR. MURDAUGH: No, ma'am.

25 THE COURT: Anything from the defense?

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1 MR. PLEXICO: No, Your Honor.

2 THE COURT: All right. Ladies and gentlemen,
3 Solicitor Murdaugh will do his opening statement.

4 MR. MURDAUGH: If Your Honor please, there was a
5 motion the other day to sequester the witnesses, and
6 I'll be honest with you, I flat forgot about it this
7 morning.

8 THE COURT: Okay.

9 MR. MURDAUGH: All of y'all need to go out and
10 sit in that room.

11 [Whereupon, the witnesses exit the courtroom]

12 MR. MURDAUGH: I apologize.

13 THE COURT: That's all right. Thank you, sir.

14 - - - - -

15 OPENING STATEMENT

16 MR. MURDAUGH: Mr. Foreman, ladies and gentlemen
17 of the jury, the case that we are about to begin to try
18 is that against -- the State against Kelvin Mays. This
19 will be one of the shortest cases that has even been
20 tried before, because there's not that many witnesses
21 as to what happened.

22 My statement is sort of -- what I'm telling
23 y'all now is sort of a roadmap for you to follow this
24 case as it goes through the courtroom. Trial is
25 divided into a number of parts: the opening

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1 statements, the testimony, the charge by the jury -- by
2 the judge, and your decision as jurors. At the end of
3 everything, you must reach a verdict. Verdict is
4 derived from the Latin word veredicto, which means to
5 speak the truth. And whatever your verdict is, let it
6 speak the truth in this case.

7 You will hear testimony from Gwen Bamfield, who
8 is the director of an outfit called ACCESS Network, I
9 think -- and if I state something wrong, they're going
10 to tell you on the stand -- ACCESS Network, which is a
11 nonprofit organization to help homeless people and
12 people with HIV and AIDS.

13 She has working for her Shedron Williams and
14 Eddie Bryant, among other people. On the night of
15 January the 21st -- they have an alarm system in there.
16 You will have testimony from Eddie Bryant that when
17 they left that afternoon, they locked the door, went
18 home. You will have testimony from Gwen Bamfield that
19 she received a call from the security people that had
20 the alarm system. She called Eddie Bryant.

21 Eddie Bryant went around there. On the way to
22 going, he grabbed a pistol. He thought it was a
23 pistol. It turned out it was a BB gun. But it worked.
24 Y'all will hear that testimony in a few minutes. He
25 goes around there. He finds that the front door has

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1 been busted open and is open. He pulls right up to the
2 front door, I mean right in it, and here comes Kelvin
3 Mays out of the door. He puts what turns out to be the
4 BB gun on him and says, put your hands up. And he put
5 his hands up. He then tried to find the police. He
6 didn't have his cell phone with him so he said, get in
7 the car, and he took him to the police station. There
8 wasn't anybody there, so he took him to Shedron
9 Williams' house. Shedron called 911. They drove back
10 around to the ACCESS Network -- which is in Hampton
11 County, by the way -- and when they got there, Ricky
12 Cook and Brad Drawdy, two policemen from the town of
13 Hampton, were there and they arrested him.

14 It's going to be short and sweet. That is the
15 case that y'all will have. And from that, you've got
16 to reach that verdict. Let that verdict speak the
17 truth. Thank you.

18 THE COURT: Thank you, solicitor. Mr. Plexico?

19 MR. PLEXICO: Pleases the Court?

20 THE COURT: Yes, sir.

21

22

23

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OPENING STATEMENT

MR. PLEXICO: Good morning, ladies and gentlemen. It's always a pleasure to talk to a jury here in Hampton. I've been the public defender -- I'm Steve Plexico -- since 1990.

This is the only day that my client will get in court. If the judge makes some kind of an error of law, the appellate courts can correct that. But if juries make the mistake of fact, you can't call up Monday morning and call Mylinda, the clerk of court, you know, well, you know, you need to call the judge back and get the solicitor and the defendant and go back in court so we can -- and the rest of the jurors, so I can change my vote. That doesn't happen. That's never happened. Once a jury renders a verdict, then that's -- that is the decision on the facts. The judge decides the law. Y'all hear the evidence and decide the facts. Now, you have to do that individually and as a group, obviously, because every verdict must be unanimous.

Now, I would ask that y'all realize that my client has absolutely nothing to prove. Why is that? Well, this isn't like a civil case where you just pull out a checkbook and write a 500-dollar check for a fender, depending on who's -- who caused the accident.

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1 This is the power of the State coming against one
2 individual. They have all the taxing power, all the
3 police, and all the resources, and everything that they
4 need, against one person. That's why they are entitled
5 to an attorney if they cannot afford one.

6 Now, they have to prove -- and they, meaning the
7 State -- that the defendant is guilty beyond a
8 reasonable doubt. Well, they start off one hundred
9 percent innocent. So then they have to take away
10 and -- put up enough proof to where this was a hundred
11 percent innocent, and they would have to take it all
12 away until there wasn't a reasonable doubt left. And
13 the judge will define that for you later in the trial.
14 But a reasonable doubt obviously is one that would --
15 you know, that you have a reason, that something that
16 makes you hesitate. And that would be enough. So they
17 have a very heavy, heavy, heavy burden in every case.

18 We have a system we are very proud of. We take
19 twelve people from the community, from all different
20 types of occupations, and they're the ones that make
21 the decision on whether or not someone is guilty or
22 whether or not someone walks free. And this is a very
23 important part of our society. I ask you to take this
24 very seriously, to listen to all the evidence and not
25 to make a decision until you've reached a verdict.

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1 Thank you very much.

2 MR. MURDAUGH: Call Gwen Bamfield.

3 THE COURT: Thank you, sir.

4 [Whereupon, Ms. Bamfield enters the courtroom]

5 THE COURT: Ms. Bamfield, please come forward to
6 be sworn.

7 If you will raise your right hand and place your
8 left hand on the Bible.

9 [Whereupon, Ms. Bamfield is duly sworn by the
10 Court]

11 THE COURT: Thank you, ma'am.

12 [Whereupon, Ms. Bamfield takes the witness
13 stand]

14 THE COURT: If you would give us your full name
15 for the record.

16 THE WITNESS: Gwen Bamfield.

17 - - - - -

18 GWEN BAMFIELD,

19 Having Been First Duly Sworn,

20 was Examined and Testified as Follows:

21 DIRECT EXAMINATION

22 BY MR. MURDAUGH:

23 Q. Ms. Bamfield, where do you live?

24 A. I live in Hampton, town of Hampton.

25 Q. And you're a native of Hampton?

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1 A. Yes. I was born in Hampton.

2 Q. Okay. How long have you been back in Hampton?
3 You moved for a while, I believe.

4 A. Yes, sir. I've been back about ten years.

5 Q. And what do you do for a living, Ms. Bamfield?

6 A. My primary job is the president of a nonprofit
7 organization called the ACCESS Network.

8 Q. Okay. And where is that located?

9 A. It's located on First Street in the town of
10 Hampton. 109 First Street East.

11 Q. And is that in Hampton County?

12 A. Yes, it is.

13 Q. Okay. Now, Ms. Bamfield, what sort of an outfit
14 is that you're talking about, the ACCESS Network?

15 A. We provide services to HIV positive clients and
16 their families, and to homeless individuals, in the four
17 Lowcountry counties of Beaufort, Colleton, Hampton, and
18 Jasper Counties.

19 Q. Okay. And do you have working for you, among
20 other people, Eddie Bryant and Shedron Williams?

21 A. Yes. Eddie Bryant is a case manager, works
22 directly with the clients that we serve; and Shedron
23 Williams is our director of prevention and education
24 services, and works in the community.

25 Q. Okay. Now, the building that y'all are located

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1 in, is that the old Holland Smith law office?

2 A. Yes, sir.

3 Q. I'm not sure any of the jurors are old enough to
4 remember that.

5 But that's located right behind the Parker
6 Building, I believe?

7 A. It's located down the street from the Murdaugh
8 law firm, and it's located directly behind City Trends and
9 next door to the Mellon Patch Daycare Center.

10 Q. Okay. On the 21st of January of this year --

11 A. Yes, sir.

12 Q. -- did you receive a call that night?

13 A. Yes, I did. We have a security system at the
14 office, through Palmetto Security Company. And it's an
15 alarm-activated system. We have sensors in the building,
16 and we set an alarm. We set the alarm with a code at the
17 end of the day when we close the office, and the security
18 system calls the -- I'm the first person that they call
19 when there's been a breach of security at the office. And
20 they called me, it was after eleven o'clock, on that -- on
21 the 21st of January.

22 Q. And when you received that call, did you then
23 call anybody?

24 A. Yes. I called Eddie Bryant, and I asked him --
25 I told him the alarm company had called, and I asked him

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1 would he go to the office to check it out.

2 Q. Okay. Did you later learn that the building had
3 been broken into?

4 A. Yes. After a few minutes the alarm company
5 called back and said that they had notified the police,
6 and they wanted to make sure that someone was at the
7 office. And then a few minutes later, Mr. Bryant called
8 me and said to come --

9 Q. Don't tell me what he said, please, ma'am.

10 A. Oh. Okay.

11 Q. As a result of it, did you later look at the
12 building?

13 A. Yes. As a result of it, I went to the office
14 that evening.

15 Q. And what did you see?

16 A. The front door was broken into. It was glass
17 panes in the door, and the pane nearest the lock, nearest
18 the knob, had been busted out and there was glass and
19 debris all over the store.

20 Q. Okay.

21 A. That's what I saw.

22 Q. And did you later have that repaired?

23 A. Yes, I did.

24 Q. And I show you two items, marked State's
25 Exhibits 1 and 2 for identification, and ask you if

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1 you can recognize those.

2 A. Yes, I do. One is the bill from Lowe's for the
3 actual door, and the hardware to replace the door; and the
4 second is for the gentlemen -- the contractor that came
5 and replaced the door.

6 Q. The Lowe's is marked State's Exhibit 1 for --

7 A. Yes.

8 Q. -- identification?

9 A. Yes, it is.

10 Q. And Bryan O'Neal Henderson --

11 A. Is the contractor, and it's States Exhibit 2.

12 Q. Okay. And do the total of these two bills add
13 up to \$893.85?

14 A. Yes, sir, they do.

15 MR. MURDAUGH: If Your Honor please, I would
16 offer these as exhibits.

17 THE COURT: Okay. Mr. Plexico?

18 MR. MURDAUGH: I'm showing them to him.

19 MR. PLEXICO: Your Honor, may I --

20 THE COURT: Any objection?

21 MR. PLEXICO: I've seen them, but if I could
22 briefly --

23 [Whereupon, Mr. Plexico reviews documents]

24 THE COURT: Any objection, Mr. Plexico?

25 MR. PLEXICO: No, Your Honor.

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1 THE COURT: They are in evidence without
2 objection.

3 [State's Exhibit Number 1, receipt, is admitted
4 into evidence by the Court]

5 [State's Exhibit Number 2, letter of cost, is
6 admitted into evidence by the Court]

7 MR. MURDAUGH: May I present them to the jury?

8 THE COURT: You may, sir.

9 [Whereupon, Mr. Murdaugh proffers documents to
10 the jury]

11 MR. MURDAUGH: Thank you, ma'am. Answer any
12 questions Mr. Plexico may have.

13 CROSS-EXAMINATION

14 BY MR. PLEXICO:

15 Q. Describe the damage to the door, please.

16 A. Describe the damage to the door?

17 Q. Yes, ma'am.

18 A. The pane was busted out, and there was damage to
19 the frame. It had splintered.

20 Q. So the door just -- they didn't stick their hand
21 in and turn the key and just -- I mean, turn the deadlock
22 and open it up?

23 A. I don't know what they did, Mr. Plexico.

24 Q. I'm just asking.

25 A. Okay.

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1 Q. I'm just asking. Did it have a deadlock on it?

2 A. It had a lock on the knob part of the door.

3 Q. Okay. All right. So you weren't there when it
4 happened, and you don't know who entered and who damaged
5 the door; correct?

6 A. No.

7 MR. PLEXICO: Okay. Thank you, ma'am.

8 MR. MURDAUGH: You may come down. Call Eddie
9 Bryant.

10 May Ms. Bamfield be excused?

11 THE COURT: Any objection, Mr. Plexico?

12 MR. PLEXICO: No, Your Honor.

13 THE COURT: Ma'am, you may be excused. Thank
14 you.

15 MR. MURDAUGH: You're welcome to stay, but you
16 can go if you want.

17 [Whereupon, the witness is excused and exits the
18 courtroom]

19 [Whereupon, Mr. Bryant enters the courtroom]

20 THE COURT: Sir, if you'll just come forward
21 over here.

22 Sir, if you will raise your right hand and place
23 your left hand on the Bible, sir.

24 [Whereupon, Mr. Bryant is duly sworn by the
25 Court]

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1 THE COURT: Thank you, sir. Take a seat.

2 [Whereupon, Mr. Bryant takes the witness stand]

3 THE COURT: Give us your full name for the
4 record.

5 THE WITNESS: My name is Eddie Jerome Bryant.

6 - - - - -

7 EDDIE J. BRYANT,

8 Having Been First Duly Sworn,

9 was Examined and Testified as Follows:

10 DIRECT EXAMINATION

11 BY MR. MURDAUGH:

12 Q. Mr. Bryant, where do you live?

13 A. 303 Sly Street, Hampton, South Carolina.

14 Q. Okay. On the -- and do you work with ACCESS
15 Network?

16 A. Yes. I'm a medical --

17 Q. And what do you --

18 A. -- case manager.

19 Q. -- do with them?

20 A. I'm a medical case manager there.

21 Q. And what do y'all -- you say a medical case
22 manager. What do you actually do?

23 A. All my clients are HIV positive, and we set up
24 all -- we try to help them get medical care, we try to
25 help them with housing, budgeting, to better their

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1 lifestyle.

2 Q. Okay. Were you working for them on January the
3 21st, 2008?

4 A. Yes, I was.

5 Q. Okay. Did you work that day?

6 A. I worked that day.

7 Q. Okay. Did you lock when you left, or did
8 somebody else do it?

9 A. No. I locked up. I set the code for the
10 burglar alarm system. I was the last one to leave.

11 Q. Did you lock the door?

12 A. Yes, I did.

13 Q. And set the security system on?

14 A. Yes, I did.

15 Q. Okay. Did, sometime later that night, you
16 receive a call from Gwen Bamfield?

17 A. Around 11:00-something that night. I was home
18 in the bed.

19 Q. Okay. As a result of that call, where did you
20 go?

21 A. I went to ACCESS Network at 109 First Street
22 East.

23 Q. Okay. And tell me what -- tell me what you did.
24 What happened?

25 A. Well, I got a call from Gwen. She said that the

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1 burglar alarm had went off, would I go down there and
2 check it out. So as I came up Maple Street to First
3 Street, which is the corner where our office is, I noticed
4 that our sensor lights was on, the outside sensor light.
5 That means someone is -- something has tripped that light
6 off. So what I did, I cut my light off on my truck, and I
7 rolled by the office. As I rolled by, I could see some --
8 a movement. The movement was right at the door. I passed
9 the office, turned around, and drove directly up in the
10 front of our office to block the entranceway. I mean,
11 directly. As I drove up, I got out. When I got out, I
12 noticed a figure coming out of the office, out of the
13 door, at the time that I was coming up on the porch, who
14 was Mr. Kelvin Mays [indicates].

15 Q. And you pointed to your left. Who are you
16 talking about specifically, sir?

17 A. The young man, with the blue shirt on, sitting
18 next to Mr. Plexico.

19 Q. You're talking about the fellow I'm putting my
20 hand on his shoulder now?

21 A. Yes.

22 Q. Okay. And what did you do?

23 A. I -- I had a BB gun.

24 Q. Is that what you meant to take, sir?

25 A. No. Yes, it is. That's what I meant to take.

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1 I had a gun, a BB gun, and at the time he made a move --

2 Q. Are you talking about a gun, a pistol, or --

3 A. Just -- it was a pistol, built like a .45
4 caliber, a BB gun.

5 He made a motion towards me, so I asked him to
6 stop, hold. So he said that, hey, man, I'm glad you
7 showed up, man. He said, I'm glad you're here; that
8 somebody was breaking in your building; I was passing by;
9 it was two guys, and I was trying to see what they was
10 trying to steal. So I said, well, you stay right there.
11 And I put the gun on him. So he said, well, we need to go
12 catch them. I said, no; you stay right there.

13 But he was talking very loud. So at the time,
14 it's dark, it's eleven o'clock at night. I'm thinking
15 maybe someone else is with him. I don't know. So I
16 apprehended him and made him get in my car. I took him to
17 the police station, which was closed. I rode to the
18 Huddle House, looking for a police. No one. At that
19 time, he was -- he was in the car and he kept saying, man,
20 I can tell you they was in a red car; I can tell you I
21 know who they are; I know where they stay. So I said,
22 well, you can explain that to the police.

23 So after I couldn't find the police, I called my
24 coworker on my cell phone, who is Shedron Williams, and
25 told him to meet me in his yard because I couldn't find

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1 anybody. I didn't want to be riding around with him. I
2 went to Shedron's house. Shedron came out. About that
3 time, I told Shedron -- I think maybe Gwen called Shedron,
4 or he called the police. They were back at the office.

5 So at that time, we went back to ACCESS Network.
6 And I got out the car. When I got out the car, I had the
7 BB gun in my hand. One of the officers didn't know who I
8 was at the time when I drove up. Matter of fact, he said,
9 put that gun down. I said, I'm not the one; he's in the
10 car. I threw the gun on the hood of the car. And at that
11 time, they took Kelvin Mays out of my truck, put him up
12 against the wall, searched him or whatever, and
13 apprehended him.

14 Q. Okay. Eddie, did -- Mr. Bryant, did you know
15 Kelvin Mays prior to this night?

16 A. Kelvin Mays came by my office about a week to
17 ten days earlier. He came in the office asking did we
18 want to buy some batteries.

19 Q. Don't tell me what you said, but did you buy the
20 batteries?

21 A. No.

22 Q. Okay. And did he come any other time?

23 A. Yes, he did. About three or four days later, he
24 came to the office asking for a fictitious person that
25 worked there. And I said, they don't work here, what

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1 makes you think they work here, you know. And he said,
2 okay. So he was just standing in the office looking
3 around, and then he left.

4 Q. Okay. Did you buy the batteries from him?

5 A. No, I -- no, I did not.

6 MR. MURDAUGH: Answer any questions --

7 [Whereupon, Mr. Murdaugh and Ms. Legette confer]

8 MR. MURDAUGH: Out of an abundance of -- excuse
9 me, Steve. Out of an abundance of caution --

10 Q. [Mr. Murdaugh] Is the ACCESS Network place,
11 that was broken into, located in Hampton County?

12 A. Yes, it is.

13 MR. MURDAUGH: Okay.

14 THE COURT: Mr. Plexico?

15 MR. PLEXICO: The Court's indulgence, please,
16 Your Honor.

17 THE COURT: Yes, sir.

18 [Whereupon, Mr. Plexico and Mr. Mays confer]

19 MR. MURDAUGH: Oh. Before Mr. Plexico --

20 THE COURT: Yes, sir. Go ahead.

21 MR. MURDAUGH: -- starts, can I ask him a couple
22 of other questions?

23 THE COURT: Sure.

24 Q. [Mr. Murdaugh] You said this was shortly after
25 eleven o'clock?

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1 A. Yes. It should have been after -- it should
2 have been after eleven o'clock. It definitely was after
3 11:00.

4 Q. Was it nighttime?

5 A. Yes, it was. 11:00 p.m. at night.

6 Q. Okay. Now, you said that he said that he had
7 seen a red car?

8 A. Yes.

9 Q. Did you see anybody else or any vehicle?

10 A. Nobody, no one, in that whole vicinity. At the
11 time that I was apprehending him, at the time that he got
12 in the car, at the time that I left, or was driving around
13 and going to the police, I saw no one.

14 MR. MURDAUGH: Thank you, sir.

15 MR. PLEXICO: May I, Your Honor?

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION

18 BY MR. PLEXICO:

19 Q. Sir --

20 A. Yes, sir.

21 Q. -- so my client comes out and says that he saw
22 two guys that were trying to break in; is that right?

23 A. Yes. When I -- after I apprehended him, he said
24 that.

25 Q. Okay. Well, I mean, that's -- all right.

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1 So you come up, you drive up, you demonstrate
2 force, you've got a gun that he can see; correct?

3 A. At the time when I got out of the car, he
4 couldn't see the gun.

5 Q. Well, I mean, the lights were on outside;
6 correct?

7 A. The sensor light was on. It shines outside of
8 the porch. I stepped under the porch, underneath the
9 porch, and the sensor light is shining out in the yard.

10 Q. Why couldn't he see the gun as you got out of
11 the car going up to the porch?

12 A. Because when I got out, the door was open. I
13 came around. When he knew anything, I was -- had
14 approached him. He couldn't see it from the beginning
15 because I opened the door, and I was standing there. He
16 couldn't see the gun until I -- until I confronted him.

17 Q. Well, how could he be sure it wasn't one of the
18 guys coming back?

19 A. One of which guys?

20 Q. Well, I mean, just because you hadn't seen
21 them -- well, if somebody breaks in, often they break in,
22 sometimes they'll set fire, sometimes they'll steal
23 something, sometimes they get scared and go away; right?

24 A. Okay.

25 Q. Okay. All right. So if you're a passerby and

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1 it's -- if you're a passerby and you're fighting someone
2 off, you go in to see what they've done, okay, you have no
3 harmful intent, the homeowner comes home or the business
4 owner or somebody who works there, and you say, well, you
5 know, I frightened a couple of guys off, would you expect
6 to be apprehended? Wouldn't you --

7 A. As a passerby, I wouldn't go in their house.

8 Q. Okay. Well, all right. But would you expect to
9 be apprehended, or accused of a burglary?

10 A. If I walked up on them -- I mean, if it was my
11 house, I would if I was the -- if I was the person going
12 in.

13 Q. When this man came out, isn't it true that he
14 didn't have a thing that belonged to ACCESS Network --

15 A. In the dark I didn't know what he had.

16 Q. -- in his hand or --

17 Well, you put him in the car --

18 A. I couldn't say he had anything at the time of
19 the apprehension.

20 Q. Well, let's talk about the entire matter. As
21 you're driving around with him, as you're watching him
22 come from the porch down to your car --

23 A. Uh-huh.

24 Q. -- did you see him drop any items that belonged
25 to ACCESS Network?

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1 A. No, I didn't.

2 Q. Okay. Were y'all missing any money from --

3 A. There's no money in the --

4 Q. -- ACCESS Network?

5 A. -- in the building.

6 Q. Okay. All right. So he clearly wasn't there to
7 steal anything; right?

8 A. Okay. What was he there for?

9 Q. Okay. Well, didn't he tell you that several
10 people were trying to break in?

11 A. Yeah. He said that --

12 Q. Don't --

13 A. -- after the apprehension.

14 Q. Okay. I mean, he walks out. So why do you call
15 this an apprehension?

16 A. He's coming out of my building. If you walked
17 up on someone at 11:30 at night, coming out of your place,
18 what would you do?

19 Q. But if you're not -- if he's not there to rob
20 you -- he didn't know you were there, because you pulled
21 up without your lights --

22 A. Do I know he's there not to rob me? I fear for
23 my life. It's 11:30 at night.

24 Q. Okay. All right. So you're upset because you
25 had to get out of bed, put --

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1 A. No, I'm not upset because I had to --

2 Q. -- your clothes on --

3 A. -- get out of the bed. I'm upset because
4 someone has broken into my office.

5 Q. Are you upset now?

6 A. No.

7 Q. Okay. All right. Now -- all right. So you are
8 upset, for whatever reason, at this time that evening;
9 correct?

10 A. I'm -- I'm alert to what is going on.

11 Q. Okay. All right. Now, so -- now, you took
12 him -- you took him to the police station, you took him to
13 the Huddle House; correct?

