

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED

MAR 19 2012

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

REICO LAMONT WELCH,

APPELLANT

A P P E N D I X

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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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.

Reico Lamar Welch,

Appellant.

Appeal From York County
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2011-UP-572
Heard December 6, 2011 – Filed December 20, 2011

AFFIRMED

Appellate Defender Elizabeth Franklin-Best, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant

Deputy Attorney General Salley W. Elliott, Assistant Attorney General David Spencer, all of Columbia; Solicitor Kevin Brackett, of York, for Respondent.

PER CURIAM: Reico Welch appeals his conviction for first-degree burglary, arguing the circuit court improperly considered three prior out-of-state offenses for breaking and entering that were consolidated into a single judgment against him. Welch claims the circuit court impermissibly considered this single judgment as three convictions, which resulted in an improperly enhanced charge of first-degree burglary.

We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 16-11-311 (2003) (stating a person is guilty of first-degree burglary "if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both . . .") (emphasis added); N.C. Gen.Stat. § 15A-1340.15(b) (2009) ("If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses.") (emphasis added); State v. Miller, 341 S.E.2d 531, 538 (N.C. 1986) (discussing the benefits of consolidating plea bargains for judgment and stating "the very purpose of consolidation for sentencing purposes is to . . . benefit [] the defendant by limiting the maximum sentence that he can receive for all of the convictions so consolidated"); see also Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ("Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning."); State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) (finding the legislature's intent should be ascertained primarily from the plain language of the statute).

AFFIRMED.

SHORT, WILLIAMS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

REICO LAMONT WELCH,

APPELLANT

Appeal from York County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 2011-UP-572

PETITION FOR REHEARING

Petitioner respectfully asks this Court, pursuant to SCAR, Rule 221(a) to rehear his case. Petitioner submits this Court has overlooked or misapprehended points necessary to the proper resolution of this case. Specifically, petitioner maintains that the Court overlooked the fact that the state *failed to prove* that the use of the out-of-state "consolidation" was appropriate for enhancing petitioner's charge to Burglary 1st degree since the only thing it provided the Court was a document entitled Judgment and Commitment which purported to show that several events were consolidated into one judgment. Additionally, as a prior conviction is an element of Burglary 1st degree, the state *failed to prove* that these events did not constitute "one offense" under S.C. Code Ann. §17-25-50. This statute provides: Considering closely connected offenses as one offense: In determining the

number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times **so closely connected in point of time that they may be considered as one offense**, notwithstanding under the law they constitute separate and distinct offenses. In short, the state failed to prove an element of the offense because it failed to offer the trial court anything more than a single document, and it failed to prove that use of the Judgment and Commitment was appropriate under South Carolina law. For this reason, petitioner asks this Court to rehear his case and reverse and remand for a new trial.

RELEVANT FACTS

Petitioner is serving 20 years in prison for participating, along with another person, in a day-time burglary of a judge's house in Rock Hill, South Carolina. Petitioner's co-defendant, who had previously spent 17 years in prison and who had been convicted of burglary in the past, received 18 months for his participation. Amended ROA p. 51, ll. 4-20; 53, ll. 8-25. Petitioner's prior record consisted of a cocaine offense for which he received probation, and he had previously spent 8-10 months incarcerated for three breaking and entering offenses which were consolidated into one judgment in Charlotte, North Carolina. Amended ROA p. 72, ll. 3-6. The state prevailed upon the judge to use this Mecklenburg County consolidation for enhancing appellant's charge to burglary-1st degree.

Before trial started, the court held a hearing on whether the state would be allowed to use the consolidated judgment in North Carolina to enhance petitioner's charge to burglary, first degree. The state relied on a true copy of petitioner's conviction issued by Mecklenburg County, Clerk of Superior Court. It appears the conviction sheet was filed January 31, 2006 and reflects petitioner's breaking and entering charges, with offense dates of June 6, 2005, May 26, 2005, and May 10,

2005. The breaking and entering charges appear to be pursuant to North Carolina statute 14 -- 54A. The charges also appear to be class H felonies.

Under South Carolina Code Ann. §16-11-311, a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both. (emphasis added). The issue in this case is whether the consolidation of charges in North Carolina constitutes one conviction or three.

North Carolina has a determinate sentencing framework that is embodied in North Carolina Gen. Statutes Article 81B. Structured sentencing of persons convicted of crimes. The North Carolina statute section 15 A-- 1340.15 Multiple convictions-- allows a judge to consolidate sentences if there are multiple offenses. It appears to be a different type of sentence than those available in South Carolina. The statute states:

(a) Consecutive sentences. -- This article does not prohibit the imposition of consecutive sentences. Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.

(b) Consolidation of sentences. -- If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a **single judgment** for the consolidated offenses. The **judgment** shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, in its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

According to the certified conviction record for North Carolina, petitioner's offenses were consolidated and the single judgment imposed was an 8 month to 10 month period of incarceration, with credit for 197 days that petitioner had already spent in confinement. In other words, North Carolina has treated petitioner's criminal acts as one consolidation. The state's position appears to be that the certified conviction reflects three separate convictions. Amended ROA p. 3-20.

The state did not call anyone from North Carolina to interpret the conviction sheet. Nor did the state enter the actual indictments into the record or otherwise use them during this hearing. For purposes of this hearing, the State believed that it could simply divine what had occurred in North Carolina by looking at a conviction sheet that offers no details regarding the actual events themselves, nor offers any reasoning as to why the sentencing judge in this matter determined that a consolidation was the appropriate sentence to pass. As the statute makes clear, the judge could have sentenced petitioner without consolidating the judgment.

Additionally, section 15 A-- 1340.14(d) Prior record level for felony sentencing, states:

Multiple prior convictions obtained in one court week. -- For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single Superior Court during one calendar week, only the conviction for the offense that the highest point total is used. If an offender is convicted of more than one offense in a single session of the District Court, only one of the convictions is used (emphasis added).

Given that the official conviction sheet only reflects a file date of January 31, 2006, it is unclear when petitioner pleaded to these charges. After all, the official sheet contains two pages, and it is unclear whether or these charges were resolved on one day or possibly two. In any event, the North Carolina statute makes clear that only one conviction should be used to determine prior record level, under their structured sentencing scheme. In other words, North Carolina treats as one conviction what the State of South Carolina may regard as three separate convictions.

Also, it appears from the North Carolina statute that class H felonies are not generally used for enhancement purposes. See North Carolina Gen. Statutes § 15 A. -- 1340.16 A. Enhanced sentence if defendant is convicted of a class A., B1, B2, C, D, or E felony and the defendant used, displayed, or threaten to use or display of firearm or deadly weapon during the commission of the felony; §15 A. -- 1340. 16 B. Life imprisonment without parole for a 2nd or subsequent conviction of a class BI felony if the victim was 13 years of age or younger and there are no mitigating factors.

But see § 15 A. -- 1340. 16. Enhanced sentence if defendant is convicted of a felony and the defendant was wearing or had in his or her immediate possession a bulletproof vest during the commission of the felony.

The trial court judge here erred by allowing the North Carolina consolidation to be used for enhancement purposes.

THE COURT: I understand that. But this is a question that I have, as I see it: can you point me to any indication in the statute that the Legislature intended that any consolidation or combination of charges would exclude those charges were combined as charges for the purposes of 16 -- 11 -- 311? I mean, what we have to do is look at the legislative intent here. . . .

Where in the statute or anything related to the statute do we find a similar intent on the part of the Legislature to exclude charges that may have been combined for the purposes of the plea, and that's just judicial expediency that results in that. We all know that. (sic) You bring them altogether and it's to your client's benefit if you can wrap up all up and get it before one sentencing judge. We've all been there. We know that.

MR. SHUSTERMAN: I don't have anything. I'm not going to make a representation to the court. My argument would be -- and I certainly respect the court's position. My argument would be show me where the legislature said that one disposition shall be counted multiple times. I mean, that's the flip side of that argument, with all due respect to the court.

Amended ROA p.10-11.

The trial court judge erred because it is the State's burden to prove that the North Carolina consolidation reflects three separate convictions as understood under the South Carolina statutory scheme since they have the burden to prove that element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

The issue arose again as the parties discussed possible closing arguments. Amended ROA p. 28-50. Ultimately, the judge determined that petitioner would not be allowed to argue consolidation to the jury, even though the prior convictions are an element of the offense. State v. Hamilton, 327 S.C. 440, 486 S.E. 2d 512 (Ct. App. 1997). Again, the judge placed the burden on

the defense to prove that the state should not be allowed to go forward with their burglary first degree indictment:

“Certainly, I would think that under the burglary, first degree, statute, which does not put any condition at all upon which convictions may be used, under that statute, I believe that any two convictions, whether the convictions were obtained on the same day were not, could be used.

Now, tell me, here's what I'm looking for from you: if you want to argue consolidation, tell me where there is any authority in this state whatsoever that consolidation of charges under a recidivist -- type analysis, recidivist statute -- type analysis, would prevent the state from going forward on a first degree burglary or an enhanced burglary where there are two or more convictions for burglary or housebreaking? Just give me something.”

Amended ROA p.41, ll. 3-15.

The judge again directed his questioning to defense counsel:

THE COURT: Let me ask you this: has this Court ever made the distinction, the South Carolina Supreme Court or Court of Appeals, ever made any distinction about separate and distinct offenses, the fact that they are plead (sic) on the same day, having any bearing on whether they are separate and distinct? Ever? Has there ever been any issue addressed? Has there ever been any situation where --

I think under Koon¹ and Gordon², they say the opposite. It doesn't make any difference if you plead on the same day or on separate days. That's not what's in control here. And that seems to be the only thing that ties the prior B&E together, that they were plead (sic) on the same day. They're almost a month apart. Okay?

Amended ROA p.44, ll. 10-22.

Trial counsel continued to assert that petitioner received one consolidation and not multiple convictions. Amended ROA p.47-48. Counsel objected when the state moved the certified conviction record into evidence. Amended ROA p.54, ll. 12-19. The lead detective testified, before the jury, that petitioner had two prior convictions for breaking and entering. Amended ROA p.63 4
- 9.

¹ Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (2007).

² State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003).

The trial court judge erred by attempting to analyze the situation under Koon, supra, and Gordon, supra. The state did not provide any factual information to the judge regarding the offenses resolved in North Carolina. Neither the judge (nor anyone else) was capable of analyzing these events as being "separate and distinct" since the state failed to provide any of the necessary information to the court. Even so, it was improper for the state to use a North Carolina state court consolidation as three "convictions" for purposes of enhancement. The state, simply, failed to meet its burden of proof on an essential element of the offense. State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). For this reason, petitioner asks this Court to rehear his case, and reverse and remand for a new trial.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

This 4th day of January, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 Appeal from York County

 Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

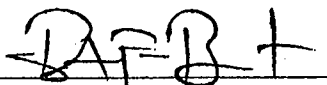
V.

REICO LAMONT WELCH,

APPELLANT

 CERTIFICATE OF SERVICE

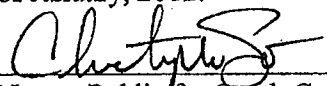
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, this 4th day of January, 2012.



 Elizabeth A. Franklin-Best
 Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day
 of January, 2012.



 (L.S.)
 Notary Public for South Carolina

My Commission Expires: May 16, 2021.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From York County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

REICO LAMONT WELCH,

Appellant.

**RETURN TO PETITION
FOR REHEARING**

Respondent now makes its return to Appellant Welch's petition for rehearing and would argue that the petition should be denied as this Court has not overlooked any facts or law in arriving at its well-reasoned decision.

Welch continues to argue that the State failed to prove an element of first degree burglary. This issue is not preserved as Welch did make the argument presented on appeal when moving for directed verdict. A party cannot argue one ground for directed verdict at trial and in turn argue an alternative ground on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

Welch's argument that the State was required to call a witness to testify as to what the law is in North Carolina is without merit. The trial judge, in determining the initial admissibility of the evidence, carefully and correctly determined that the effect of consolidation did not turn three offenses into one, but rather gave one sentence for three

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convictions. This was a matter of law, not of fact.

Further, the North Carolina burglary convictions admitted clearly occurred on separate dates and were separate incidents. Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (2007) (determining that even if March 13 and 14, 1986 burglaries should be treated as one for purposes of sentencing, the March 28th burglary of a separate building two weeks later clearly constitutes a separate burglary for purposes of the recidivist statute).

Finally, Welch argues his three convictions for breaking and entering a building in North Carolina, all committed on different days, should be treated as only one because they were consolidated for one sentence. The plain language of the North Carolina statute for consolidation says otherwise, which is as follows:

§ 15-A-1340.15. Multiple Convictions

(a) Consecutive Sentences. – this Article does not prohibit the imposition of consecutive sentences. Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.

(b) Consolidation of Sentences. – If an offender is **convicted of more than one offense** at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

N.C. Gen. Stat. § 15-A-1340.15 (emphasis added).

In North Carolina, “in situations where a defendant is convicted of two or more offenses, the General Assembly has given the trial court discretion to consolidate the offenses into a single judgment.” State v. Tucker, 588 S.E.2d 853, 855 (N.C. 2003) quoted by State v. Edwards, 595 S.E.2d 213 (N.C. Ct. App. 2004). Tucker cites with approval a case prior

to enactment of the present statute, State v. Miller, 341 S.E.2d 531 (N.C. 1986). In that case, the North Carolina Supreme Court was determining whether offenses consolidated for judgment, as opposed to consolidated for a hearing, required separate findings at sentencing for each offense consolidated. The Court reasoned as follows:

... [T]he total sentence is limited by the maximum sentence for the most serious offense in the consolidated judgment. This is the very purpose of consolidation for sentencing purposes and works to the benefit of the defendant by limiting the maximum sentence that he can receive **for all of the convictions so consolidated**. Here, pursuant to the plea bargain, the kidnapping and second degree murder **convictions** were consolidated for judgment, thus insuring the defendants **only one sentence for two convictions** with a maximum prison sentence of fifty years or life. Without the consolidation, defendants could have been sentenced to the maximum prison sentence of fifty years or life. Without the consolidation, defendants could have been sentenced to the maximum prison sentences of fifty years or life for the second degree murders in addition to at the presumptive terms of twelve years for the first degree kidnapping convictions. ...

Miller, at 537-38 (emphasis added).

Accordingly, as a matter of law, it is apparent that North Carolina would consider the three breaking and entering offenses to be three convictions with one sentence. Miller, supra.

In conclusion, Appellant's three North Carolina breaking and entering convictions are three convictions with one sentence, and the Court properly allowed the State to admit evidence of two of these breaking and entering convictions as evidence of two or more convictions under S.C. Code §16-11-311.

CONCLUSION

For all of the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted,

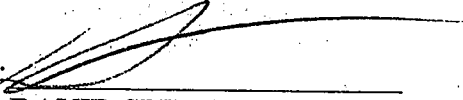
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

KEVIN SCOTT BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: 

DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 13, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From York County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

REICO LAMONT WELCH,

Appellant.

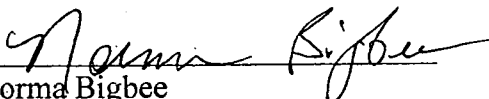
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Return to Petition for Rehearing on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served.

This 13th day of January 13, 2012



Norma Bigbee
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

The State,

Respondent

v.

Reico Lamar Welch,

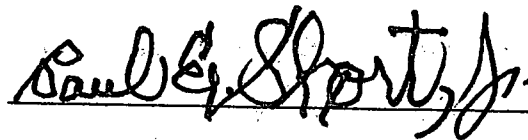
Appellant.

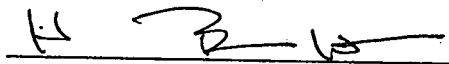
The Honorable Larry B. Hyman, Jr.
York County
Trial Court Case No. 2008-GS-46-01888
2008-GS-46-01889
2008-GS-46-01890

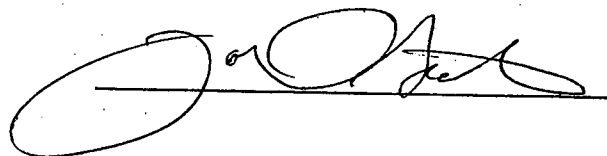
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J. Short

 J. Williams

 J. Geathers

Columbia, South Carolina

cc: Appellate Defender Elizabeth Franklin-Best
Assistant Attorney General David Spencer

FILED

26 January 2012

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

REICO LAMONT WELCH,

APPELLANT

SECOND AMENDED RECORD ON APPEAL

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

Attorney for Appellant

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit
Moss Justice Center
1675 York Highway, Ste. 1-A
York, SC 29745-7495
(803) 628-3020

Attorneys for Respondent

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1 MONDAY, MARCH 8, 2009 - COURT IN SESSION - 2:30 P.M.

2 THE COURT: MADAM SOLICITOR.

3 MS. LIPINSKI: YOUR HONOR, THIS IS THE MATTER OF THE STATE
4 VERSUS REICO LAMONT WELCH. I'LL HAND YOU UP THE INDICTMENTS.

5 THE COURT: IS THE STATE GOING FORWARD ON ALL THREE
6 INDICTMENTS?

7 MS. LIPINSKI: YES, YOUR HONOR. THEY'RE ALL RELATED. THE
8 DEFENDANT IS PRESENT IN THE COURTROOM. HE IS REPRESENTED BY STEVE
9 SCHUSTERMAN. THE STATE HAS SUBMITTED TO THE COURT A WITNESS LIST
10 FOR YOUR REVIEW. WE'RE NOT NECESSARILY GOING TO CALL ALL SIXTEEN
11 OF THESE. I THINK SOME OF THEM ARE KIND OF CHAIN WITNESSES, THAT I
12 THINK MR. SCHUSTERMAN AND I WILL BE ABLE TO WORK OUT EVENTUALLY.

13 BUT WE DO ANTICIPATE THIS TRIAL TAKING-- PERHAPS THE STATE
14 WILL FINISH TOMORROW OR WEDNESDAY MORNING.

15 THE COURT: VERY WELL.

16 MS. LIPINSKI: IN ADDITION TO THE WITNESS LIST, WE HAVE
17 SUBMITTED AN EVIDENCE LIST. THERE MAY BE A FEW ADDITIONS TO THAT,
18 BUT WE'VE TRIED TO PRE-MARK EVERYTHING. AND I'VE SHOWED THE
19 WITNESS LIST AND THE EVIDENCE LIST TO MR. SCHUSTERMAN PRIOR TO
20 CALLING THIS CASE. SO, I DON'T THINK THERE'S ANY QUESTION ABOUT ANY
21 OF THAT. HE MAY HAVE SOME OBJECTION TO RELEVANCE, BUT AT LEAST
22 DISCOVERY AND ALL THOSE TYPE THINGS HAVE BEEN RESOLVED.

23 MR. SCHUSTERMAN HAS A MOTION REGARDING THE BURGLARY, FIRST
24 DEGREE. I'M SHOWING YOU STATE'S EXHIBIT 13, MARKED FOR ID AT THIS

1 POINT. THAT'S A COPY OF THE CERTIFIED CONVICTION. I THINK THE COURT
2 MAY NEED THAT IN ORDER TO ENTERTAIN MR. SCHUSTERMAN'S MOTION.