14 A. I rode by the Huddle House. I never went to the
15 Huddle House.

16 Q. Okay. Did you get out of your car --

17 A. -- I didn't --

18 Q. -- and knock on the door at the police station?

19 A. No, I didn't. The police station was locked
20 down, closed.

21 Q. Okay. So then you went -- you took him to your
22 friend's house, your coworker's house --

23 A. My coworker house.

24 Q. -- Shedron Williams; right?

25 A. Yes.

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1 Q. All right. Now, do you know a Fatima Doctor?

2 A. Yes, I do.

3 Q. Does she work there?

4 A. Yes, she does.

5 Q. Okay. Isn't that the person he asked for?

6 A. He asked for who? When?

7 Q. My client.

8 A. No, he didn't.

9 Q. You said he came -- came in earlier and asked --

10 A. I'm not even sure if Fatima was working in
11 January. I mean, she might have been. She just recently
12 started working.

13 Q. Aren't you --

14 A. Maybe she was --

15 Q. Hadn't she been trying to get a job there?

16 A. Who?

17 Q. Fatima.

18 A. I don't do hiring. You'd have to ask Ms.
19 Bamfield.

20 Q. Okay. All right. Well, okay. All right. Now,
21 but my point is is you seem to have jumped the gun on this
22 idea of a fictitious person who, in fact, lives -- who is
23 actually Fatima Doctor, who actually works there; correct?

24 A. I jumped the gun on it?

25 Q. I mean, since you --

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1 A. He never asked me for Fatima Doctor. He asked
2 for a fictitious name. It was not Fatima -- if Fatima
3 Doctor works there -- which she's a medical case manager.
4 I work side-by-side with her. If he had asked for Fatima,
5 I would have gotten Fatima or gave him some information
6 saying that she worked here or she's not here. He never
7 asked for Fatima Doctor.

8 Q. Couldn't this have been -- couldn't this have
9 been before she started and while she was expecting to get
10 a job?

11 A. Couldn't it have been?

12 Q. Yes.

13 A. I mean --

14 Q. Anyway, so he drives around with you all this
15 time. Does he attempt to jump out of the car?

16 A. No, not with that gun pointed at him.

17 Q. Well, it's obviously a BB gun.

18 A. He don't know it.

19 Q. How would you not know it?

20 A. Ask him did he know it.

21 Q. How would you not know it?

22 A. He didn't jump out. He didn't buck.

23 MR. PLEXICO: Your Honor, I --

24 A. He didn't run it -- run from it.

25 Q. [Mr. Plexico] Okay. All right. And did he --

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1 did he leave through -- and did he leave through the back
2 door?

3 A. He -- no, he didn't.

4 Q. Okay. So he left through the front door?

5 A. Yes.

6 Q. And wouldn't it indicate to you that someone who
7 left through the front door wasn't there to do anything
8 wrong?

9 A. Not if he got caught coming out the door. He
10 was trying -- when I drove up the first time, he backed
11 back in the place. When I went back, I saw him, his
12 movement. He went back in the door. When I passed by and
13 turned around, he was trying to get out the door.

14 Q. Thank you. So doesn't it -- wouldn't it appear
15 to you if he was doing something wrong and he was aware
16 that you were there, that he would leave through the back
17 door and run out --

18 A. I can't say --

19 Q. -- over the railroad tracks --

20 A. I cannot say what it would appear --

21 Q. -- and down in the swamp?

22 A. -- to be -- what he would do.

23 Q. I mean, isn't that what a reasonable burglar
24 would do?

25 A. I don't know. I'm not a burglar.

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1 Q. He wouldn't come out -- he wouldn't come out and
2 say, hey, how are you? I mean --

3 A. No.

4 Q. You know, I mean, but wouldn't --

5 A. But he had been apprehended.

6 Q. But wouldn't he leave through a window in the
7 back?

8 A. What window would he -- he can't get out of our
9 windows.

10 Q. Well, couldn't he -- you have a back door, don't
11 you, sir?

12 A. They are locked two or three -- they have the
13 deadbolt lock.

14 Q. Okay. But you can break through them and get on
15 out, can't you?

16 A. Not these windows.

17 Q. Okay. Well, the doors you can, certainly.

18 A. How?

19 Q. Well, he got in the front door. Somebody got in
20 the front door.

21 A. He broke the window, reached in, and unlocked
22 the door. He didn't go through the glass when he broke
23 in. They are little window panes, eight by ten.

24 Q. What damaged the doorframe?

25 A. What doorframe? What you mean? He broke the

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1 windows.

2 Q. Okay. All right. Now, so he went all around
3 with you, he offered to help you --

4 A. He didn't offer to help me.

5 Q. Well, he told you who --

6 A. He made a statement to try and clear himself.

7 Q. That's because you tried him and convicted him;
8 isn't it true --

9 A. No. I didn't try him. I caught him in the act.

10 Q. You saw a man there who said somebody --

11 A. No.

12 Q. -- had nothing, had stolen nothing, who had done
13 nothing wrong --

14 A. That's a known thief.

15 MR. PLEXICO: Your Honor, I have a matter of law
16 we need to take up outside the jury's presence.

17 THE COURT: Ladies and gentlemen of the jury,
18 I'm going to go ahead and excuse you to the jury room.

19 I will caution you, ladies and gentlemen, you
20 are not to begin discussing this case at this time
21 because you haven't heard all the evidence, you haven't
22 heard the arguments of the lawyers, or my charge on the
23 law.

24 So ladies and gentlemen, just go back to your
25 jury room, get a cup of coffee, get a Coke. You are

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1 welcome to bring it back in when I bring you back in,
2 and we'll be with you shortly. Thank you.

3 [Whereupon, the jury exits the courtroom at 9:50
4 a.m.]

5 - - - - -

6 MOTION FOR A MISTRIAL

7 THE COURT: All right, Mr. Plexico.

8 MR. PLEXICO: Your Honor, he responded that my
9 client -- it was not in response to my question -- was
10 a known thief, Judge. I believe --

11 THE COURT: All right. What was your question,
12 specifically, Mr. Plexico?

13 MR. PLEXICO: I would ask the court reporter,
14 Judge, to read it back.

15 THE COURT: Mia, would you read it back.

16 [Whereupon, testimony is played back by the
17 court reporter]

18 THE COURT: Mr. Plexico, your questions --
19 number one y'all had obviously a, I would say, heated
20 cross-examination. Let's just put it that way.
21 However, your questions and the way that you were
22 eliciting them, it doesn't surprise me that he said
23 what he said. I mean, you were pushing him and asking
24 him what a known burglar would do, and you were asking
25 him that you tried and convicted him, and he said no, I

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1 just -- he said apprehended -- but he caught him.

2 Respectfully, at this time I'm going to deny
3 your motion. Let's go ahead and keep going with the
4 case.

5 MR. PLEXICO: Your Honor, I don't think I stated
6 it, but I would have moved for a mistrial on --

7 THE COURT: Well, I'm assuming that's what you
8 were moving for.

9 MR. PLEXICO: Yes, Your Honor.

10 THE COURT: Sorry. You're right. I should have
11 just -- I shouldn't have just jumped to the assumption.
12 But, obviously, that's where you were going. So
13 respectfully, at this time I'm going to deny your
14 motion, sir.

15 Anything further we need to put on the record?

16 MR. MURDAUGH: Not from the State.

17 MR. PLEXICO: Not from the defense, Your Honor.

18 THE COURT: All right. Mr. Plexico, when I
19 bring the jury back in, you're going to continue with
20 your cross-examination; correct, sir?

21 MR. PLEXICO: Yes, Your Honor.

22 THE COURT: Okay. Bring them back in.

23 [Whereupon, the jury enters the courtroom at
24 9:54 a.m.]

25 THE COURT: Welcome back, ladies and gentlemen

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1 of the jury.

2 At this time, Mr. Plexico is going to continue
3 his cross-examination of Mr. Bryant.

4 CONTINUED CROSS-EXAMINATION

5 BY MR. PLEXICO:

6 Q. So you did drive around with my client; correct?

7 A. Yes, sir.

8 Q. Okay. And so you weren't frightened of him;
9 correct?

10 A. Yes.

11 Q. Okay. All right. But yet you drove all around
12 with him; correct?

13 A. I had no choice.

14 Q. He was in your front seat?

15 A. Yes.

16 Q. All right. Did you have a cell phone?

17 A. Yes, I did.

18 Q. You called Shedron?

19 A. After -- I stopped and put the car out of gear
20 and called Shedron.

21 Q. Okay. Why didn't you call the local police or
22 911?

23 A. At the time when he was -- at the time when I
24 first apprehended him, the reason why I -- he was talking
25 loud about the guys. Like -- it -- to me, I feared for

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1 the fact that it might have been a --, he might have had an
2 accomplice, because of the way he was talking. He was
3 talking loud, hey, man, I'm glad you showed up. So I'm
4 thinking he might have somebody else with him in the
5 building. I don't know. So I want to get away from there
6 at that time. And at the time, I didn't have my cell
7 phone on me. It was in the car. So I got him away from
8 the scene because if he has an accomplice, I could -- I
9 mean, anything could happen..

10 Q. Okay. But your car was, what, twenty feet away
11 from you?

12 A. From where?

13 Q. From where you were standing.

14 A. Fifteen feet away.

15 Q. Okay. And you said you had -- you had the
16 pellet gun; correct?

17 A. Right.

18 Q. So you chose not to walk over to your car by
19 yourself --

20 A. And leave him --

21 Q. -- pick up the phone and call 911?

22 A. -- out of sight in the dark? No, I did not. I
23 kept my eyes completely on the person involved.

24 Q. So you didn't take -- you didn't put him in your
25 car, stand outside your car, and use your cell phone?

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1 A. No, I did not. I got in -- I put him in the car
2 and got in the car with him.

3 Q. But it was okay for you to call Shedron;
4 correct?

5 A. After the fact that I went to the police
6 station. I called him from the police lot. Yes. After I
7 put the car out of gear so I could have one free hand,
8 yes, I did, which he's in -- on instant dial on my phone.

9 Q. So why didn't you -- you're in the police lot,
10 at least. Why didn't you call 911 there if you were going
11 to make a phone call?

12 A. At the time, I -- I don't know. I can't say. I
13 called the nearest person, that I could get to, that I
14 thought of.

15 Q. Now, all this time he never tried to leave, he
16 never tried to run off; correct?

17 A. No. Would you, if I had a pistol on you?

18 Q. Well, why would someone who hasn't done anything
19 wrong want to run off? I wouldn't have done anything
20 wrong. I would be shocked and surprised. I would be
21 upset. Why wouldn't one want to run off if they haven't
22 done anything wrong?

23 A. [No response]

24 MR. PLEXICO: I don't have anything further,
25 Judge.

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1 THE COURT: Any redirect?

2 MR. MURDAUGH: He may come down. Call Shedron
3 Williams.

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

5 MR. MURDAUGH: May the witness stay in the
6 courtroom now?

7 THE COURT: He may.

8 [Whereupon, the witness is excused and remains
9 in the courtroom]

10 [Whereupon, Mr. Williams enters the courtroom]

11 THE COURT: Mr. Williams, if you will please
12 come forward to be sworn, sir.

13 Sir, if you will raise your right hand, place
14 your left hand on the Bible.

15 [Whereupon, Mr. Williams is duly sworn by the
16 Court]

17 THE COURT: Thank you, sir. If you would just
18 take a seat here, sir.

19 [Whereupon, Mr. Williams takes the witness
20 stand]

21 THE COURT: If you would give us your full name
22 for the record. And respectfully, sir, I'm going to
23 ask that you speak up, because our microphones are
24 gone.

25 THE WITNESS: Okay.

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1 THE COURT: All right? Thank you, sir.

2 THE WITNESS: My name is Shedron Devant
3 Williams.

4 - - - - -

5 SHEDRON D. WILLIAMS,
6 Having Been First Duly Sworn,
7 was Examined and Testified as Follows:

8 DIRECT EXAMINATION

9 BY MR. MURDAUGH:

10 Q. Mr. Williams, where do you live?

11 A. I live in Hampton.

12 Q. Okay. Where do you work?

13 A. I work for the ACCESS Network.

14 Q. And what is the ACCESS Network?

15 A. It's an HIV and AIDS prevention and care
16 services for the Lowcountry of South Carolina.

17 Q. Okay. And what do you do with them?

18 A. I serve as the director of education and
19 prevention.

20 Q. Okay. On the night of January the 21st, 2008,
21 this year --

22 A. Yes, sir.

23 Q. -- did you have an occasion to talk to Eddie
24 Bryant?

25 A. Yes, sir.

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1 Q. About what time was it?

2 A. It was -- it was over in the night. I was
3 actually asleep. My family and I were sleeping. He
4 called me and he told me to get up, that he was on my --
5 on his way to my house. And like I said, it was over in
6 the night, and it just kind of stunned me that he could
7 call me at that point and say it like that. So I didn't
8 know what was going on, so I immediately got up. And at
9 that point he pulled into my yard, and so I went out -- I
10 met him at the door. And he was outside the vehicle, and
11 he had Mr. Mays outside with him, and he --

12 Q. Now, when you say Mr. Mays, who are you talking
13 about?

14 A. We know him in the neighborhood as iPod.

15 Q. As what?

16 A. As iPod was the name that we knew him in the --

17 Q. iPod?

18 A. Yes, sir.

19 Q. Okay. Is he in the courtroom?

20 A. Yes, sir.

21 Q. Where is he?

22 A. Right here [indicates].

23 Q. Describe what he's wearing.

24 A. Blue denim jeans and a blue button-down shirt.

25 Q. Okay. Go ahead.

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1 A. All right. So when I came to the door, Mr.
2 Bryant told me that he had caught him coming out of the
3 office.

4 Q. Don't tell me what he told you.

5 A. Okay.

6 Q. But what did y'all do?

7 A. When I came to the door, Mr. Bryant was out of
8 the vehicle. He was, as well. And Mr. Bryant began to
9 approach me. And I said, what's going on. He said that
10 Mr. Mays --

11 MR. PLEXICO: I would object, Your Honor.
12 Hearsay.

13 A. Mr. Mays was coming out of the --

14 Q. [Mr. Murdaugh] Don't tell me. Don't tell me
15 what was said.

16 A. Okay.

17 Q. But tell me what y'all did.

18 A. Okay.

19 Q. Did Eddie have a gun?

20 A. In his hand he did, yes.

21 Q. Okay.

22 A. All right. He had the gun. He said --

23 Q. Don't tell me what he said.

24 A. All right.

25 Q. What did y'all do?

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1 A. At that point I told Eddie to remove him from my
2 home, and to take him back to the office, and I would call
3 the 911 because no -- he could find no police.

4 Q. Okay. And did you follow Eddie anywhere?

5 A. I immediately went and put on my clothes, and
6 then I came back to the -- I followed them to the office.
7 They had left ahead of me. And by the time I got there,
8 the officers were there and he was being handcuffed.
9 Actually, they were bringing him off of the porch at that
10 point.

11 Q. Okay. Did you call 911?

12 A. I did.

13 Q. Did you find out that the officers had already
14 been --

15 A. Dispatched.

16 Q. -- dispatched?

17 A. Yes, sir.

18 Q. Okay. And were the officers at the office when
19 you got there?

20 A. Yes, sir.

21 MR. MURDAUGH: Okay. Thank you, sir. Answer
22 any questions Mr. Plexico may have.

23 THE COURT: Mr. Plexico?

24 MR. PLEXICO: I don't have any questions of --
25 well, I do have one, Judge.

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CROSS-EXAMINATION

BY MR. PLEXICO:

Q. Does Fatima Doctor work there?

A. Yes, she does.

Q. And my client does come and see her sometimes,
doesn't he?

A. Well, he had -- he had stopped by one or two
times.

Q. And to see Fatima; correct?

A. Yes.

MR. PLEXICO: I don't have anything else, Judge.

REDIRECT EXAMINATION

BY MR. MURDAUGH:

Q. How close -- how long before this break-in did
he come in that office?

A. Approximately two, three weeks.

Q. Okay. Had he been in before that?

A. Not -- no -- not to my knowledge he hadn't.

MR. MURDAUGH: Okay. Thank you, sir.

THE COURT: Any recross, Mr. Plexico?

RECROSS-EXAMINATION

BY MR. PLEXICO:

Q. He had a purpose when he came in there, correct,
to see Fatima?

A. That was the person who he spoke with.

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1 MR. PLEXICO: Thank you.

2 MR. MURDAUGH: You may come down.

3 [Whereupon, the witness exits the witness stand]

4 MR. MURDAUGH: Call Ricky Cook.

5 May Mr. Williams be excused?

6 THE COURT: Any objection, Mr. Plexico?

7 MR. PLEXICO: Without any objection, Your Honor.

8 THE COURT: You are excused, Mr. Williams.

9 Thank you, sir.

10 [Whereupon, the witness is excused and exits the
11 courtroom]

12 [Whereupon, Mr. Cook enters the courtroom]

13 THE COURT: Sir, will you raise your right hand
14 and place your left hand on the Bible.

15 [Whereupon, Mr. Cook is duly sworn by the Court]

16 THE COURT: Sir, if you will please give us your
17 full name for the record, and take a seat.

18 [Whereupon, Mr. Cook takes the witness stand]

19 THE WITNESS: Lieutenant Ricky Cook. I work for
20 the Hampton Police Department.

21

22

23

24

25

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RICKY COOK,

Having Been First Duly Sworn,

was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. MURDAUGH:

Q. Ricky, how long have you been in law enforcement?

A. Since 1984.

Q. And how long with the Hampton Police Department?

A. Since the year 2000.

Q. Okay. Were you employed with them on the 21st of January of this year?

A. Yes, I was.

Q. Did you have an occasion on that night to respond to a call?

A. Yes, I did.

Q. And where was that call located?

A. Crises Network Center.

Q. And that's where?

A. Where Gwen Bamfield -- one block off of Main Street.

Q. That's First Street East?

A. First Street East.

Q. Okay. Tell me what you found when you got -- was anybody with you?

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1 A. Officer Drawdy and I were on patrol that night.
2 Dispatch gave us a 1085, which is a silent alarm with
3 glass-breaking. We responded to the building. When we
4 arrived on the scene, the glass was broke out right next
5 to the doorknob. Somebody had reached their hand in. And
6 the door was open. Him and myself went inside with
7 flashlights --

8 Q. Talking about you and Brad Drawdy?

9 A. Yes, sir. Me and Brad Drawdy.

10 Q. Okay.

11 A. -- with guns drawn, because we thought somebody
12 was still in the building. We searched the building
13 upstairs, all over, and cleared it, and came back to the
14 door. When we got back to the door, Mr. Eddie Bryant had
15 pulled up, with the suspect in his vehicle with him.

16 Q. Okay. And who was the suspect?

17 A. Mr. Mays.

18 Q. Okay. And where is -- what Mays? Do you know
19 his name?

20 A. Kelvin.

21 Q. And where is he? Is he in the courtroom?

22 A. Yes, he is, sitting right next to Mr. Plexico.

23 Q. Okay. And did y'all arrest him?

24 A. After Mr. Eddie Bryant told me that --

25 MR. PLEXICO: I object. That would be hearsay,

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1 Your Honor.

2 THE COURT: Okay.

3 Q. [Mr. Murdaugh] Did y'all arrest him?

4 A. Yeah. I placed him under arrest and put him in
5 the back of the patrol car.

6 Q. The damage that was done to the door, was it to
7 the windowpanes and the frame?

8 A. The glass was broke out.

9 MR. PLEXICO: Okay. Thank you, sir.

10 THE COURT: Mr. Plexico?

11 Keep your seat, sir.

12 CROSS-EXAMINATION

13 BY MR. PLEXICO:

14 Q. And you've been in law enforcement I guess
15 almost twenty-five years, pretty much, next year; correct?

16 A. Pretty much.

17 Q. A quarter of a century; right, sir?

18 A. [Indicates affirmatively]

19 Q. Now, when you looked, did you look carefully and
20 closely when you went into the place?

21 A. Yeah. We searched the building.

22 Q. Did you see any gloves in there?

23 A. To my recollection, I didn't find any gloves.

24 Q. Were there any gloves when you -- when either of
25 you -- did either of the officers, yourself and Officer

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1 Drawdy present at the scene, when y'all searched my client
2 did y'all find any gloves on my client?

3 A. No, I don't believe I did.

4 Q. Okay. Did y'all find any like screwdrivers, or
5 a jack or car jacks, or anything like that?

6 A. I found nothing on him when I searched him and
7 put -- placed him in handcuffs.

8 Q. Okay. Did you look on the ground to see if
9 there's anything like gloves with anything, screwdrivers,
10 car jacks, something that might be used to break a
11 doorframe? Did you see any of that stuff on the ground?

12 A. It should be in the incident report. I can't
13 remember whether we found something that broke the glass.
14 I think we did, but -- Officer Drawdy might be got that on
15 his report.

16 Q. Okay. All right.

17 MR. PLEXICO: May I approach?

18 THE COURT: You may.

19 Q. [Mr. Plexico] Is this your police report, sir?

20 A. Yes, it is.

21 Q. I don't believe it says anything, correct me if
22 I'm wrong, in regards to that matter.

23 A. No. It does not have anything about finding
24 anything that he broke the window out with.

25 MR. PLEXICO: May I approach?

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1 THE COURT: You may.

2 Q. [Mr. Plexico] Would you have fingerprinted that
3 if -- if you had it?

4 A. Myself and Officer Drawdy do not take
5 fingerprints. We call Officer Bluebolt now, and he's in
6 charge of all that.

7 Q. Okay. But you would have done that, because
8 that was your procedure?

9 A. Yeah, that's the procedure.

10 Q. Okay. So y'all recovered no fingerprints from
11 anything inside; is that correct?

12 A. I did not.

13 Q. Okay. All right. Are you aware of any that was
14 pertinent?

15 A. No. I don't think so.

16 Q. Okay. All right. And you don't know how the
17 glass got broken yourself because you were not there;
18 correct?

19 A. That's correct.

20 MR. PLEXICO: All right. I don't have anything
21 further.

22 MR. MURDAUGH: You may come down. May Mr. Cook
23 be excused?

24 THE COURT: Any objection?

25 MR. PLEXICO: Without objection, Your Honor.

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1 MR. MURDAUGH: Call Brad Drawdy.

2 THE COURT: You are excused, Lieutenant Cook.
3 Thank you.

4 [Whereupon, the witness is excused and exits the
5 courtroom]

6 [Whereupon, Mr. Drawdy enters the courtroom]

7 THE COURT: Sir, if you would raise your right
8 hand and place your left hand on the Bible.

9 [Whereupon, Mr. Drawdy is duly sworn by the
10 Court]

11 THE COURT: If you would, sir, give us your full
12 name for the record. And speak loudly. And you can go
13 ahead and have a seat.

14 [Whereupon, Mr. Drawdy takes the witness stand]

15 THE WITNESS: Bradford Drawdy.

16 THE COURT: Thank you, sir.

17 - - - - -

18 BRADFORD DRAWDY,

19 Having Been First Duly Sworn,

20 was Examined and Testified as Follows:

21 DIRECT EXAMINATION

22 BY MR. MURDAUGH:

23 Q. Mr. Drawdy, where do you live?

24 A. Altman Road in Hampton.

25 Q. And by whom are you employed?

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1 A. Hampton Police Department, sir.

2 Q. And how long have you been with them?

3 A. With Hampton, approximately a year and a half.

4 Q. Okay, sir. Prior to that, were you in law
5 enforcement?

6 A. Yes, sir.

7 Q. Where?

8 A. I've worked Allendale, Orangeburg County, and
9 Holly Hill.

10 Q. How long have you been in law enforcement?

11 A. Six years.

12 Q. Okay, sir. I ask you whether or not you were
13 employed by the Town of Hampton on the night of January
14 the 21st, 2008.

15 A. Yes, sir.

16 Q. Did you receive a call or go anywhere that
17 night?

18 A. Yes, sir.

19 Q. What time was it? Do you know?

20 A. I'm -- around 11:00 or 11:30, somewhere along in
21 that time frame, I believe.

22 Q. And what was the purpose in going wherever you
23 went?

24 A. We were dispatched to a burglary alarm --

25 Q. You say we.

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1 A. Myself and Sergeant Cook. Well, Hampton Police
2 Department was. And it was myself and --

3 Q. Were y'all riding together?

4 A. No, sir.

5 Q. Okay. Two separate cars?

6 A. Yes, sir.

7 Q. Okay. Go ahead. I didn't mean to interrupt
8 you.

9 A. But we were dispatched to an alarm -- a burglary
10 alarm at ACCESS Network on First Street East in Hampton.
11 When we arrived we found a broken windowpane on the front
12 door and the door open so him and myself began to clear
13 the business, make sure nobody was in there still.

14 Q. And did you clear it?

15 A. Yes, sir.

16 Q. And did you find anybody in there?

17 A. No, sir.

18 Q. Did anything happen after y'all had cleared the
19 building?

20 A. Yes, sir. We had other units in route to us I
21 believe from Varnville. When we got through clearing it,
22 when we walked outside we saw a Varnville officer on the
23 front porch with Mr. Eddie Bryant and the defendant, and
24 Mr. Bryant proceeded to tell us --

25 Q. Don't tell me what he said.

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1 A. Okay.
2 Q. And you said he was with the defendant?
3 A. Yes, sir.
4 Q. Tell me, do you see him in the courtroom?
5 A. Yes, sir.
6 Q. Where is he?
7 A. You talking about the defendant?
8 Q. Yeah, the defendant.
9 A. Mr. Kelvin Mays, right there [indicates].
10 Q. Okay. So you're pointing to your left?
11 A. Yes, sir.
12 Q. Can you describe to the jury who you are talking
13 about?
14 A. The subject, sitting at the table over there, in
15 the blue shirt.
16 Q. Okay. Did you know him before this night?
17 MR. PLEXICO: Your Honor --
18 Q. [Mr. Murdaugh] Just yes or no.
19 A. No. I knew his name. I knew his name.
20 Q. Okay. And is this the fellow that had him --
21 A. Yes, sir.
22 Q. -- right here?
23 A. Yes, sir.
24 Q. Eddie Bryant?
25 A. Yes, sir.

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1 Q. What time was it when y'all received the report
2 -- I mean, the call?

3 A. I'm not sure. I believe it was around 11:00 or
4 11:30, I believe. I'm not sure.

5 Q. I show you an item and ask you if you can
6 identify this.

7 A. Yes, sir. This is Sergeant -- or Lieutenant
8 Ricky Cook's police report. It states the dispatch time
9 was 11:33.

10 Q. Okay. And is that at night?

11 A. Yes, sir.

12 MR. MURDAUGH: Okay. Thank you, sir.

13 THE WITNESS: Yes, sir.

14 MR. MURDAUGH: Answer any questions Mr. Plexico
15 may have.

16 THE COURT: Mr. Plexico?

17 MR. PLEXICO: Thank you, Judge.

18 CROSS-EXAMINATION

19 BY MR. PLEXICO:

20 Q. Do you have a separate report?

21 A. No, sir.

22 Q. This is the department report?

23 A. Yes, sir.

24 Q. All right.

25 MR. PLEXICO: I'm sorry. May I approach him?

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1 THE COURT: You may.

2 Q. [Mr. Plexico] I believe this is what he's just
3 showed you. So this is the department report?

4 A. Yes, sir.

5 Q. Could I have it?

6 A. Yes, sir.

7 MR. PLEXICO: All right. With that, Judge, I
8 don't have anything else.

9 THE COURT: Okay. Anything further, solicitor?

10 MR. MURDAUGH: Nothing from --

11 Yeah. Let me ask you a question.

12 THE WITNESS: Yes, sir.

13 REDIRECT EXAMINATION

14 BY MR. MURDAUGH:

15 Q. You said that you received the call at what
16 time?

17 A. According to this it says 2333, which is 11:33.

18 Q. Okay. And when did y'all arrive there?

19 A. It states 2336, approximately three minutes
20 later.

21 MR. MURDAUGH: Thank you, sir.

22 THE WITNESS: Thank you, sir.

23 MR. MURDAUGH: You may -- anything Steve?

24 MR. PLEXICO: Yes.

25

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RECROSS-EXAMINATION

BY MR. PLEXICO:

Q. So this individual, when y'all arrived, was not there --

A. No, sir.

Q. -- is that correct?

A. No, sir.

Q. That was only three minutes after you got the call?

A. Yes, sir.

Q. Okay. So nobody waited on y'all; correct?

A. I mean, nobody was there.

MR. PLEXICO: Okay.

MR. MURDAUGH: You may come down. May Mr. Drawdy be excused?

THE COURT: Any objection?

MR. PLEXICO: No objection, Judge.

THE COURT: You are excused, sir.

[Whereupon, the witness is excused and exits the courtroom]

MR. MURDAUGH: With that, the State rests.

THE COURT: All right. Thank you.

Ladies and gentlemen of the jury, at this time I have a matter of law that I need to take up with the attorneys. Again, I'm going to send you back to your

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1 jury room.

2 I will tell you again that you are not to begin
3 discussing this case. It wouldn't be appropriate to do
4 so at this time. You have still not heard the
5 arguments of the attorneys, as well as my charge on the
6 law, and possibly anything else.

7 So, again, go get another Coke, refresh
8 yourselves, and we'll bring you back very quickly.
9 Thank you.

10 [Whereupon, the jury exits the courtroom at
11 10:12 a.m.]

12

13 MOTION FOR A DIRECTED VERDICT

14 THE COURT: All right. Is there any motions?

15 MR. PLEXICO: Yes, Your Honor. I would move for
16 a directed verdict in that all their evidence, Your
17 Honor, would not satisfy I believe the standard in
18 regards to more than suspicion, Judge.

19 THE COURT: Okay. Respectfully, sir, I deny
20 that motion for a directed verdict. Obviously, taking
21 the evidence in the light most favorable to the
22 nonmoving party, I think there is both direct and
23 circumstantial evidence which could reasonably tend to
24 prove the guilt of Mr. Mays and -- or that this jury
25 could deduce that. So respectfully, sir, I deny your

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1 motion.

2 Additionally, sir, I need to ask your client
3 about his fifth amendment rights and that he has
4 understood them. And it's my understanding from you,
5 Mr. Plexico, that you have, in fact, discussed that
6 with him. Is that correct, sir?

7 MR. PLEXICO: Yes, Your Honor, I have.

8 THE COURT: Okay. And Ms. Legette, have you had
9 an opportunity to go through the entire rap sheet to
10 determine what you intend on using, pursuant to Rule
11 609, for impeachment purposes?

12 MS. LEGETTE: Yes, Your Honor, I have.

13 THE COURT: Okay. Is there anything in addition
14 to what you stated before?

15 MR. MURDAUGH: We are making a list. I'll give
16 you a copy of it, and Steve, if you'll just --

17 THE COURT: Okay.

18 MR. MURDAUGH: I assume that we're going to have
19 a short recess when he finishes -- when you finish with
20 this?

21 THE COURT: If y'all need one, absolutely.

22 MR. MURDAUGH: If you'll do that, I'll get you a
23 list of what I intend to use, and Mr. Plexico.

24 THE COURT: Okay.

25 [Whereupon, Mr. Murdaugh and Mr. Plexico confer]

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1 MR. PLEXICO: We are ready to proceed, Judge.

2 THE COURT: As far as the -- are you sure?

3 MR. PLEXICO: Positive.

4 - - - - -

5 DEFENDANT'S RIGHTS

6 THE COURT: All right, sir. Mr. Mays, I have
7 certain questions that I need to ask you regarding your
8 right to testify or not testify on your own behalf. Of
9 course, you always have the right to testify but,
10 again, you also have the right not to testify where you
11 potentially could incriminate yourself.

12 Sir, what I want just to advise you is that the
13 fifth amendment to the Constitution of the United
14 States states that no person shall be compelled in any
15 criminal case to be a witness against themselves. And,
16 basically, this provision of constitutional law means
17 that you cannot be required or made to testify in this
18 case. Sir, this is a right and a privilege that
19 extends only to you. It is a personal privilege, and
20 it's not something that can be determined by your
21 attorney. Of course, it's my understanding that Mr.
22 Plexico has advised you as to, I'm sure, your fifth
23 amendment rights and whether or not he believes it is
24 in your best interest to testify. But again, sir, I
25 emphasize that whether or not to testify is a decision

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1 that you and only you can make. Do you understand
2 that, sir?

3 MR. MAYS: Yes, ma'am.

4 THE COURT: All right, sir. I need to tell you
5 that if you elect not to testify, I'm going to tell
6 this jury that they can't hold it against you, in my
7 jury charge, and the reason for that is you never have
8 the burden of proving yourself innocent. The burden is
9 always on the State to prove your guilt on this charge
10 beyond a reasonable doubt. Do you understand that,
11 sir?

12 MR. MAYS: Yes.

13 THE COURT: Additionally, sir, I need to also
14 tell you that if you do choose to testify, at that time
15 you are waiving or giving up your constitutional
16 privilege against self-incrimination. And basically
17 that means that if you voluntarily take this witness
18 stand and testify, you are going to subject yourself to
19 the same rules that govern all the other witnesses, and
20 that you will be examined and cross-examined on any
21 relevant issue in this case, and that you may be
22 impeached to the same extent that any other witness
23 can. Do you understand that, sir?

24 MR. MAYS: Yes.

25 THE COURT: That is why we just discussed your

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1 prior criminal record. Under our rules of evidence,
2 it's Rule 609, it basically states that if you've been
3 convicted of a crime of moral turpitude, or a crime
4 that carries more than a year in prison, and it is
5 within the last ten years, that the solicitor's office
6 may bring that up and ask you whether or not you've
7 been convicted of it. Do you understand that, sir?

8 MR. MAYS: Yes.

9 THE COURT: All right, sir. I just want to make
10 absolutely sure that you understand and appreciate
11 that, if you do choose to take the witness stand, sir.

12 All right. Mr. Mays, do you need to speak with
13 your attorney any further before you make this
14 decision?

15 MR. MAYS: No, ma'am.

16 THE COURT: All right, sir. Do you understand
17 what I have explained to you, sir?

18 MR. MAYS: Yes.

19 THE COURT: Okay. And do you have any questions
20 of me?

21 MR. MAYS: None whatsoever.

22 THE COURT: Sir, do you wish to testify?

23 MR. MAYS: No, ma'am.

24 THE COURT: All right, sir. I appreciate that.
25 I do find that you understand your rights completely.

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1 You have answered my questions intelligently, and I
2 have no doubt you understand your fifth amendment
3 rights, sir. So I appreciate it, and you can go ahead
4 and be seated.

5 MR. MAYS: Thank you.

6 THE COURT: All right. With that said, Mr.
7 Plexico, do you intend on putting up any evidence?

8 MR. PLEXICO: No, Your Honor. We would -- I
9 need to rest, I guess, in front of the jury.

10 THE COURT: Of course you'll do that.

11 Do you-all want to go ahead and just take a few
12 minutes' break right now while they're refreshing
13 themselves?

14 MR. PLEXICO: Sure.

15 THE COURT: And when we come back, I guess we'll
16 go straight into closing arguments, if that's
17 acceptable.

18 Mr. Plexico, any objection to that?

19 MR. PLEXICO: Since he's going first, I will
20 leave that to Randolph.

21 MR. MURDAUGH: I'm ready to go.

22 THE COURT: I'm sure. Okay.

23 [Whereupon, a charge conference is held]

24 THE COURT: Well, let's do this. Let me see the
25 attorneys back in chambers for a quick moment.

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1 [Whereupon, a recess is taken from 10:35 a.m. to
2 10:53 a.m.]

3 THE COURT: I just need you to look at the
4 verdict form, make sure it's, you know, fine for both
5 of you.

6 MS. LEGETTE: I think it's okay, Your Honor. I
7 think it's fine.

8 MR. PLEXICO: It's twenty-five but not to fifty,
9 just in case somebody picks up --

10 THE COURT: I will -- exactly. I will get Aaron
11 to take it off.

12 Anything else, y'all?

13 MR. PLEXICO: I don't think it will -- I don't
14 think that matters on this --

15 THE COURT: No. We're going to take it off.

16 MR. PLEXICO: -- it could confuse somebody down
17 the road somewhere.

18 THE COURT: I understand. I agree with you.

19 MS. LEGETTE: Yeah, that's right. That's
20 correct.

21 MR. PLEXICO: I don't have anything else.

22 THE COURT: Okay. We're good to go. Okay.
23 Well, give me just a moment.

24 [Off the record momentarily]

25 THE COURT: Thank you, y'all. Please be seated.

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1 Just briefly, ladies and gentlemen, the State
2 had made a request to charge --

3 [Off the record momentarily]

4 THE COURT: -- under People v. Rossie. And
5 respectfully, I'm not going to charge this specific
6 quote because what it states is in the absence of
7 inconsistent circumstances proof of unlawful entry into
8 a building which contains personal property that could
9 be the subject of larceny gives rise to an inference
10 that will sustain a conviction of burglary.

11 This case seems to be fact specific -- appears
12 to be fact specific. But I am not going to charge
13 that. However, I will read to y'all what I'm going to
14 charge, that portion of burglary in the second degree
15 in regards to intent to commit a crime in the building.
16 The portion I charge is Anderson's charge. I think
17 it's a little better than the one we've got in our
18 book. And states -- and bear with me, it's a little
19 bit long of a paragraph, but I think it adequately
20 covers what you are trying to do, as well as preserving
21 the rights of the defendant.

22 It says: as to intent to commit a crime therein
23 in a building -- which I'm trying to define for the
24 jury -- there must have been an intent to commit a
25 crime, any crime, a felony or a misdemeanor, whether or

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1 not that crime was actually committed. The mere entry
2 into a building without consent is not sufficient to
3 constitute second-degree burglary. There must have
4 been an intent to commit a crime once inside. Further,
5 it's not sufficient that the intent to commit a crime
6 was formulated after entry. To convict the defendant
7 of second degree burglary, you must find that at the
8 time he entered the building, the defendant intended to
9 commit a crime once therein. The defendant's actions
10 after he entered the building can be evidence used to
11 determine if he had the intent to commit a crime at the
12 time of entry. Proof of intent necessarily rests on
13 inference from conduct. It does not matter that the
14 intended crime was not completed, or the intent exists
15 at the time of the entering. It is no defense that the
16 intent was abandoned after the entry, because the
17 entering with intent to commit a crime completes the
18 offense of burglary.

19 That's why it's an intent to commit a crime
20 therein as opposed to committing a crime therein as one
21 of the elements. All right?

22 So I think, Ms. Legette, that covers what you're
23 asking for. And it's Anderson's charge on burglary
24 second specifically as to that definition. And I
25 think, again, it covers Mr. Mays's rights, as well.

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1 Okay. With that said, y'all, anything else that
2 we need before I go ahead and bring this jury in?

3 MR. MURDAUGH: I am aware of nothing.

4 THE COURT: Okay. Mr. Plexico?

5 MR. PLEXICO: No, Your Honor, not from the
6 defense.

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

8 I will tell you that my law clerk did fix the
9 verdict form. It reflects the proper indictment
10 numbers. That was just a typographical error, so --

11 MR. MURDAUGH: I saw that, and we are good with
12 it.

13 THE COURT: All right. We fixed it, y'all.

14 All right. If the State and the defense are
15 both ready, let's go ahead and bring the jury in.

16 [Whereupon, the jury enters the courtroom at
17 10:56 a.m.]

18 THE COURT: Welcome back, ladies and gentlemen
19 of the jury. At this time you are going to hear the
20 closing statements from the attorneys in this case, and
21 then my charge on the law, and then we are going to
22 give the case to you for your deliberations.

23 Solicitor?

24 MR. MURDAUGH: Please the Court?

25 THE COURT: Yes, sir.

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CLOSING ARGUMENT

MR. MURDAUGH: Mr. Foreman, and ladies and gentlemen of the jury, I told y'all at the inception that this is going to be a short case because, frankly, there was not a whole lot of evidence other than the fact that he had broken in to steal.

Now, His Honor will charge you what the law is. The law in this case, he is charged with burglary in the second degree. And she will charge you that if a person breaks into a building -- not a house, now, but a building, which is like a store building, or ACCESS Network -- with the intent to commit a crime during the nighttime, then you are guilty of burglary in the second degree. And that's the law.

She is also going to charge you that -- and has made reference to this earlier, that we don't want people to come into the courtroom with a blank mind and put aside everything you have learned during your life. We want you to use, in making a determination as to guilt or innocence of this client, the things that you have learned. Y'all may have heard at one time that if you catch a child with a hand in the cookie jar, that's pretty good evidence -- even though she hasn't got a cookie yet -- that she's going to get a cookie. You've got to use that kind of life experience in determining

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1 whether or not this fellow is guilty.

2 Now, let's look at the evidence. The evidence
3 is that at about 11:30 -- the officer said they got the
4 call at 11:33, was that correct -- 11:33, and that they
5 went around there. They found the door broken in.
6 They went in and searched it. Eddie Bryant got there,
7 before the officers did, as a result of the silent
8 alarm going off. They called Gwen Bamfield, she called
9 Eddie Bryant, Eddie went around there. He grabbed the
10 wrong gun. Yeah. But it worked pretty good, so it
11 must have looked like a gun.

12 Anyhow, they got there -- you remember -- and
13 y'all help me just a little bit. I think I recall
14 Eddie saying that he drove by first and that he saw
15 somebody try to step over and hide. Do you remember
16 that? He went down and turned around, and came back
17 and came right up to the door, and here comes the
18 fellow out of it, and he put the gun on him.

19 Do you remember Shedron Williams saying that
20 about -- he said about three weeks before -- the only
21 time he had ever come in there was about three weeks
22 before. Eddie says that he came in with a sack of
23 batteries to sell about ten days before, and then about
24 three days before he came in and asked for a fictitious
25 person. Do y'all recall that testimony?

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1 You know, I don't know why he went in there. He
2 had never been in there before, but he came in three,
3 maybe two, times just before. Was that to case it to
4 see what was in there he could steal? You know, I
5 don't know. They say he didn't steal anything, and we
6 can -- we admit that. But he doesn't have to steal.
7 He has to do the breaking and entering into the
8 building with the intent to commit a crime.

9 Now, at eleven o'clock at night, why do you
10 break into a building that you don't intend to commit a
11 crime? I mean, that's pretty good inference of itself
12 that he is doing it, breaking in, to commit a crime.
13 They say he broke the window, went in. And that hiding
14 when Eddie drove by, when he said he ducked back behind
15 it, as I recall his testimony, that is pretty
16 significant to me. I don't know whether it is to
17 y'all. And what's significant to me doesn't make any
18 difference, and I'm just telling you this so y'all can
19 consider it. But it seems pretty significant that if
20 he is doing what Mr. Plexico is going to say he did,
21 that is, I saw a broken-in door and I went in to see
22 whether or not anybody had robbed y'all, why would he
23 hide when he drove by there the first time? Why would
24 he duck back to do it?

25 Let me tell you something. This case is a

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1 simple one. The Judge is going to tell you, as I was
2 telling y'all in the beginning, that you use your
3 everyday knowledge. Y'all can take into consideration
4 anything, anything, that y'all have in your mind and
5 your life experience in determining whether or not he
6 is guilty. You can take into consideration what he
7 has -- what a person has to lose or to gain, any of
8 these five people that testified. They have nothing to
9 lose or gain one way or the other. You can take into
10 consideration the way that they put their hand on the
11 Bible and held up their right hand and swore to their
12 God that they would tell the truth. You can consider
13 everything in making that determination.

14 Eleven o'clock -- 11:30 at night, I think it
15 was, in that vicinity, in Hampton County in the town
16 of Hampton, a door is broken in. The fellow, Kelvin
17 Mays -- and they all identified him as Kelvin Mays, as
18 the fellow they caught -- is coming out the door. They
19 arrest him. When he went by the first time, he ducked
20 back, according to Eddie Bryant. All of that, in your
21 good common sense, you know that he went in there to
22 steal something. He went in there three weeks, ten
23 days, and three days before it, with no reason for
24 going in there.

25 He is guilty, and it's your job to make a

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1 determination of his guilt or innocence. As I told
2 you, you must reach a verdict. Verdict is derived from
3 that Latin word veredicto, which means to speak the
4 truth. And let your verdict in this case speak the
5 truth. Thank you very much.

6 Just one second, please.

7 [Whereupon, an off-the-record bench conference
8 is held]

9 THE COURT: All right. Mr. Plexico?

10 MR. PLEXICO: Thank you, Your Honor.

11 THE COURT: Yes, sir.

12 MR. PLEXICO: Mr. Solicitor.

13 - - - - -

14 CLOSING ARGUMENT

15 MR. PLEXICO: Ladies and gentlemen of the jury,
16 I want to thank y'all for being here today.

17 Sometimes when you look at something, it's not
18 always the way that it seems, and it seems -- certainly
19 seemed one way to Mr. Bryant. But if you go by -- just
20 use your common sense and experience. You go by your
21 neighbor's house, your friend's house, you go by
22 someone's office, and you see that the glass is broken,
23 the door is open, you would go in.

24 Now, if somebody drove by and as they went down
25 the road and they were going to turn around, if you're

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1 doing wrong, look at the actions. The actions dictate,
2 I believe, what the finding of the fact should be, and,
3 therefore, what your verdict should be. If you're
4 doing wrong, you're out of there to start with.

5 This is a small, small town. Everybody knows
6 the building that we're talking about. You know,
7 railroad tracks are just a couple of lots away behind
8 the daycare center. You've got woods over towards the
9 storage areas across the street. If you're doing
10 wrong, it's an easy place to run out and get away, if
11 that -- if you're doing wrong. Nobody has seen you,
12 nobody can identify you. But if you happen upon a
13 situation where, you know, somebody has broken into
14 your friends' place or the door is ajar, there's glass
15 down, you go out and -- who knows what people think.
16 You know, people go out and break in places, burn
17 places down, not only -- you know, rob them. Goodness
18 knows. Maybe somebody is working late, and hurt. You
19 don't know. Thank goodness for the people who have the
20 courage to go out and take action, right then at that
21 time, and actually do something. We don't want to
22 discourage that kind of behavior.

23 Now, when someone comes up, how do you know that
24 they are not the burglar? What if they didn't take
25 off? Mr. Bryant testified, with his little BB pistol,

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1 he said he couldn't see it at first. Now, if he
2 couldn't see it, and if he was guilty, well, then is
3 the time to run off; hold his shirt up, take off
4 running, boom, he's gone across the tracks in about
5 thirty seconds. That makes sense, if you're guilty.

6 But if you're not guilty -- you remember this is
7 entry without consent, with intent to commit a crime
8 therein. Now, that's the fundamentals of burglary.
9 All right. If my neighbor sees a house is broken into
10 in the neighborhood, for instance -- for example, or
11 one sees -- not mine. Excuse me. If one sees a house
12 broken into in their neighborhood and they go in to
13 investigate and make sure everybody is okay, that
14 doesn't make them a burglar. If you see a business
15 broken in and you go in and say, you know, Fatima, are
16 you okay? Yeah.

17 I don't know what Mr. Bryant was thinking in the
18 way he seemed to approach this. I think it seems to me
19 to justify his actions. He could not get out that my
20 client had been there to visit his friend, on several
21 occasions, Fatima Doctor. There's nothing wrong with
22 going in and saying hello or -- to Fatima Doctor. But
23 he took this very innocent fact, oh, he looked around.
24 Well, do we have to be ashamed? Do we have to walk
25 around with our eyes cast down? Is there anything

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1 wrong with us? Of course not. You don't have to do
2 that. You come in, you look around, hey, hello, is
3 Fatima here, what's going on. All right. Are you
4 supposed to walk and run into walls?

5 See, something completely innocent, Mr. Bryant
6 took it and turned it around to make it look like
7 something bad. Now, we know he had a right to be
8 concerned. I mean, why not be? We would be ashamed if
9 he hadn't. If he didn't have the courage, we would be
10 ashamed.