3 THE ONLY OTHER EVIDENCE OR ISSUE THAT THE STATE NEEDS TO
4 RESOLVE IS THE CO-DEFENDANT, MR. GEORGE HILL, WHO THE STATE TOOK
5 INTO CUSTODY LAST MONDAY, THE STATE IS ASKING THAT HE WILL BE
6 COMPELLED TO TESTIFY IN THIS MATTER. HE TESTIFIED AT HIS GUILTY
7 PLEA. THE STATE HAS A PARTIAL TRANSCRIPT OF HIS TESTIMONY. BASED
8 ON HIS TESTIMONY, IT MAY BE NECESSARY TO USE THAT.

9 I'VE GIVEN MR. SCHUSTERMAN A COPY AND I'VE CODIFIED ANY
10 QUESTIONS THAT I ANTICIPATE COMING UP IN THE TRANSCRIPT, AND I'VE
11 AUTHENTICATED THE TRANSCRIPT SO THE COURT---

12 THE COURT: WAS THERE AN ELOCUTION IN THE TRANSCRIPT?

13 MS. LIPINSKI: YES. HE TALKS ABOUT WHAT THEY ALL DID, YOUR
14 HONOR. I DON'T THINK THERE'S ANY QUESTION ABOUT THE AUTHENTICITY
15 OF THAT, IF WE NEED IT AT THE APPROPRIATE TIME.

16 THE ONLY PRE-TRIAL MOTION THE STATE WOULD HAVE IS A VERY
17 BRIEF JACKSON V. DENNO. AND I DON'T KNOW IF YOU WANT TO HEAR MR.
18 SCHUSTERMAN'S POSITION ON THAT, OR THE STATE'S, BUT WE MIGHT WANT
19 TO HEAR HIS FIRST, BECAUSE THAT WILL---

20 THE COURT: LET'S HEAR MR. SCHUSTERMAN'S FIRST.

21 MR. SCHUSTERMAN: THANK YOU, YOUR HONOR. MAY IT PLEASE THE
22 COURT. AS HAS BEEN STATED, I REPRESENT MR. WELCH. THE MOTION THAT
23 I HAVE REGARDS THE ONE INDICTMENT FOR BURGLARY IN THE FIRST
24 DEGREE.

1 IT IS MY UNDERSTANDING, YOUR HONOR, THAT THERE ARE, AS YOU
2 ARE AWARE, THE STATUTE HAS SEVERAL DIFFERENT MEANS BY WHICH ONE
3 CAN ARRIVE AT A BURGLARY IN THE FIRST DEGREE.

4 THE COURT: AND ONE IS PRIOR CONVICTION.

5 MR. SCHUSTERMAN: THAT IS CORRECT, SIR.

6 THE COURT: TWO PRIOR CONVICTIONS.

7 MR. SCHUSTERMAN: TWO PRIOR CONVICTIONS. YOUR HONOR, IT IS
8 BEFORE YOU. MS. HERVEY HANDED UP TO YOU A CERTIFIED TRUE COPY OF
9 THE NORTH CAROLINA JUDGMENT AND COMMITMENT PAPERWORK.

10 AND I SUBMIT TO YOU THAT THIS, I BELIEVE BASED ON WHAT I HAVE
11 BEEN PRESENTED, THAT THE STATE IS TAKING THE POSITION THAT THESE
12 OFFENSES ARE THE TWO PRIOR, THESE REPRESENT THE TWO PRIOR
13 ADJUDICATIONS.

14 I TAKE EXCEPTION FOR TWO REASONS, YOUR HONOR. THE FIRST
15 REASON IS THAT I SUBMIT TO YOU THAT AS I LOOK AT THIS DOCUMENT, IT
16 APPEARS-- AND I DON'T WANT TO HOLD MYSELF OUT AS A MEMBER OF THE
17 NORTH CAROLINA BAR. BUT IT APPEARS THAT IT IS A CONSOLIDATION OF
18 CHARGES; THAT IT IS ONE DISPOSITION, UNLIKE--

19 CLEARLY, I UNDERSTAND THAT THE LAW IS THAT IF THERE WERE
20 MULTIPLE CONVICTIONS IN A SINGLE PLEA AND THERE WERE INDIVIDUAL
21 SENTENCES FOR DIFFERENT DATES, LIKE YOU CAME AND SOMEONE PLEAD
22 BEFORE YOU AND YOU HAD A SENTENCING SHEET FOR MULTIPLE COUNTS
23 NOT ON THE SAME DAY, THAT THOSE MIGHT BE USED FOR MULTIPLE
24 CONVICTIONS.

1 THAT IS NOT WHAT WE HAVE HERE, YOUR HONOR. HERE IN THIS CASE
2 WE HAVE ONE CONSOLI-- AND I USE THE TERM, CONSOLIDATION BECAUSE--
3 AND AGAIN, I DON'T KNOW IF THAT'S THE PROPER TERM. IT'S JUST FROM
4 SUCH RESEARCH AND FROM SPEAKING TO PEOPLE, I THINK THAT IS THE
5 TERM THAT IS USED. I'M NOT USING IT AS A TERM OF ART.

6 BUT IT APPEARS IT IS A CONSOLIDATION OF A NUMBER OF CHARGES,
7 BUT THERE'S ONLY ONE DISPOSITION. AND IT'S NOT MULTIPLE
8 DISPOSITIONS, ALL OF THEM RUNNING CONCURRENT TO ONE ANOTHER. IT'S
9 JUST-- IT WOULD BE THE EQUIVALENT, AS I UNDERSTAND, OF ONE
10 SENTENCING SHEET BEING GIVEN.

11 SO, I SUBMIT TO THE COURT THAT THIS IS NOT THE SITUATION WHERE
12 YOU HAVE MULTIPLE CONVICTIONS FOR BURGLARY THAT WOULD TRIGGER
13 THE STATUTE IN SOUTH CAROLINA.

14 MY SECOND ARGUMENT IS, YOUR HONOR, IS THAT THEY LABEL THESE
15 CONVICTIONS AS BEING-- ONCE AGAIN, IT'S MY UNDERSTANDING THAT
16 THERE ARE A NUMBER OF DIFFERENT LEVELS IN THE STATE OF NORTH
17 CAROLINA---

18 THE COURT: WHAT ABOUT AUTOMOBILES?

19 MR. SCHUSTERMAN: MY POINT BEING, YOUR HONOR, AGAIN NOT
20 SPEAKING AS AN EXPERT, THAT B&E, DEPENDING ON THE STATUTE CAN
21 RANGE ANYWHERE FROM A VEHICLE TO, ALL THE WAY UP TO A HOME. AND
22 I BELIEVE THAT THE COURT WOULD HAVE TO MAKE TYPE OF LEGAL
23 ANALYSIS TO WHATEVER HE PLEAD TO WOULD BE SIMILAR OR AKIN TO
24 WHAT OUR BURGLARY STATUTE IS.

1 THE COURT: LET ME LOOK REAL QUICK HERE. OUR STATUTE DOESN'T
2 REALLY REFER TO B&E, I DON'T THINK.

3 MR. SCHUSTERMAN: IT DOES NOT, SIR.

4 THE COURT: I THINK IT SAYS A PRIOR BURGLARY OR HOUSE
5 BREAKING OR A COMBINATION OF BOTH. I'M LOOKING TO SEE IF THERE'S
6 BEEN ANY AMENDMENT OF THAT STATUTE, ACCORDING TO THE
7 COURTROOM COPIES, ANYWAY.

8 (PAUSE TO REVIEW STATUTE)

9 IT DOESN'T APPEAR TO BE. FROM WHAT THE STATUTE SAYS, THAT
10 WOULD BE SUBSECTION A-2 OF 16-11-311. SUBSECTION A SAYS A PERSON
11 GENERALLY IS GUILTY OF BURGLARY IN THE FIRST DEGREE IF A PERSON
12 ENTERS A DWELLING WITHOUT CONSENT WITH THE INTENT TO COMMIT A
13 CRIME IN A DWELLING, AND EITHER-- AND IT LISTS SEVERAL THINGS.

14 SUBSECTION 2 SAYS THE BURGLARY-- AND THIS IS AN OR, EITHER/OR,
15 OR THE BURGLARY IS COMMITTED BY A PERSON WITH A RECORD OF TWO OR
16 MORE CONVICTIONS FOR BURGLARY OR HOUSE BREAKING OR A
17 COMBINATION OF BOTH.

18 MS. LIPINSKI, ADDRESS THAT ISSUE FOR ME.

19 MS. LIPINSKI: I'LL BE GLAD TO, YOUR HONOR.

20 THE COURT: HOW I KNOW THIS IS NOT B&E AUTO OR-- WE'RE NOT
21 SPEAKING IN TERMS OF BREAKING AND ENTERING, ANYWAY, OR LARCENY.
22 WE'RE SPEAKING IN TERMS OF A BURGLARY CONVICTION OR A HOUSE
23 BREAKING CONVICTION. AND I UNDERSTAND B&E COULD BE A HOUSE
24 BREAKING.

1 MS. LIPINSKI: MAY IT PLEASE THE COURT, YOUR HONOR. AND I
2 UNDERSTAND THAT MR. SCHUSTERMAN HAS A COPY OF THE NORTH
3 CAROLINA STATUTE. I'D LIKE TO REVIEW THAT. I DON'T WANT TO SPEAK TO
4 THAT.

5 THE COURT: ALL RIGHT.

6 MS. LIPINSKI: BUT IF YOU WOULD LOOK TO THE MIDDLE PART OF THE
7 CERTIFIED CONVICTION WHERE IT LISTS FIRST, THE LISTING OF OFFENSES,
8 AND GO OVER TO, THERE'S A COLUMN LISTING GS NUMBERS.

9 THE COURT: THAT'S THEIR STATUTES.

10 MS. LIPINSKI: YES, THE STATUTE NUMBER, 14-54A. AND IF YOU LOOK
11 AT NORTH CAROLINA STATUTE 1454-A, IT TALKS ABOUT THE BURGLARY OF A
12 BUILDING SPECIFICALLY. THERE ARE OTHER ONES LISTED, B, C, D, AND E,
13 WHICH DO COMPOSE OTHER VARIABLES OF BREAKING AND ENTERING. BUT
14 SPECIFICALLY THE STATUTE, AND ALSO, FOR THE COURT'S EDIFICATION,
15 THERE'S ACTUALLY A THIRD BREAKING AND ENTERING LISTED ON THE
16 SECOND PAGE AT THE TOP OF THAT GRID, A SEPARATE OFFENSE WITH A
17 SEPARATE FILE NUMBER.

18 SO, WHILE WE LISTED TWO PRIOR CONVICTIONS, THERE'S ACTUALLY
19 THREE FOUND ON HERE. BUT, YET AGAIN, IT STILL LISTS THE GENERAL
20 SESSIONS NUMBER AS 14-54A.

21 THE COURT: ALL RIGHT. AND WOULD YOU AGREE WITH ME THAT THIS
22 SEEMS TO BE ONE SENTENCE?

23 MS. LIPINSKI: THEY ARE CONSOLIDATED FOR THE PURPOSE OF
24 SENTENCING, YOUR HONOR. HOWEVER, IF YOU LOOK AT RIGHT ABOVE
25 WHERE IT SAYS HE WAS IN PRISON FOR EIGHT TO TEN MONTHS, RIGHT

1 ABOVE THAT IT SAYS THE COURT MAY CONSIDER THE EVIDENCE ORDERS OF
2 THE ABOVE OFFENSES BE CONSOLIDATED SOLELY FOR THE PURPOSE OF
3 JUDGMENT.

4 I THINK IT IS MORE, IT SEEMS, A SITUATION OF CONCURRENT
5 SENTENCE WHERE THEY'RE RUNNING EVERYTHING TOGETHER. BUT THEY
6 DO TALK VERY SPECIFICALLY IN HERE THAT THOSE OFFENSES ARE
7 CONSOLIDATED. THUS, THE NORTH CAROLINA COURT IS RECOGNIZING THAT
8 THERE ARE MULTIPLE OFFENSES BEING LISTED ON THIS. WHEN I SPOKE TO
9 THE CLERK, AND IT MAY BE THAT WE NEED TO BRING SOMEBODY DOWN
10 FROM NORTH CAROLINA, SHE INDICATED THAT IT WAS A JUDICIAL
11 EFFICIENCY ARGUMENT ONLY.

12 AND IF YOU LOOK OVER WHERE IT'S LISTING THE STATUTE, EACH OF
13 THE BREAKING AND ENTERINGS HAVE SEPARATE FILE NUMBER. THE
14 TWENTY-SIX, WHICH IS THE LEAD ONE AT THE TOP, LEFT-HAND CORNER OF
15 THE PAGE, BUT THEN IT THEN GOES ON TO LIST 05-CR-22-7331 FOR THE
16 SECOND BREAKING AND ENTERING. AND THEN IT GOES ON TO THE NEXT
17 PAGE TO LIST 05-CR-23-8779.

18 ALSO, IF YOU LOOK, VERY SPECIFICALLY, THEY HAVE SEPARATE
19 OFFENSE DATES. THE FIRST OF THESE OFFENSES OCCURS ON MARCH 10, 2005.
20 THE NEXT OCCURS ON MARCH 26, 2005. AND FINALLY, THE LAST ONE
21 OCCURS ON JUNE 6, 2005.

22 SO, WE THINK THE SITUATION IS MORE AKIN TO THE SITUATION OF
23 STATE V. KOON WHICH IS WHERE AN INDIVIDUAL PLEAD GUILTY TO
24 MULTIPLE OFFENSES ON ONE DAY, AND THAT WAS INDICATED THAT IT
25 SHOULD BE TAKEN AS ONE AND SAID SOMETHING WAS SO CLOSELY

1 RELATED THAT IT COULD NOT BE COUNTED FOR THE PURPOSES OF
2 ENHANCEMENT IN TERMS OF---

3 THE COURT: AND THAT'S UNDER THE-- IT'S USUALLY A CASE THAT'S
4 CONSIDERED UNDER THE LIFE WITHOUT PAROLE STATUTE, WHICH HAS A
5 SPECIFIC LEGISLATIVE ENACTMENT WHICH SAYS IF THEY ARE RELATED SO
6 CLOSE IN TIME OR OTHER CIRCUMSTANCES, THEN IT SHOULD BE
7 CONSIDERED AS ONE, AND IT DOES NOT COUNT AS A SEPARATE AND
8 DISTINCT OFFENSE.

9 MS. LIPINSKI: RIGHT. IN KOON, IT TALKS ABOUT THAT EVEN IF YOU
10 ARE PLEADING GUILTY ON THE SAME DAY, THE OFFENSES OCCUR ON
11 VASTLY DIFFERENT DAYS AND ARE NOT INTERTWINED IN SOME WAY WHERE
12 IT WAS AN ARMED ROBBERY OFFENSE WITH INNOCENT VICTIMS, WHICH WAS
13 BENJAMIN. OR WHERE IT WAS A DRUG TRAFFICKING CONSPIRACY WHERE
14 HE'S SELLING DAY AFTER DAY TO THE SAME PEOPLE, WHICH WAS---

15 THE COURT: DOESN'T KOON OVERRULE BENJAMIN ANYWAY?

16 MS. LIPINSKI: WELL, IT DOES DRAW A BRIGHT LINE. I THINK WHAT
17 THE COURT SAID WAS THAT BENJAMIN PERHAPS HAD BEEN TAKEN TOO FAR
18 WHEN WHAT THEY WANTED TO ESTABLISH WAS TO LOOK AT THE SPECIFIC
19 OFFENSE DATES AND TO LOOK AT WHETHER OR NOT THERE WAS THAT
20 CONNECTION.

21 THE STATE WOULD SUBMIT THAT BECAUSE OF THE VAST-- YOU
22 KNOW, THESE CRIMES ARE COVERED FOR THE MOST PART FOR ONE PERIOD,
23 FROM MARCH 10 THROUGH JUNE 6. AND FOR THAT REASON THEY DON'T
24 FALL INTO THE ANALOGIES WHERE THEY ARE BEING INTER-RELATED.

25 THE COURT: DO YOU HAVE THE KOON CASE?

1 MS. LIPINSKI: YES SIR.

2 THE COURT: I HAVE ACTUALLY READ THAT CASE VERY RECENTLY.

3 MR. SCHUSTERMAN: MAY I JUST BRIEFLY RESPOND?

4 THE COURT: YES SIR.

5 MR. SCHUSTERMAN: FIRST, AND I AM SURE THAT MS. LIPINSKI JUST
6 MISSPOKE. ACTUALLY, IT DOESN'T RUN FROM MARCH; IT RUNS FROM MAY
7 TO JUNE.

8 THE COURT: RIGHT.

9 MR. SCHUSTERMAN: IT STARTS ON MAY 10 AND RUNS, THESE
10 CHARGES RUN TO JUNE. SO, IT'S THIRTY DAYS, NOT NINETY DAYS.

11 THE COURT: RIGHT.

12 MR. SCHUSTERMAN: IF I MAY SAY, YOUR HONOR, I'M NOT TAKING
13 ISSUE WITH THAT ARGUMENT. I THINK MAYBE THE FOCUS HAS BEEN
14 SHIFTED A LITTLE BIT. MY FOCUS IS, YOUR HONOR, THAT IT'S TRUE THAT WE
15 HAVE A SITUATION WHERE IF IT WAS HERE IN SOUTH CAROLINA, YOU'D
16 HAVE INDIVIDUAL SENTENCING SHEETS; THAT THE PERSON IS SENTENCED
17 ON EACH INDIVIDUAL CHARGE.

18 THIS DOESN'T SAY THAT THE PERSON-- IF YOU READ THE SHEET THAT
19 WE WERE PROVIDED BY NORTH CAROLINA, IT DOES NOT SAY THAT EACH
20 AND EVERY COUNT SHALL HAVE EIGHT MONTHS TO TEN MONTHS AND ALL
21 SHALL RUN CONCURRENTLY OR TREATED AS ONE.

22 THE CONSOLIDATION OCCURS NOT POST-SENTENCING, BUT PRE-
23 SENTENCING. AND I THINK THAT IS THE DISTINCTION HERE. WHAT I'M
24 SAYING IS THAT, IF ON THIS SHEET IT SAYS EACH COUNT SHALL CARRY
25 EIGHT TO TEN MONTHS AND ALL SHALL RUN TOGETHER OR RUN

1 CONCURRENTLY, THE FACT THAT THEY HAVE JUDICIAL EFFICIENCY AND
2 HAVE ONE PIECE OF PAPER, I CAN UNDERSTAND. THE CONSOLIDATION
3 OCCURRED PRIOR TO THE SENTENCE BEING IMPOSED.

4 THE COURT: I UNDERSTAND THAT. BUT THIS IS A QUESTION THAT I
5 HAVE, AS I SEE IT: CAN YOU POINT ME TO ANY INDICATION IN THIS STATUTE
6 THAT THE LEGISLATURE INTENDED THAT ANY CONSOLIDATION OR
7 COMBINATION OF CHARGES WOULD EXCLUDE THOSE CHARGES OR COMBINE
8 THOSE CHARGES FOR THE PURPOSES OF 16-11-311? I MEAN, WHAT WE HAVE
9 TO DO IS LOOK AT THE LEGISLATIVE INTENT HERE.

10 WE HAVE STATUTES LIKE THE RECIDIVIST OR THE LIFE WITHOUT
11 PAROLE STATUTE WHERE THE LEGISLATURE HAS SAID IF WE HAVE
12 OFFENSES THAT ARE SO CLOSELY CONNECTED AS TO ESSENTIALLY BE ONE
13 CONTINUOUS ACT, WE DON'T WANT TO COUNT THOSE. WE'RE NOT GONNA
14 COUNT THOSE. OKAY?