11 Now, there's no burglary tools. There weren't
12 any cuts on his elbow or his hand. Okay? There's no
13 torn clothing where he elbowed it out, there are no
14 rocks there, there's nothing there with his
15 fingerprints on it, there's no screwdrivers. I mean,
16 what does a burglar need? Okay. Well, businesses just
17 aren't just left with the doors unlocked, wide open.
18 They got to have something to break in. Okay? I mean,
19 think about it. No evidence of anything there.

20 Now, no evidence of any burglary tools. That
21 would show you what? If I had a screwdriver or a
22 crowbar, you -- a crowbar to pry those doors and
23 windows open, that's evidence. But that's -- but if
24 you don't have any evidence -- I mean, you're talking
25 about intention. How do you determine that? You just

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1 assume, okay, he's bad. That's what Mr. Bryant did.

2 The question here today is have they proved,
3 beyond a reasonable doubt, each and every element. And
4 one of those elements in intent. Okay? They have to
5 prove intent. And if it's as he says it was -- which
6 you heard Mr. Bryant testify to what he said -- well,
7 then it would be completely wrong. It would be morally
8 wrong. You would not follow your duty and your oath to
9 find him guilty if there's -- it makes you hesitate.
10 If you think about it, you hesitate, then you have a
11 reasonable doubt. No burglary tools, no evidence he
12 was cut, no fingerprints on anything, no office drawers
13 broken open and valuables taken out. Okay? No
14 fingerprints on computers, that he had stacked up by
15 the door, that he was going to take out? Okay? And if
16 he was casing the place, he would know where it was, go
17 in and get it, and be gone. Okay?

18 And officers arrived in three minutes after
19 getting the call. And he had already jumped the gun,
20 already made the assumption, tried him, determined he
21 was a bad guy, held at gunpoint, so to speak, and was
22 then taken out. Okay? I mean, didn't call the police.
23 Could have called the police. He called his friends
24 right by the police. It just shows us that he was
25 upset, he had to get out of bed. Someone had broken

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1 the glass, and broken into his place of business, and
2 he assumed that. And then he made up this story where
3 he didn't have -- well, he had to make it up because if
4 you go in there asking for someone and you go in there
5 and sit down -- and Shedron came in here and said, you
6 know, yes, he knows Fatima, he comes in to visit.

7 All right. Compare this, the calmness of
8 Shedron, with the attitude and approach of Mr. Bryant,
9 and you have two different things here. And what if
10 it's true? If that makes you hesitate, that's a
11 reasonable doubt. We have no burden here at all. We
12 are one-hundred percent innocent until y'all decide
13 individually and collectively that the State has proven
14 the defendant guilty beyond a reasonable doubt.

15 I mean, when you don't stack things up, and
16 you're not breaking in drawers, nothing is ransacked,
17 it just doesn't make any sense that he's a burglar.
18 And this is -- you know, you have to have evidence.

19 What evidence can I state that shows me that he
20 intended to commit a crime? No flight. He could have
21 jumped out of that car and ran. He could have been
22 gone at any time. Okay? He didn't have to be seen.
23 He could have ran off. Okay? And that's a -- you
24 know, palm trees over there. It's right behind -- you
25 know, a block or so over from Dr. Mills' office on one

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1 side. And you've got the storage unit, you've got the
2 woods. That person could have been gone. If I put to
3 you the guilty person would have fled, the guilty
4 person would have had to have been chased down. They
5 would have had the Hampton County dog team out that
6 night finding that person, if they had done that.
7 Okay?

8 The guilty person would have fled, and my client
9 was not guilty. He did not flee. Why? He wasn't
10 there to do harm. He wasn't there to do anything
11 wrong. You've got to have all three things. Entry
12 without consent, that -- someone comes in and they go
13 to the neighbor's broken house [phonetic] and they say,
14 you, Mr. Smith, Mrs. Smith, or you kids, are y'all
15 okay. All right? When the police arrive and arrest
16 them for burglary -- or another neighbor arrives and
17 they arrested him for burglary, or apprehends, whatever
18 that word means, apprehends, it shows his mind -- his
19 frame of mind. Okay? That doesn't make that person
20 guilty. What if it is as he says? That's a reasonable
21 doubt. And by your oath, if you have a reasonable
22 doubt, then you cannot convict. And this case clearly
23 shows that there is a reasonable doubt.

24 Kelvin will not get another day in court to have
25 the facts decided. This is a short, brief case because

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1 there is no evidence against him. And when the State
2 doesn't have any evidence, they just want you to roll
3 with it and go ahead and convict. But many cases of
4 weak evidence are short. Why? Because the evidence is
5 not there to put up on the witness stand. No physical
6 evidence, no forensic evidence, absolutely nothing at
7 all except an act which is easily understood as human,
8 decent, and easily explained. Thank you very much.

9 THE COURT: Thank you, Mr. Plexico.

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CHARGE OF THE COURT

THE COURT: Mr. Foreperson, ladies and gentlemen of the jury, you have followed very patiently and listened attentively to the presentation of the evidence in this case, and I want to thank you for that, and also the able arguments made by Solicitor Murdaugh on behalf of the State and Steve Plexico on behalf of the defendant.

Ladies and gentlemen, it now becomes the duty of the trial judge, under the constitution of this state, to charge you and instruct you in the law that is applicable to this case, and it is your duty as jurors to accept and apply the law as the Court will now state it to you. As I told you, it is your exclusive duty to decide all the issues of fact in this case. You must determine the effect, value, weight, and truth of the evidence. Both the State and the defendant have the right to expect that you will carefully consider and evaluate the evidence and apply the law to the case -- of the case to the evidence. Now, by doing so, both the State of South Carolina and the defendant will receive and obtain a fair and impartial trial in this case.

Ladies and gentlemen, the State of South Carolina by the bill of indictment in this case charged

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1 the defendant, Kelvin Mays, with burglary in the second
2 degree. The indictment reads as follows: that in
3 Hampton County, on or about January 21st of 2008, the
4 defendant, Kelvin Mays, did enter the building of
5 ACCESS Network located at 109 First Street East,
6 Hampton, South Carolina, without consent and with the
7 intent to commit a crime therein and that the entering
8 did occur in the nighttime.

9 Ladies and gentlemen, I remind you that the fact
10 that the defendant was arrested, charged, and indicted
11 in this case is not evidence and cannot be considered
12 by you as evidence of guilt in this case, nor does it
13 create any presumption or inference of guilt. This
14 document is just simply the formal written instrument
15 which contains the charge made against the defendant.
16 It is the formal document by which the case is brought
17 into this Court.

18 Now, ladies and gentlemen, the defendant, Kelvin
19 Mays, has pled not guilty to this indictment and that
20 plea puts the burden on the State to prove the
21 defendant guilty of this charge beyond a reasonable
22 doubt.

23 Ladies and gentlemen, a person charged with
24 committing a criminal offense in South Carolina is
25 never required to prove himself innocent. I charge you
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1 that it's an important rule of law that a defendant in
2 a criminal trial, no matter what the seriousness of the
3 charge may be, will always be presumed to be innocent
4 of the crime for which the indictment was issued,
5 unless guilt has been proven by evidence satisfying you
6 of that guilt beyond a reasonable doubt. This
7 presumption of innocence does not end when you begin
8 your deliberations, but it accompanies the defendant
9 throughout the trial until you reach a verdict of guilt
10 based on evidence satisfying you, the jury, of that
11 guilt beyond a reasonable doubt.

12 Ladies and gentlemen, the presumption of
13 innocence is like a robe of righteousness that is
14 placed about the shoulders of the defendant, which
15 remains with the defendant until it has been stripped
16 from the defendant by, again, evidence satisfying you
17 of the defendant's guilt beyond a reasonable doubt.

18 Ladies and gentlemen, the presumption of
19 innocence is not a mere legal theory. It is not just a
20 legal phrase. It is a substantial right to which every
21 defendant is entitled unless you, the jury, are
22 satisfied from the evidence, the defendant's guilt,
23 beyond a reasonable doubt.

24 Now, ladies and gentlemen, the State has the
25 burden of proving the defendant guilty beyond a

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1 reasonable doubt. The term reasonable doubt must be
2 given its plain and ordinary meaning. However, to the
3 extent that I may define it for you, a reasonable doubt
4 is the kind of doubt that would cause a reasonable
5 person to hesitate to act in the most important of
6 their personal decisions. The defendant is entitled,
7 ladies and gentlemen, to every reasonable doubt arising
8 in the whole case. If, upon any issue of fact
9 essential to a conviction, you have a reasonable doubt
10 as to how that issue should be resolved, you must
11 resolve that reasonable doubt in favor of the
12 defendant. Now, ladies and gentlemen, some of you may
13 have served as jurors in civil cases where you were
14 told that it is only necessary to prove that a fact is
15 more likely true than not true, such as by the greater
16 weight or the preponderance of the evidence. In
17 criminal cases, the State's proof must be more powerful
18 than that. It must be beyond a reasonable doubt.
19 Ladies and gentlemen, proof beyond a reasonable doubt
20 is proof that leaves you firmly convinced of the
21 defendant's guilt. Now, ladies and gentlemen, there
22 are very few things in this world that we know with
23 absolute certainty, and in criminal cases the law does
24 not require proof that overcomes every possible doubt.
25 If based on your consideration of the evidence you are

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1 firmly convinced the defendant is guilty of the crime
2 charged, you must find the defendant guilty. If, on
3 the other hand, you think there is a real possibility
4 that the defendant is not guilty, you must give the
5 defendant the benefit of the doubt and find him not
6 guilty.

7 Ladies and gentlemen, I remind you that during
8 this trial you and I have certain duties to perform.
9 As the trial judge, it's my responsibility to preside
10 over the trial of the case, and also I have the duty to
11 rule on the admissibility of the evidence offered
12 during the trial. Ladies and gentlemen, you are only
13 to consider the competent evidence that is before you.
14 You are only to consider the testimony which has been
15 presented right here from this witness stand, and the
16 exhibits which have been made a part of the record in
17 this case. I have the additional duty to charge you
18 the law applicable to this case. As the presiding
19 judge, I am the sole judge of the law of this case and
20 it's your duty as jurors to accept and apply the law as
21 I now state it to you. If you have any idea as to what
22 the law is or what the law you think ought to be, and
23 it doesn't agree with what I'm now going to tell you
24 the law is, you must abandon this idea because you are
25 sworn to accept the law exactly as I state it to you.

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1 Ladies and gentlemen, in every case tried in
2 this court before a jury, the jury becomes the sole and
3 exclusive judge of the facts.

4 A trial judge cannot state, comment on, or make
5 any statement to a trial jury about the facts in the
6 case. Again, since you, the jury, are the sole judge
7 of the facts in this case, you are not to infer from
8 what I have said during the progress of this trial in
9 ruling upon the admissibility of evidence or otherwise,
10 or anything that I now say during the course of this
11 instruction to you, that I have an opinion about the
12 facts in this case. I do not. The law does not allow
13 me to have an opinion about the facts. This is a
14 matter solely for you, the jury, to determine. Ladies
15 and gentlemen, as I told you before, it is your duty to
16 determine the effect, value, weight, and truth of the
17 evidence that's been presented during this trial.

18 Now, ladies and gentlemen, there are two types
19 of evidence which are presented, generally, during a
20 trial. They are direct evidence and circumstantial
21 evidence. Direct evidence is the testimony of a person
22 who claims to have actual knowledge of a fact, such as
23 an eyewitness. It is evidence which immediately
24 establishes the main fact to be proved. Circumstantial
25 evidence is proof of a chain of facts and circumstances

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1 indicating the existence of a fact. It is evidence
2 which immediately establishes collateral facts from
3 which the main fact can be inferred. Ladies and
4 gentlemen, circumstantial evidence is based on
5 inference and not on personal knowledge or information.
6 You need to understand, ladies and gentlemen, that the
7 law makes absolutely no distinction between the weight
8 or value to be given to either direct or circumstantial
9 evidence, nor is a greater degree of certainty required
10 of circumstantial evidence than direct evidence. You
11 should weigh all of the evidence in the case and after
12 weighing all the evidence, if you are not convinced of
13 the guilt of the defendant beyond a reasonable doubt,
14 you must find the defendant not guilty.

15 Now, ladies and gentlemen, it is your duty to
16 determine the credibility of the witnesses who have
17 testified in this case. And credibility simply means
18 the believability. It becomes your duty as jurors to
19 analyze and to evaluate the evidence and determine
20 which evidence convinces you of its truth. In
21 determining the ability -- or the believability of
22 witnesses who have testified in this case, you may
23 believe one witness over several witnesses, or several
24 witnesses over one witness. You may believe a part of
25 a testimony of a witness and reject the remaining part

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1 of the testimony of that same witness. You may believe
2 the testimony of a witness, again, in its entirety, or
3 reject it. Ladies and gentlemen, you may consider
4 whether any witnesses exhibited to you any interest,
5 any bias, any prejudice, or any other motive in this
6 case. As well, as I told you at the beginning, you can
7 also consider the appearance and manner of the witness
8 while on the witness stand.

9 Ladies and gentlemen, I instruct and emphasize
10 that the fact that the defendant did not testify in
11 this case is not a factor to be considered by you in
12 any way in your deliberation and in your consideration
13 on the question of the guilt or innocence of a
14 defendant. It must not be considered by you in any
15 manner whatsoever.

16 Ladies and gentlemen, a defendant has the
17 constitutional right to remain silent and the assertion
18 of this right must not be considered by you in your
19 deliberations. I repeat, under your oath, you are to
20 draw no conclusion whatsoever from the fact that the
21 defendant in this case did not testify. The fact that
22 this defendant did not testify should not even be
23 discussed in the jury room.

24 Ladies and gentlemen, the burden of proof, as
25 I've stated to you, is on the State. The defendant is

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1 not required to prove his innocence. Again, the burden
2 of proof remains on the State to prove guilt beyond a
3 reasonable doubt.

4 Ladies and gentlemen, the indictment in this
5 case alleges, as I read to you earlier, burglary in the
6 second degree. To prove burglary in the second degree,
7 the State must prove beyond a reasonable doubt that the
8 defendant entered a -- or entered a building, without
9 consent, with the intent to commit a crime therein the
10 building, and that the defendant entered or remained in
11 the building in the nighttime.

12 Ladies and gentlemen, a building is any
13 structure where people assemble for the purpose of
14 business, government, education, religion,
15 entertainment, public transportation, or public use, or
16 where goods are stored. Without consent simply means
17 to enter a building without the consent of a person in
18 lawful possession.

19 With an intent to commit a crime therein, ladies
20 and gentlemen, there must have been an intent to commit
21 a crime. And it can be any crime, a felony or a
22 misdemeanor, and whether or not that crime was actually
23 committed. The mere entry into a building without
24 consent is not sufficient to constitute second degree
25 burglary. There must have been an intent to commit a

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1 crime once inside. Further, it is not sufficient that
2 the intent to commit a crime was formulated after the
3 entry. To convict the defendant of second degree
4 burglary, you must find that at the time he entered the
5 building, the defendant intended to commit a crime once
6 in. The defendant's actions after he entered the
7 building can be evidence used to determine if he had
8 the intent to commit a crime at the time of entry.

9 Ladies and gentlemen, proof of intent
10 necessarily rests on inference from conduct. It does
11 not matter that the intended crime was not completed.
12 Where the intent exists at the time of the entering, it
13 is no defense that the intent was abandoned after the
14 entry, because the entering with intent to commit a
15 crime completes the offense of burglary.

16 Ladies and gentlemen, nighttime is the period
17 between sunset and sunrise during which there is not
18 enough daylight to recognize a person's face except by
19 artificial light or moonlight.

20 Mr. Foreperson, ladies and gentlemen of the
21 jury, as you retire to begin your deliberations, I wish
22 to express the hope that each of you will be mindful of
23 the importance of your duties here today. You are not
24 called upon very often to serve as jurors, and the
25 proper performance of this duty requires each of you to

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1 reach the height of freeing your mind of all improper
2 influences. Ladies and gentlemen, you and I are acting
3 for the community, and we must see to it that this
4 trial is fair and the verdict is just. You have
5 observed that during the trial of this case the
6 presiding officer of the Court is always addressed as
7 Your Honor. The reason is that the Court is entrusted
8 with the honor of this community, the honor of this
9 state, and the honor of our county, in seeking that
10 every case tried here receives fair and impartial
11 justice. Now, you, the jury, take into your care the
12 preservation of this community, the honor of this
13 state, and the honor of this country.

14 Now, please don't get the idea that I am trying
15 to intimate to you how I might think you should decide
16 this case. As I've already told you, under the rules
17 of the law I have absolutely no opinion as to the facts
18 of the case, and it would be highly improper for me to
19 influence you in that way. So I'm not trying to tell
20 you what your verdict should be. But as the presiding
21 officer of this Court, I am vitally concerned that
22 whatever verdict you find will be the result of you
23 going back into that jury room and confining your
24 consideration to the evidence and the law that you've
25 heard in this courtroom, weighing it fairly and

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1 impartially, as I have every confidence you will do.

2 Ladies and gentlemen, everyone is entitled to
3 justice, both the State and the defendant. You owe no
4 support or sympathy to anyone. The Court is of the
5 confirmed opinion, ladies and gentlemen, that whatever
6 verdict you reach will represent truth and justice for
7 all.

8 Now, Mr. Foreperson, and members of the jury,
9 you must remember your verdict must be unanimous. It
10 must be the verdict of all twelve of you. And to that
11 effect, ladies and gentlemen, I am going to, shortly,
12 send you back to your jury room, and once again I am
13 going to tell you not to begin your deliberations. And
14 the reason is this: I need to ask the attorneys if
15 there is anything additional that they would like me to
16 add or to charge you. I will also send back with you
17 any evidence we have by way of paper evidence, or --
18 I'm sorry -- and, additionally, a verdict form.

19 The verdict form simply has the caption of the
20 case and the indictment number, and it is simply: as
21 to indictment number 2008-GS-25-156, the charge of
22 burglary in the second degree, we, the jury,
23 unanimously find the defendant, Kelvin Mays, and it
24 says check one, either guilty or not guilty. And
25 then there is a line for the foreperson to sign, and it

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1 is dated. Ladies and gentlemen, please don't infer by
2 the order that I put guilty or not guilty as having any
3 inference whatsoever. In every trial I just flip them.
4 That's all we do, simply. All right?

5 So Mr. Foreperson and members of the jury, I am
6 going to send you back again to the jury room for the
7 last time. Again, you are not to begin your
8 deliberations because it might be that I need to bring
9 you out here and further charge you. If there is
10 nothing I need to further charge you on the law, the
11 bailiffs are going to bring the verdict form and any
12 evidence back to you, and that is going to be your
13 signal to begin your deliberations.

14 Mr. Foreperson, when you reach a verdict, after
15 you've filled out the paperwork simply knock on the
16 door and we will accept you back into the courtroom.
17 All right?

18 So with that said, ladies and gentlemen, I
19 appreciate your attention. You have been a wonderful
20 jury. And we will be with you shortly. All right?
21 You are excused. Thank you.

22 [Whereupon, the jury exits the courtroom at
23 11:31 a.m.]

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RENEWED MOTION FOR A DIRECTED VERDICT

THE COURT: All right. Respectfully, for the record, after Mr. Murdaugh made his closing statement he brought to my attention that Mr. Plexico did not rest his case for the record, and I told him that I noted that it was rested for the record properly at the proper time and I also preserve his objections at that point. I also understand that he would renew his motion for a directed verdict based on the same grounds, I presume.

Is that correct, Mr. Plexico?

MR. PLEXICO: Yes, Your Honor.

THE COURT: And, respectfully, I deny that motion based on the same grounds. And I do find that those motions were made timely, without any objection from the solicitor.

MR. MURDAUGH: That is correct. As though they had been made at the conclusion of the -- before we argued.

THE COURT: Yes, sir. And that's all of our agreement and understanding.

Respectfully, anything else, Mr. Plexico, we need to put on the record as to that?

MR. PLEXICO: Not as to regards to that. Thank you, Your Honor.

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1 THE COURT: Okay. As to the charge: any
2 objections from the State?

3 MR. MURDAUGH: No objections or additions.

4 THE COURT: Okay. Any objections or additions
5 from Mr. Plexico?

6 MR. PLEXICO: No, Your Honor.

7 THE COURT: All right. Gentlemen, I've got the
8 verdict form, which is the same that we showed you,
9 with the indictment number corrected.

10 Additionally, Mia, do you have the paper
11 evidence?

12 Gentlemen, let's take a look very quickly at
13 Exhibits 1 and 2.

14 MR. MURDAUGH: 1 and 2.

15 THE COURT: Okay.

16 [Whereupon, Mr. Murdaugh and Mr. Plexico review
17 exhibits]

18 THE COURT: All right. And for the record, we
19 will be at ease until we get a verdict.

20 [Whereupon, the evidence and verdict form go out
21 to the jury at 11:32 a.m.]

22 [Whereupon, a recess is taken from 11:32 a.m. to
23 12:04 p.m.]

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VERDICT

THE COURT: All right. Is the State ready?

MR. MURDAUGH: The State is.

THE COURT: Is the defense ready?

MR. PLEXICO: The defense is ready, Your Honor.

THE COURT: All right. Let's bring them in.

[Whereupon, the jury enters the courtroom at
12:05 p.m.]

THE COURT: Mr. Foreperson, I understand you
have reached a verdict, sir.

THE FOREPERSON: Yes, ma'am.

THE COURT: All right. If you would please hand
it to Ms. Nettles.

[Whereupon, the foreperson proffers documents to
the clerk of court. The clerk of court proffers
documents to the Court]

[Whereupon, the Court reviews documents]

THE COURT: All right. Ms. Nettles, would you
like to read the verdict?

THE CLERK OF COURT: Yes, ma'am.

THE COURT: Okay. If you would publish the
verdict, please.

THE CLERK OF COURT: The State of South
Carolina, County of Hampton, in indictment number
2008-GS-25-156, the State of South Carolina vs. Kelvin
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1 Mays, as to the charge of burglary in the second
2 degree, we, the jury, unanimously find the defendant,
3 Kelvin Mays, guilty; I certify this as a unanimous
4 decision of the jury; signed by Lonzo Forester,
5 September 10th, 2008, Hampton, South Carolina.

6 THE COURT: Thank you.

7 Mr. Plexico, would you like this jury
8 individually polled, sir?

9 MR. PLEXICO: Yes, Your Honor.

10 - - - - -

11 POLLING OF THE JURY

12 THE COURT: All right. Ms. Nettles, if you
13 would poll the jury.

14 THE CLERK OF COURT: Yes, ma'am.

15 When I call your name, if you would stand. I'm
16 going to ask you two questions. Answer each question
17 separately.

18 Emma J. Mole, was this your verdict?

19 MS. MOLE: Yes, ma'am.

20 THE CLERK OF COURT: And is it still your
21 verdict?

22 MS. MOLE: Yes, ma'am.

23 THE CLERK OF COURT: Nellie Jackson, was this
24 your verdict?

25 MS. JACKSON: Yes, it was.

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1 THE CLERK OF COURT: And is it still your
2 verdict?

3 MS. JACKSON: Yes.

4 THE CLERK OF COURT: Leroy Devore, was this your
5 verdict?

6 MR. DEVORE: Yes, ma'am.

7 THE CLERK OF COURT: And is it still your
8 verdict?

9 MR. DEVORE: Yes, ma'am.

10 THE CLERK OF COURT: Kenyatta Davis, was this
11 your verdict?

12 MR. DAVIS: Yes.

13 THE CLERK OF COURT: And is it still your
14 verdict?

15 MR. DAVIS: Yes.

16 THE CLERK OF COURT: Mike Wilkins, was this your
17 verdict?

18 MR. WILKINS: Yes.

19 THE CLERK OF COURT: And is it still your
20 verdict?

21 MR. WILKINS: Yes.

22 THE CLERK OF COURT: Lonzo Forester, was this
23 your verdict?

24 MR. FORESTER: Yes.

25 THE CLERK OF COURT: And is it still your

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1 verdict?

2 MR. FORESTER: Yes.

3 THE CLERK OF COURT: Kevin Ginn, was this your
4 verdict?

5 MR. GINN: Yes, ma'am.

6 THE CLERK OF COURT: Is it still your verdict?

7 MR. GINN: Yes, ma'am.

8 THE CLERK OF COURT: Louretta Busby, was this
9 your verdict?

10 MS. BUSBY: Yes, ma'am.

11 THE CLERK OF COURT: Is it still your verdict?

12 MS. BUSBY: Yes, ma'am.

13 THE CLERK OF COURT: Beverly Carter, was this
14 your verdict?

15 MS. CARTER: Yes, ma'am.

16 THE CLERK OF COURT: Is it still your verdict?

17 MS. CARTER: Yes, ma'am.

18 THE CLERK OF COURT: Michael Smith, was this
19 your verdict?

20 MR. SMITH: Yes, ma'am.

21 THE CLERK OF COURT: And is it still your
22 verdict?

23 MR. SMITH: Yes, ma'am.

24 THE CLERK OF COURT: Dan Peeples, was this your
25 verdict?

State v. Mays
Jury Trial - Volume 2 of 2
September 10, 2008

1 MR. PEEPLES: Yes, ma'am.

2 THE CLERK OF COURT: Is it still your verdict?

3 MR. PEEPLES: Yes, ma'am.

4 THE CLERK OF COURT: Harold Eadie, was this your
5 verdict?

6 MR. EADIE: Yes.

7 THE CLERK OF COURT: And is it still your
8 verdict?

9 MR. EADIE: Yes.

10 THE COURT: Anything further required from this
11 jury? From the State?

12 MR. MURDAUGH: No, ma'am.

13 THE COURT: From the defense?

14 MR. PLEXICO: No, Your Honor.

15 THE COURT: All right. Ladies and gentlemen of
16 the jury, I want to thank you very much for how hard
17 y'all have worked and the attention you've paid in this
18 case. As you all understand, these matters are very
19 important, and I know that y'all exercised your duty as
20 jurors diligently and conscientiously, and I appreciate
21 that. I will tell you that the attorneys appreciate
22 that.

23 Solicitor, is there something?

24 MR. MURDAUGH: Yes, ma'am. I was going to ask
25 that you allow them to stay --

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1 THE COURT: Absolutely. I will for sure do
2 that, sir. Yes.

3 Ladies and gentlemen of the jury, I will tell
4 you a few things before I allow you to depart, if you
5 wish to. My understanding is I may pick another jury
6 this week, and we may try a case tomorrow, so
7 unfortunately I cannot let you go or relieve you for
8 tomorrow. But what I am going to ask you to do is
9 this. You're going to call the line -- the phone
10 number that you were given after six o'clock tonight,
11 and it's going to tell you whether or not you need to
12 come back in the morning. Okay? So, again, I'm just
13 not sure if we're going to need your services tomorrow,
14 but we may. So just make sure you call that jury line,
15 follow the prompt. If it says comes back, you need to
16 come back. Okay? I wish I didn't have to do that, but
17 I need all my jurors here. So respectfully, if we do
18 end up pulling another jury, I may need some of you on
19 that jury and you possibly could get chosen.

20 Additionally, ladies and gentlemen, at this time
21 it's my duty, as the judge, to sentence Mr. Mays. You
22 are welcome to stay, if you would like, or you may also
23 leave. It's completely up to you. You can stay
24 exactly where you are, if you would like to, or of
25 course we can break for just a quick minute. If you

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September 10, 2008

1 would like to excuse yourself and go, you are more than
2 welcome to. It is completely up to you.

3 I will also tell you, ladies and gentlemen, that
4 of course -- during the course of this trial, I had
5 told you that you are not to discuss this case with
6 anybody. At this point, it is now up to you whether or
7 not you want to discuss this case. The attorneys, or
8 someone else, may contact you or may want to talk to
9 you in regards to the case. Again, it's up to you
10 whether or not you want to talk about it.

11 If someone calls you or someone approaches you
12 and you do not wish to speak with them about it, you
13 can simply say, no thank you, I don't want to talk
14 about it. If they persist, you're to call up here to
15 the courthouse and ask for Ms. Nettles and give me --
16 or give Ms. Nettles their name, and I can assure you
17 that I will make sure that they don't come and speak to
18 you again. Okay? Again, it's completely up to you
19 whether or not you want to discuss this case. But
20 certainly no one can force you or badger you or get you
21 to speak if you don't want to.

22 Additionally, though, if you don't have a
23 problem with it and want to tell them, you know,
24 possibly, you know, why or what's -- that is completely
25 up to you. And, again, you are also free to go home

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September 10, 2008

1 and now tell your family and friends if you want to.
2 So I just want y'all to understand and know that.

3 But with that said, ladies and gentlemen, you
4 are welcome to stay during the sentencing. I'm going
5 to go ahead and sentence Mr. Mays, and I'm actually
6 handling another couple of matters, as well, after
7 that. So it's completely up to you.

8 Again, I want to thank you all for your service
9 and just remind y'all that if you'll call after six
10 o'clock tonight. I'm hopeful that I don't have to use
11 you, but there is a chance I might. Okay?

12 So with that said, again, thank you. And for
13 anyone that wants to leave, please feel free and go
14 ahead now. And if not, you are welcome to stay.

15 [Whereupon, the jury is excused at 12:18 p.m.]

16 MR. MURDAUGH: If Your Honor please?

17 THE COURT: Yes, sir.

18 MR. MURDAUGH: I would like to give you his
19 criminal record before you sentence him.

20 THE COURT: Thank you. Okay.

21 [Whereupon, Mr. Murdaugh proffers documents to
22 the Court]

24 - - -

25 - - -

State v. Mays
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September 10, 2008

SENTENCING

MR. PLEXICO: Are you ready for us to come up?

THE COURT: Yes, sir. Actually, you can keep him at the table. I'm fine with that. Just stand up, Mr. Mays.

[Whereupon, Mr. Mays complies]

THE COURT: Yes, sir.

MR. MURDAUGH: Your Honor please, Mr. Mays has a prior criminal -- significant prior criminal record: a 1995 sale of narcotic drugs, a '95 assault on an officer, a '94 larceny, a '94 sale of illegal drugs, all in Connecticut; a shoplifting and unlawful carrying of a weapon in South Carolina, four counts of fraudulent check in South Carolina; a '91, '90, '91, '93, 2000, 2001, 2002 petty larcenies in New York, a possession of marijuana fifth offense in New York, another petty larceny, another petty larceny in 2003, a grand larceny in 2004 along with possession of burglary tools, a -- those being in New York. A petty -- two petty larcenies in '04 and '05 in New York, a criminal possession of stolen property in '94, a criminal possession of marijuana fifth offense in New York, a robbery second degree in 1982, an assault third degree in I assume New York, a burglary second in New York in '92, three more petty larcenies in New York, a grand

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1 larceny in 1999 in New York, and a 1990 burglary and
2 assault with intent to cause physical harm.

3 THE COURT: All right, solicitor. Anything else
4 from the State?

5 MR. MURDAUGH: No, ma'am. Did I pass up the
6 sentencing sheet?

7 THE COURT: Yes, you did, sir.

8 All right. Mr. Plexico?

9 MR. PLEXICO: Your Honor, we would contest the
10 1990 burglary and assault conviction in 1990, Judge --
11 I don't believe he had a conviction for that -- and
12 possession of the firearm, Your Honor. That was
13 mentioned earlier. Aside from that, we have no
14 disagreements with the record.

15 MR. MURDAUGH: I'll withdraw those.

16 THE COURT: Thank you, solicitor.

17 MR. PLEXICO: My client is forty-three years
18 old, Your Honor, and he is a bus driver in Walterboro,
19 Your Honor. And the case has been tried. We want to
20 thank everybody for their consideration in this matter,
21 Your Honor.

22 Do you have anything to add?

23 MR. MAYS: No, sir.

24 THE COURT: Is there anything you would like to
25 say, Mr. Mays?

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September 10, 2008

1 MR. MAYS: No.

2 THE COURT: Okay.

3 Mr. Mays: Yeah. Your Honor, I just had a
4 trial, you know. I pray to God that it's turning out
5 later on, because I'm trying to come back and do this
6 over, because I can't -- I can't see it.

7 MR. PLEXICO: I'll be glad to notice a -- I'll
8 be glad to file a notice of appeal with the office of
9 appellate defense in Columbia, now that my client --

10 THE COURT: Okay. Thank you, Mr. Plexico.

11 Anything further, Mr. Mays?

12 MR. MAYS: No, ma'am.

13 THE COURT: All right. On indictment number
14 2008-GS-25-156, it's for burglary in the second degree
15 violent, it's the sentence of this Court that you be
16 committed to the Department of Corrections for a period
17 of fifteen years. Good luck to you, Mr. Mays.

18 MR. MAYS: Thank you.

19 MR. MURDAUGH: Thank you, ma'am.

20 THE COURT: Thank you.

21 [Whereupon, a recess is taken from 12:18 p.m. to
22 12:30 p.m.]

23

24

25

State v. Mays
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September 10, 2008

POST TRIAL MOTIONS

THE COURT: Post trial motions, sir, in Kelvin Mays' case?

MR. PLEXICO: Post trial motions? I don't have any at this time, Judge.

THE COURT: Are you sure?

MR. MURDAUGH: Renew all your --

MR. PLEXICO: Oh. I would renew -- I'm sorry. I would renew my motions. Yes, Your Honor. I would renew my motions that I had made previously to Your Honor, the motions for a directed verdict.

THE COURT: All right. And obviously make a motion for a new trial; is that correct?

MR. PLEXICO: And I would make a motion for a new trial, also, Judge.

THE COURT: JNOV? All right. Respectfully, I'm going to deny those motions, based on my earlier rulings on your directed verdict motion. I certainly think there is adequate evidence put before the jury that they could find, as they did, your client guilty, sir. Respectfully, we just wanted to make sure we protected your record. All right?

MR. PLEXICO: Thank you, Your Honor. I'm sorry.

THE COURT: All right. That's okay.

[JURY TRIAL CONCLUDES AT 12:31 P.M.]

State v. Mays
Jury Trial - Volume 2 of 2
September 10, 2008

C E R T I F I C A T E

~~STATE OF SOUTH CAROLINA~~

COUNTY OF HAMPTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 14th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the jury trial held before the Honorable Carmen T. Mullen, on Wednesday, September 10, 2008.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 12th day of December, 2008.

Mia Perron
Mia Perron, CCR, CVR-CM
Circuit Court Reporter
14th Judicial Circuit

MIA PERRON, CCR, CVR-CM

-118-

WITNESSES

Jim Bolton

DOCKET NO. 2008GS250156

The State of South Carolina

County of Hampton

COURT OF GENERAL SESSIONS

April Term 2008

ARREST WARRANT NUMBER

J460227

Date of Arrest: 01/22/08

ACTION OF GRAND JURY

TRIALS

Kelvin Mays

THE STATE

VS.

Robert H. Brackley
 Foreperson of Grand Jury
 Date: APR 18 2008

VERDICT

Indictment for

Burglary / Burglary (Violent) (After June 20, 1985) - Second degree

SC Code: 16-11-0312

CDR Code:0086

Forperson of Petit Jury
 Date:

INDICT

AMTRUC COPY
 CLERK OF COURT FOR
 HAMPTON COUNTY, S.C.
Michael D. [Signature]

DATE 2-11-12

STATE OF SOUTH CAROLINA)
COUNTY OF HAMPTON)

INDICTMENT 2008GS250156

At a Court of General Sessions, convened on April 18, 2008, the Grand Jurors of Hampton County present upon their oath:

Burglary / Burglary (Violent) (After June 20, 1985) - Second degree

That in Hampton County, on or about January 21, 2008, the Defendant, Kelvin Mays, did enter the building of the Access Network located at 109 1st Street E., Hampton, S.C. without consent and with the intent to commit a crime therein in and that the entering did occur in the nighttime. All in violation of Section 16-11-312 (B) of the South Carolina Code of Laws (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Hampton
STATE

INDICTMENT/CASE#:

08-GS-25-0156

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip:

DL#

SID#

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

In violation of §

16-11-312 (B)

of the S.C. Code of Laws, bearing CDR Code #

0086☐ NON-VIOLENT☒ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS☐ \$17-25-45(CSC w/minor 1st or Lewd Ad)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:

Solicitor

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 15 days/months/years or ☐ 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 Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ set by SCDPPPS _____

Attend Voc. Rehab. or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

*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	\$ _____
§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	\$ _____
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
§90.11 TP (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
TOTAL		\$ <u>133.90</u>

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP☐ Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

211412
Sept. 10, 2008

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Kelvin Mays,

Appellant.

Appeal From Hampton County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2012-UP-301
Submitted April 2, 2012 – Filed May 16, 2012

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia,
for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General William M. Blich, Jr., all

of Columbia, and Solicitor Isaac McDuffie Stone, III,
of Beaufort, for Respondent.

PER CURIAM: Kelvin Mays appeals his conviction of second-degree burglary. Mays argues the trial court erred in denying his motion for a mistrial because his character was wrongly attacked, which most likely impacted the verdict. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding an issue was not preserved when appellant raised relevancy at trial but argued a different ground on appeal, namely that the testimony represented improper character evidence); State v. Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992) (holding an appellant may not be heard on appeal to complain of the admission of evidence elicited by his own counsel).

AFFIRMED.

FEW, C.J., HUFF and SHORT, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

AW 14

FILED FORM 5

STATE OF SOUTH CAROLINA

2012 JUN 13 AM 11:58

COUNTY OF

Hampton

IN THE COURT OF COMMON PLEAS

MYLINDA B. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

2012-CP-25-211

Full name and prison number (if any) of Applicant

Kelvin Lamar Williams

v.

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - 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 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 Hampton County Detention Center
2. Name and location of Court which imposed sentence Hampton County Court House, Varnville
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-G-9-25-0156
 - (b) 2008-G-5-25-0156
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 10, 2008 / Fifteen years
 - (b) _____

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. MAY 16, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Pursuant to Rule 220 (b)(1), SCACR, (2003)
- ii. State V. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 44.
- iii. State V. Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1991)
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) ~~_____~~
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel (Trial)
 (b) _____
 (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See on back of pages (2) and (3)
 (b) _____
 (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? 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. _____

Continued From page 2.

On February 15/2008 indictment 2008-GS-250156 For Burglar, (Non-Violent) was true billed. On April 12/2008 an indictment for Burglary (Violent) was also true billed. Both indictments list the docket number as 2008-GS-250156 which by law is impossible.

Thus the applicant has not been properly notified of the charge against him. See *Weinhauer V. State* 334 S.C. 327, 333, 516 S.E. 2d 840, 842 (1999) (citing *State V. Sowell* 85 S.C. 278, 67 S.E. 316 (1910)) Whereas Counsel fail to object the changed nature of the offense.

- 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) _____
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO / YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. _____
 - ii. Stephen Plexico, - P.O. BOX 1114 Varnville SC. 29944
 - iii. Celia Robinson - P.O. Box 11589 Columbia SC. 29211-15
- (b) the proceedings at which each such attorney represented you:
- i. _____
 - ii. Trial
 - iii. Court of Appeals

19. State clearly the relief you seek in filing this application:

Vacated Sentence

20. Are you now under sentence from any other court that you have not challenged?

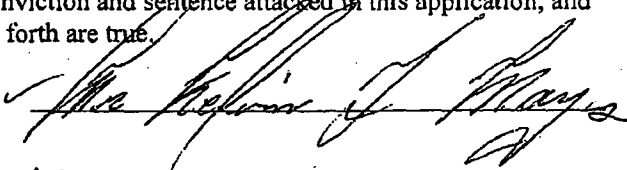
NO

STATE OF SOUTH CAROLINA)

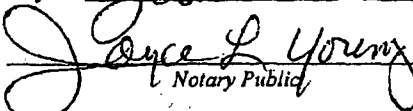
County of)

VERIFICATION

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attached in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 12
day of June, 2012

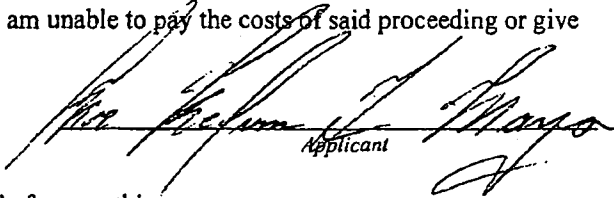
 (L.S.)
Notary Public

My Commission Expires: 10-11-2021

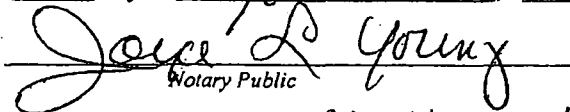
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
12 day of June, 2012


Notary Public

My Commission Expires: 10-11-2021

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HAMPTON	)	
	)	
	)	2012-CP-25-0211
	)	
Kelvin Mays, #323694	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed June 13, 2012, 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 Hampton County Clerk of Court. The Applicant was indicted at the April 2008 term of the Hampton County Grand Jury for burglary – second degree (08-GS-25-0156). Stephen T. Plexico, Esquire, represented the Applicant.

The Applicant proceeded to a jury trial where he was found guilty as indicted. On September 10, 2008, the Honorable Carmen Tevis Mullen sentenced the Applicant to confinement for a period of fifteen (15) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Applicant was represented on his appeal by M. Celia Robinson, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Mays, No. 2012-UP-301 (S.C. Ct. App. filed May 16, 2012). The Remittitur was issued on June 1, 2012.

Attached herewith and incorporated herein are the records of the Hampton County Clerks of Court regarding the subject convictions and the appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

- a. "did not object to the admission of improper character evidence"
- b. "did not motion the Court to quash the indictment"

III.

The Respondent submits that the Applicant's claim of ineffective assistance of counsel is without merit. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on the issue of ineffective assistance of counsel.

[Signature on the following page.]

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
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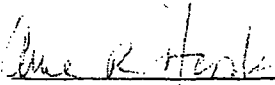
Nov. 5, 2012.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HAMPTON	)	
	)	
	)	2012-CP-25-0211
	)	
KELVIN MAYS, #323694	)	
	)	
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:

Marion C. Fairey, Jr., Esquire
 The Fairey Law Firm, LLC
 304 Lee Ave
 PO Box 661
 Hampton, SC 29924-3442

DATED this 5th day of November, 2012


 Anne R. Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HAMPTON) CASE NO.: 2012-CP-25-00211

KELVIN MAYS,)
)
 PLAINTIFF,)
)
 VS.)
)
 STATE OF SOUTH CAROLINA)
)
 _____)

PCR HEARING

held before the Honorable Deadra L. Jefferson
 Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
 in the Beaufort County Courthouse
 Beaufort, South Carolina
 on Tuesday, August 27, 2013, Commencing at 10:18 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

APPEARANCES OF COUNSEL

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EXHIBITS

[None]

Mays v. The State of South Carolina
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PROCEEDINGS

1
2 THE COURT: This is Kelvin Mays vs. the State of
3 South Carolina, 2012-CP-25-211. It's before the Court
4 on an application for post conviction relief which was
5 filed on June 13th of 2012. He alleges ineffective
6 assistance of trial counsel, alleging that his counsel
7 did not object to the admission of improper character
8 evidence and did not motion the Court to quash the
9 indictment. The State filed its return dated November
10 5th of 2012.

11 This case is a result of a jury trial where the
12 applicant was found guilty on September 10th of 2008.
13 Judge Mullen sentenced the applicant to a period of
14 confinement of fifteen years on the charge of burglary
15 in the second degree.

16 Mr. Fairey, you represent the applicant?

17 MR. FAIREY: Yes, Your Honor.

18 THE COURT: Are you ready to proceed?

19 MR. FAIREY: We are, Your Honor.

20 THE COURT: Okay. Ms. Wilson, you represent the
21 State. Are you ready to proceed?

22 MS. WILSON: Yes, Your Honor.

23 THE COURT: And the record should also reflect
24 that a direct appeal was filed and was dismissed.

25 Actually, it was affirmed, pursuant to State v.

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1 Hazelton, in an unpublished opinion. Let's see. 2012
2 UP 301.

3 You may proceed.

4 MR. FAIREY: May it please the Court, Your
5 Honor?

6 THE COURT: Yes, sir.

7 MR. FAIREY: We would call Mr. Stephen Plexico.

8 THE COURT: Mr. Plexico, if you would come to
9 the stand.

10 I'll remind you, sir, you're still under oath.

11 MR. PLEXICO: Yes, Your Honor.

12 [Whereupon, Mr. Plexico comes forward]

13 THE COURT: You may proceed.

14 Sir, if you would state your full name for the
15 record.

16 THE WITNESS: Stephen Timothy Plexico.

17 THE COURT: You may proceed.

18 MR. FAIREY: Thank you, Your Honor.

19 THE COURT: You're welcome.
20
21
22
23 - - -
24 - - -
25 - - -

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STEPHEN PLEXICO,

Having Been Previously Sworn,

was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. FAIREY:

Q. Mr. Plexico, you are currently employed by the
fourteenth circuit public defender's office?

A. Yes, sir.

Q. And you are the chief public defender?

A. Yes. For Allendale, Hampton, and Jasper.

Q. And how many years have you been a public
defender in the fourteenth circuit?

A. Twenty-three, twenty-four, twenty-five years.
Almost a quarter of a century.

Q. And you have twenty-three years experience
trying criminal cases in this circuit?

A. Yes.

Q. How many criminal trials would you estimate
you've tried?

A. I have no idea. Fifty.

Q. Hundreds?

A. I wouldn't say hundreds.

Fifty, seventy-five. I've forgotten some.

Q. Sure.

How many burglary -- of those would be burglary

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1 trials?

2 A. I don't know. At least ten.

3 Q. So you are well-familiar with the elements of
4 burglary second degree?

5 A. Yes, sir.

6 Q. And you would agree that burglary second degree
7 requires proof that the defendant entered a dwelling
8 without consent?

9 A. No, sir. A building.

10 Q. Building without consent.

11 Would you agree that burglary second requires
12 proof that the defendant entered the building with intent
13 to commit a crime?

14 A. Yes, sir.

15 Q. And proof that the defendant entered the
16 building at nighttime?

17 A. Depending on the degree of the burglary that's
18 alleged.

19 Here, he was arraigned that morning on his new
20 charge and we knew we were going to trial on a burglary
21 second charge.

22 Q. And that required proof that he entered the
23 building at nighttime?

24 A. Yes.

25 Q. Is it a correct statement of the law that the

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1 mere entry into a building without consent is not
2 sufficient to constitute second degree burglary?

3 A. Yes.

4 I think you could get that as a jury charge.

5 Q. And is it also a correct statement of the law
6 that it is not sufficient that the intent to commit a
7 crime was formulated after entry?

8 A. Correct.

9 Q. And is it correct that the defendant's actions
10 after he entered the building can be evidence used to
11 determine if he had intent?

12 A. Yes.

13 Q. And that's what the trial judge charged in this
14 case?

15 A. I don't remember what she charged.

16 Q. Have you had a chance to review the transcript?

17 A. Yes.

18 I've gone over it. It's been a while. I
19 reviewed it briefly again recently.

20 Q. Do you have a copy or --

21 A. Yes.

22 If you could direct me to where you're at, that
23 would be most helpful.

24 Q. And I think you can see the judge's charges on
25 burglary at pages 99 and 100.

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1 [Whereupon, the witness reviews documents]

2 A. Okay. Yes.

3 Q. [Mr. Fairey] And does it appear that the trial
4 judge charged those elements that I just read to you?

5 A. I'll have to look over it. Just a moment.

6 [Whereupon, the witness reviews documents]

7 A. Yes. That would be at 99, and 4 through 11, for
8 the body of the law.

9 Q. [Mr. Fairey] Okay. And that charge was made
10 without objection from you?

11 A. Yes.

12 Q. Did you bring your file with you today?

13 A. I think so. Yes. Right here.

14 Q. And have you had a chance to review it?

15 A. Yes. I've looked over it.

16 Q. There's a letter in that file dated September
17 3rd, 2008, to Robert Hughes, providing notice that
18 Mr. Mays' case will be called the week of September 8,
19 2008. Do you see that?