15 WHERE IN THIS STATUTE OR IN ANYTHING RELATED TO THIS STATUTE
16 DO WE FIND A SIMILAR INTENT ON THE PART OF THE LEGISLATURE TO
17 EXCLUDE CHARGES THAT MAY HAVE BEEN COMBINED FOR THE PURPOSES
18 OF A PLEA? AND THAT'S JUST JUDICIAL EXPEDIENCY THAT RESULTS IN
19 THAT. WE ALL KNOW THAT. YOU BRING THEM ALL TOGETHER AND IT'S TO
20 YOUR CLIENT'S BENEFIT IF YOU CAN WRAP IT ALL UP AND GET IT BEFORE
21 ONE SENTENCING JUDGE. WE'VE ALL BEEN THERE. WE KNOW THAT.

22 BUT WHERE IS THERE ANYTHING TO INDICATE-- SHOW ME A CASE.
23 SHOW ME A LEGISLATIVE ENACTMENT WHERE EITHER THE LEGISLATURE OR
24 THE SUPREME COURT HAS TAKEN THE POSITION THAT CLOSELY RELATED
25 OFFENSES SHOULD NOT BE CONSIDERED SEPARATELY? OR WHERE THE

1 OFFENSES ARE PLEAD TOGETHER, THEY SHOULD NOT BE CONSIDERED AS A,
2 AS SEPARATELY. WHAT DO WE HAVE THERE?

3 MR. SCHUSTERMAN: I DON'T HAVE ANYTHING. I'M NOT GOING TO
4 MAKE A REPRESENTATION TO THE COURT. MY ARGUMENT WOULD BE-- AND
5 I CERTAINLY RESPECT THE COURT'S POSITION. MY ARGUMENT WOULD BE
6 SHOW ME WHERE THE LEGISLATURE SAID THAT ONE DISPOSITION SHALL BE
7 COUNTED MULTIPLE TIMES. I MEAN, THAT'S THE FLIP SIDE OF THAT
8 ARGUMENT, WITH ALL DUE RESPECT TO THE COURT.

9 THE COURT: WELL, THAT IS MAYBE THE OTHER SIDE. BUT I LOOK AT
10 THE CERTIFICATE THAT I'VE BEEN PASSED UP WHICH SHOWS THE-- I GUESS
11 THIS IS A SENTENCING SHEET AND IT SHOWS THERE WAS A CONVICTION FOR
12 A BREAKING AND ENTERING THAT OCCURRED ON JUNE 6, 2005. THERE WAS A
13 CONVICTION FOR A BREAKING AND ENTERING THAT OCCURRED ON MAY 26,
14 2005. THERE WAS A CONVICTION FOR A BREAKING AND ENTERING THAT
15 OCCURRED ON MAY 10, OF 2005. I HAVE THREE CONVICTIONS.

16 OF COURSE, I WOULD NOT ALLOW MS. LIPINSKI TO PROVE MORE THAN
17 TWO. I THINK THERE'S NO ARGUMENT ABOUT THAT. BUT SHOW ME
18 ANYTHING TO SUGGEST THAT THESE CONVICTIONS-- THERE WERE
19 SEPARATE OFFENSES. THERE WERE CONVICTIONS FOR EACH. WHY THEY
20 SHOULD NOT BE USED FOR THE PURPOSES OF THE STATUTE.

21 I MEAN, I CAN SEE WHERE AN ARGUMENT CAN CERTAINLY BE MADE,
22 IF THERE WAS AN ARGUMENT TO BE MADE AS TO WHETHER OR NOT IT
23 CONSTITUTES A CONVICTION SUCH AS WE SOMETIMES SEE ON CHARGES
24 WHERE THE STATUTE WILL SAY WHAT A CONVICTION MEANS OR WHAT A
25 CONVICTION IS OR ISN'T. WE USED TO RUN INTO THAT WITH DUI

1 CONVICTIONS WHERE SOMEONE HAD PLEAD NOLO CONTENDRE, AND THEY
2 CONSIDERED IT, AND CHANGED THE STATUTE TO INCLUDE IT.

3 MR. SCHUSTERMAN: WELL, MY ARGUMENT WOULD BE, YOUR HONOR,
4 THAT JUST FROM A VERY, FROM A PRACTICAL STANDPOINT THAT THERE
5 WOULD BE POSSIBLE A WAY, YOUR HONOR, TO WITH THIS-- THE WAY
6 NORTH CAROLINA IS SET UP, THERE WOULD BE NO WAY TO IN ANY WAY
7 SEGREGATE THOSE CHARGES. THERE IS ONE CONSOLIDATION. IF FOR
8 WHATEVER REASON THE COURT DECIDED IT WAS GOING TO ELIMINATE ONE
9 CHARGE, SOMEONE WAS WRONGFULLY CONVICTED, THAT ELIMINATION OF
10 THAT CHARGE WOULD NOT CHANGE BECAUSE IT IS ONE SENTENCE THAT
11 WAS GIVEN AS A RESULT OF THOSE CHARGES.

12 I GUESS MY POSITION IS THAT IT IS VERY DIFFERENT. WHILE I'M
13 AWARE THAT WE SOMETIMES DO THE EXACT, SAME THING IN SOUTH
14 CAROLINA, EACH CHARGE STANDS ON ITS OWN TWO FEET. THERE IS AN
15 INDIVIDUAL SENTENCE ON EACH CHARGE. ONE IS GIVEN A SENTENCE ON
16 EACH CHARGE. AND THEN OF COURSE, AT THE COURT'S LIBERTY, THEY RUN
17 IT CONCURRENT TO EACH OTHER.

18 THAT'S NOT THE CASE HERE. I DON'T KNOW WHAT WAS DONE IN THIS
19 MATTER. I WASN'T AT THE PLEA. I DON'T KNOW THAT. I DON'T KNOW THAT
20 MY CLIENT WAS EVER GIVEN ANY WARNING AS YOU DO, AS SOUTH
21 CAROLINA JUDGES DO ROUTINELY, TO SAY THAT THE CONVICTION ON THIS
22 COUNTS AS A PROPERTY OFFENSE, AND TWO OR MORE MAY RESULT IN THE
23 ENHANCEMENT OF A CHARGE OR THE POSSIBILITY OF GREATER
24 PUNISHMENT LATER ON. I DON'T KNOW THAT WAS DONE.

1 AND I GUESS IT'S ALL HOW YOU LOOK AT IT. WHAT I FOUND
2 INTERESTING AND MY ARGUMENT COMES FROM, NOWHERE ON THE
3 PAPERWORK FROM NORTH CAROLINA DOES IT EVER ACKNOWLEDGE AN
4 INDIVIDUAL CHARGE. AT NO TIME, DESPITE WHAT MS. LIPINSKI READS, IT
5 NEVER STATES THAT EACH CHARGE STANDS ON ITS ON.

6 AND AS A RESULT OF THAT, THE ONE TERM IS A TERM THAT WAS
7 GIVEN TO EACH SENTENCE. IT SPECIFICALLY TOSSES OUT CONSOLIDATION.
8 I'M ASSUMING THAT A CONSOLIDATION INDICATES ONE SENTENCE FOR THE
9 CHARGES AND, THUS, ONE CONVICTION.

10 IT WOULD SEEM THAT IF THE INTENT OF NORTH CAROLINA--
11 CERTAINLY I CAN'T ARGUE SOUTH CAROLINA. BUT, CLEARLY, THE STATE
12 OF NORTH CAROLINA COULD HAVE VERY EASILY SAID EACH CHARGE
13 STANDS ON ITS ON, AND AS SUCH EACH CHARGE WILL CARRY A SENTENCE
14 OF EIGHT TO TEN MONTHS, A MINIMUM OF EIGHT, A MAXIMUM OF TEN, AND
15 ALL SHALL RUN CONCURRENT TO ONE ANOTHER AND YOU HAVE THE SAME
16 ONE PIECE OF PAPER FOR JUDICIAL EFFICIENCY. IT DOESN'T SAY THAT.

17 IT SPECIFICALLY TALKS ABOUT CONSOLIDATION OF THE CHARGES.
18 AND I SUBMIT BASED ON THE NORTH CAROLINA-- BECAUSE WE HAVE TO
19 USE THEIR STATUTORY FRAMEWORK. IT'S NOT OUR STATUTE. IT'S THEIR
20 STATUTE THAT THIS IS ONE OFFENSE, THE WAY NORTH CAROLINA HAS
21 CONSTRUCTED IT.

22 MR. LIPINSKI: IT SEEMS TO ME THAT IF MR. SCHUSTERMAN COULD
23 POINT TO A NORTH CAROLINA CASE THAT INTERPRETS NORTH CAROLINA
24 CONVICTIONS IN THAT MANNER, THAT IF THAT IS THE CASE, IT WOULD BE
25 READILY ACCESSIBLE TO FIND WHERE THAT ISSUE HAS COME UP IN A NORTH

1 CAROLINA CASE, AND THEY INTERPRETED IT THAT WAY. AND I SUBMIT TO
2 THE COURT, AND I JUST LOOKED AT THE DEFENDANT'S RAP SHEET WHERE AT
3 LEAST BREAKING AND ENTERING, THREE SEPARATE TIMES, GUILTY THREE
4 SEPARATE TIMES.

5 IT WOULD SEEM TO ME THAT IF THEY WERE COLLAPSING IT DOWN
6 INTO ONE THE OTHER TWO OR THREE BREAKING AND ENTERINGS ON THIS
7 CONSOLIDATION WOULDN'T HAVE A GUILTY AND A SENTENCE FOLLOWING
8 HIM ON A RAP SHEET. SO, CLEARLY, NORTH CAROLINA IS ENTERING THEM
9 INTO THE NCIC SYSTEM AS THREE SEPARATE CONVICTIONS.

10 THE COURT: WE CERTAINLY HAVE A FORM OF CONSOLIDATION HERE
11 IN SOUTH CAROLINA. CHARGES ARE CONSOLIDATED EVERYDAY. WHAT
12 HAPPENS IS HE PLEADS TO ONE INDICTMENT, AND THE OTHER INDICTMENTS
13 ARE DISMISSED, AND HE HAS NO RECORD THEN FOR THE OTHER OFFENSES.
14 WE SEE THAT ON A REGULAR BASIS. I DON'T KNOW HOW MANY TIMES IN
15 THIS COURTROOM RIGHT HERE OR THE ONE DOWN THE HALL I HAVE ASKED
16 THE SOLICITOR, AS PART OF THE RECOMMENDATION, AS PART OF THE PLEA
17 AGREEMENT, A REDUCTION OF CHARGES OR DOES IT INVOLVE A DISMISSAL
18 OF CHARGES. AND I MAKE THEM PUT ON THE RECORD THAT CERTAIN
19 CHARGES ARE DISMISSED.

20 IN THIS CASE, AS WE OFTEN SEE, AND IN OTHER CASES, AND IN FACT
21 WE SEE IN THIS CASE, I'M HANDED UP FOUR-- IS IT FOUR OR THREE
22 INDICTMENTS? THREE INDICTMENTS. THIS IS WHAT THE STATE DECIDES TO
23 GO FORWARD ON. CERTAINLY, THAT BURGLARY IS A CONVICTION. THE
24 GRAND LARCENY IS A CONVICTION.

1 WHAT, MR. SCHUSTERMAN, WOULD OCCUR IF THIS LARCENY STATUTE
2 HAD AN ENHANCEMENT AS A PROPERTY CRIME LIKE YOU HAVE IN SOUTH
3 CAROLINA? IF HE WAS ENHANCED ON THE B&E, COULD HE NOT ALSO BE
4 ENHANCED LATER ON THE LARCENY? UNDER YOUR ANALYSIS, I DON'T
5 THINK SO, EITHER ONE. YOU COULDN'T ENHANCE HIM EITHER WAY.

6 AS I READ THE STATUTE, I SEE NOTHING TO INDICATE OTHERWISE. AS
7 I READ THIS STATUTE. AND I'LL TAKE A LOOK AT KOON IN A MOMENT IF
8 YOU'D LIKE ME TO LOOK AT IT AGAIN. BUT AS I READ THIS STATUTE THE
9 LEGISLATURE VERY CLEARLY SAYS-- THIS IS WHAT IT SAYS: THE
10 BURGLARY IS COMMITTED BY A PERSON WITH A PRIOR RECORD OF TWO OR
11 MORE CONVICTIONS FOR BURGLARY OR HOUSEBREAKING OR A
12 COMBINATION OF BOTH.

13 I THINK, CLEARLY, THE LEGISLATURE INTENDED TO INCLUDE THESE
14 OFFENSES IF HE PLEAD TO THEM. NORTH CAROLINA DIDN'T LET HIM OFF THE
15 HOOK ON EITHER CHARGE.

16 NOW, THE QUESTION THAT I'M MORE IMPRESSED WITH IS, OR THE
17 ARGUMENT, IS WHETHER OR NOT THE NORTH CAROLINA STATUTE
18 INVOLVING THE BREAKING AND ENTERING OF A DWELLING OR A BUILDING.
19 I THINK THAT'S CERTAINLY WHAT WAS INTENDED BY THE STATE.

20 NOW, I HAVEN'T HEARD FROM YOU ON THAT, BUT I CERTAINLY WILL.
21 I'M GLAD TO SEE THAT THE GENERAL STATUTE THAT HE PLEAD UNDER IS
22 INCLUDED ON THIS SENTENCING SHEET, OR RAP SHEET OR WHATEVER IT IS.
23 IT SAYS JUDGMENT AND COMMITMENT, ACTIVE PUNISHMENT FELONY. IT
24 WOULD APPEAR TO BE COMPARABLE TO OUR SENTENCING SHEET.

25 SPEAK TO ME AT 14-54A, THAT'S THE BREAKING AND ENTERING.

1 MR. SCHUSTERMAN: YES SIR, IT IS. AND YOUR HONOR, I BELIEVE YOU
2 WERE HANDED UP THE SAME SHEET OF PAPER OBVIOUSLY BY MS. LIPINSKI,
3 AND YOU'LL NOTICE---

4 MS. LIPINSKI: ACTUALLY, I NEVER GOT IT TO HIM TO LOOK AT.

5 THE COURT: CAN I LOOK AT IT?

6 MS. LIPINSKI: YES SIR, I'M SORRY.

7 THE COURT: 14-54A.

8 MR. SCHUSTERMAN: YES SIR.

9 MS. LIPINSKI: AT THE BOTTOM, YOUR HONOR.

10 THE COURT: ANY PERSON WHO BREAKS OR ENTERS A BUILDING WITH
11 INTENT TO COMMIT A FELONY OR LARCENY THEREIN SHALL BE PUNISHED
12 AS A CLASS H FELON.

13 MR. SCHUSTERMAN: YOU'LL NOTICE, YOUR HONOR, AT THE TOP OF
14 THE PAGE THERE IS SECTION 14-51, WHICH IS FIRST AND SECOND DEGREE
15 BURGLARY. THAT TERM IS USED. SO, THIS OBVIOUSLY ISN'T THEIR
16 BURGLARY STATUTE. THAT'S NOT WHAT IS DONE. SO, THE QUESTION IS---

17 THE COURT: IT'S A BREAKING AND ENTERING STATUTE.

18 MR. SCHUSTERMAN: RIGHT. AND WHAT'S INTERESTING IS THAT OUR
19 STATUTE DOESN'T REFER TO A BREAKING AND ENTERING STATUTE. OUR
20 STATUTE ONLY REFERS TO A BURGLARY OR A HOUSEBREAKING STATUTE.

21 THE COURT: THE BURGLARY STATUTES WERE AMENDED PROBABLY
22 BACK IN THE EARLY EIGHTIES. BEFORE THEN, AND I DON'T KNOW IF YOU
23 WERE PRACTICING THEN, BUT I CERTAINLY WAS, BUT IT WAS VERY COMMON
24 TO HAVE SOMEONE CHARGED WITH HOUSEBREAKING.

25 MR. SCHUSTERMAN: YES SIR.

1 THE COURT: LET ME SEE WHAT IT SAYS HERE.

2 (PAUSE TO REVIEW DOCUMENT)

3 14-51 REFERS TO A DWELLING HOUSE OR THE CURTILAGE WHEREIN
4 ANY BUILDING NOT A DWELLING HOUSE WHICH IS A ROOM USING AS A
5 SLEEPING COMPARTMENT, BURGLARY IN THE SECOND DEGREE.

6 (PAUSE TO REVIEW DOCUMENT)

7 THIS 14-54 SPEAKS OF BREAKING-- OR, 14-54A SPEAKS OF BREAKING
8 INTO ANY BUILDING WITH INTENT TO COMMIT A FELONY OR LARCENY
9 THEREIN. SO, WE CAN ASSUME BECAUSE THAT'S WHAT HE WAS CONVICTED
10 OF, THAT HE BROKE INTO A BUILDING WITH THE INTENT TO COMMIT A
11 FELONY OR LARCENY THEREIN.

12 NOW, WOULD THAT COME UNDER A BURGLARY, UNDER THE SOUTH
13 CAROLINA STATUTE? I THINK IT CERTAINLY WOULD. THAT MIGHT BE THIRD
14 DEGREE BURGLARY, MS. LIPINSKI. SIMPLY AT BEST BREAKING INTO A
15 BUILDING WITH THE INTENT TO COMMIT A LARCENY OR A FELONY? IS
16 THAT--

17 MS. LIPINSKI: WELL, THAT'S CERTAINLY-- OBVIOUSLY, THIS IS A LOT
18 OF CALLING THINGS DIFFERENT THINGS. BUT I THINK THE CASE LAW IS
19 QUITE CLEAR THAT IF YOU LOOK AT THE INTENT OF THE STATUTE IT
20 CLEARLY, IT IS DEFINING BREAKING AND ENTERING OF A BUILDING WITH
21 THE INTENT TO COMMIT A CRIME THEREIN, WHICH WE UNDER THE SOUTH
22 CAROLINA STATUTE DEFINE AS BURGLARY.

23 NORTH CAROLINA MAY CALL IT A DIFFERENT THING. THAT DOESN'T
24 MEAN THAT IT'S NOT WITHIN THE GUISE OF THE LEGISLATURE TO PUNISH

1 PEOPLE WHO ARE CONVICTED OF THESE TYPES OF CRIMES AND THE CASE
2 LAW DOESN'T SUPPORT THAT ANALOGY.

3 THE COURT: IF WE LOOK AT 14-54A, THAT HE HAS BEEN CONVICTED
4 OF, IF WE LOOK AT IT, DOES THAT NOT CONSTITUTE BURGLARY UNDER THE
5 SOUTH CAROLINA STATUTE? ANY PERSON WHO BREAKS AND ENTERS A
6 BUILDING WITH INTENT TO COMMIT A FELONY OR A LARCENY THEREIN.

7 CAN YOU TELL ME, MR. SCHUSTERMAN, IF THAT UNDER ANY
8 SCENARIO WOULD NOT CONSTITUTE BURGLARY IN THE STATE OF SOUTH
9 CAROLINA?

10 MR. SCHUSTERMAN: I AM NOT SURE THAT-- I HAVE SEVERAL
11 QUESTIONS. I DON'T KNOW THAT I CAN TELL YOU THAT. I'M TRYING TO
12 UNDERSTAND THE DIFFERENCE BETWEEN 14-51 AND 14-54. I'M NOT SURE
13 THAT I UNDERSTAND---

14 THE COURT: 14-51 AND 14-54, THE DIFFERENCE IS SIMPLY THAT IN 14-
15 51, THERE MUST-- IT CAN BE A BUILDING, IT CAN BE AN OUTBUILDING. IT
16 CAN BE A DWELLING. THE KEY IS THAT THAT BUILDING HAS A SLEEPING
17 APARTMENT OR COMPARTMENT LOCATED IN IT. THAT SEEMS TO BE WHAT
18 14-51 SPEAKS TO.

19 MR. SCHUSTERMAN: WELL, BASED ON MY UNDERSTANDING OF 14-54,
20 WHEN YOU LOOK AT THE DEFINITION OF 14-54, IT APPEARS THAT WOULD
21 DEFINE WHAT A BUILDING IS. IT APPEARS TO BE, SEEMS TO ENCOMPASS---

22 THE COURT: DWELLINGS AS WELL.

23 MR. SCHUSTERMAN: THAT'S CORRECT, SIR. AND YET, IF YOU LOOK AT
24 14-54, AND I DON'T HAVE IT IN FRONT OF ME. I THINK IT'S PARAGRAPH TWO,
25 OR SUBPARAGRAPH TWO, THERE'S SOME ACTION WHERE YOU CAN FALL

1 UNDER THAT STATUTE AND ONLY BE GUILTY OF A MISDEMEANOR. AND I'M
2 NOT SURE OF THAT. SO, I DON'T HAVE---

3 THE COURT: AND I DON'T KNOW WHAT DIFFERENCE IT WOULD MAKE
4 WHETHER NORTH CAROLINA CLASSIFIES IT AS A MISDEMEANOR OR NOT.

5 MR. SCHUSTERMAN: WELL, BECAUSE, LET'S SAY, YOUR HONOR, THAT
6 IF 14-- THE WAY I READ IT IS MAYBE 14-54 HAD SOME PROVISION, SOME
7 TRESPASSING PROVISION IN IT AS OPPOSED TO 14-51, WHICH TALKS ABOUT A
8 BURGLARY. I'M CERTAINLY NOT AN EXPERT ON NORTH CAROLINA LAW, BUT
9 IF THERE'S SOMEHOW A FACTUAL SCENARIO WHERE THAT IS ENCOMPASSED,
10 THEIR TRESPASSING OR SOME TYPE SITUATION IN THAT, IN 14-54, THAT
11 DIFFERENTIATION. I DON'T KNOW THE ANSWER TO THAT.

12 THE COURT: I THINK NORTH CAROLINA BREAKS IT DOWN JUST LIKE
13 SOUTH CAROLINA. NORTH CAROLINA PUTS THE GREATEST EMPHASIS ON
14 THE FACT THAT THERE IS A SLEEPING COMPARTMENT OR A SLEEPING AREA
15 IN THE BUILDING, UNDER 14-51. IT WOULD APPEAR THAT UNDER 14-51 YOU
16 COULD ACTUALLY BREAK INTO A DWELLING HOUSE. IF THAT DWELLING
17 HOUSE WAS NOT BEING USED. SAY, IT WAS AN ABANDONED DWELLING
18 HOUSE OR THERE WAS NO SLEEPING COMPARTMENT THEREIN, IT MAY NOT
19 QUALIFY AS A FIRST OR A SECOND DEGREE BURGLARY.

20 I THINK THAT SOUTH CAROLINA GOES FURTHER WITH CLASSIFICATION
21 OF BURGLARIES, FIRST AND SECOND DEGREES, AND THAT'S WHEN WE GET
22 DOWN INTO BREAKING AND ENTERING BUILDINGS.

23 THE THING THAT IMPRESSES ME IS THAT IF A PERSON IS CONVICTED
24 OF A CRIME PERTAINING TO ELEMENTS OF 14-54A, AND THAT'S WHAT IS
25 INDICATED ON THIS SHEET, THAT IS, THE PERSON BROKE OR ENTERED INTO

1 ANY BUILDING, AND HE HAD THE INTENT TO COMMIT A FELONY OR A
2 LARCENY THEREIN, THAT WOULD BE THE INTENT. IT'S A LITTLE NARROW,
3 BUT IT WOULD STILL BE THE SAME AS SOUTH CAROLINA, BE AN INTENT TO
4 COMMIT A CRIME THEREIN. THEN HE HAS COMMITTED BURGLARY UNDER
5 THE SOUTH CAROLINA BURGLARY STATUTE, THE SAME THING AS THE
6 SOUTH CAROLINA BURGLARY STATUTE.

7 MR. SCHUSTERMAN: THANK YOU.

8 THE COURT: ALL RIGHT, SIR. I'M GOING TO ALLOW IT.

9 MS. LIPINSKI: JUDGE, WE DO HAVE A JURY WAITING. I THINK WE HAVE
10 A JACKSON V. DENNO HEARING, IS THE ONLY PRE-TRIAL WE HAVE LEFT.
11 JUST FOR THE COURT'S NOTIFICATION, INVESTIGATOR GURGANUS GOES
12 DOWN TO SERVE A BURGLARY IN THE FIRST DEGREE WARRANT ON REICO
13 WELCH, STARTS TO TELL HIM WHAT'S GOING ON. REICO TELLS HIM, THE
14 DEFENDANT TELLS HIM, IF YOU DON'T SERVE THE WARRANT, I'LL TELL YOU
15 WHERE THE STOLEN PROPERTY IS. INVESTIGATOR GURGANUS TELLS HIM HE
16 CAN'T MAKE THAT DEAL, AND THAT'S PRETTY MUCH THE END OF THE
17 CONVERSATION.

18 IF YOU WANT TO, WE CAN GO AHEAD AND PICK THE JURY AND
19 PERHAPS DO THE JACKSON V. DENNO HEARING AT A BREAK OR LATER ON
20 TODAY SO WE DON'T KEEP THEM WAITING TOO LONG, OR WE CAN CUT THE
21 REST OF THE PANEL LOOSE.

22 THE COURT: ALL RIGHT. VERY WELL. LET'S BRING IN THE JURY, THEN.
23 MS. LIPINSKI, DO YOU INTEND TO TRY TO USE ALL THREE CONVICTIONS? I
24 PRETTY MUCH INDICATED THAT I WANT YOU TO USE TWO.

1 MS. LIPINSKI: I'D RATHER-- AND WE CAN EVEN DO THE JACKSON V.
2 DENNO THING FIRST THING TOMORROW MORNING. I MEAN, I DON'T THINK
3 IT'S THAT---

4 THE COURT: OKAY.

5 MS. LIPINSKI: BECAUSE I DO HAVE A WITNESS WHO WOULD LIKE TO
6 LEAVE TO GO TO FLORIDA TOMORROW FOR A FUNERAL AND FAMILY
7 MATTER, I'D LIKE TO GET TO HIM IF AT ALL POSSIBLE.

8 THE COURT: OKAY. DO YOU HAVE A COPY OF THIS NORTH CAROLINA
9 STATUTE?

10 MS. LIPINSKI: YES SIR.

11 THE COURT: I'D LIKE TO MAKE A PART OF THE RECORD.

12 MS. LIPINSKI: I'LL REPLACE THAT FIRST THING TOMORROW MORNING
13 AND PRINT OUT A MORE APPROPRIATE COPY.

14 THE COURT: MADAM COURT REPORTER, CAN YOU GO AHEAD AND
15 MARK THIS SECTION HERE AS A COURT'S EXHIBIT?

16 (WHEREUPON COPY OF STATUTE WAS MARKED AS COURT'S EXHIBIT
17 ONE)

18 ARE YOU GOING TO INTRODUCE THE ONE, THE STATE'S EXHIBIT 13
19 LATER?

20 MS. LIPINSKI: YES SIR.

21 MR. SCHUSTERMAN: YOUR HONOR, MAY I SAY, OR ASK, I ASSUME
22 THAT THIRTEEN IS A CERTIFIED NORTH CAROLINA CONVICTION?

23 THE COURT: THAT'S CORRECT.

1 MR. SCHUSTERMAN: I WOULD ASK THAT THE TWO LARCENIES AND
2 THE POSSESSION OF STOLEN GOODS BE REDACTED. I DON'T KNOW HOW
3 THAT RELATES---

4 THE COURT: THAT'S THE TWO ON THE BACK?

5 MR. SCHUSTERMAN: NO SIR. THAT'S THREE OF THE FIVE ON THE TOP.

6 THE COURT: ALL RIGHT. HE'S GOT A GOOD POINT THERE, MS. LIPINSKI.

7 MS. LIPINSKI: YES SIR. AND I PREVIOUSLY STATED, IF THERE'S
8 ANYTHING ON HERE THAT HE FINDS OBJECTIONABLE, THE STATE WILL
9 ENTERTAIN ANY MOTION ON HIS PART TO REDACT. I DON'T HAVE ANY
10 PROBLEM REDACTING THAT PART.

11 THE COURT: ALL RIGHT.

12 MS. LIPINSKI: I CAN WHITE IT OUT AND PRESENT ANOTHER COPY. I'D
13 LIKE TO KEEP ONE GOOD COPY FOR THE RECORD THAT HAS EVERYTHING ON
14 IT. BUT IF HE WANTS TO LOOK AT IT TONIGHT, OR HE WANTS THE SENTENCE
15 OMITTED, OR CERTAINLY ANYTHING LIKE THAT, THEN CERTAINLY WE WILL
16 GO DOWN THAT ROAD.

17 THE COURT: VERY WELL. I'LL HAND THIS BACK TO YOU, THEN.

18 MS. LIPINSKI: THANK YOU, YOUR HONOR. YOUR HONOR, WE CAN
19 LEAVE THAT AS A GOOD COPY OF STATE'S EXHIBIT NUMBER 13, AND I'LL
20 MARKED THE REDACTED VERSION LATER.

21 THE COURT: YOU HAVEN'T INTRODUCED IT YET, I DON'T THINK.

22 MS. LIPINSKI: I THINK I MARKED IT FOR ID.

23 THE COURT: YOU'VE MARKED IT.

24 MS. LIPINSKI: AND WE CAN JUST LEAVE IT AT THAT AND I WILL MOVE
25 IT INTO EVIDENCE.

1 THE COURT: WE'LL JUST GIVE IT BACK TO YOU THEN UNTIL YOU MOVE
2 IT INTO EVIDENCE.

3 MS. LIPINSKI: THANK YOU, YOUR HONOR.

4 THE COURT: THANK YOU. VERY WELL. LET'S BRING THAT JURY
5 PANEL IN.

6 (WHEREUPON THE JURY ENTERED THE COURTROOM)

7 GOOD AFTERNOON, LADIES AND GENTLEMEN OF THE JURY. YOU AS A
8 SPECIFIC GROUP HAVE BEEN DRAWN FOR THIS CASE WE'RE ABOUT TO BEGIN.
9 AND WE'RE ABOUT TO BEGIN THE CASE OF THE STATE OF SOUTH CAROLINA
10 VERSUS REICO LAMONT WELCH. MR. WELCH HAS BEEN CHARGED WITH
11 SEVERAL OFFENSES BY INDICTMENT. THESE INDICTMENTS ARE NOTHING
12 MORE THAN CHARGES. THEY ARE NOT EVIDENCE IN ANY WAY
13 WHATSOEVER AND YOU SHOULD NOT CONSIDER THEM AS EVIDENCE. AN
14 INDICTMENT IS NOTHING MORE THAN THE DOCUMENT BY WHICH A CHARGE
15 IS BROUGHT INTO THE COURT.

16 MR. WELCH HAS BEEN CHARGED WITH BURGLARY IN THE FIRST
17 DEGREE. IT IS ALLEGED THAT ON THE 13TH DAY OF MARCH OF 2008, THAT HE
18 WILLFULLY AND UNLAWFULLY ENTERED THE DWELLING OF A LYNN G.
19 WATKINS, LOCATED AT 1780 MEADOW DALE ROAD IN ROCK HILL, AND HE
20 DID SO WITHOUT CONSENT AND WITH THE INTENT TO COMMIT A CRIME
21 THEREIN.

22 HE IS ALSO INDICTED FOR GRAND LARCENY. IT IS ALLEGED THAT ON
23 THAT DAY WHILE IN MS. LYNN WATKIN'S HOME, AGAIN, LOCATED AT 1790
24 MEADOW DALE ROAD IN ROCK HILL, THAT HE TOOK GOODS BELONGING TO
25 THAT PERSON VALUED AT MORE THAN \$1000.

1 MR. SCHUSTERMAN: I WILL NOT.

2 MS. LIPINSKI: NO SIR.

3 THE COURT: SO, NEITHER ONE OF YOU NEED TO MAKE
4 ARRANGEMENTS IN THAT REGARD?

5 MR. SCHUSTERMAN: NO SIR, YOUR HONOR.

6 MS. LIPINSKI: NO SIR.

7 THE COURT: IF NECESSARY, I WILL AFFORD YOU THE
8 OPPORTUNITY TO SEE HIM AT THE JAIL, IF THAT WERE THE CASE.

9 MR. SCHUSTERMAN: THANK YOU, YOUR HONOR.

10 MS. LIPINSKI: IF IT TURNS OUT THAT HE WILL NEED TO SEE HIM,
11 I WILL MAKE HIM AVAILABLE AT THE JAIL AT 8:30 IN THE MORNING
12 AND THAT WILL BE PLENTY OF TIME BEFORE COURT.

13 THE COURT: YOU'RE BOTH GOING TO LOOK AT THE ISSUE OF
14 PRIVILEGE OVER THE EVENING?

15 MS. LIPINSKI: YES, YOUR HONOR.

16 THE COURT: I WOULD ASK YOU BOTH TO LOOK AT THE THRIFT
17 CASE AS FAR ANY IMMUNITY THAT MIGHT BE GRANTED.

18 MS. LIPINSKI: YES, YOUR HONOR. THE STATE UNDERSTANDS
19 THAT HE WOULD HAVE TRANSACTIONAL IMMUNITY AND NOT LIMITED
20 IMMUNITY.

21 THE COURT: THAT'S CORRECT. LIMITED IMMUNITY IS NOT
22 AUTHORIZED IN THIS CASE, EXCEPT IN THRIFT. IF YOU WOULD, BE
23 PREPARED TO ARGUE THAT. LET'S SAY ABOUT 9:15 IN THE MORNING.

24 MS. LIPINSKI: YOUR HONOR, THAT'S FINE. MR. SCHUSTERMAN
25 AND I HAVE REVIEWED AND I WILL PASS UP TO THE COURT THE

1 CERTIFIED CONVICTIONS THAT WERE ORIGINALLY PRESENTED TO THE
2 COURT IN PRE-TRIAL, WE'RE DOWN TO ONE PAGE. AND WE HAVE, AT
3 THE REQUEST OF MR. SCHUSTERMAN, WHITED OUT THE POSSESSION
4 OF STOLEN GOODS AND LARCENY CONVICTION, SO THAT IT NOW ONLY
5 REFLECTS THE TWO CONVICTIONS FOR BREAKING AND ENTERING.

6 THE COURT: I THINK THAT'S ALL THAT'S NECESSARY FOR YOUR
7 PURPOSES, IS THE TWO B&E?

8 MS. LIPINSKI: THAT'S RIGHT. AND I HAVE ALSO OFFERED TO MR.
9 SCHUSTERMAN IF THERE ARE ANY OTHER MISCELLANEOUS ITEMS ON
10 THIS PAPER THAT HE WOULD NOT WANT, THAT WE WOULD WHITE
11 THAT OUT ALSO. YOU WANTED US TO AGREE ON THAT AND I WANT TO
12 LET YOU KNOW WE WERE ABLE TO ACCOMPLISH THAT TODAY. SO,
13 THE STATE WILL BE MOVING THAT INTO EVIDENCE TOMORROW
14 MORNING AS WELL.

15 THE COURT: HOW ABOUT THE NORTH CAROLINA STATUTE?

16 MS. LIPINSKI: THAT WAS A COURT'S EXHIBIT? YES SIR, YOUR
17 HONOR.

18 THE COURT: YOU CAN MOVE IT IN.

19 MS. LIPINSKI: I THINK YOUR ARGUMENT ABOUT WHAT YOU ARE
20 GOING TO ALLOW HIM TO ARGUE IN TERMS OF THE CLOSING
21 ARGUMENT ABOUT WHETHER OR NOT IT'S A BURGLARY FIRST OR A
22 BURGLARY SECOND AND WHAT THE JURY--

23 BECAUSE, FROM THIS B&E 14-54A, I DON'T KNOW THAT THEY
24 CAN MAKE THAT CONCLUSION WITHOUT A COPY OF THE STATUTE
25 THAT YOUR HONOR CAN ACKNOWLEDGE.

1 THE COURT: I THINK THAT YOU ARE ENTITLED TO IT.

2 MS. LIPINSKI: AND I DON'T KNOW IF WE NEED TO PUT THE
3 STATUTE IN. I DON'T KNOW IF MR. SCHUSTERMAN'S ARGUMENT IS
4 GOING TO BE LIMITED CONSOLIDATION, OR IS HE'S GOING TO
5 ULTIMATELY ARGUE THAT THAT DOESN'T CONSTITUTE A BURGLARY.

6 MR. SCHUSTERMAN: I DON'T KNOW THAT-- QUITE CANDIDLY,
7 SIR, AS WE'VE SPOKEN ABOUT THIS. I DON'T KNOW THAT IN GOOD
8 FAITH I CAN ARGUE THAT THE WAY IT IS WRITTEN IT IS NOT
9 SEMANTICALLY SIMILAR TO OUR BURGLARY STATUTE.

10 THE COURT: THAT'S A TWO-EDGED SWORD FOR YOU.

11 MR. SCHUSTERMAN: YES SIR. MY ARGUMENT, AS WE SPOKE
12 ABOUT EARLIER, I WAS GOING TO ARGUE THE CONSOLIDATION
13 ARGUMENT, TAKING EXCEPTION TO RULE---

14 THE COURT: I THINK THAT THIS IS VERY SIMILAR TO WHAT I
15 HAD IN JACKSON V. DENNO. I CAN MAKE FINDINGS AND IT CAN STILL
16 BE ARGUED BEFORE THE JURY THAT THE CONFESSION IS NOT
17 VOLUNTARY AND THE JURY CAN MAKE ITS OWN FINDING. IT CAN BE
18 VERY SIMILAR IN THIS SITUATION.

19 MS. LIPINSKI: SO, YOUR HONOR, TO BE CLEAR, PART OF YOUR
20 ARGUMENT IS GOING TO BE SIMILAR TO DENNO WHERE IT IS, THE
21 PRELIMINARY DETERMINATION---

22 THE COURT: I HAVEN'T BEEN ASKED TO CHARGE. AND I COULD
23 CRAFT A DENNO-TYPE ARGUMENT THAT I CAN ADD ONTO BURGLARY,
24 FIRST DEGREE. I CAN GIVE SOMETHING LIKE THAT IF THE DEFENSE
25 WANTS IT.

1 MR. SCHUSTERMAN: WELL, I CERTAINLY WOULD WANT
2 NOTHING MORE THAN YOU'VE DETERMINED IS ITS ADMISSIBILITY AND
3 WEIGHT THAT YOU ARE TO GIVE IT TOWARD THE ULTIMATE FACT IN
4 16-13-311.