20 A. No.

21 But if you say that it's there, I have no doubt.
22 I gave you a copy of it.

23 Q. Okay. Who is Robert Hughes?

24 A. Robert Hughes is the solicitor at the time, I do
25 believe.

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1 Q. Solicitor?

2 A. He was an assistant solicitor at the time.

3 Q. Mr. Hughes didn't work for the public defender's
4 office?

5 A. He did later.

6 The trial actually was John Bryan's trial that I
7 inherited from him. So when he left, I got -- I received
8 his file.

9 [Whereupon, Mr. Fairey reviews documents]

10 MR. FAIREY: Your Honor, may I approach?

11 THE COURT: You may.

12 Q. [Mr. Fairey] This is what I'm talking about.

13 MS. WILSON: Can I see the letter, please?

14 THE COURT: Yes. Show it to counsel before --

15 MR. FAIREY: Absolutely.

16 THE COURT: Thank you, sir.

17 MR. FAIREY: I'm sorry.

18 [Whereupon, Mr. Fairey proffers documents to
19 Ms. Wilson]

20 [Whereupon, Ms. Wilson reviews documents]

21 Q. [Mr. Fairey] I'm just trying to make clear
22 whether or not Mr. Hughes had been involved in this case
23 or not.

24 A. I don't -- I've got a letter to Mr. Bryan on
25 July 1st, 2008.

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1 [Reading] John Bryan, Attorney at Law. Dear
2 Mr. Bryan, by way of this letter, be notified State v.
3 Mays will be tried Monday, July 7th, 2008.

4 Then there is a letter to Mr. Hughes that says
5 that it is September 3rd, 2008.

6 I have -- I did not date my notes back then, but
7 I have where I advised him where he wanted a trial. I
8 just started over basically with the matter and then, you
9 know, we had the trial. Just a second.

10 [Whereupon, the witness reviews documents]

11 A. I don't recall any involvement that he had with
12 the case.

13 Q. [Mr. Fairey] In any event, you did learn that
14 you would be trying this case the week of September 8th?

15 A. Yes.

16 I talked to my client about it, told him what
17 was going to happen, told him, you know, headed to trial.
18 September 8th is when it was -- when it was tried.

19 Q. Were you acquainted with Mr. Mays before this
20 case?

21 A. I didn't know him personally. I had never even
22 represented him before, that I recall, at all, sir.

23 Q. So you had not represented him before?

24 A. No, sir.

25 Q. After receiving this notice that Mr. Mays' case

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1 would be called the week of September 8th, did you make
2 arrangements to meet with Mr. Mays?

3 A. I have down where I advised him of rights and
4 penalties, he wants a trial, and what he says. I have
5 further notes --

6 Q. Did that meeting occur after September 3rd?

7 A. I have no clue. I did not write it down, sir.

8 Q. And prior to meeting with Mr. Mays, would it
9 have been your practice to review your file first?

10 A. Yes.

11 And I have down here, for instance, where he
12 rejected again a plea offer before we started trial. That
13 was made back in May of -- May 7th of 2008, when -- with
14 the prior lawyer.

15 Q. Okay. And the -- if I'm correct, the fourteenth
16 solicitor's office has an open-file policy?

17 A. If they have a file.

18 Q. All right. And were you able to obtain
19 discovery in this case?

20 A. Yes. I had -- if I remember, yes, I had
21 whatever they had.

22 Q. Did that discovery constitute a police report
23 and a written statement from an eyewitness named Eddie
24 Bryant?

25 A. That may have.

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1 If that was in the information I gave you, I
2 would not question that, sir.

3 Q. Or do you have any other information that was
4 provided to you in discovery?

5 A. No.

6 I mean, not that I recall. I mean, I would have
7 to thumb through it. I mean, it's -- I've got -- I have a
8 record for him. I have --

9 Q. Well, for instance, were you aware, before the
10 case was called, which witnesses the State was going to
11 call?

12 A. No.

13 I mean, you would have to have the director of
14 the place, who is Ms. Wright. You would have to have the
15 employee that saw him. I mean, you know, you -- you know.

16 Q. You knew Ms. Vanfield would be called and you
17 knew that Mr. Bryant would be called?

18 A. Yes.

19 And whatever officer that came in that said, you
20 know, whatever. I mean, this is just run of the mill, as
21 far as any case.

22 Q. And your file contains an extensive stack of
23 papers involving Mr. Mays' record; is that correct?

24 A. Right.

25 Q. Okay. And am I right that a significant portion

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1 of the file was dedicated to Mr. Mays' prior criminal
2 record?

3 A. Yes.

4 Q. And you would agree that Mr. Mays had a
5 significant prior criminal record?

6 A. Well, if I remember correctly, he had a lot of
7 petty crimes in there.

8 Q. He had past convictions or guilty pleas for
9 shoplifting, larceny, petit larceny, burglary?

10 A. Yes.

11 Q. Does that sound familiar?

12 A. Yes.

13 Q. And in this case was it your professional
14 judgment that the defendant should not testify?

15 A. Well, he didn't want to testify.

16 He had a witness and if -- that may or may not
17 have helped him. If he didn't testify, there's no point
18 in -- I just -- I had rather go with the closing argument.
19 I feel like I've won more cases that way with getting the
20 last word to the jury than putting up -- especially when
21 you have a burglary.

22 Burglaries are -- it's not as quick as a crime
23 of passion, but, I mean, it certainly doesn't take much
24 time to commit a burglary. So once you admit that you are
25 there, you're in the area, I mean, did you take those five

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1 minutes to go do that. And, of course, he's on the steps.
2 I mean, you know. But, I mean, he has a lot to explain
3 when he gets on the witness stand.

4 Q. Well, did you advise him not to testify?

5 A. I don't recall that.

6 I told him I would -- I advised him of his
7 rights and penalties, and what I told him was he had a
8 right to testify or a right to remain silent.

9 Q. Did you advise him that if he took the stand, he
10 would be asked about his prior criminal record?

11 A. I would have told him that.

12 But, you know, there are rules that exclude much
13 of that, so --

14 Q. And you made a pretrial motion regarding his
15 record; correct?

16 A. I don't remember.

17 Q. Can you refer to the transcript? I believe it
18 would be -- it is page 7, a Rule 609 motion to limit
19 testimony about prior record.

20 [Whereupon, the witness reviews documents]

21 A. Yes.

22 Q. [Mr. Fairey] Okay. When you came to court to
23 try this case, did you believe that Mr. Mays would testify
24 on his own behalf?

25 A. No.

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1 Q. You at least knew it was a possibility that he
2 would not testify?

3 A. Yes.

4 I mean, I didn't think he was going to testify
5 because they -- I mean, how do you explain that you were
6 at the house; hey, man, nice TV you have here on the
7 porch; I'm loading it for you. I mean, that's not a great
8 story.

9 Q. But your trial strategy was to make the State
10 meet it's burden of proof?

11 A. Yes, sir.

12 Q. Okay. Keep Mays' -- Mr. Mays' prior criminal
13 record out?

14 A. Would you repeat that, sir?

15 Q. Sure.

16 Your strategy was to make the State meet its
17 burden of proof and to keep Mr. Mays' criminal record out;
18 is that correct?

19 A. Well, I mean, it wasn't so much the criminal
20 record. It was what he had to say when he got on the
21 witness stand.

22 I mean, he's there at a place that's been
23 burglarized, standing on the porch. Jesus. I mean, if
24 you want to lose a case, put up that witness if that's the
25 defendant.

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1 Q. Well, and --

2 A. I mean, that's just bad judgment.

3 Q. This trial did occur five years ago.

4 It appears there were five witnesses that were
5 called by the State?

6 A. Yes.

7 Q. And did you know prior to the case being called
8 that Mr. Bryant was the only witness who had actually saw
9 the defendant, Mr. Mays, at the scene of the crime?

10 A. I talked to my client. Based on what my client
11 told me, he said that they picked him up and they went
12 around looking for this person in a red or brown car or
13 whatever it was that he said it was.

14 Q. And that's what the statement of Mr. Bryant,
15 that he gave to the police, said?

16 A. Yes.

17 Q. And there were no other witness statements in
18 the solicitor's file?

19 A. Not that I recall.

20 And a 'very -- it appears to be a very, very
21 brief unfortunately typical police report.

22 Q. Now, Mr. Bryant was an employee at the Access
23 Network and that's the place that was burglarized?

24 A. Yes.

25 He and Mr. Williams, I believe Cedron [phonetic]

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1 Williams, another witness, was an employee there.

2 Q. And Mr. Bryant I believe testified on this night
3 that he received a call from his boss that the burglary
4 alarm had gone off?

5 A. Yes, sir.

6 Q. He went to the Access office in his car?

7 A. Yes, sir.

8 Q. And when he arrived, he saw that the motion
9 light over the front door had turned on?

10 A. I -- yes. That sounds familiar.

11 Q. And that he circled his car around and drove up
12 to the front door?

13 A. Yes, sir.

14 Q. And that he saw Kelvin Mays walk out the front
15 door when he drove off?

16 A. I don't know if he saw him on the porch at this
17 point or if he saw him walk out. But it's not a pretty
18 scene if you're defending a case on burglary.

19 Go ahead, sir.

20 Q. Did he testify that he pulled a gun and he
21 pointed it at Kelvin Mays?

22 A. Yes.

23 He had a B.B. gun that apparently the person he
24 didn't know it was a B.B. gun.

25 Q. It turned out to be a B.B. gun?

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1 A. Yes, sir.

2 Q. And he made Kelvin Mays get into his car at the
3 point of this B.B. gun?

4 A. Yes.

5 Q. And he drove him to the Huddle House?

6 A. I'm not -- he drove him all around town looking
7 for this mysterious car that my client told him he had
8 seen drive away from the place, and he was just there
9 guarding the stuff, or whatever it was.

10 Q. But he eventually returned back to the Access
11 office where the police arrived?

12 A. Yeah.

13 Q. And you agree that Mr. Bryant was the only
14 witness who could testify about all the elements of
15 burglary second?

16 A. Yes.

17 Q. Nobody else saw Mr. Mays?

18 A. No. No. It was just dead of night.

19 Q. And then on direct examination, Mr. Bryant
20 testified about how he found Mr. Mays at the Access
21 Network?

22 On page 30. And I'm going to read. [Reading]
23 Question: and tell me what you did, what happened.

24 Answer: well, I got a call from Gwen. She said that the
25 burglar alarm had went off, would I go down there and

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1 check it out.

2 MS. WILSON: What page are you reading from?

3 I'm sorry.

4 MR. FAIREY: 30 and 31.

5 MS. WILSON: Okay.

6 Q. [Mr. Fairey] [Reading] So as I came up Maple
7 Street and First Street, which is the corner where our
8 office is, I noticed that our sensor lights was on, the
9 outside sensor light. That means someone has -- someone
10 has -- something has tripped that light off [phonetic].
11 So what I did, I cut my light off on my truck and I rolled
12 by the office. As I rolled by, I could see a movement.
13 The movement was right at the door. I passed the office,
14 turned around, and drove directly up in the front of my
15 office to block the entranceway. I mean, directly. As I
16 drove up, I got out. When I got out, I noticed a figure
17 coming out of the office, out of the door, at the time
18 that I was coming up on the porch, who was Mr. Kelvin
19 Mays.

20 Did I read that correctly?

21 A. Yes, sir.

22 Q. And we have already discussed that at the time,
23 burglary second required the showing of intent?

24 A. Yes.

25 Q. Correct?

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1 And you are reasonably certain the judge would
2 charge intent to the jury?

3 A. Yeah.

4 You have to have intent to commit a crime
5 therein.

6 MS. WILSON: Your Honor, at this point I'm going
7 to object to the line of the questioning.

8 I'm having trouble determining relevancy because
9 in his application his allegations were counsel didn't
10 object to the admission of improper character evidence
11 and didn't quash the indictment. So I'm not really
12 sure what this jury instruction issue is.

13 THE COURT: Yes, sir?

14 MR. FAIREY: I'm just trying to establish the
15 elements of burglary as trial strategy.

16 I am supposing that there is going to be an
17 argument, possibly, that the not failure to object and
18 failure to handle it the way it was was based on trial
19 strategy.

20 THE COURT: I'm sorry. Say that one more time.

21 MR. FAIREY: That the failure to object to the
22 character evidence was based on some kind of trial
23 strategy.

24 THE COURT: Okay. So how does that tie into the
25 elements of the offense?

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1 MR. FAIREY: I can move on, Your Honor.

2 THE COURT: Okay.

3 Q. [Mr. Fairey] Mr. Plexico, can you turn to the
4 solicitor's closing argument in the case? Page 80.

5 [Whereupon, the witness reviews documents]

6 Q. [Mr. Fairey] In the solicitor's closing
7 argument, would you agree that he urged the jury to find
8 intent based upon the fact that Mr. Bryant testified he
9 saw Mr. Mays hiding or ducking at the entranceway when he
10 drove up?

11 [Whereupon, the witness reviews documents]

12 A. This is on page 82?

13 Q. [Mr. Fairey] Page 80, 81 and 82. There --

14 A. Okay.

15 Q. -- are actually three instances.

16 A. Just a minute. Okay.

17 [Whereupon, the witness reviews documents]

18 A. [Reading] And that -- hiding when Eddie drove by
19 when he said he ducked back behind it. As I recall his
20 testimony, that's pretty significant to me. I don't know
21 whether it is to you-all and what's --

22 This is on page 81, the last full paragraph.

23 [Reading] And what's significant to me doesn't
24 make any difference, and I'm telling you this so y'all can
25 consider it.

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1 Q. [Mr. Fairey] And also on page 82 he makes a
2 reference to Kelvin Mays coming out the door, when he went
3 by the first time he ducked back, according to Eddie
4 Bryant?

5 A. I don't remember.

6 I don't see that, but if you say it says -- I
7 see it now. [Reading] When he went by the first time, he
8 ducked back, according to Eddie Bryant.

9 Q. So would it appear to you that the solicitor was
10 arguing to the jury that they should infer intent to
11 commit a crime from the fact that Mr. Mays was trying to
12 hide?

13 A. Yes. That was --

14 Q. Trying to jump back or hide behind something?

15 A. Yeah. That would be reasonable.

16 Q. And if you flip back to page 30 and 31 to
17 Mr. Bryant's actual testimony, did Mr. Bryant say he saw
18 anyone hiding when he drove up?

19 [Whereupon, the witness reviews documents]

20 A. No.

21 I don't actually -- I see it where it says he's
22 coming out of the building.

23 Q. [Mr. Fairey] Okay. Does it say he was trying
24 to duck behind something?

25 A. Not that I see, sir. Not at all.

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1 Q. But the solicitor made that argument to the jury
2 without objection?

3 A. Yes.

4 Q. Now, during your cross-examination of
5 Mr. Bryant, you also asked him about finding Mr. Mays
6 at the Access office; correct?

7 A. What page are you on?

8 Q. Page 41.

9 A. Okay.

10 [Whereupon, the witness reviews documents]

11 Q. [Mr. Fairey] And at page 41, start with your
12 questions of Mr. Bryant. [Reading] Did he leave through
13 -- and did he leave through the back door. Answer: no,
14 he didn't. Question: okay. So he left through the front
15 door. Answer: yes. Question: and wouldn't it indicate
16 to you that someone who left through the front door wasn't
17 there to do anything wrong. Answer: not if he got caught
18 coming out the door. He was trying -- when I drove up the
19 first time, he backed in the place. When I went back, I
20 saw him, his movement. He went back in the door. When I
21 passed by and turned around, he was trying to get out the
22 front door.

23 Did I read that correctly?

24 A. Yes. He was trying to get out the door.

25 Q. And those were in responses to your questions?

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1 A. Yes.

2 Q. And when Mr. Bryant gave his testimony, did it
3 register with you that he was trying to say that Mr. Mays
4 hid or ducked?

5 A. Yes.

6 Well, I mean, that's what he said in response to
7 my questions. I mean, it's been a while. Essentially.

8 Q. All right.

9 A. I was saying he was coming out, he was a helpful
10 Samaritan, he went in.

11 My insinuation was he was checking for wounded
12 victims of a burglary and securing the premises and just
13 being a good citizen.

14 Q. That was your argument as to Mr. Mays' actions?

15 A. Yeah.

16 I mean, that was the general thrust of it. I
17 mean, you can't make it sound --

18 Q. Can you take a second and review the statement
19 of Eddie Bryant that's in your file?

20 A. It's very brief. Just a second.

21 [Whereupon, the witness reviews documents]

22 A. Yes.

23 Q. [Mr. Fairey] Okay. And does -- anywhere in
24 Mr. Bryant's statement does he state that he saw Mr. Mays
25 back into the building, duck down, or hide behind

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1 something?

2 A. No.

3 Q. Did you confront Mr. Bryant with his statement
4 on cross-examination?

5 A. No, I did not.

6 Q. And I want to ask you about another exchange you
7 had with Mr. Bryant on cross-examination at page 42.

8 [Whereupon, the witness reviews documents]

9 Q. [Mr. Fairey] I'm starting at line 14.

10 [Reading] Question: so it -- wouldn't it appear to you
11 that if he was doing something wrong and he was aware that
12 you were there, that he would leave through the back door
13 and run out. Answer: I can't say. Question: over the
14 railroad tracks. Answer: I cannot say what it would
15 appear. Question: and down in the swamp. Answer: to be
16 what he would do. Question: isn't that what a reasonable
17 burglar would do. Answer: I don't know. I'm not a
18 burglar. Question: he wouldn't come out -- he wouldn't
19 come out and say, hey, how are you, I mean. Answer: no.
20 Question: you know, I mean, but wouldn't -- answer: but
21 he had been apprehended. Question: but wouldn't he leave
22 through a window in the back. Answer: what window would
23 he -- he can't get out of our windows. Question: well,
24 couldn't he -- you have a back door, don't you, sir.
25 Answer: they are locked two or three -- they have a

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1 deadbolt lock. Question: okay. But you can break
2 through them and get out, can't you. Answer: not these
3 windows. Question: okay. Well, the doors you can,
4 certainly. Answer: how. Question: well, he got in the
5 front door. Somebody got in the front door. Answer: he
6 broke the window, reached in, and unlocked the door. He
7 didn't go through the glass when he broke in. There are
8 little window panes, eight by ten. Question: what
9 damaged the doorframe. Answer: what doorframe. What do
10 you mean. He broke the windows. Question: okay. All
11 right. Now, so he went all around with you. He offered
12 to help you. Answer: he didn't offer to help me.
13 Question: well, he told you who -- answer: he made a
14 statement to try and clear himself. Question: that's
15 because you tried him and convicted him. Isn't that true.
16 Answer: no, I didn't try him. I caught him in the act.
17 Question: you saw a man there who said somebody --
18 answer: no. had nothing -- had nothing stolen, who had
19 done nothing wrong. Answer: that's a known thief.

20 Did I read that correctly?

21 A. Yes.

22 Q. Okay. And after Mr. Bryant stated that Mr. Mays
23 was a known thief, you asked the judge to excuse the jury?

24 A. Yes.

25 Q. And you made a motion for a mistrial?

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1 A. Yes.

2 Q. And the basis of that motion was Mr. Bryant's
3 statement that Mr. Mays was a known thief?

4 A. Yes.

5 And that was -- that put his character into
6 issue when he had not testified.

7 Q. And that had been given an answer to your
8 question about why Mr. Bryant believed Mr. Mays was a
9 burglar?

10 A. Yes.

11 Q. And your motion for mistrial was denied?

12 A. Yes.

13 I believed it was unresponsive and put his
14 character into issue.

15 Q. And do you have the conference in the transcript
16 before you?

17 A. Yes.

18 Q. Did you request that the judge give a limiting
19 instruction to the jury?

20 A. No, I didn't, but I certainly should have.

21 Q. This matter went up on appeal. Other than
22 filing the notice of appeal, did you have any involvement
23 with the appeal?

24 A. No.

25 Q. And as trial counsel, did you believe there were

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1 appealable issues from this trial?

2 A. I thought that was the appealable issue.

3 Q. And did you know whether a basis of the appeal
4 was Mr. Bryant's statement was Mr. Mays was a known thief?

5 A. I think it was when I read over it.

6 And I did not preserve it properly, was their
7 ruling. I did not preserve the issue properly, I think
8 was what that is. Or the clear implication of it.

9 THE COURT: The Court notes for the record that
10 the appeal states that the objection preserved it and
11 that appellate counsel sought to argue a different
12 ground for relief.

13 It doesn't say he didn't properly preserve it.
14 It simply says you can't make one objection and then
15 argue something different on appeal. He made an
16 objection to relevance and then they sought to argue
17 character on appeal.

18 MR. FAIREY: It also notes that the appellant
19 may not be heard on appeal to complain of the
20 admission of evidence solicited by its own counsel.

21 THE COURT: I read it. Uh-huh.

22 And, strategically, it was correct for him to
23 have elicited it the way he did. Otherwise, it would
24 have just been hanging in the air without an answer.

25 Q. [Mr. Fairey] Mr. Plexico, do you know if the

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1 propriety of the solicitor's closing argument was raised
2 on appeal?

3 A. No.

4 Q. And if there had been an issue with the
5 propriety of the solicitor's closing argument, based upon
6 the evidence, would that have been preserved?

7 A. No, because I didn't make an objection to that,
8 as I recall.

9 MR. FAIREY: Thank you, Your Honor. That's all
10 I have.

11 THE COURT: You're welcome.

12 Any questions, Ms. Wilson?

13 MS. WILSON: Thank you, Your Honor.

14 THE COURT: You're welcome. You may proceed.

15 CROSS-EXAMINATION

16 BY MS. WILSON:

17 Q. Mr. Plexico, do you recall when you were
18 appointed to represent Mr. Mays in this case?

19 A. The office was appointed.

20 Mr. Bryan had the case originally on 3/20/2008.
21 He had a plea offer, as I said. In May, have some other
22 notes from him. I would have read those notes and went
23 and talked to my client. And then he had an outline of
24 his priors. He had rejection of his plea offer, and then
25 another objection later -- rejection by me later that I

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1 notes on the same -- his notes and my own notes.

2 Q. Do you recall about how many times you got to
3 meet with him before he went to trial?

4 A. I don't remember.

5 Q. Was it sufficient to prepare his case for trial?

6 A. Yes.

7 Q. And did you file Brady or Rule 5 motions on his
8 behalf or did your office initially with his prior public
9 defender?

10 A. Yes.

11 Q. And did you review that discovery --

12 A. Yes.

13 Q. -- of Mr. Mays?

14 A. It was a small amount.

15 Q. And included in that, were there statements from
16 the State's witnesses?

17 A. There's one statement from I think it was
18 Mr. Bryant.

19 Q. And did you review that with Mr. Mays?

20 A. Yes.

21 I would have shown him whatever I had.

22 Q. Okay. And did you discuss with him any of the
23 elements of the State -- the elements of the burglary
24 second charge and what the State had to prove?

25 A. Yes.

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1 Q. Did you talk to him about his version of the
2 facts?

3 A. Yes.

4 Q. Did you discuss any possible defenses?

5 A. There weren't -- I mean, I was -- yes, I was
6 there. But it's just a huge misunderstanding, that I'm
7 just not the burglar even though I was there at the
8 burglarized place.

9 Q. So is that what you argued at trial, that he was
10 just at the wrong place --

11 A. Yes.

12 Q. -- at the wrong time? Is that essentially --

13 A. That's essentially what I was shooting for,
14 given his -- you know, you've got to -- it's what you've
15 got. It's what you've got.

16 Q. Do you think the State had evidence to prove all
17 the elements of burglary second?

18 A. Yes.

19 I mean, it's difficult. You're there in the
20 middle of the night and the place is broken -- broken
21 into. And, you know, I mean, people aren't that naive in
22 the world. And that may sound like a perfectly plausible
23 argument, but in the real world twelve average jurors just
24 aren't that naive.

25 Q. Did Mr. Mays give you any potential witnesses or

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1 leads to investigate?