5 THE COURT: RIGHT. THAT'S PART OF MY GENERAL CHARGE.

6 MS. LIPINSKI: IM NOT OPPOSED TO THE CONSOLIDATION
7 ARGUMENT, OR I WON'T BE TOMORROW, UNLESS I CAN FIND SOME
8 COMPELLING CASE LAW. BUT WHAT I'M TRYING TO UNDERSTAND IS,
9 DO I MOVE THE STATUTE IN, OR DO YOU CLAIM THESE ARE PART OF A
10 PRIOR BURGLARY?

11 THE COURT: THE ONLY WAY YOU COULD DO THAT WOULD BE
12 BY STIPULATION. BECAUSE, AGAIN, IT IS ONE OF THE ELEMENTS OF
13 YOUR DEFENSE, THAT'S YOUR AGGRAVATION. OKAY? AND YOU HAVE
14 TO ESTABLISH THE TWO CONVICTIONS IN NORTH CAROLINA AND THAT
15 THEY ARE A HOUSEBREAKING OR A BURGLARY.

16 MS. LIPINSKI: CERTAINLY. AND I---

17 THE COURT: IF YOU'VE GOT A SHEET THAT SAYS B&E YOU
18 MIGHT WANT TO PUT IN THE STATUTE TO CLEARLY INDICATE THAT
19 THIS IS WHAT IT IS. SHORT OF THAT, YOU WOULD NEED A
20 STIPULATION.

21 MS. LIPINSKI: OR I COULD PUT SOMEBODY WITH A NORTH
22 CAROLINA LICENSE ON THE STAND AND HAVE THEM SPIT IT OUT.

23 THE COURT: SURE.

24 MS. LIPINSKI: THAT ISSUE WILL BE RESOLVED TONIGHT ONE
25 WAY OR THE OTHER.

1 YESTERDAY, MR. SCHUSTERMAN, ON THE PART OF THE
2 DEFENDANT, REQUESTED THAT BECAUSE WE DID NOT STIPULATE TO
3 THE TWO PRIOR CONVICTIONS, AND THAT IS A FACTUAL MATTER FOR
4 THE JURY, THAT HE BEGAN TO ARGUE A LEGAL CONSOLIDATION
5 ARGUMENT THAT HE MADE PRE-TRIAL. AND THE STATE INITIALLY
6 THOUGHT ABOUT THAT, AND I THOUGHT ABOUT IT AGAIN MORE LAST
7 NIGHT. AND IT'S THE STATE'S POSITION THAT PURSUANT TO THE
8 HOLDING OF STATE V. KOON WHICH STATES THAT AS LONG AS
9 BURGLARIES OCCUR ON SEPARATE DAYS AND ARE NOT CLOSELY
10 CONNECTED IN TIME SO AS TO CONSTITUTE ON TRANSACTION, THEN
11 THE STATE OF SOUTH CAROLINA WILL TREAT THEM AS SEPARATE AND
12 DISTINCT OFFENSES FOR THE PURPOSE OF ENHANCING.

13 BASED ON THAT, THE STATE OBJECTS TO MR. SCHUSTERMAN
14 ARGUING CONSOLIDATION TO THE JURY BECAUSE WE BELIEVE THAT
15 IT GOES AGAINST THE LAWS OF SOUTH CAROLINA; THAT THEY MAY BE
16 THE LAW. NORTH CAROLINA, ALTHOUGH I COULDN'T FIND ANY
17 SUPPORT FOR THAT, SO WE CERTAINLY FEEL THAT THERE'S A LAW IN
18 SOUTH CAROLINA THAT WE WOULD NEVERTHELESS TREAT IT AS
19 THAT, DESPITE THE EFFORTS OF JUDICIAL EFFICIENCY THAT NORTH
20 CAROLINA WENT TO, TO PUT IT ON ONE JUDGEMENT AND CONVICTION.

21 I ALSO JUST WANT TO MAKE THE COURT AWARE THAT
22 YESTERDAY, BELIEVING THAT WE WERE HEADED TOWARDS A
23 DIFFERENT CLOSING ARGUMENT, THE STATE DID ACKNOWLEDGE
24 THAT WE WOULD ACCEPT A REDACTED VERSION OF THE JUDGMENT

1 AND COMMITMENT THAT WOULD ONLY REQUEST A FEW BREAKING
2 AND ENTERINGS AND NOT DEAL WITH ANCILLARY CHARGES.

3 HOWEVER, IF THE COURT IS GOING TO CONTINUE WITH THEIR
4 DECISION, AND WE RESPECT THE COURT'S DECISION REGARDING
5 CONSOLIDATION, BECAUSE I CERTAINLY THINK WE ARE MOVING
6 BEYOND TO SOME RESPECTS AND THE COURT MAY NOT FLUSH OUT,
7 SPECIFICALLY THAT THE STATE FEELS THE NON-REDACTED VERSION
8 OF THE CERTIFIED CONVICTION IS APPROPRIATE BECAUSE THAT
9 BECOMES THE STATE'S RESPONSE TO THE ARGUMENT THAT NORTH
10 CAROLINA WOULD NOT JUST CONSOLIDATE THESE TWO BREAKINGS
11 AND ENTERINGS, BUT THEY WERE CONSOLIDATING TWO LARCENIES
12 AND BREAKING AND ENTERING AND A POSSESSION OF STOLEN GOODS.

13 AND I UNDERSTAND THAT YOUR INITIAL CONCERN WAS THE
14 PREJUDICIAL EFFECT OF THIS. HOWEVER, THE STATE FEELS THAT
15 SINCE IT'S ALMOST ANCILLARY THAT THESE CHARGES OF BREAKING
16 AND ENTERING THAT THEY WOULD BE SOME LARCENY INVOLVED,
17 AND WE FIND OUT THAT THE NORTH CAROLINA STATUTE, THAT ALSO
18 LARCENY IS ONE OF THE ELEMENTS OF THAT STATUTE, AND THE
19 STATE FEELS THAT THE PROBATIVE VALUE IN ASKING IS NOT
20 OUTWEIGHED BY THE PREJUDICIAL EFFECT.

21 I ALSO WANT TO INQUIRE---

22 THE COURT: LET ME ASK YOU THIS, IF I MAY.

23 MS. LIPINSKI: YES SIR.

24 THE COURT: WHAT IS THE PRESENT VALUE OF A LARCENY IN
25 THIS CASE?

1 MS. LIPINSKI: I THINK IT BECOMES PROBATIVE SOLELY TO
2 RESPOND TO HIS ARGUMENT, TO MR. SCHUSTERMAN'S ARGUMENT,
3 THAT IT'S ONLY ONE BREAKING AND ENTERING, AND THEY WERE
4 CONSOLIDATING EVERYTHING AND THEY TREATED IT AS ONE.

5 I THINK IF THE JURY KNEW THE NUMBER OF OFFENSES AND
6 THAT IT WASN'T JUST TWO SIMILAR OFFENSES, THAT THAT WOULD BE
7 OUR RESPONSE TO THAT.

8 THE COURT: LET ME TELL YOU WHAT I THINK ABOUT THAT.
9 WHAT IS THE DATE OF THE TWO B&E ON THE FIRST PAGE?

10 MS. LIPINSKI: ONE'S ON JUNE 6 AND ONE'S ON MAY 26.

11 THE COURT: AND WHAT IS THE DATE OF THE ONE ON THE THIRD
12 PAGE?

13 MS. LIPINSKI: IT'S MAY 10.

14 THE COURT: SO, IT'S ESSENTIALLY BETWEEN MAY 10 AND JUNE
15 6?

16 MS. LIPINSKI: YES SIR.

17 THE COURT: I HAVE SOME CONCERN THAT PERHAPS THEY MAY
18 FIND THESE TO BE SO CLOSE IN TIME AS TO ESSENTIALLY BE ONE. BUT
19 WHAT WE HAVE HERE IS THE THIRD OFFENSE OCCURRING BETWEEN
20 THE FIRST TWO OFFENSES. AND THERE'S SOME TESTIMONY TO
21 OTHERWISE SEGREGATE THE OFFENSES. I DON'T SEE THE NEED IN
22 PUTTING IN A THIRD OFFENSE WHEN IN FACT THE STATE IS ONLY
23 REQUIRED TO SHOW--

24 TOO, THAT THERE WAS A SOUTH CAROLINA SUPREME COURT
25 CASE THAT RECENTLY CAME OUT IN THE LAST TWO YEARS, I BELIEVE,

1 - I CANNOT RECALL THE CASE - ON THIS VERY ISSUE; THAT IS,
2 WHETHER OR NOT THE STATE COULD PUT UP EVIDENCE OF MULTIPLE
3 OFFENSES WHEN IN FACT, FOR ENHANCEMENT PURPOSES, THEY ONLY
4 NEEDED, I THINK, TWO PRIORS. AND I CANNOT RECALL THE CASE, BUT
5 IT IS A VERY RECENT CASE.

6 IF THE THIRD OFFENSE HAD OCCURRED, THE OFFENSE ON THE
7 THIRD PAGE, HAD OCCURRED SOMETIME BEYOND, SOMETIME
8 FURTHER DISTANCED FROM THE LAST ONE, I WOULD AGREE WITH YOU
9 THAT IT SHOULD BE ADMITTED BECAUSE THERE WOULD BE A CHANCE
10 THAT THE JURY COULD SAY, WELL, THE MAY 6 OFFENSE IS, YOU
11 KNOW, WAS WITHIN, WHAT WAS IT, FORTY DAYS? IT WAS MAY 10
12 AND---

13 MS. LIPINSKI: AND JUNE 6. SO, YOU'RE LOOKING AT ABOUT
14 TWENTY-SIX DAYS.

15 THE COURT: SO TWENTY-SIX DAYS. WELL, IF WE HAD ONE THAT
16 WAS ON MAY 1, I WOULD SAY THAT'S EVEN MORE DISTANT AND I
17 WOULD ALLOW TESTIMONY CONCERNING THAT. I THINK THAT IT'S
18 APPROPRIATE TO PROVE THE TWO. I DON'T THINK THAT THERE'S ANY
19 ADDITIONAL PROBATIVE VALUE AS TO THE THIRD ONE, THE ONE
20 BEING ON THE THIRD PAGE. I DON'T THINK IT WOULD ADD TO YOUR
21 CASE IN ANY WAY, UNLESS YOU HAVE SOME ARGUMENT THAT WOULD
22 CONVINCE ME OTHERWISE, NOT WITH THE FACT THAT YOU HAVE THE
23 ONE IN BETWEEN.

1 MS. LIPINSKI: AND THE STATE'S ONLY POSITION IS, THE DATES
2 ARE MAY 26 AND JUNE 6. SO, YOU'RE LOOKING AT A TEN-DAY
3 STRETCH. THE ONE ON THE---

4 THE COURT: WAIT A MINUTE. I MAY HAVE MISUNDERSTOOD
5 YOU. THE ONE FROM THE FIRST PAGE, WHEN?

6 MS. LIPINSKI: MAY 26.

7 THE COURT: RIGHT.

8 MS. LIPINSKI: AND JUNE 6.

9 THE COURT: OKAY, ALL RIGHT.

10 MS. LIPINSKI: THE ONE ON THE THIRD PAGE IS MAY 10.

11 THE COURT: WELL, THAT'S EXACTLY WHAT I CONTEMPLATED.
12 THE ONE ON THE SECOND PAGE IS MUCH MORE DISTANT IN TIME.

13 MS. LIPINSKI: RIGHT. SO, I THINK I OUGHT TO GET THE MAY 10
14 AND JUNE 6.

15 THE COURT: EXACTLY. THAT'S MY POSITION THAT I TAKE.

16 MR. SCHUSTERMAN: AND I HAVE NO OBJECTION TO THAT. AND
17 THAT'S NOT WHERE WE WERE GOING. MY OBJECTION WAS TO THE
18 COLLATERAL CHARGES COMING IN. IF YOU'RE ACCUSED OF TWO OR
19 THREE CHARGES AND I'M GOING TO ARGUE CONSOLIDATION, OR BE
20 ALLOWED TO, THEY ARE GOING TO TAKE THE TWO THAT ARE MOST
21 REMOTE IN TIME, THAT OBVIOUSLY ARE NOT GOING TO GIVE ME THE
22 ONES THAT ARE CLOSEST IN TIME. I UNDERSTAND THAT.

23 THE COURT: WELL, IF THE DEFENSE IS TAKING THE POSITION
24 THAT THESE WERE, ARE CONSOLIDATED OFFENSES THAT THEY'RE SO

1 CLOSE IN TIME, THEY SHOULD BE CONSIDERED AS ONE, I WOULD
2 CERTAINLY ALLOW THE STATE TO DO ALL THREE.

3 NOW, I'M NOT SURE ABOUT THESE LARCENIES. I'M NOT MOVED
4 BY YOUR ARGUMENT THAT THE LARCENIES SHOULD COME IN, MS.
5 LIPINSKI. UNDER WHAT THEORY SHOULD THESE LARCENIES BE ABLE
6 TO COME IN, UNLESS-- WHAT WAS THE DATE? IT WAS FAIRLY RECENT,
7 WASN'T IT?

8 MS. LIPINSKI: THEY'RE ALL ATTACHED TO THE BURGLARY. SO,
9 THERE'S A BURGLARY ON JUNE 6 AND THERE'S A LARCENY ON JUNE 6.

10 THE COURT: WHAT YEAR?

11 MS. LIPINSKI: THEY'RE ALL 2005.

12 THE COURT: WELL, IF THIS DEFENDANT TAKES THE STAND, IF
13 YOUR CLIENT TAKES THE STAND---

14 MR. SCHUSTERMAN: HE'S NOT.

15 THE COURT: OF COURSE, I'LL HAVE TO INQUIRE ABOUT THAT.

16 MR. SCHUSTERMAN: I UNDERSTAND.

17 THE COURT: BUT IF HE WOULD TAKE THE STAND I THINK THEY
18 WOULD BE ADMISSIBLE. BUT IF HE DOES NOT TAKE THE STAND, MS.
19 LIPINSKI, THEN HOW DO WE GET THOSE CONVICTIONS IN, THE
20 LARCENIES?

21 MS. LIPINSKI: YOU KNOW, IF IT COMES TO ARGUING BY THE
22 STATE, THAT'S THE RESPONSE, THAT THEY'RE NOT CONSOLIDATED,
23 THAT NORTH CAROLINA'S NOT BEEN TREATING THEM AS ONE
24 BURGLARY IN THE FUTURE BECAUSE THEY'RE ARE THESE MULTITUDE
25 OFFENSES ON THE ORDER. AND THAT'S SIMPLY IT.

1 I UNDERSTAND THAT THERE'S STILL A QUESTION OF FACT. I
2 HAVE TO PROVE TO THE COURT THAT---

3 THE COURT: WELL, WHAT IF HE HAD GONE IN, BROKEN AND
4 ENTERED AND ABUSED THE CAT? WOULD YOUR ARGUMENT BE THE
5 SAME?

6 MS. LIPINSKI: NO. BUT MY ARGUMENT IS BECAUSE THE
7 DEFINITION OF BREAKING AND ENTERING TALKS ABOUT SOMEBODY
8 ENTERING TO COMMIT A LARCENY. THE FACT THAT HE'S GOT A
9 LARCENY REALLY DOESN'T PREJUDICE BECAUSE IT'S GOING TO BE
10 SOMETHING THAT---

11 THE COURT: WHAT PROBATIVE VALUE DOES IT HAVE?

12 MS. LIPINSKI: IT'S JUST THAT SIMPLY---

13 THE COURT: IT MAKES IT SOUND BETTER.

14 MS. LIPINSKI: NO, IT DOESN'T MAKE IT SOUND BETTER. IT
15 MAKES MY ARGUMENT THAT THEY'RE NOT JUST LOOKING AT A
16 STRING OF BURGLARIES AND COLLAPSING IT ALL INTO ONE; THAT HE
17 HAD A STRING OF CHARGES AND IT'S NOT A MATTER OF
18 CONSOLIDATING IT ALL INTO ONE. THEY'RE DOING IT FOR THE
19 PURPOSE OF JUDICIAL EFFICIENCY AND LISTING THE NUMBER OF
20 CHARGES IN ORDER. AND IF YOU DISAGREE WITH ME, THEN THAT'S
21 FINE.

22 THE COURT: AND I DO DISAGREE WITH YOU, BECAUSE, WOULD
23 YOUR POSITION BE ANY DIFFERENT IF NORTH CAROLINA HAD NOT
24 CHARGED HIM WITH THE LARCENY? WOULD YOUR POSITION BE ANY
25 DIFFERENT THAN IT IS RIGHT NOW? AND I WOULD SAY, ABSOLUTELY

1 NOT. HE DOESN'T HAVE TO BE CHARGED WITH THE LARCENY. HE'S
2 CHARGED WITH BREAKING AND ENTERING; THAT'S THE ENTERING THE
3 HOUSE WITH THE INTENT TO COMMIT A FELONY IN NORTH CAROLINA,
4 JUST AS IT IS IN SOUTH CAROLINA.

5 THEY DIDN'T HAVE TO STEAL ONE THING IN THE WORLD FROM
6 THEM, JUDGE WATKINS. THEY DIDN'T HAVE TO TAKE A SINGLE ITEM.
7 THAT IS STILL BURGLARY. THEY WENT IN THERE WITH THE INTENT TO
8 DO IT. THAT'S BURGLARY, PLAIN AND SIMPLE.

9 SO, I DON'T SEE WHERE THAT HAS ANY BEARING ON THIS CASE.
10 AND MY RULING'S GONNA BE THAT I'M GONNA LET YOU PUT IT ALL IN.
11 I'M GOING TO LET YOU PUT IN ALL THREE BURGLARIES. BUT BECAUSE
12 OF THE POSITION THAT'S BEING TAKEN BY THE DEFENSE THAT THESE
13 SHOULD BE CONSOLIDATED, I THINK THAT YOU SHOULD BE ABLE TO
14 PUT AS MANY IN AS IS NECESSARY FOR THE JURY TO CONSIDER TO
15 GET THE THREE. THIS IS THE THIRD ONE. BUT I'M GOING TO REQUIRE
16 THAT A REDACTION OF THE LARCENY CHARGES.

17 AND I DON'T SEE WHERE IT MAKES A BIT OF DIFFERENCE ONE
18 WAY OR THE OTHER. I'M JUST TRYING TO PROTECT THE RECORD.

19 MS. LIPINSKI: I UNDERSTAND. WE WILL REDACT THE LARCENIES
20 AND LEAVE THE THREE BURGLARIES.

21 THE COURT: ALL RIGHT.

22 MS. LIPINSKI: I HAVE A COPY OF THE NORTH CAROLINA
23 STATUTE, THE 1454A UNDER WHICH HE IS LISTED AND CONVICTED. I
24 CAN SUBMIT THAT AS A PIECE OF EVIDENCE.

1 THE COURT: WE CAN DO IT TWO WAYS AND I'LL HAND THIS
2 BACK TO THE DEFENSE. ON THE ONE HAND, I WILL TAKE JUDICIAL
3 NOTICE OF THE NORTH CAROLINA STATUTE. I WILL CHARGE AS TO
4 WHAT B&E IS IN NORTH CAROLINA. OR I WILL REQUIRE MS. LIPINSKI
5 TO PUT SOMEBODY UP AND I'LL GIVE YOU THE OPPORTUNITY CROSS
6 EXAMINE HER. I DON'T WANT THERE TO BE ANY QUESTION AS TO
7 WHAT THE STATUTE IN NORTH CAROLINA IS.

8 MS. SCHUSTERMAN: AND IF I HAVE IN ANY WAY ALLUDED TO
9 THE COURT BY TAKING ISSUE WITH THE STATUTE, I DIDN'T MEAN TO. I
10 THINK AT A PRIOR HEARING I CONCEDED THAT I THOUGHT THAT
11 THEIR BREAKING AND ENTERING STATUTE, I COULD NOT ARGUE IT IN
12 GOOD FAITH, THAT IT WAS NOT AKIN TO OUR BURGLARY STATUTE.

13 SO, I DON'T NEED HER TO BRING IN ANYBODY. I DON'T NEED TO
14 CROSS EXAMINE THEM ON IT. AND I'M TELLING THE COURT THAT I
15 DON'T THINK THE CHARGE IS THE ISSUE. SO, IF THE STATE WANTS TO
16 PUT IN, IN WRITING, WHETHER THAT WAS APPROPRIATE, I DON'T KNOW
17 WHETHER IT'S APPROPRIATE FOR THEM TO HAVE A LAW TO TRY TO
18 LIBERATE IT WORD BY WORD. I DON'T KNOW THAT THE LAW SHOULD
19 BE TREATED ANY DIFFERENTLY THAN WHAT THE LAW OF SOUTH
20 CAROLINA IS. I UNDERSTAND THAT YOU'RE GOING TO CHARGE IT AND
21 I HAVE NO OBJECTION TO YOU CHARGING IT.

22 MS. LIPINSKI: AND YESTERDAY YOU SAID SOMETHING ABOUT
23 MAKING A COURT'S EXHIBIT AND I WAS LOOKING AT HOW TO DO THAT
24 UNDER THE RULES OF EVIDENCE. BUT IF YOU WANT TO PUT IT IN

1 THE COURT: ONCE AGAIN, I'LL ASK YOU, MR. SCHUSTERMAN.

2 MR. SCHUSTERMAN: YES SIR.

3 THE COURT: I'M TRYING TO GET A HANDLE ON YOU
4 CONSOLIDATION ARGUMENT. IF WE LOOK AT KOON AND GORDON
5 AND THAT LINE OF CASES THAT ADDRESS THE ISSUE OF
6 CONSOLIDATION; THAT IS, THE CRIMES WHICH WERE COMMITTED SO
7 CLOSE IN TIMES UNDER CIRCUMSTANCES ONE OFFENSE, THEY ALL
8 SEEM TO RELATE BACK TO THE RECIDIVIST STATUTE.

9 THE RECIDIVIST STATUTE SPECIFICALLY HAS AN ELEMENT THAT
10 SAYS FOR THE PURPOSES OF THE RECIDIVIST STATUTE, CRIMES THAT
11 ARE COMMITTED SO CLOSELY IN TIME AND CIRCUMSTANCE AS TO BE
12 COMMIT ONE OFFENSE SHOULD NOT BE CONSIDERED AS SEPARATE
13 OFFENSES.

14 I'M LOOKING HERE AT THE STATUTE WHICH I HAVE A COPY OF
15 HERE. I THINK IT'S 17-25-50. "IN DETERMINING THE NUMBER OF
16 OFFENSES FOR THE PURPOSE OF IMPOSITION OF SENTENCE" - AND
17 HERE AGAIN, WE'RE TALKING ABOUT A LIFE WITHOUT PAROLE
18 SENTENCE - "THE COURT SHALL TREAT AS ONE OFFENSE ANY NUMBER
19 OF OFFENSES WHICH HAS BEEN COMMITTED AT TIMES SO CLOSELY
20 CONNECTED IN POINT OF TIME THAT THEY MAY BE CONSIDERED AS
21 ONE OFFENSES, NOTWITHSTANDING UNDER THE LAW THEY
22 CONSTITUTE SEPARATE AND DISTINCT OFFENSES."

23 NOW, AS LOOK AT KOON, THAT HAS BEEN APPLIED IN
24 SITUATIONS WHERE AN ARMED ROBBERY OF MORE THAN ONE
25 PERSON, I THINK MS. LIPINSKI WOULD AGREE WITH ME THAT THAT

1 WOULD CERTAINLY QUALIFY. WHERE YOU PULL A GUN ON A GROUP
2 OF PEOPLE AND YOU ROB THEM ALL, YOU MAY HAVE COMMITTED
3 THREE, FOUR, FIVE OFFENSES OF ARMED ROBBERY, BUT THEY'RE ALL
4 CONSIDERED AS ONE BECAUSE THEY OCCURRED AT THE SAME TIME.

5 NOW, I UNDERSTAND FULLY WHAT OUR COURT AND WHAT THE
6 STATUTE SAYS ABOUT THE RECIDIVIST SITUATION. BUT AS TO
7 BURGLARY, FIRST DEGREE, THE STATUTE SIMPLY SAYS THERE HAS
8 BEEN MORE THAN TWO PRIORS, TWO PRIOR CONVICTIONS.

9 NOW, TELL ME HOW YOU TAKE THE CONSOLIDATION
10 ARGUMENT OVER TO THE BURGLARY FIRST STATUTE? WHAT
11 AUTHORITY DO YOU HAVE? WHAT CAN YOU SHOW ME WHERE IT HAS
12 EVER BEEN APPLIED TO THE BURGLARY, FIRST, STATUTE?

13 MR. SCHUSTERMAN: I DON'T KNOW THAT THERE IS. I DON'T
14 KNOW.

15 THE COURT: AND THAT'S WHAT BOTHERS ME. I'M CERTAIN
16 THIS IS AN ISSUE THAT'S BEEN ADDRESSED OR SHOULD HAVE BEEN
17 ADDRESSED OR IF THERE IS ANY GOOD LEGITIMATE ARGUMENT. I SEE
18 THE BURGLARY FIRST STATUTE AS BEING AN ENTIRELY DIFFERENT
19 SITUATION OF THE RECIDIVIST STATUTE BECAUSE OF 17-25-50. AND IN
20 17-25-50, THE LEGISLATURE DETERMINED, IT WAS THEIR INTENT THAT
21 THOSE OFFENSES THAT ARE SO CLOSELY CONNECTED IN POINT OF
22 TIME, THAT THEY CONSTITUTE ONE OFFENSE SHOULD NOT BE
23 CONSIDERED AS SEPARATE AND DISTINCT OFFENSES. SO, TELL ME, ---

24 MR. SCHUSTERMAN: I WOULD JUST ASK THE COURT, IS THE
25 COURT SAYING, THEN, THAT BECAUSE OF THE WAY THE BURGLARY,

1 FIRST, STATUTE IS WRITTEN THAT IF MY CLIENT ON THAT PARTICULAR
2 DAY IN 2005, HAD ROBBED THREE HOUSES IN A ROW, ONE AFTER
3 ANOTHER OTHER, THAT EVEN THOUGH THEY OCCURRED OBVIOUSLY
4 WITHIN POTENTIALLY TEN MINUTES OF EACH OTHER, BECAUSE THEY
5 WERE SEPARATE AND DISTINCT OFFENSES, AND BECAUSE THERE IS NO
6 RELATIONSHIP BACK TO THE RECIDIVIST STATUTE, I THINK IT RELATES
7 TO BURGLARY, THE FIRST, THAT THE COURT WOULD TREAT THOSE
8 MATTERS AS THREE SEPARATE BURGLARIES.

9 THE COURT: LET ME TAKE YOUR EXAMPLE THERE.

10 MR. SCHUSTERMAN: YES SIR.

11 THE COURT: I BELIEVE THAT IF YOUR CLIENT WAS THEN BEING
12 TRIED FOR A SUBSEQUENT BURGLARY, THOSE THREE SEPARATE AND
13 DISTINCT BURGLARIES, ALTHOUGH THEY MAY HAVE BEEN
14 COMMITTED VERY CLOSE IN TIME, COULD ENHANCE HIS CHARGE TO A
15 BURGLARY IN THE FIRST DEGREE.

16 HOWEVER, IF THE STATE WERE TO DECIDE THAT THEY WERE
17 GOING TO SEEK LIFE WITHOUT PAROLE UNDER THE RECIDIVIST
18 STATUTE, I DON'T THINK THAT THEY STATE WOULD PREVAIL IN
19 SAYING THAT WE COULD COUNT THEM EACH AS A SEPARATE
20 CONVICTION BECAUSE THEY OCCURRED SO CLOSE IN TIME.

21 YOU KNOW, IT MAKES SENSE. IF WE LOOKED AT 17-25-50 AND
22 WE LOOK AT THE RECIDIVIST STATUTE, GENERALLY, WE ARE IN A
23 SITUATION WHERE THE LEGISLATURE IS ESSENTIALLY SAYING THIS IS
24 THE EXTREME PENALTY; THIS IS THE GREATEST PENALTY THAT WE
25 CAN GIVE ANYONE SHORT OF THE DEATH PENALTY. WE ARE

1 IMPOSING LIFE WITHOUT THE POSSIBILITY OF PAROLE. AND THE
2 STATUTE GOES ON TO SAY THAT IF YOU'RE SIXTY YOU SERVE THIRTY
3 YEARS, AND IF YOU'RE SEVENTY AND YOU SERVED TWENTY YEARS,
4 YOU MAY BE PAROLED UNDER CERTAIN CIRCUMSTANCES.

5 CERTAINLY THE LEGISLATURE INTENDED, THOUGH, THAT IT
6 WOULD BE LIFE WITHOUT PAROLE. AND THE LEGISLATURE'S SAYING
7 CONSIDERING THE SEVERITY OF A PENALTY THAT WE IMPOSE HERE
8 FOR AN OFFENSE THAT WOULD NOT CARRY NEARLY AS SEVERE A
9 PENALTY IF IT WERE NOT COMMITTED BY RECIDIVISM, WE ARE GOING
10 TO MAKE AN EXCEPTION. WE'RE GOING TO SAY OFFENSE THAT HAVE
11 COMMITTED AT TIMES SO CLOSELY CONNECTED IN TIME THAT THEY
12 MAY BE CONSIDERED AS ONE OFFENSE.

13 WE'RE NOT GONNA DO THAT. IF A FELLOW GOES OUT AND HE
14 ROBS THREE PEOPLE-- OR IN YOUR SCENARIO, EVEN PERHAPS IF HE
15 HAD ROBBED THREE HOUSES IN A ROW OR WENT INTO AN APARTMENT
16 COMPLEX AND ROBBED EVERY APARTMENT IN THE COMPLEX, THAT
17 ONE COUNT WOULD CONSTITUTE A SEPARATE BURGLARY. I STILL
18 BELIEVE THAT THE STATE WOULD NOT BE ABLE TO USE ALL THOSE
19 BURGLARIES THAT OCCURRED WITHIN A SHORT PERIOD, AT ONE TIME.
20 I DON'T THINK THEY WOULD BE ABLE TO USE THAT UNDER THE
21 RECIDIVIST STATUTE.

22 AND I CAN SEE WHY THE LEGISLATURE DID THAT. BUT IN YOUR
23 CASE HERE I'M NOT SO SURE THAT THESE WOULD NOT EVEN HAVE
24 BEEN SOMETHING THAT SOMEONE COULD-- THEY'RE A MONTH APART.

1 I WOULD SUGGEST THAT THE STATE COULD PROBABLY EVEN USE IT
2 UNDER THE RECIDIVIST STATUTE.

3 CERTAINLY, I WOULD THINK THAT UNDER THE BURGLARY,
4 FIRST DEGREE, STATUTE, WHICH DOES NOT PUT ANY CONDITION AT
5 ALL UPON WHICH CONVICTIONS MAY BE USED, UNDER THAT STATUTE,
6 I BELIEVE THAT ANY TWO CONVICTIONS, WHETHER THE CONVICTIONS
7 WERE OBTAINED ON THE SAME DAY OR NOT, COULD BE USED

8 NOW, TELL ME, HERE'S WHAT I'M LOOKING FOR FROM YOU: IF
9 YOU WANT TO ARGUE CONSOLIDATION, TELL ME WHERE THERE'S ANY
10 AUTHORITY IN THIS STATE WHATSOEVER THAT CONSOLIDATION OF
11 CHARGES UNDER A RECIDIVIST-TYPE ANALYSIS, RECIDIVIST STATUTE-
12 TYPE ANALYSIS, WOULD PREVENT THE STATE FROM GOING FORWARD
13 ON A FIRST DEGREE BURGLARY OR AN ENHANCED BURGLARY WHERE
14 THERE ARE TWO OR MORE CONVICTIONS FOR BURGLARY OR HOUSE
15 BREAKING? JUST GIVE ME SOMETHING.

16 MR. SCHUSTERMAN: YOU MAY HAVE LOST ME. I THINK WHAT
17 YOU'RE SAYING IS THAT THE CONCEPT OF USING MULTIPLE OFFENSES
18 AS ONE IS ONLY APPLICABLE UNDER THE RECIDIVIST STATUTE.

19 THE COURT: I WOULDN'T SAY ONLY. I WOULD SAY SHOW ME
20 WHERE IT APPLIES TO THE BURGLARY, FIRST DEGREE, STATUTE.

21 MR. SCHUSTERMAN: I GUESS WHAT WE'RE DOING, SIR, AND I
22 WOULD CERTAINLY DEFER TO YOU. I THINK WHAT WE'RE DOING IS
23 WE'RE TAKING THE SAME COIN, BUT FLIPPING IT---

24 THE COURT: RIGHT.

1 MR. SCHUSTERMAN: WE'RE FLIPPING IT HEAD TO TAIL, USING
2 YOUR PERSPECTIVE.

3 THE COURT: RIGHT.

4 MR. SCHUSTERMAN: OBVIOUSLY, ONE COULD TAKE YOUR
5 ARGUMENT THAT IT MAKES A GREAT DEAL OF SENSE. I UNDERSTAND.
6 THE LOGICAL CONCLUSION THAT ONE CAN DRAW FROM THE COURT'S
7 POSITION IS THAT THE CONCEPT OF HANDLING MULTIPLE OFFENSES
8 AS ONE, TAKING IT TO ITS LOGICAL CONCLUSION, WHAT THE COURT
9 HAS SAID THAT CONCEPT IS ONLY APPLICABLE UNDER THE HOW
10 LONG SITUATION, UNDER THE RECIDIVIST STATUTE. UNDER NO
11 SITUATION, BASED ON WHAT THE COURT IS SAYING, WOULD THIS
12 CONCEPT IN STATE VERSUS KOON, THESE MULTIPLE OFFENSES
13 CONSOLIDATED OR HANDLED AS ONE OFFENSE, FOR ENHANCEMENT
14 PURPOSES WOULD ONLY BE APPLICABLE WHEN THE HOW LONG*
15 STATUTE IS TRIGGERED.

16 AND IF THAT'S THE COURT'S POSITION THEN I ACCEPT IT. I'M
17 PROTECTING MYSELF ON THE RECORD. I DON'T HAVE AN ARGUMENT
18 FOR YOU. MY FEELING IS IF SOMEONE PLEAD ALL AT ONE TIME, THEIR
19 POSITION IS, TO MY UNDERSTANDING, AND I'M CERTAINLY CAPABLE
20 OF BEING WRONG, THAT THERE'S NO BRIGHT LINE ATTACHED THAT
21 SAYS EVEN UNDER THE RECIDIVIST STATUTE THAT SAYS, OKAY, IF
22 TWO THINGS OCCUR WITHIN SIX MINUTES, IT'LL BE ONE OFFENSE
23 VERSUS AN HOUR VERSUS TWO HOURS. I DON'T KNOW THAT THERE'S
24 A BRIGHT LINE TEST. I'M NOT AWARE.

25 THE COURT: KOON SAYS THERE IS NO BRIGHT LINE TEST.

1 MR. SCHUSTERMAN: OKAY. SO, MY ARGUMENT IS LIKE MOST, IT
2 BECOMES-- IT SEEMS TO ME MY ARGUMENT IS IF THERE'S NO BRIGHT
3 LINE TEST, AND YOU ACKNOWLEDGE THAT THE STATUTE AS YOU
4 BELIEVE THAT I CANNOT, THAT EVEN IF I STIPULATE THAT IT'S A
5 BURGLARY, AND THAT THE CONCEPT OF BURGLARY, FIRST, IS PURELY
6 A SENTENCING ISSUE. AND I THINK EARLIER YOU SPOKE OF IT LIKE A
7 DUI. IF YOU TRY A DUI, WHETHER IT'S A SECOND OR A FOURTH, IT
8 WOULD BE TRIED THE SAME WAY. ONLY UPON A CONVICTION AND WE
9 COME BEFORE YOU, WOULD THE COURT LET YOU KNOW WHETHER IT'S
10 A SECOND, THIRD, OR SUBSEQUENT.

11 THAT IS HOW I WAS INTERPRETING IT. AND I WOULD DEFER TO
12 THE COURT WHEN IT SAYS NO, THAT'S A FACTUAL ISSUE. SO, WHEN IT
13 GOES FROM BEING A MERE LEGAL ACKNOWLEDGMENT TO A FACTUAL
14 ISSUE, AND SINCE THERE IS NO BRIGHT LINE TEST, IS IT NOT FOR A
15 JURY, THEN, TO DETERMINE WHETHER OR NOT IT IS ONE OFFENSE
16 BECAUSE HE PLEAD ON THE SAME DAY; YES, IT OCCURRED; WHETHER
17 IT'S TWO OR THREE OCCURRED OVER A TEN-DAY PERIOD OR A
18 TWENTY-SIX-DAY PERIOD, IS IT NOT FOR A JURY TO DECIDE?

19 I'M NOT IN ANY WAY, SIR, LOOKING TO BE ARGUMENTATIVE.
20 PLEASE DON'T IT THAT WAY.

21 THE COURT: I'M NOT.

22 MR. SCHUSTERMAN: I'M MERELY LOOKING TO ENUNCIATE MY
23 CASE FOR MY CLIENT'S BEHALF OF THE SITUATION. IF THE COURT
24 SAYS NO AND I THINK HIS HONOR WILL ACKNOWLEDGE THAT I CAME
25 TO YOU IN CHAMBERS WITH THIS DILEMMA YESTERDAY OR THE DAY

1 BEFORE WHETHER I COULD BASED ON YOUR RULING ETHICALLY
2 ARGUE CONSOLIDATION. I CERTAINLY WOULD NEVER HAVE DONE
3 THAT WITHOUT THE COURT SAYING TO ME, YOU KNOW, IF THE COURT
4 HAD DECIDED THAT AS A MATTER OF LAW---

5 THE COURT: AND I THINK I TOLD YOU THAT YOU COULD. BUT
6 I'M NOW HAVING SECOND THOUGHTS.

7 MR. SCHUSTERMAN: AND I UNDERSTAND. AND IF YOU TELL ME
8 I CAN'T, THEN I WILL NOT. I HAVE NO PROBLEM WITH DOING
9 WHATEVER THE COURT INSTRUCTS.