2 A. No.

3 He gave me one witness which essentially, I
4 mean, yes, he was there, he was with me that night and
5 then he left and he would have left in about time to do
6 the burglary.

7 And after all, it's not a matter of whether this
8 individual was there and they're trying the wrong man that
9 day. It's, you know, he was there. What good was that?
10 So, I mean, that's -- what am I proving? He has friends?
11 I mean, it wouldn't -- it's pointless to put up a witness,
12 lose your closing. And then you've got him.

13 Q. What kind of investigation did you have to do in
14 this case?

15 A. I mean, I knew where the office was, to start
16 with. It's just near -- it's about a block off of
17 downtown.

18 It's an old attorney's office in the town of
19 Hampton. It's right down from my office. I mean, it's
20 within rock-throwing distance almost.

21 Q. Did the most of your -- the bulk of your
22 investigation include reviewing the discoveries and any
23 reports or statements you received?

24 A. Yes.

25 I drove by and looked at the building.

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1 Q. Did you feel like you had ample time to prepare
2 for trial?

3 A. Yes.

4 Q. And we kind of discussed it, but can you
5 articulate your trial strategy in this case?

6 A. Well, I mean, I was just hoping they would drop
7 the ball.

8 I mean, you know, he just didn't want to plea.
9 I thought it would be wise for him to plea. He had a
10 right to do that.

11 And, you know, I was -- so, you know, it's -- in
12 reality, if you do -- if you're a good Samaritan and
13 you're just there, why should you be punished? I mean,
14 you just happen to be a passerby in the middle of the
15 night at a burglary scene. I mean, that could happen. I
16 mean, it could happen.

17 Q. Is it your testimony today that you spoke to
18 Mr. Mays about his right to testify?

19 A. Yes.

20 Q. Did you also talk to him about the possibility
21 of the State impeaching him with his prior record?

22 A. Yes.

23 Q. And it's your testimony that he chose not to
24 testify?

25 A. Correct.

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1 Q. And were you able to effectively cross-exam all
2 the State's witnesses at trial?

3 A. Yes, as best I could.

4 Q. After Mr. Bryant's testimony about Mr. Mays
5 being a known thief, did you -- you motioned for a
6 mistrial; is that correct?

7 A. Yes.

8 Q. And do you recall the basis of that motion?

9 A. I may have said it was not responsive to my
10 question, but I think what I should have said was it not
11 only not responsive but it put his character into issue
12 when he had not testified.

13 Q. Did you feel like, after making that motion, you
14 properly preserved it for appellate review?

15 A. I thought I had.

16 I wish I had done it more thoroughly now,
17 certainly.

18 Q. Did you have -- did you see any objections that
19 you could have raised in the State's closing argument?

20 A. No.

21 Q. And if you did, would you have objected?

22 A. Well, I would have if I had seen any.

23 But I didn't see anything that was -- you know,
24 that was --

25 MS. WILSON: Thank you.

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1 THE COURT: Any redirect of the witness?

2 MR. FAIREY: None, Your Honor.

3 THE COURT: Okay. Sir, you may step down.

4 [Whereupon, Mr. Plexico is excused and exits the
5 witness stand]

6 THE COURT: You may proceed.

7 MR. FAIREY: Thank you, Your Honor. I would
8 next call Mr. Kelvin Mays.

9 THE COURT: Sir, raise your right hand to be
10 sworn.

11 [Whereupon, Mr. Mays is duly sworn by the Court
12 as follows: do you swear or affirm the testimony you
13 five will be the truth]

14 THE WITNESS: Yes, ma'am.

15 THE COURT: You can put your right hand down,
16 sir.

17 State your full name for the record.

18 THE WITNESS: Kelvin Mays.

19 THE COURT: Spell your last name for the court
20 reporter, please.

21 THE WITNESS: M-A-Y-S.

22 THE COURT: You may proceed.

23 MR. FAIREY: Thank you, Your Honor.

24 THE COURT: You're welcome.

25

- - -

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1 KELVIN MAYS,

2 Having Been First Duly Sworn,

3 was Examined and Testified as Follows:

4 DIRECT EXAMINATION

5 BY MR. FAIREY:

6 Q. Mr. Mays, how soon before your trial did you
7 first meet with Mr. Plexico?

8 A. Three days before my trial I met --

9 THE COURT: Sir, I need you speak up for me,
10 please.

11 A. Three days.

12 I met with him. He came to the County Detention
13 and -- with like two boxes in his hands and told me that,
14 I'm going to be representing you and you're going to have
15 a trial starting Monday. And he said, I won't -- don't
16 worry about nothing, just play it by ear.

17 So I was like -- I said, let me -- at first I
18 asked him for some -- the motion for discovery. And then
19 he was like, don't worry about this, play this by ear. I
20 say, what do you mean play it by ear.

21 I told him -- it was a -- it was a confrontation
22 then because I said, oh, no, I do not want you to
23 represent me. Because I know he's affiliated also with
24 Gwen Vanfield, the person that owned the place, you know.
25 And I -- that's why I really didn't want him to represent

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1 me, because I knew it would have been some type of
2 conflict.

3 And during the trial, I see that there was a
4 conflict because many things he could have done he did not
5 do inside the trial.

6 Q. Mr. Mays, how long did this meeting last?

7 A. The meeting last nothing but about five minute
8 and he was gone.

9 Q. During that meeting, did you discuss whether or
10 not you should testify in your -- in the case?

11 A. He told me not to testify.

12 Q. Did you agree to not testify?

13 A. Yes.

14 I agreed not to testify because I know I have an
15 extensive criminal record and I know that would have put
16 my record into view.

17 Q. Mr. Mays, is there anything else that you would
18 want to tell the Court about your case?

19 A. Well, really, I know I was dealt with -- I know
20 I did things in my life and, you know, I think, you know,
21 things come back. And I guess these is one of the things
22 that came back on me.

23 And like I said, I brought it to Mr. Plexico at
24 the time that, you know, I really needed someone else to
25 handle my case because I knew what he was doing to me, you

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1 know, in the whole trial. And it was evidence through the
2 whole trial what he was doing to me. And this is the
3 consequences from -- you know, this is the consequences
4 from his doings, you know.

5 MR. FAIREY: Thank you, Mr. Mays.

6 THE WITNESS: Yes, sir.

7 MR. FAIREY: Answer any questions that --

8 THE COURT: Any questions, Ms. Wilson?

9 MR. FAIREY: -- the State may have.

10 MS. WILSON: Thank you, Your Honor. Briefly.

11 CROSS-EXAMINATION

12 BY MS. WILSON:

13 Q. Mr. Mays, did you have a public defender before
14 you had Mr. Plexico?

15 A. I seen him only one time, and I don't -- I don't
16 even remember his name.

17 Q. But you spoke with him one time?

18 A. For about -- when the Court preliminary hearing,
19 supposed to be a preliminary hearing. And they didn't
20 have an attorney for me so they picked him.

21 And he just jumped up and said, okay, did what
22 he was supposed to do at the preliminary hearing. After
23 he did that, it was nothing else. I asked him for some --
24 the Brady material and I never received nothing on it.

25 I never -- Mr. Plexico never told me about any

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1 witnesses or nothing. I never knew nothing till I went
2 inside the trial and everything unfolded right there.

3 Q. Did you ever try to fire Mr. Plexico or have him
4 relieved before trial?

5 A. Yeah.

6 I only seen the man one day.

7 Q. Well, did you tell the Court that before you
8 went to trial?

9 A. Mr. Plexico is good with the guy. I mean, far
10 as, you know, trying to do what he did to me, yes. I told
11 him.

12 But I didn't told the Courts because, you
13 know --

14 Q. Well, before you went to trial, did you -- were
15 you able to go over discovery and see what the statements
16 of that one witness were against you?

17 A. Discovery? I didn't see nothing. He did not
18 present nothing to me.

19 He had a one sheet of piece of paper on the
20 desk, right, which was totally different from the sheet of
21 paper from the witness statement. He had a statement
22 stating because when I went --

23 My issue was this: I said, now, isn't it
24 obvious to you that if I burglarize a building and he --
25 why wouldn't he take me to the police station, right?

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1 During my whole session, right? Now, all of a sudden,
2 because I -- I told to mister -- I told him, and also
3 Mr. Jim Bolton, who I guess took the statement from the
4 witness, I said, so why he never took me to the police
5 station.

6 Q. And you told this to Mr. Plexico?

7 A. And I told this to Mr. Plexico. But --

8 Q. When did you tell this to Mr. Plexico?

9 A. I told this to Mr. Plexico the day he came to
10 see me.

11 Q. So you did talk to him about your case when you
12 were seen?

13 A. No.

14 I told him --^a because he had a note. He had a
15 note with a different statement and I said --

16 Q. Okay. I'm not trying to -- I just want you to
17 slow down a little bit so we can get it all out. Thank
18 you.

19 Okay. So when you spoke with Mr. Plexico at the
20 jail, he showed you a statement?

21 A. He showed me a statement inside the trial.

22 Q. Okay.

23 A. And I spoke to him right there, tried to speak
24 to him right there, during the trial that what is this
25 statement and why is this -- and why is this changed up in

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1 the statement.

2 Because from the beginning Mr. Jim Bolton, which
3 is an officer, right, which is the Major of Hampton
4 County, he was like, oh, I don't -- you know, I don't
5 believe this anyway because why he ain't brought you to
6 the police station.

7 And I'm -- and this was my argument inside the
8 whole thing. My argument was this man, he is telling
9 you -- all of this he telling you about a girl that I know
10 that I didn't -- he's saying that I didn't know -- this is
11 Fatima Doctor, which is my friend. And I usually come up
12 and see her all the time. I used to see her every day at
13 work. This is how these people in this place know me.
14 Cedric Williams and also Eddie Bryant.

15 Q. Thank you, Mr. Mays.

16 So did you talk to Mr. Plexico about your right
17 to testify at trial?

18 A. Yes, ma'am.

19 Q. You spoke to him about that.

20 And did you tell him? that you wanted to testify
21 or you didn't want to testify?

22 A. He told me not to testify and I agreed with him
23 not to testify because, like I said, I know that I have an
24 extensive record.

25 Q. Okay. And do you also recall being advised of

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1 the court date -- by the Court at your trial about your
2 right to testify?

3 A. Yes. And the Court also -- yes.

4 The Court told me that did your lawyer advise
5 you about your right not to testify and I said, yes, he
6 did.

7 Q. Okay. And was it your decision not to testify?

8 A. It was me and his decision.

9 But, yeah, I would say I was -- he was right on
10 that, yeah, not to testify.

11 Q. Okay. Did you talk to Mr. Plexico about what
12 you thought happened that night or the fact that you
13 thought took place that day?

14 A. He didn't want to discuss what happened that
15 night.

16 He wanted to tell me -- he told me to play it by
17 ear.

18 MS. WILSON: Thank you.

19 THE WITNESS: Yes, ma'am.

20 THE COURT: Any redirect?

21 MR. FAIREY: Nothing further, Your Honor.

22 THE COURT: Any further witnesses?

23 MR. FAIREY: No, Your Honor. We would rest.

24 THE COURT: The State may proceed.

25 MS. WILSON: Nothing from the State, Your Honor.

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1 [Whereupon, the Court reviews documents]

2 THE COURT: Any closing argument from the
3 applicant?

4 MR. FAIREY: We do, Your Honor.

5 First, for the record, we make a motion to amend
6 the petition to conform to the evidence presented.

7 THE COURT: Any objection?

8 MS. WILSON: Yes, Your Honor.

9 The State would object because we didn't have
10 any notice of these allegations in writing. But we'll
11 leave it up to your discretion.

12 THE COURT: Do you need to supplement the record
13 regarding the allegations, or do you feel you've had
14 an adequate opportunity to address them?

15 MS. WILSON: Your Honor, I think we may have had
16 an adequate opportunity to address it, but I'm
17 actually not clear on what allegation he -- I don't
18 feel like he specifically presented evidence on one
19 thing that I can identify. So if he could just
20 articulate on what he --

21 MR. FAIREY: Certainly, Your Honor, and by way
22 of closing statement.

23 - - -

24 - - -

25 - - -

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CLOSING ARGUMENT

MR. FAIREY: This was a criminal trial where the strategy clearly was for the defendant to not testify and put the burden on the State to prove their case.

And the key element in the case was intent. And when the solicitor stood up in closing argument and argued three times in his four-and-a-half page closing argument that the jury should infer intent because Mr. Hayes was seen hiding, ducking, hiding behind the doorway when Mr. Bryant first came up and no objection to that when there's no --

THE COURT: Is that not what the evidence showed at trial?

MR. FAIREY: The evidence did not show that at trial. If you look at Mr. Bryant's --

THE COURT: There's no testimony that he was hiding or ducking behind a bush?

MR. FAIREY: There was none.

The testimony -- the first testimony that was brought out on direct was is that Mr. Bryant drove up and he saw a movement, and then he came back around and Mr. Mays was walking out the door.

On cross-examination from Mr. Plexico, Mr. Bryant testified -- he expanded on that a little bit. But he basically said he saw something go back in the

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1 door and when he came back around Mr. Bryant
2 [phonetic] walked out of the door. That's the extent
3 of the testimony. And I believe that's on page 30 and
4 then again on page 41 or 42, if I'm not mistaken.

5 But there certainly was no evidence that Mr.
6 Mays was seen ducking, hiding, or doing anything like
7 that. I think the best --

8 THE COURT: Is argument evidence?

9 MR. FAIREY: Well, I think it is in this case,
10 Your Honor.

11 THE COURT: How is argument evidence? Doesn't
12 the Court instruct the jury that argument is just
13 argument, that it's not evidence?

14 MR. FAIREY: It is.

15 But that was the lynchpin of the defendant's --
16 of the State's argument about intent, was that this
17 ducking and hiding --

18 THE COURT: Did they really -- did they really
19 need that to establish intent when there was direct
20 eyewitness testimony that he was coming out of the
21 building?

22 MR. FAIREY: Well, coming out of the building,
23 as the judge charged the jury, is insufficient
24 evidence. You have to show intent. Coming out of the
25 building itself, being there without intent --

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1 THE COURT: Intent may be shown by acts and
2 conduct of the defendant and other circumstances from
3 which you may naturally and reasonably infer intent.
4 That's a very broad net.

5 MR. FAIREY: It is.

6 But if it means anything at all, it has to have
7 -- be something other than the fact that he was there.
8 If --

9 THE COURT: I think that if you see -- you have
10 an eyewitness that says somebody is coming out of a
11 building, coupled with the fact that I've been
12 notified that my burglar alarm has gone off, that's
13 sufficient to establish intent.

14 MR. FAIREY: Okay. But in any event, we would
15 submit, Your Honor, that failure to object to that in
16 closing argument, which was key -- in other words, it
17 was raised three times in a four-and-a-half page
18 argument -- prejudiced the trial.

19 The second thing is, of course, eliciting the
20 response from Mr. Bryant that -- in response to the
21 question why do you believe Mr. Bryant was burglarizing
22 -- or a burglar, and the answer because he's a known
23 thief. He moved for a mistrial. There was no request
24 for a limiting instruction.

25 And I believe based upon the Court of Appeals's

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1 decision, and the cases they relied on, that clearly
2 showed that that prejudiced the trial.

3 And we believe that those meet the standard of
4 Strickland as stated by the U.S. Supreme Court.

5 THE COURT: Ms. Wilson?

6 MS. WILSON: May it please the Court, Your
7 Honor.

8 - - - - -

9 CLOSING ARGUMENT

10 MS. WILSON: With regard to the applicant
11 allegation that Mr. Plexico failed to object to the
12 State's argument in closing about Mr. Mays' intent
13 because he was hiding behind a building: it's the
14 State's position that this allegation is without merit
15 and it should be dismissed because there was
16 testimony, I believe from Mr. Bryant, that he noticed
17 movement inside the home.

18 And the testimony that was elicited by Mr.
19 Plexico on cross, the purpose of it was to bring out
20 the improbability of a burglar just walking out of the
21 front door. So that testimony, it wasn't prejudicial,
22 it was to show that's an unlikely -- that was an
23 unlikely outcome.

24 Also, Your Honor, with regard to the closing
25 argument: closing argument is not evidence. And the

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1 State was simply arguing its version of the facts and
2 what it thought and wanted the jury to believe about
3 the facts presented at trial.

4 Also, Your Honor, there's overwhelming evidence
5 of Mr. Mays' guilt in this case. He was seen leaving
6 the building through a damaged front door after the
7 burglary alarm was alerted. He actually backed into
8 the building to not be seen -- that's in evidence --
9 and also his testimony that he was familiar with the
10 location where the location had took place, he had
11 visited it maybe days or weeks prior.

12 With regard to the allegation about failure to
13 object to Mr. Bryant [phonetic] being a known thief:
14 it's the State's position that Mr. Plexico did object
15 to that by making a motion for a mistrial. And the
16 Court of Appeals' opinion doesn't say that it wasn't
17 preserved for review. It says that the appellate
18 counsel argued a different -- argued the issue
19 differently on appeal and that the way it was raised
20 on appeal wasn't preserved.

21 And it's the State's position that this
22 application should be denied with prejudice.

23 THE COURT: I assume that you're abandoning any
24 argument regarding your client's right to testify
25 since he's acknowledged that it was his decision,

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1 ultimately, to testify and that he acknowledges that
2 was good advice from Mr. Plexico?

3 MR. FAIREY: Yes, Your Honor.

4 We wouldn't submit that his failure to testify
5 was prejudicial.

6 [Whereupon, the Court reviews documents]

7 - - - - -

8 COURT'S RULING

9 THE COURT: I've considered the totality of the
10 record in this case.

11 I'll start with the solicitor's closing
12 argument. He argued what his perception was of the
13 facts as presented in this case. And while it may in
14 some instance have been erroneous, it would not have
15 been the basis for a mistrial nor -- even if the
16 objection had been sustained. It is not sufficient to
17 have undermined the Court's confidence in this jury's
18 verdict.

19 The most that would have been done would have
20 been a curative instruction. But I don't even know
21 that that would have been necessary, considering this
22 record, because the Court clearly instructs in its
23 initial instructions to any jury that argument is just
24 that. It is a party's contention as to what they
25 believe the evidence will show in opening argument and

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1 it is their contention as to what they believe the
2 evidence has produced or shown in closing argument.
3 In other words, it is their job to persuade you to
4 agree with their version of the facts. And so
5 argument is just that, it's argument.

6 I think a jury is astute enough to know the
7 difference between what has been presented in terms of
8 testimony, because the Court instructs that they are
9 to make their decision based on sworn testimony of the
10 witnesses who've testified and the other evidence that
11 has or will be introduced in the trial of the case.

12 And so I cannot -- while, you know, he could
13 have objected, I can discern no prejudice from his
14 failure to object in this instance.

15 As it regards the objection or the contention
16 that he should have preserved for the record the
17 statement made by the witness, that being Mr. Bryant,
18 that he's a known thief at line 14, page 44 of the
19 transcript: counsel clearly preserved the issue with
20 a valid objection. He asked for a mistrial. And
21 while it probably would been advisable for him to have
22 asked for a curative instruction, again, I can discern
23 no prejudice from the failure to do that considering
24 the breadth of this record.

25 Because I -- you know, in the grand scheme

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1 of this record, it is clear that the jury would not
2 have made a decision based on that lone statement that
3 he -- that's a known thief without something to
4 corroborate that or to back that up. Otherwise, it's
5 just a statement of someone's -- I don't know.
6 Really, it almost, in the context of this testimony,
7 could have worked against the witness and against his
8 credibility because it is evidence of a certain level
9 of animus against the applicant in this case. But in
10 the totality of this record, I can discern no
11 prejudice. In other words, there's nothing -- that
12 statement in and of itself does not undermine the
13 Court's confidence in the outcome of this trial.

14 More specifically, when you read the entirety of
15 the record there is substantial circumstantial
16 evidence reasonably tending to prove the defendant's
17 guilt of the offense. There's been a great deal of
18 talk about intent. The law is very clear. Intent may
19 be shown by acts and conduct of the defendant and
20 other circumstances from which you may naturally and
21 reasonably infer intent. And as I've already noted,
22 that's a very broad net when you're talking about
23 intent.

24 Sometimes the Court will give a specific
25 instruction on intent. It's not necessary. Even when

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1 requested, it is very rarely given. Sometimes it's
2 given. Sometimes I think there is a perception that
3 that instruction, it really doesn't add much to the
4 intent instruction within the context of a burglary
5 charge. But a jury has the ability to look at intent
6 from the totality of the record, that being
7 circumstantial as well as direct evidence.

8 You have evidence in the record not only of that
9 night something happening, but the course of conduct
10 by the applicant where he almost -- the context of the
11 testimony is that he basically had scoped this
12 location out and that he had pretty much -- this
13 wasn't his first time there, that he had been there to
14 sell batteries or -- that the sale of batteries or
15 some superfluous intent and that it is really
16 implausible, based on the totality of this record,
17 that he would have been a good Samaritan.

18 Mr. Plexico was left with -- in the untenable
19 position of trying to make lemonade out of lemons with
20 a client who did not really have a defense. And,
21 frankly, I don't know that I would have come up with
22 that defense. But then I haven't advocated in
23 seventeen years, so I don't know.

24 But I think in light of the breadth of the
25 record, his contention that his client was a good

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1 Samaritan, that he happened upon some other people
2 that had broken into the building and that it was his
3 intention to secure the location for the owners of the
4 building because he knew that person that worked
5 there, that he had frequented the building, it wasn't
6 his first time there, and thank goodness you came, you
7 know, when you did because I was just trying to make
8 sure nothing was taken out of the building, I think is
9 -- you know, with nothing more, I think imaginative.
10 It didn't work, but sometimes defenses don't work.

11 And, strategically, I can discern no prejudice
12 from that decision, again, trying to make the best of
13 a situation where there was really not a viable
14 defense in this case.

15 But considering the totality of this record, the
16 things complained of while -- you know, you can always
17 do something better. You can always preserve a record
18 better. But the issue is not whether he should have
19 done it. The issue is whether there's any prejudice
20 that can be discerned from his failure to do it. And
21 I am at a loss as to there being any.

22 So based on those observations, the motion --
23 the application for post conviction relief is denied.

24 Ms. Wilson will prepare a proposed order within
25 fifteen days of today. She will be given leave to

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1 make any other findings consistent, factually, with
2 the record, as well as any other conclusions of law.
3 And the Court, of course, will make its own -- I
4 rarely, if ever, sign an order as it's presented to
5 me. I usually end up rewriting it, probably much to
6 everybody's chagrin, mostly my law clerk's chagrin.

7 But certainly a copy of that order will be
8 provided to applicant's counsel. And if you have any
9 changes or modifications that you wish Ms. Wilson to
10 add, certainly I'm sure she will be amenable to
11 considering your request. And if you-all can't come
12 to some agreement on that, certainly you should make
13 the Court aware of it so that I can consider any
14 request for modifications, as well.

15 Thank you both very much.

16 MS. WILSON: Thank you, Your Honor.

17 MR. FAIREY: Thank you, Your Honor.

18 [HEARING CONCLUDES AT 11:20 A.M.]
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C E R T I F I C A T E

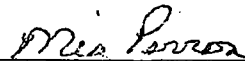
STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the PCR hearing held before the Honorable Deadra L. Jefferson, on Tuesday, August 27, 2013.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 14th day of March, 2014.



Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

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11-20-13

FILED

STATE OF SOUTH CAROLINA)
 COUNTY OF HAMPTON)
 IN THE COURT OF COMMON PLEAS

2013 NOV 14 AM 10:57

KYLINDA S. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

2012-CP-25-0211

Kelvin Mays, #323694,

Applicant,

v.

State of South Carolina,

Respondent.