10 THE COURT: LET ME ASK YOU THIS: HAS THIS COURT EVER
11 MADE THE DISTINCTION, THE SOUTH CAROLINA SUPREME COURT OR
12 COURT OF APPEALS, EVER MADE ANY DISTINCTION ABOUT SEPARATE
13 AND DISTINCT OFFENSES, THE FACT THAT THEY'RE PLEAD ON THE
14 SAME DAY, HAVING ANY BEARING ON WHETHER THEY ARE SEPARATE
15 AND DISTINCT? EVER? HAS THERE EVER BEEN ANY ISSUE
16 ADDRESSED? HAS THERE EVER BEEN ANY SITUATION WHERE--

17 I THINK UNDER KOON AND GORDON, THEY SAY THE OPPOSITE.
18 IT DOESN'T MAKE ANY DIFFERENCE IF YOU PLEAD ON THE SAME DAY
19 OR ON SEPARATE DAYS. THAT'S NOT WHAT'S IN CONTROL HERE. AND
20 THAT SEEMS TO BE THE ONLY THING THAT TIES THE PRIOR B&E
21 TOGETHER, THAT THEY WERE PLEAD ON THE SAME DAY. THEY'RE
22 ALMOST A MONTH APART. OKAY?

23 MR. SCHUSTERMAN: YES SIR, I ABSOLUTELY AGREE WITH YOU.

24 THE COURT: WHAT ABOUT YOU, MS. LIPINSKI?

1 MS. LIPINSKI: WELL, THAT'S THE STATE'S POSITION, TOO. HE
2 PLEAD TO FOUR COUNTS OF BURGLARY ON THE SAME DAY. I MEAN,
3 THAT WAS THE ISSUED RAISED---

4 THE COURT: IT MAKES NO DIFFERENCE ON WHAT DATE YOU DO
5 IT.

6 MS. LIPINSKI: RIGHT. AND, YOU KNOW, THAT WAS THE STATE'S
7 POSITION YESTERDAY, IN TRYING TO DRAW THE JURY CHARGE TO
8 NONETHELESS EXPLAIN TO THEM THE LAW.

9 BUT NONETHELESS, ACCOMMODATING MR. SCHUSTERMAN'S
10 CONSOLIDATION ARGUMENT, IT SEEMS HE WAS ARGUING JUST THE
11 LAW OF THE STATE OF SOUTH CAROLINA. I RESPECT HIS POSITION. I
12 MEAN, YOU KNOW, WE ANTICIPATED THIS WAS COMING. IT HAPPENS
13 IN EVERY BURGLARY, OR EVERY CASE WHERE WE USE A KIND OF
14 ENHANCEMENT PROVISION. AND I UNDERSTAND HIS ARGUMENT
15 ABOUT THE STIPULATION.

16 BUT, YOU KNOW, THE PROBLEM-- AND THIS IS KIND OF THE FLIP
17 SIDE THAT NEVER EVER ARTICULATES. IF THE STATE STIPULATES TO
18 THOSE TWO PRIOR CONVICTIONS---

19 THE COURT: YOU DON'T HAVE TO.

20 MR. LIPINSKI: I UNDERSTAND THAT. BUT IF FOR WHATEVER
21 REASON YOU GIVE THEM A CHARGE OF BURGLARY, SECOND DEGREE,
22 NON-VIOLENT, THE EVIDENCE WOULD THEN BE TO SAY, THE ONLY
23 EVIDENCE THAT I CAN HAVE IS THAT IT'S A BURGLARY, FIRST DEGREE,
24 IS THE TWO PRIOR CONVICTIONS. AND IF I HAVE STIPULATED TO IT,
25 THEN THE JURY'S LOST ON WHAT THE ENHANCEMENT IS.

1 THE COURT: UNLESS THE COURT IN ITS CHARGE PUTS FORWARD
2 THE STIPULATION.

3 MS. LIPINSKI: AND I UNDERSTAND THAT. BUT THIS PURPOSE OF
4 STIPULATING IS TO GET THAT ISSUE NOT BEFORE THE JURY. THIS
5 PURPOSE OF STIPULATING WAS NOT---

6 THE COURT: IT'S CLEAR THAT IT'S AN ELEMENT OF---

7 MS. LIPINSKI: RIGHT. I UNDERSTAND THE PREJUDICE
8 ARGUMENT TO HIM AND WE HAD THIS DISCUSSION BEFORE THE TRIAL
9 WHERE I SAID, YOU KNOW, IT DOES BECOME CIRCULAR. SO, IT
10 BECOMES A DOUBLE-EDGED SWORD.

11 ~~SO, THE STATE'S POSITION IS, IF KOON IS THE LAW OF THE STATE~~
12 ~~AND I CAN'T FIND ANYTHING THAT SAYS IT'S NOT, THAT PLEADING ON~~
13 ~~THE SAME DATE DOESN'T AFFECT OUR ABILITY TO USE IT, THEN I~~
14 ~~THINK THE STATE CAN GO FORWARD UNDER THE BURGLARY FIRST.~~

15 AND YOU LOOK AT ~~STATE V. SIMONS~~ WHICH SAYS I CAN'T PUT
16 ANY INFORMATION IN ABOUT THE PRIOR BURGLARIES, THAT I'M
17 LIMITED TO THE PRIOR CERTIFIED CONVICTIONS. YOU'VE GOT TO
18 PROVE THIS, BUT YOU CAN'T USE THE EVIDENCE THAT YOU WOULD
19 NORMALLY USE. IT'S NOT A LYLE ISSUE OR THOSE KIND OF THINGS,
20 AND I UNDERSTAND IT.

21 AND IF YOU RULE THAT CONSOLIDATION IS INAPPROPRIATE I'LL
22 BACK DOWN THE TWO PRIOR CONVICTIONS AND WE'LL REDACT THE
23 THIRD. I MEAN, I FEEL THAT IF HE'S GOING TO BE LEFT TO MAKE THAT
24 ARGUMENT AND THE COURT RULES THAT'S CORRECT, THEN I WANT
25 THE TWO DONE APART, BECAUSE I THINK THAT'S MY BEST RESPONSE.

1 MR. SCHUSTERMAN: MAY I BE HEARD ON HER RESPONSE?

2 THE COURT: YES SIR.

3 MR. SCHUSTERMAN: THANK YOU, SIR. I UNDERSTAND THAT
4 YOU AND THE STATE ARE TALKING ABOUT STATE VERSUS KOON, AND
5 I RESPECT WHAT STATE VERSUS KOON SAYS. BUT I THINK THAT THE
6 COURT WILL CONCEDE THAT - AND I MAY BE USING THE TERM
7 INCORRECTLY - BUT I THINK THE OBVERSE OF WHAT KOON SAYS THAT
8 IF I CAME AND I PLEAD TO ANOTHER BURGLARY A MONTH LATER, BUT
9 THE TWO BURGLARIES WERE STILL SO CLOSE IN TIME THAT UNDER
10 THE RECIDIVIST STATUTE THE FACT THAT I PLEAD TO THEM A MONTH
11 APART WOULDN'T BE USED AS A CRITERIA.

12 THE COURT: THAT'S CORRECT.

13 MR. SCHUSTERMAN: SO, WHAT I'M SAYING, SIR, IS MAYBE WE'RE
14 LOOKING AT THE WRONG CONCEPT. MAYBE WHAT WE'RE LOOKING AT
15 HERE IS NOT STATE VERSUS KOON BECAUSE WE PLEAD ON THE SAME
16 DAY, BUT WE'RE LOOKING AT WHETHER OR NOT I CAN ARGUE
17 CONSOLIDATION.

18 WELL, MAYBE THE WORD, CONSOLIDATION, IS THROWING
19 EVERYBODY OFF. THAT THE OFFENSES-- ARGUE THAT THERE'S NO
20 BRIGHT LINE TEST. THAT THREE OFFENSES THAT ARE SO SIMILAR
21 THAT OCCUR WITHIN TWENTY-SIX DAYS ARE, AND IT IS A FACTUAL
22 ELEMENT, UNLIKE DUI, THAT THAT CONCEPT IS ONE THAT IS OPEN FOR
23 THE JURY TO DETERMINE SHOULD IT BE COUNTED AS ONE OFFENSE OR
24 NOT.

1 NOW, IF YOU SAY TO ME BECAUSE IT IS TAKING THAT CONCEPT, (
2 THEN NO, YOU CAN'T DO THAT, THEN VERY SIMPLY, WE'LL TAKE THE
3 TWO CONVICTIONS. WE'LL ARGUE THE MERITS OF THIS CASE, AND IT
4 IS WHAT IT IS. BUT YOU AND THE STATE ARE ARGUING STATE VERSUS
5 KOOON, AND IT ALL OCCURRING ON THE SAME DAY. I DON'T KNOW
6 THAT THE SAME DAY IS WHAT IS CRITICAL. I MEAN, IT MAY BE PART
7 OF THE ARGUMENT THAT IT OCCURRED ON THE SAME DAY. BUT EVEN
8 IF THEY OCCURRED ON SEPARATE DATES, I DON'T THINK THAT TAKES
9 THEM OUT BASED ON THE TIME OF THE OFFENSES, BECAUSE THERE'S
10 NO BRIGHT LINE TEST TO ARGUE THAT THESE ARE MULTIPLE
11 OFFENSES.

12 OBVIOUSLY, THE FACTS ARE THEY PLEAD ON ONE DAY VERSUS
13 PLEADING ON THREE DAYS IN A ROW OR A MONTH APART, THAT MAY
14 CUT BETTER FOR ME, JUST FROM AN ARGUMENT POINT. BUT EVEN
15 WITHOUT THAT, I DON'T THINK IT WOULD MATTER. I DON'T THINK
16 THERE'S ANYTHING IN THE STATUTE THAT SAYS THAT THERE'S
17 ANYTHING THAT WOULD PROHIBIT ME MAKING A RECIDIVIST
18 ARGUMENT IF THE PEOPLE PLEAD ON MULTIPLE DATES TO OFFENSES.
19 BECAUSE, ULTIMATELY, I THINK WE LOOK AT THE OFFENSE, NOT THE
20 TIME OF THE PLEA.

21 THE COURT: THERE IS A BURGLARY, FIRST STATUTE THAT SAYS
22 IF THE BURGLARY IS COMMITTED BY A PERSON WITH A PRIOR RECORD
23 OF TWO OR MORE CONVICTIONS FOR BURGLARY OR HOUSE BREAKING.
24 WHAT YOU HAVE TO PROVE IS THAT HE HAD A PRIOR RECORD.

1 MS. LIPINSKI: I UNDERSTAND THAT. BUT MR. SCHUSTERMAN IS
2 NOW SAYING IT'S NOT, THE DATES ARE NOT, DO NOT PASS THE BRIGHT
3 LINE TEST, THERE MUST BE MORE THAN THAT. BUT, FACTUALLY,
4 THERE'S NOTHING MORE THAN THAT IN THE RECORD, OTHER THAN
5 HE'S BEEN CONVICTED OF---

6 THE COURT: THAT'S TRUE.

7 MS. LIPINSKI: ---BREAKING AND ENTERING AND THEY OCCURRED
8 ON SEPARATE DATES. AND SIMONS SAYS PARTICULARIZED DETAILS
9 ABOUT BURGLARIES ARE NOT ADMISSIBLE TO PROVE THE TWO PRIOR
10 CONVICTIONS. SO, I AM KIND OF HAMSTRUNG THAT I CAN'T COME IN
11 HERE AND SAY THAT IT WAS TWO DIFFERENT VICTIMS AND ONE WAS
12 A HOUSE AND ONE WAS A---

13 THE COURT: THERE AGAIN, I DON'T THINK THAT UNDER THE
14 BURGLARY STATUTE YOU'RE REQUIRED TO DO ANYTHING BUT SHOW
15 THAT THERE ARE TWO PRIOR CONVICTIONS, AND CONSOLIDATION IS
16 NOT APPROPRIATE.

17 MS. LIPINSKI: YES SIR.

18 MR. SCHUSTERMAN: JUDGE, IF I MAY.

19 THE COURT: YES SIR.

20 MR. SCHUSTERMAN: MAY I ASSUME, THEN, THAT WHAT WE'RE
21 BACK TO, THEN, IS THAT WE'RE NOT GOING TO ALLOW THE THREE IN
22 BECAUSE THAT WOULD BE PREJUDICIAL? WE'RE GOING TO ALLOW
23 TWO IN, BUT I CAN'T ARGUE, I'M JUST GOING TO ARGUE THE FACTS OF
24 THIS CASE. AND---

25 THE COURT: RIGHT.

1 MR. SCHUSTERMAN: ---THEY'RE GOING TO STAND.

2 THE COURT: THAT'S CORRECT.

3 MR. SCHUSTERMAN: BUT AT THE SAME TIME, YOUR HONOR, I
4 WOULD APPRECIATE, FOR THE RECORD, I WOULD ASK YOU NOT TO
5 TELL THE JURY THAT I'VE STIPULATED THAT THERE ARE NOT---

6 THE COURT: I WOULD NOT DO THAT.

7 MR. SCHUSTERMAN: THANK YOU.

8 THE COURT: BECAUSE YOU ARE NOT STIPULATING.

9 MR. SCHUSTERMAN: NO, I'M NOT. BUT I'M NOT GOING TO ARGUE
10 AGAINST THE COURT'S RULING EITHER.

11 THE COURT: THANK YOU VERY MUCH. ALL RIGHT, LET'S GET
12 MR. HILL BACK IN.

13 GEORGE HILL, DULY SWORN, TESTIFIED AS
14 FOLLOWS, IN CAMERA:

15 DIRECT EXAMINATION BY MS. LIPINSKI:

16 Q YOU NAME IS GEORGE HILL?

17 A YES MA'AM.

18 Q AND MR. HILL, YOU OBVIOUSLY KNOW WHO I AM?

19 A YES MA'AM.

20 Q AND YOU KNOW MR. SCHUSTERMAN IS?

21 A YES MA'AM.

22 Q I BELIEVE YOU AND HE MET YESTERDAY FOR THE FIRST TIME?

23 A YES MA'AM.

24 Q AND, OBVIOUSLY, YOU KNOW REICO WELCH?

25 A YES MA'AM.

1 Y'ALL CAME UP THERE AT NINE O'CLOCK. MY FAMILY TRIED TO BE
2 THERE, TRIED TO GIVE ME SOME KIND OF ASSISTANCE. I DIDN'T HAVE
3 NO LAWYER WITH ME OR NOTHING.

4 AND I SPOKE TO YOU PERSONALLY, LIKE I'M SPEAKING TO YOU
5 NOW, WITH NO DISRESPECT. I TOLD YOU I DIDN'T WANT TO COME
6 BACK DOWN HERE. WHY IS Y'ALL FORCING ME TO COME BACK DOWN
7 HERE. THAT'S WHAT I SAID.

8 Q WELL, WHY DIDN'T---
9 THE COURT: LET'S MOVE ON.

10 MS. LIPINSKI: SORRY, YOUR HONOR.

11 Q YOU'VE BEEN CONVICTED OF BURGLARY IN THE PAST?

12 A YES MA'AM.

13 Q BURGLARY, THIRD DEGREE, 1987. CORRECT?

14 A THIRD DEGREE?

15 Q UH-HUH.

16 A NO MA'AM.

17 Q IS THAT WHAT YOU DID THE SEVENTEEN FOR?

18 A I WON'T CHARGED WITH BURGLARY, THIRD DEGREE. I THINK IT
19 WAS BURGLARY, SECOND DEGREE. IF I'M NOT MISUNDERSTANDING.
20 THAT'S BEEN TWENTY-TWO YEARS AGO.

21 Q LET ME SHOW YOU WHAT'S BEEN MARKED AS STATE'S EXHIBIT
22 NUMBER EIGHTEEN AND ASK YOU IF THIS BEARS YOUR SIGNATURE?

23 A YES MA'AM.

1 Q THAT APPEARS TO BE THE PAPERWORK WHERE YOU WERE
2 ORIGINALLY INDICTED FOR BURGLARY, SECOND DEGREE, AND YOU
3 PLEAD TO BURGLARY, THIRD DEGREE.

4 A YES MA'AM. WHEN I GOT MY OWN FBI, SLED REPORT, IT JUST
5 HAD BURGLARY SECOND DEGREE.

6 Q I UNDERSTAND THAT. BUT YOU MAY HAVE PLEAD TO A LESSER
7 OFFENSE?

8 A LIKE I SAID, IT BEEN TWENTY-TWO YEARS AGO.

9 Q I UNDERSTAND. AND THEN YOU ALSO PLEAD TO ACCESSORY
10 AFTER THE FACT FOR HOUSE BREAKING AND GRAND LARCENY. WHAT
11 I'M SHOWING YOU IS STATE'S EXHIBIT NINETEEN. I'LL ASK YOU TO
12 LOOK AT THAT. THAT SHOWS WHERE THEY ALLOWED TO PLEAD TO
13 THE LESSER, ACCESSORY AFTER THE FACT.

14 A YES MA'AM.

15 Q AND YOU, LIKE REICO, WERE ORIGINALLY CHARGED WITH
16 BURGLARY, FIRST DEGREE?

17 A (NO RESPONSE)

18 Q YOU, LIKE REICO, WAS ORIGINALLY CHARGED FOR THE
19 WATKINS' BURGLARY WITH BURGLARY, FIRST DEGREE.

20 A WHEN I FIRST GOT ARRESTED, I WASN'T CHARGED AND TOOK-- I
21 WASN'T CHARGED. THEY DIDN'T CHARGE ME. THEY CHARGED ME
22 WITH BURGLARY, SECOND DEGREE.

23 Q SO, AT NO POINT WHILE YOU WERE IN YORK COUNTY WERE YOU
24 CHARGED WITH BURGLARY, FIRST DEGREE?

25 A YES MA'AM.

1 Q THAT'S MY POINT.

2 A YES.

3 Q AT SOME POINT YOU WERE CHARGED WITH BURGLARY, FIRST
4 DEGREE.

5 A THEY CHARGED ME WITH BURGLARY, SECOND DEGREE. THEY
6 CAME BACK AND MADE IT FIRST DEGREE. THEN THEY CAME BACK
7 AND MADE IT SECOND DEGREE.

8 Q AND YOU PLEAD STRAIGHT UP TO BURGLARY, SECOND DEGREE,
9 IN FRONT OF JUDGE NETTLES?

10 A YES MA'AM.

11 Q AND YOU RECEIVED A SENTENCE OF EIGHTEEN MONTHS?

12 A YES MA'AM.

13 Q AND AS PART OF THAT PLEA, YOU AGREED TO TESTIFY AGAINST
14 REICO WELCH?

15 A WHEN I PLEAD IN FRONT OF MR. NETTLES, I TALKED TO MY
16 LAWYER, MR. B. J., AND AT THAT PARTICULAR TIME I DIDN'T WANT TO
17 SAY NOTHING BECAUSE I KNEW THAT MR. WELCH DIDN'T HAVE
18 NOTHING TO DO WITH IT. BUT THEY SAID, THEY KEPT ON, KEPT ON,
19 KEPT ON SAYING THAT WHEN YOU COME IN COURT THERE'S GONNA BE
20 SOME QUESTIONS THAT THE D. A. WAS GONNA ASK YOU AND THIS AND
21 THAT.

22 SO, MY MODEL WAS JUST COME IN, PLEAD GUILTY TO THE
23 BURGLARY. BUT IT WASN'T THAT SIMPLE. I COULDN'T COME IN AND
24 PLEAD GUILTY TO THE BURGLARY. I HAD TO BE ASKED PARTICULAR
25 QUESTIONS BEFORE I PLEAD GUILTY.

1 THE COURT: THANK YOU, SIR. YOU MAY STEP DOWN. MS.
2 LIPINSKI, DO YOU ANTICIPATE ANY FURTHER NEED FOR THIS WITNESS?

3 MS. LIPINSKI: NO, YOUR HONOR.

4 THE COURT: ALL RIGHT. HE'S RELEASED FROM CUSTODY.
5 WE'LL TAKE ABOUT A FIFTEEN MINUTE BREAK AT THIS TIME.

6 (WHEREUPON THE JURY EXITED THE COURTROOM AND THE
7 COURT WAS IN RECESS AT 12:10 P.M.)