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DEC 16 2013

S.C. Supreme Court

ORDER OF DISMISSAL

Presiding Judge:
 Applicant's Attorney:
 Respondent's Attorney:
 Trial Counsel:
 Date of Hearing:
 Court Reporter:

Hon. Deadra L. Jefferson
 Marion C. Fairey, Jr., Esquire
 Ashleigh R. Wilson, Esquire
 Stephen T. Plexico, Esquire
 August 27, 2013
 Susan "Mia" Perron

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 13, 2012. The Respondent made its Return on November 5, 2012. An evidentiary hearing on the matter was convened on August 27, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Marion C. Fairey, Jr. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Stephen T. Plexico, Esquire. The Court had before it the trial transcript, the Hampton County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the Applicant's appellate records.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Hampton County Clerk of Court. The Applicant was indicted at the April 2008 term of the Hampton County Grand Jury for Burglary-Second Degree (2008-GS-25-0156).¹ He was represented by Stephen T. Plexico, Esquire.

The Applicant proceeded to trial and was found guilty. On October 10, 2008, the Applicant was sentenced by the Honorable Carmen T. Mullen to fifteen (15) years imprisonment.

A timely Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. M. Celia Robinson, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Mays, Up. Op. No. 2012-UP-301 (S.C. Ct. App. May 16, 2012). The Remittitur was issued on June 1, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Counsel did not object to the admission of improper character evidence.
 - b. Counsel did not motion the Court to quash the indictment.

At the evidentiary hearing, the Applicant proceeded solely on the following allegations:

1. Ineffective assistance of counsel.
 - a. Failure to object to the State's closing argument.
 - b. Failure to object to Bryant's "known thief" testimony or request a limiting instruction.
 - c. Improperly advising the Applicant not to take the stand to testify.

¹ Burglary-Second Degree is a violent, serious felony punishable by fifteen (15) years imprisonment and an offender is not eligible for parole until service of one-third (1/3) of his sentence. S.C. CODE ANN. § 16-11-312(C)(2) (2010).

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This Court finds all allegations other than those the Applicant pursued at the evidentiary hearing were abandoned by the Applicant since no testimony or argument was presented to support the allegations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusion of law as required by S.C. CODE ANN. § 17-27-80 (2003).

Summary of the Testimony

The Applicant's trial counsel, Stephen T. Plexico, Esquire testified he is the Chief Public Defender for Allendale, Hampton and Jasper counties. He testified he has been practicing law for twenty-three (23) to twenty-five (25) years. He testified he has tried between fifty (50) and seventy-five (75) criminal cases and at least ten (10) Burglary trials. Counsel testified he was appointed to represent the Applicant on March 20, 2008 and this was his first time representing him. Counsel testified he does not recall how many times he met with the Applicant, but that he had adequate conversations in order to prepare for trial.

Counsel testified he met with the Applicant but had not notated the exact date in his file, but that he reviewed the Applicant's file before meeting with him and explained to the Applicant his constitutional rights and range of penalty as well as the advantages and disadvantages of going to trial. He testified there were no leads to investigate. He testified the Applicant rejected a plea offer made prior to trial on May 7, 2008. Counsel testified that the State sent him a letter

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advising of the trial date and he in turn advised the Applicant that the case would be called for trial on September 8, 2008. Counsel testified he had all of the state's discovery, the police report, and eyewitness statements, and knew of several witnesses that the State would call at trial.

Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf. He testified the discovery file was thin and he reviewed the materials with the Applicant. He testified the Applicant had no defenses and the State met all elements of the indicted offense of Burglary-Second Degree. Counsel testified he spoke to the Applicant's alibi witness who was the only witness furnished by the Applicant. Unfortunately, the witness' testimony was that the Applicant was with him, but left at the time of the burglary and proved nothing other than the Applicant's presence at the crime scene. Counsel further testified that while an alibi witness could be useful, this testimony was of no use unless the Applicant testified, which was unadvisable due to the Applicant's lengthy record. Counsel testified he discussed with the Applicant his version of the facts, the elements of the charges, and what the State was required to prove. He testified he also discussed with the Applicant his version of the facts.

Counsel testified he had ample time to prepare for trial. He testified that he felt he effectively cross examined all of the witnesses. He testified he was hoping for the best at trial, but thought the Applicant should have accepted the State's plea deal. Counsel testified that the Applicant was arraigned the morning of the trial for Burglary-Second Degree. He testified at trial he did not object to the court's jury charge. Counsel testified that it was his trial strategy to hold the State to their burden of proof and keep the Applicant's criminal record out. He testified that their theory was one of "mere presence," placing the Applicant in the wrong place at the wrong time. He further testified that it was the defense's contention that the Applicant was merely a "good Samaritan." Counsel testified he had no basis to object to the Solicitor's closing argument,

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as he was merely arguing the State's version of the evidence presented at trial. He further testified that it was his strategy not to offer any evidence to maintain the right of last argument to the jury. He testified this was his strategy because, in his experience, by maintaining this advantage, he has won more cases.

Counsel testified he made a pretrial motion regarding the Applicant's prior record pursuant to Rule 609, SCRE. Counsel testified he advised the Applicant of his right to testify, but did not recall advising him not to testify. Counsel testified the Applicant did not want to testify at trial. Counsel testified he told the Applicant the State could impeach him by introducing his prior record. Counsel testified the Applicant's prior record was extensive, consisting of mostly petit crimes and corresponding guilty pleas, and did not preclude him from testifying. Rather, the Applicant did not testify because he did not have any beneficial testimony.

Counsel testified Eddie Bryant was the State's key witness. Counsel testified that, from Bryant's testimony, a reasonable jury could infer that the Applicant was not necessarily hiding at the scene of the burglary. He testified Bryant's testimony was that he saw movement and saw the Applicant back into the office. Counsel testified he did not confront or impeach Bryant about his statement.

Counsel testified when Bryant called the Applicant a "known thief," he moved for a mistrial. Counsel testified he thought the statement improperly put the Applicant's character at issue. He testified he felt the answer was unresponsive to his question on cross-examination, that in hindsight he should have requested a limiting instruction, and that a ruling on the character issue would have been appealable. Counsel testified he felt he properly preserved the issue for appeal, but he should have requested a limiting instruction.

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The Applicant testified he met with counsel three (3) days prior to trial and that counsel came to the county detention center with two (2) boxes. He testified he learned of his trial shortly before and counsel advised they were going to trial on Monday and that his trial strategy was "to play it by ear." The Applicant testified he did not see any discovery. He claims he knew nothing about the case until it unfolded at trial. The Applicant also testified he did not want counsel to represent him. He testified he felt Counsel had a conflict because he was affiliated with the owner of the business, Gwen Bamfield, who was one of the State's witnesses. He testified Counsel told him not to testify because of his record and he agreed. He testified he agreed that his criminal record, while petit in nature was extensive. He testified it was his choice not to take the stand. He further testified that the Court fully advised him of his right to testify, that ultimately it was his decision not to testify, and that he agrees that Counsel was "right" on this issue.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCF).

For the Applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, he must show both: (1) that his "counsel failed to render reasonably effective assistance under prevailing professional norms," and (2) that he was prejudiced by his counsel's ineffective performance. See Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 144 S. Ct. 2052, 2064-65 (1984)). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for

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counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). 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 690, 104 S. Ct. at 2066. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds that counsel has extensive experience in the practice of criminal law and has been practicing law for over twenty-three (23) years. This Court finds that Counsel met with the Applicant prior to trial and fully investigated the Applicant's case. This Court finds that counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds that Counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds that Counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have objected to the State's closing argument.

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[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions.

State v. Mouzon, 321 S.C. 27, 31–32, 467 S.E.2d 122, 125 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975)). “A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744 (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Linder, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981)). “The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744 (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); Copeland, 321 S.C. at 324, 468 S.E.2d at 624). “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (citing Simons, 331 S.C. at 338, 503 S.E.2d at 166). “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.

This Court finds Counsel was not ineffective for failing to object to a portion of the State's closing argument. The Applicant alleges Counsel should have objected to the following statements made by the State during its closing argument:

I think I recall Eddie saying that he drove by first and that he saw somebody try to step over and hide. (Tr. Vol. II 80:13–15) . . .

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When [the Applicant] went by the first time, he ducked back, according to Eddie Bryant. (Tr. Vol. II 82:18-20).

This Court finds the State was arguing to the jury its perception of the facts presented at trial. Eddie Bryant's testimony at trial was as follows:

He was trying—when I drove up the first time, he back in the place. When I went back, I saw him, his movement. He went back in the door. When I passed by and turned around, he was trying to get out the door. (Tr. Vol. II 42:9-13).

This Court finds the statements made during the State's closing argument were reasonable inferences based on Bryant's testimony at trial. This Court finds that the State's closing argument was not improper and not the basis for a mistrial. This Court also finds that any error that resulted from the State's closing argument was cured when the jury was told that argument was not to be considered evidence. (Tr. 14:22-25). This Court finds the State's closing argument did not undermine this Court's confidence in the jury's verdict. This Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that prejudice resulted from his performance.

This Court finds the Applicant failed to meet his burden of proving trial Counsel failed to object to or request a limiting instruction for Bryant's "known thief" statement. This Court finds Counsel's Motion for Mistrial should have preserved the issue for appeal. This Court also finds that while a curative instruction here was probably advisable, in light of the record, no prejudice resulted at trial. This Court finds a reasonable jury probably would not make its decision solely on Bryant's testimony about the Applicant being a "known thief."

This Court also finds the likelihood this statement alone affected the outcome of the Applicant's trial is minimal considering the overwhelming evidence of the Applicant's guilt presented at trial. The presence of overwhelming evidence of guilt negates any claim that

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counsel's performance could have reasonably affected the outcome of the defendant's trial. Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 575, 552 S.E.2d 718, 722 n. 3, 725 (2001). The evidence presented at trial showed the Applicant was discovered by one of the State's witnesses leaving the building through its damaged door, was seen backing into the building to avoid detection, and was known to be familiar with the location. The Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that prejudice resulted from his performance.

Lastly, this Court finds the Applicant failed to meet his burden of proving trial Counsel improperly advised the Applicant not to testify at trial. This Court finds and the record reflects this allegation is wholly without merit. Counsel provided credible testimony that he discussed with the Applicant his right to testify and that the Applicant chose not to take the stand of his own free will. The Applicant freely and voluntarily waived his right to testify after being advised of his rights by the court. The Applicant was advised by the court that it was his decision alone whether or not he chose to take the stand (Tr. Vol. II 71:6-72:3), that the State had to prove his guilt beyond a reasonable doubt (Tr. Vol. II 72:4-12), and that he was giving up his right against self-incrimination if he took the stand to testify (Tran. 72:13-22). This Court finds after being advised of his rights, the Applicant indicated he did not want to take the stand, did not have any questions about his rights, and did not need any additional time to discuss his rights with his attorney. (Tr. Vol. II 73:9-74:3). This Court finds the Applicant has failed to carry his burden of proving Counsel provided improper advice about his right to testify.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland,

466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by Counsel's representation. See id. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof. Therefore, all allegations are hereby denied and dismissed.

CONCLUSION

Based on the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

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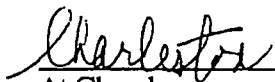
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice;
and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6th day of November, 20 13



Hon. Deandra L. Jefferson
Presiding Judge


_____, South Carolina.
At Chambers

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

CERTIFICATE OF SERVICE

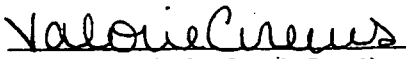
RE: Kelvin Mays v. The State of South Carolina
Case No. 2012-CP-25-0211

PERSONNALLY APPEARED before me Amber Adams, who being duly sworn, deposes and says: that she is employed by The Fairey Law Firm; that she served or caused to be served via US Mail Delivery postage prepaid the attached Plaintiff's Notice of Appeal to the addresses listed below on December 12, 2013.

Ashleigh R. Wilson
Assistant Attorney General
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


Amber Adams

Sworn to before me this
12 day of December, 2013


Notary Public for South Carolina
My Commission Expires: 12/23/2021

UNITED STATES OF AMERICA
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UNITED FRONTIER CODES

Daniel Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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FILE - 20-13

FILED

STATE OF SOUTH CAROLINA) AM 10:57
 COUNTY OF HAMPTON)
 IN THE COURT OF COMMON PLEAS
 2012-CP-25-0211

Kelvin Mays, #323694,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

Presiding Judge:

Applicant's Attorney:

Respondent's Attorney:

Trial Counsel:

Date of Hearing:

Court Reporter:

Hon. Deadra L. Jefferson

Marion C. Fairey, Jr., Esquire

Ashleigh R. Wilson, Esquire

Stephen T. Plexico, Esquire

August 27, 2013

Susan "Mia" Perron

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 13, 2012. The Respondent made its Return on November 5, 2012. An evidentiary hearing on the matter was convened on August 27, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Marion C. Fairey, Jr., Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Stephen T. Plexico, Esquire. The Court had before it the trial transcript, the Hampton County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the Applicant's appellate records.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Hampton County Clerk of Court. The Applicant was indicted at the April 2008 term of the Hampton County Grand Jury for Burglary-Second Degree (2008-GS-25-0156).¹ He was represented by Stephen T. Plexico, Esquire.

The Applicant proceeded to trial and was found guilty. On October 10, 2008, the Applicant was sentenced by the Honorable Carmen T. Mullen to fifteen (15) years imprisonment.

A timely Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. M. Celia Robinson, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Mays, Up. Op. No. 2012-UP-301 (S.C. Ct. App. May 16, 2012). The Remittitur was issued on June 1, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Counsel did not object to the admission of improper character evidence.
 - b. Counsel did not motion the Court to quash the indictment.

At the evidentiary hearing, the Applicant proceeded solely on the following allegations:

1. Ineffective assistance of counsel.
 - a. Failure to object to the State's closing argument.
 - b. Failure to object to Bryant's "known thief" testimony or request a limiting instruction.
 - c. Improperly advising the Applicant not to take the stand to testify.

¹ Burglary-Second Degree is a violent, serious felony punishable by fifteen (15) years imprisonment and an offender is not eligible for parole until service of one-third (1/3) of his sentence. S.C. CODE ANN. § 16-11-312(C)(2) (2010).

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This Court finds all allegations other than those the Applicant pursued at the evidentiary hearing were abandoned by the Applicant since no testimony or argument was presented to support the allegations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusion of law as required by S.C. CODE ANN. § 17-27-80 (2003).

Summary of the Testimony

The Applicant's trial counsel, Stephen T. Plexico, Esquire testified he is the Chief Public Defender for Allendale, Hampton and Jasper counties. He testified he has been practicing law for twenty-three (23) to twenty-five (25) years. He testified he has tried between fifty (50) and seventy-five (75) criminal cases and at least ten (10) Burglary trials. Counsel testified he was appointed to represent the Applicant on March 20, 2008 and this was his first time representing him. Counsel testified he does not recall how many times he met with the Applicant, but that he had adequate conversations in order to prepare for trial.

Counsel testified he met with the Applicant but had not notated the exact date in his file, but that he reviewed the Applicant's file before meeting with him and explained to the Applicant his constitutional rights and range of penalty as well as the advantages and disadvantages of going to trial. He testified there were no leads to investigate. He testified the Applicant rejected a plea offer made prior to trial on May 7, 2008. Counsel testified that the State sent him a letter

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advising of the trial date and he in turn advised the Applicant that the case would be called for trial on September 8, 2008. Counsel testified he had all of the state's discovery, the police report, and eyewitness statements, and knew of several witnesses that the State would call at trial.

Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf. He testified the discovery file was thin and he reviewed the materials with the Applicant. He testified the Applicant had no defenses and the State met all elements of the indicted offense of Burglary-Second Degree. Counsel testified he spoke to the Applicant's alibi witness who was the only witness furnished by the Applicant. Unfortunately, the witness' testimony was that the Applicant was with him, but left at the time of the burglary and proved nothing other than the Applicant's presence at the crime scene. Counsel further testified that while an alibi witness could be useful, this testimony was of no use unless the Applicant testified, which was unadvisable due to the Applicant's lengthy record. Counsel testified he discussed with the Applicant his version of the facts, the elements of the charges, and what the State was required to prove. He testified he also discussed with the Applicant his version of the facts.

Counsel testified he had ample time to prepare for trial. He testified that he felt he effectively cross examined all of the witnesses. He testified he was hoping for the best at trial, but thought the Applicant should have accepted the State's plea deal. Counsel testified that the Applicant was arraigned the morning of the trial for Burglary-Second Degree. He testified at trial he did not object to the court's jury charge. Counsel testified that it was his trial strategy to hold the State to their burden of proof and keep the Applicant's criminal record out. He testified that their theory was one of "mere presence," placing the Applicant in the wrong place at the wrong time. He further testified that it was the defense's contention that the Applicant was merely a "good Samaritan." Counsel testified he had no basis to object to the Solicitor's closing argument,

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as he was merely arguing the State's version of the evidence presented at trial. He further testified that it was his strategy not to offer any evidence to maintain the right of last argument to the jury. He testified this was his strategy because, in his experience, by maintaining this advantage, he has won more cases.

Counsel testified he made a pretrial motion regarding the Applicant's prior record pursuant to Rule 609, SCRE. Counsel testified he advised the Applicant of his right to testify, but did not recall advising him not to testify. Counsel testified the Applicant did not want to testify at trial. Counsel testified he told the Applicant the State could impeach him by introducing his prior record. Counsel testified the Applicant's prior record was extensive, consisting of mostly petit crimes and corresponding guilty pleas, and did not preclude him from testifying. Rather, the Applicant did not testify because he did not have any beneficial testimony.

Counsel testified Eddie Bryant was the State's key witness. Counsel testified that, from Bryant's testimony, a reasonable jury could infer that the Applicant was not necessarily hiding at the scene of the burglary. He testified Bryant's testimony was that he saw movement and saw the Applicant back into the office. Counsel testified he did not confront or impeach Bryant about his statement.

Counsel testified when Bryant called the Applicant a "known thief," he moved for a mistrial. Counsel testified he thought the statement improperly put the Applicant's character at issue. He testified he felt the answer was unresponsive to his question on cross-examination, that in hindsight he should have requested a limiting instruction, and that a ruling on the character issue would have been appealable. Counsel testified he felt he properly preserved the issue for appeal, but he should have requested a limiting instruction.

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The Applicant testified he met with counsel three (3) days prior to trial and that counsel came to the county detention center with two (2) boxes. He testified he learned of his trial shortly before and counsel advised they were going to trial on Monday and that his trial strategy was "to play it by ear." The Applicant testified he did not see any discovery. He claims he knew nothing about the case until it unfolded at trial. The Applicant also testified he did not want counsel to represent him. He testified he felt Counsel had a conflict because he was affiliated with the owner of the business, Gwen Bamfield, who was one of the State's witnesses. He testified Counsel told him not to testify because of his record and he agreed. He testified he agreed that his criminal record, while petit in nature was extensive. He testified it was his choice not to take the stand. He further testified that the Court fully advised him of his right to testify, that ultimately it was his decision not to testify, and that he agrees that Counsel was "right" on this issue.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC).

For the Applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, he must show both: (1) that his "counsel failed to render reasonably effective assistance under prevailing professional norms," and (2) that he was prejudiced by his counsel's ineffective performance. See Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 144 S. Ct. 2052, 2064-65 (1984)). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for

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counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). 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 690, 104 S. Ct. at 2066. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds that counsel has extensive experience in the practice of criminal law and has been practicing law for over twenty-three (23) years. This Court finds that Counsel met with the Applicant prior to trial and fully investigated the Applicant's case. This Court finds that counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds that Counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds that Counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have objected to the State's closing argument.

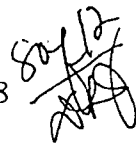
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[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions.

State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 125 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975)). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744 (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Linder, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744 (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); Copeland, 321 S.C. at 324, 468 S.E.2d at 624). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (citing Simons, 331 S.C. at 338, 503 S.E.2d at 166). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

This Court finds Counsel was not ineffective for failing to object to a portion of the State's closing argument. The Applicant alleges Counsel should have objected to the following statements made by the State during its closing argument:

I think I recall Eddie saying that he drove by first and that he saw somebody try to step over and hide. (Tr. Vol. II 80:13-15) . . .

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When [the Applicant] went by the first time, he ducked back, according to Eddie Bryant. (Tr. Vol. II 82:18-20).

This Court finds the State was arguing to the jury its perception of the facts presented at trial. Eddie Bryant's testimony at trial was as follows:

He was trying—when I drove up the first time, he back in the place. When I went back, I saw him, his movement. He went back in the door. When I passed by and turned around, he was trying to get out the door. (Tr. Vol. II 42:9-13).

This Court finds the statements made during the State's closing argument were reasonable inferences based on Bryant's testimony at trial. This Court finds that the State's closing argument was not improper and not the basis for a mistrial. This Court also finds that any error that resulted from the State's closing argument was cured when the jury was told that argument was not to be considered evidence. (Tr. 14:22-25). This Court finds the State's closing argument did not undermine this Court's confidence in the jury's verdict. This Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that prejudice resulted from his performance.

This Court finds the Applicant failed to meet his burden of proving trial Counsel failed to object to or request a limiting instruction for Bryant's "known thief" statement. This Court finds Counsel's Motion for Mistrial should have preserved the issue for appeal. This Court also finds that while a curative instruction here was probably advisable, in light of the record, no prejudice resulted at trial. This Court finds a reasonable jury probably would not make its decision solely on Bryant's testimony about the Applicant being a "known thief."

This Court also finds the likelihood this statement alone affected the outcome of the Applicant's trial is minimal considering the overwhelming evidence of the Applicant's guilt presented at trial. The presence of overwhelming evidence of guilt negates any claim that

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counsel's performance could have reasonably affected the outcome of the defendant's trial. Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 575, 552 S.E.2d 718, 722 n. 3, 725 (2001). The evidence presented at trial showed the Applicant was discovered by one of the State's witnesses leaving the building through its damaged door, was seen backing into the building to avoid detection, and was known to be familiar with the location. The Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that prejudice resulted from his performance.

Lastly, this Court finds the Applicant failed to meet his burden of proving trial Counsel improperly advised the Applicant not to testify at trial. This Court finds and the record reflects this allegation is wholly without merit. Counsel provided credible testimony that he discussed with the Applicant his right to testify and that the Applicant chose not to take the stand of his own free will. The Applicant freely and voluntarily waived his right to testify after being advised of his rights by the court. The Applicant was advised by the court that it was his decision alone whether or not he chose to take the stand (Tr. Vol. II 71:6-72:3), that the State had to prove his guilt beyond a reasonable doubt (Tr. Vol. II 72:4-12), and that he was giving up his right against self-incrimination if he took the stand to testify (Tran. 72:13-22). This Court finds after being advised of his rights, the Applicant indicated he did not want to take the stand, did not have any questions about his rights, and did not need any additional time to discuss his rights with his attorney. (Tr. Vol. II 73:9-74:3). This Court finds the Applicant has failed to carry his burden of proving Counsel provided improper advice about his right to testify.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland).

466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by Counsel's representation. See id. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof. Therefore, all allegations are hereby denied and dismissed.

CONCLUSION

Based on the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

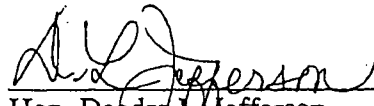
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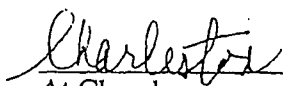
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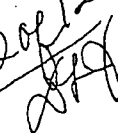
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice;
and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6th day of November, 20 13


Hon. Deadra L. Jefferson
Presiding Judge


At Chambers, South Carolina.

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STATE OF SOUTH CAROLINA)

COUNTY OF HAMPTON)

CERTIFICATE OF SERVICE

RE: Kelvin Mays v. The State of South Carolina
Case No. 2012-CP-25-0211

PERSONNALLY APPEARED before me Amber Adams, who being duly sworn, deposes and says: that she is employed by The Fairey Law Firm; that she served or caused to be served via US Mail Delivery postage prepaid the attached Plaintiff's Notice of Appeal to the addresses listed below on December 12, 2013.

Ashleigh R. Wilson
Assistant Attorney General
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


Amber Adams

Sworn to before me this
12 day of December, 2013


Notary Public for South Carolina
My Commission Expires: 10/23/2021