8 COURT IN SESSION - 12:25 P.M.

9 THE COURT: BRING IN THE JURY.

10 (WHEREUPON THE JURY ENTERED THE COURTROOM)

11 THE COURT: MS. LIPINSKI, CALL YOUR NEXT WITNESS.

12 MS. LIPINSKI: YOUR HONOR, AT THIS TIME, THE STATE WOULD
13 OFFER INTO EVIDENCE STATE'S EXHIBIT NUMBER THIRTEEN, WHICH IS
14 MR. REICO WELCH'S PRIOR CONVICTION FOR BREAKING AND
15 ENTERING, SUBJECT TO THE COURT'S PRE-TRIAL RULING.

16 THE COURT: ALL RIGHT.

17 MS. LIPINSKI: AND I'VE GIVEN A COPY TO MR. SCHUSTERMAN.

18 THE COURT: SUBJECT TO YOUR PREVIOUS OBJECTIONS.

19 MR. SCHUSTERMAN: YES SIR.

20 (WHEREUPON STATE'S EXHIBIT NUMBER THIRTEEN WAS ADMITTED
21 INTO EVIDENCE OVER OBJECTION)

22 MS. LIPINSKI: YOUR HONOR, AT THIS TIME, I WOULD LIKE TO
23 PUBLISH THAT TO THE JURY WHILE I CALL MY NEXT WITNESS.

24 THE COURT: ALL RIGHT.

RALPH GURGANUS-DIRECT EXAMINATION BY MS. LIPINSKI

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1 (WHEREUPON STATE'S EXHIBIT NUMBER THIRTEEN WAS
2 PUBLISHED TO JURY)

3 MS. LIPINSKI: YOUR HONOR, THE STATE CALLS DETECTIVE
4 RALPH GURGANUS.

5 RALPH GURGANUS, DULY SWORN,
6 TESTIFIED AS FOLLOWS:

7 DIRECT EXAMINATION BY MS. LIPINSKI:

8 Q DETECTIVE GURGANUS, WITH WHOM ARE YOU CURRENTLY
9 EMPLOYED?

10 A YORK COUNTY SHERIFF'S OFFICE.

11 Q IN WHAT CAPACITY?

12 A I'M A DETECTIVE.

13 Q SPECIFICALLY, WHAT TYPE OF CRIME DO YOU INVESTIGATE?

14 A PROPERTY CRIMES.

15 Q HOW LONG HAVE YOU BEEN SO EMPLOYED?

16 A I'VE BEEN WITH THE SHERIFF'S OFFICE SINCE SEPTEMBER OF
17 2001.

18 Q WHAT ARE SOME OF YOUR DAY TO DAY DUTIES AND
19 RESPONSIBILITIES?

20 A I INVESTIGATE DIFFERENT PROPERTY CRIMES SUCH AS
21 LARCENY, B&E AUTO. ALSO ARSON, BURGLARIES, CRIMES OF THAT
22 NATURE.

23 Q DID YOU HAVE THE OCCASION TO PARTICIPATE IN THE
24 INVESTIGATION OF THIS PARTICULAR CASE?

25 A YES, I DID.

1 Q SPECIFICALLY, DID YOU HAVE THE OCCASION TO SPEAK WITH
2 GEORGE HILL?

3 A YES, I HAD THE PLEASURE.

4 MS. LIPINSKI: MAY I APPROACH THE WITNESS, YOUR HONOR?

5 THE COURT: YOU MAY.

6 Q LET ME SHOW YOU WHAT'S BEEN MARKED PREVIOUSLY AS
7 STATE'S EXHIBIT NUMBER SIXTEEN AND ASK YOU IF YOU ARE
8 FAMILIAR WITH THAT DOCUMENT? AND IF THAT IS THE WAIVER OF
9 RIGHTS FORM THAT YOU USED WHEN YOU WENT TO GO SPEAK WITH
10 MR. HILL?

11 A THAT IS CORRECT. IT IS THE MIRANDA WARNING RIGHTS THAT I
12 READ TO HIM AND EXPLAINED TO HIM.

13 Q JUST BRIEFLY, WHERE DID YOU SEE MR. HILL?

14 A IN OUR CONFERENCE ROOM OF THE DETECTIVE DIVISION, CID.

15 Q DID YOU EVER HAVE THE OCCASION TO GO SPEAK TO HIM
16 WHILE HE WAS IN A HOLDING CELL OR IN THE DETENTION CENTER
17 HERE?

18 A NO, I DID NOT.

19 Q SO, YOU BROUGHT HIM TO YOUR CONFERENCE ROOM?

20 A YES, HE WAS BROUGHT IN.

21 Q WERE YOU DRESSED AS YOU ARE TODAY, OR WERE YOU
22 DRESSED DIFFERENTLY?

23 A I WAS DRESSED IN SLACKS, A POLO SHIRT, WITH THE YORK
24 COUNTY BADGE.

1 Q WHAT WAS MR. HILL'S DEemeanOR WHEN YOU WENT TO GO
2 SPEAK WITH HIM?

3 A MR. HILL WAS VERY ANXIOUS. HE WAS RAMBLING DIFFERENT
4 THINGS. AND THAT'S HOW HIS DEemeanOR WAS WHEN I FIRST MET
5 HIM.

6 Q WAS HE ABLE TO TELL YOU HIS NAME?

7 A AT FIRST, NO. HE COULDN'T TELL ME. HE SAID GEORGE. AND I
8 CALMED HIM DOWN FROM HIS RAMBLING TO ASSURE HIM THAT I'M
9 THERE TO TALK TO HIM. AND I SAT REAL CALMLY WITH GEORGE, OR
10 MR. HILL, AND EXPLAINED TO HIM, WE'RE SITTING HERE. WE'RE GOING
11 TO TAKE EACH STEP SLOWLY SO HE WILL NOT BE CONFUSED.

12 I WANTED TO MAKE SURE THAT MR. HILL WAS NOT GOING TO BE
13 CONFUSED AT ANYTHING THAT WAS TAKING PLACE IN THAT
14 INTERVIEW ROOM. SO, FINALLY, MR. HILL TOLD ME HIS NAME.

15 Q WHEN YOU SPOKE WITH HIM, WAS THERE ANYONE ELSE
16 PRESENT OTHER THAN YOU AND MR. HILL?

17 A AT THAT TIME IT WAS DETECTIVE MARTIN AND DETECTIVE
18 BRANNON.

19 Q DID DETECTIVE MARTIN AND BRANNON THREATEN MR. HILL IN
20 ANY WAY?

21 A NO, THEY DID NOT.

22 Q DID THEY COERCE HIM IN ANY WAY?

23 A NO, THEY DID NOT.

24 Q DID YOU ALL OFFER HIM ANYTHING IN EXCHANGE FOR HIM
25 TALKING WITH YOU?

1 A NO, WE DID NOT.

2 Q DID HE SIGN THE WAIVER OF RIGHTS FORM?

3 A YES, HE DID.

4 Q DID HE SIGN IT IN BOTH PLACES OR JUST ONE?

5 A ONE. HE ONLY SIGNED-- AFTER I READ AND EXPLAINED EACH
6 LINE AFTER THE MIRANDA WARNING HE SIGNED ACKNOWLEDGING
7 HIS RIGHTS.

8 Q WHAT DOES THE BOTTOM OF THE FORM INDICATE?

9 A IT SAYS WAIVER OF RIGHTS. IT SAYS I AM WILLING TO TALK TO
10 POLICE AND ANSWER QUESTIONS. I DO NOT WANT AN ATTORNEY AT
11 THIS TIME. I UNDERSTAND AND KNOW WHAT I AM DOING. NO
12 PROMISES OR THREATS HAVE BEEN MADE TO ME. AND NO PRESSURE
13 OF ANY KIND HAS BEEN PLACED UPON ME.

14 WHEN I READ THAT TO HIM HE SAID HE WAS NOT WILLING TO
15 SIGN ANYTHING ELSE. BUT HE BEGAN TALKING.

16 Q DID HE EVER INDICATE TO YOU THAT HE WANTED AN
17 ATTORNEY BEFORE HE TALKED?

18 A HE DID NOT.

19 Q DID HE EVER INDICATE TO YOU THAT HE HAD BEEN
20 THREATENED IN ANY WAY?

21 A NO.

22 Q COERCED BY ANYONE?

23 A HE DID NOT.

24 Q AND ONCE HE BEGAN SPEAKING TO YOU OPENLY, WHAT WAS HE
25 TALKING ABOUT?

1 A HE WAS TALKING ABOUT HOW MESSED UP IT WAS, ABOUT WHAT
2 HE WAS BEING ARRESTED FOR. AND THIS TIME, TO MAKE SURE THAT
3 MR. HILL WASN'T CONFUSED ABOUT WHY I WAS THERE, AFTER I
4 EXPLAINED HIM HIS RIGHTS AND I ASKED HIM IF HE WAS WILLING TO
5 PROVIDE A WRITTEN STATEMENT OF WHAT HAPPENED, HE SAID NO, HE
6 WAS NOT WILLING TO PROVIDE ANYTHING ELSE IN WRITING.

7 I SAID, WELL, SO I WON'T LOSE TRACK OF OUR INTERVIEW AND
8 WHAT'S HAPPENED TODAY, I SAID, MR. HILL, DO YOU MIND IF I TAKE
9 NOTES. SO, I TOOK BRIEF NOTES ON WHAT WAS SAID BY MR. HILL. I
10 WANTED TO UNDERSTAND FROM MR. HILL WHY HE WAS IN A CAR
11 WITH THE DEFENDANT, AND WHAT WAS THE RELATIONSHIP. SO, WE
12 BEGAN BACK WITH HOW LONG THEY HAD KNOWN EACH OTHER AND
13 CONTINUED.

14 Q AND HOW LONG DID HE INDICATE THAT HE HAD KNOWN REICO
15 WELCH?

16 A FOR SEVERAL YEARS. HE HAD KNOWN MR. REICO WELCH FOR
17 SEVERAL YEARS AND THEY HAD BEEN DOING BUSINESS TOGETHER
18 FOR QUITE SOME TIME.

19 Q DID HE EXPLAIN TO YOU HOW HE AND MR. WELCH ENDED UP IN
20 YORK COUNTY THAT DAY?

21 A HE EXPLAINED TO ME. I ASKED HIM WHAT SORT OF BUSINESS
22 HE WAS IN. HE INFORMED ME, WHICH I HAD TO HAVE HIM TRANSLATE
23 FOR ME, HE SAID THAT HE WAS IN THE BUSINESS WITH MR. WELCH OF
24 BURGLARY, OR MORE OR LESS, GOING TO BUSINESSES AND
25 RESIDENCES. AND THAT HIS MAIN JOB WAS CUTTING BLOCKS.

1 Q WERE YOU FAMILIAR WITH THAT TERM?

2 A I HAD NO IDEA WHAT CUTTING A BLOCK WAS. SO, I ASKED MR.
3 HILL TO EXPLAIN TO ME. I SAID, SINCE I'VE NEVER HEARD THE
4 PHRASE, CUTTING BLOCKS, I SAID, CAN YOU EXPLAIN TO ME WHAT
5 CUTTING BLOCKS MEANS? AND HE DID.

6 Q WHAT DID HE EXPLAIN TO YOU THAT MEANT?

7 A HE TOLD ME THAT HIM AND MR. WELCH WOULD AGREE ON
8 WHICH LOCATION THEY WERE GOING TO HIT. AND WHILE HE DROPPED
9 MR. WELCH OFF AT THE PLACE WHERE THEY WERE GOING TO HIT, HE
10 WOULD LEAVE HIM THERE AND DRIVE AROUND THE BLOCKS, WAITING
11 ON WHETHER IT WAS AN AGREED TIME OR WHATEVER SIGNAL IT WAS.
12 THEN HE WOULD COME BACK AND PICK HIM UP. AND IN RETURN, HE
13 WOULD GET THREE, FOUR HUNDRED DOLLARS.

14 MR. SCHUSTERMAN: YOUR HONOR, MAY WE APPROACH?

15 THE COURT: COME FORWARD.

16 (WHEREUPON A BENCH CONFERENCE TOOK PLACE)

17 THE COURT: YOU MAY CONTINUE, MS. LIPINSKI.

18 Q AND AFTER HE EXPLAINED TO YOU ABOUT CUTTING BLOCKS,
19 DID MR. HILL BEGIN TO TALK TO YOU ABOUT THAT INCIDENT?

20 A HE DID. HE TOLD ME THAT HE ARRIVED IN YORK COUNTY WITH
21 MR. WELCH BETWEEN TEN-THIRTY AND ELEVEN O'CLOCK.

22 Q DID HE TELL YOU WHERE THEY WENT?

23 A THEY WENT TO THE VICTIMS' RESIDENCE IN THE
24 NEIGHBORHOOD. THEY DROVE BY, TURNED AROUND AND CAME

1 BACK. THAT'S WHERE HE TOLD ME THAT HE DROPPED OFF MR. WELCH
2 AND HE DROVE OFF TO CUT THE BLOCKS.

3 Q DID HE INDICATE THAT HE EVER WENT IN THE HOUSE?

4 A NO, HE DID NOT.

5 Q DID YOU ASK HIM IF HE WENT IN THE HOUSE?

6 A I ASKED HIM STEP BY STEP WHAT HAPPENED. I SAID, ARE YOU
7 SURE YOU DID NOT GO IN THE HOUSE. HE SAID I NEVER WENT IN THE
8 HOUSE. I WAS CUTTING THE BLOCK. I CAME BACK. I PULLED UP TO
9 THE FRONT OF THE RESIDENCE. I HEARD THE ALARM GOING OFF. I
10 SAW MR. WELCH RUNNING TOWARDS THE VEHICLE WITH A
11 PILLOWCASE. HE GOT INSIDE THE VEHICLE AND TOLD ME TO DRIVE
12 OFF. AT THAT TIME, MR. HILL SAID THEY DROVE OFF. THEY
13 PROCEEDED DOWN 274 TOWARDS HIGHWAY 161.

14 Q DID HE EVER INDICATE THAT THEY DID ANYTHING WITH THE
15 PILLOWCASE OR THE ITEMS MR. WELCH TOOK OUT OF THE HOUSE?

16 A YES. HE SAID THAT REICO THREW IT OUT ON 161.

17 Q DID YOU EVER HAVE ANY OCCASION TO TAKE MR. HILL WITH
18 YOU OUTSIDE THE LAW ENFORCEMENT CENTER IN ORDER TO
19 ATTEMPT TO RECOVER THOSE ITEMS?

20 A I DID NOT TAKE HIM OUT.

21 Q DID ANYONE ELSE WORKING WITH THE SHERIFF'S DEPARTMENT
22 TAKE HIM OUT?

23 A I BELIEVE THEY TOOK HIM-- I BELIEVE OTHER DETECTIVES
24 TOOK HIM DOWN 161 TO THAT AREA TO SEE IF HE COULD IDENTIFY
25 THE AREA THAT THE REST OF THE JEWELRY WAS THROWN OUT.

1 Q WERE THEY ABLE TO DO THAT?

2 A THEY WERE NOT.

3 Q LET'S MAKE IT CLEAR. DID YOU EVER GO TO THE WATKINS'
4 HOUSE AT THE TIME THEY WERE RESPONDING TO THE BURGLAR
5 ALARM?

6 A NO, I DID NOT.

7 Q DID YOU HAVE OCCASION TO VIEW DODGE CHARGER WHEN
8 THEY WERE TAKING MR. WELCH AND MR. HILL INTO CUSTODY?

9 A I WAS NOT THERE.

10 Q SO, YOUR RESPONSIBILITY HAPPENED BACK AT THE DETENTION
11 CENTER WHEN YOU HAD THE OCCASION TO INTERVIEW MR. HILL
12 THERE?

13 A THAT'S WHAT I DID, INTERVIEW HIM.

14 Q DID YOU SUBSEQUENTLY HAVE THE OCCASION TO INTERVIEW
15 MR. REICO WELCH?

16 A I...

17 Q DID YOU HAVE THE OCCASION TO GO SPEAK TO HIM?

18 A YES, I DID.

19 Q WHERE WAS THAT AT?

20 A THAT WAS AT THE DETENTION CENTER.

21 Q WHAT WAS THE PURPOSE YOU GOING TO SPEAK TO HIM? WAS IT
22 TO GET A STATEMENT FROM HIM, OR DID YOU GO FOR ANOTHER
23 PURPOSE?

24 A I WENT DOWN TO SERVE A FIRST DEGREE BURGLARY WARRANT
25 ON HIM.

1 Q WAS THAT DIFFERENT THAN THE BURGLARY WARRANT THAT
2 HAD BEEN SERVED ON HIM PREVIOUSLY?

3 A THAT IS CORRECT.

4 Q WHAT IS THE PURPOSE-- OR, WHY DID YOU ENHANCE THE
5 BURGLARY TO A BURGLARY, FIRST DEGREE?

6 A BASED ON THE CRIMINAL HISTORY THAT I READ.

7 Q SPECIFICALLY, THAT HE HAD TWO PRIOR CONVICTIONS FOR
8 BREAKING AND ENTERING?

9 A THAT IS CORRECT.

10 Q SO, YOU GO FOR THE PURPOSE OF SERVING THIS WARRANT ON
11 MR. WELCH?

12 A THAT WAS MY PURPOSE.

13 Q AND WAS AT THE DETENTION AT THE BOOKING AREA, OR WAS IT
14 SOMEWHERE ELSE?

15 A I WENT DOWN TO THE DETENTION CENTER. OF COURSE, I HAD
16 TO FOLLOW PROTOCOL SIGNING IN AND TELLING THE DETENTION
17 OFFICERS WHY I WAS THERE. AT THAT TIME THEY HAD MR. WELCH
18 COME OUT OF THE HOLDING CELL. AND I TOOK HIM INTO THE
19 BOOKING AREA WHERE IT WAS MORE PRIVATE TO SERVE THE
20 WARRANT.

21 Q DID YOU ATTEMPT TO SERVE THAT WARRANT ON HIM?

22 A YES, I DID.

23 Q WHAT WAS HIS REACTION TO THAT?

24 A THE FIRST THING I DID WAS TELL HIM WHY I WAS THERE. I TOLD
25 HIM I HAD A BURGLARY, FIRST DEGREE, WARRANT TO SERVE ON HIM.

1 AT THAT TIME, HE SAID, WHOA, MAN. HE SAID, DON'T DO THIS. HE
2 SAID HE COULD PROVIDE ME WITH INFORMATION.

3 AT THAT TIME I WANTED TO BE VERY CLEAR THAT HE KNEW HIS
4 RIGHTS. SO, I TOOK OUT THE MIRANDA FORM SIMILAR TO THIS.

5 Q I'LL SHOW YOU WHAT'S BEEN MARKED AS STATE'S EXHIBIT
6 NUMBER FOURTEEN---

7 A RIGHT.

8 Q AND ASK YOU IF THIS IS THE WAIVER OF RIGHTS FORM THAT
9 YOU TOOK OUT TO USE WITH MR. WELCH?

10 A THIS IS THE ORIGINAL COPY. THIS IS THE FORM THAT I READ
11 AND EXPLAINED TO HIM HIS MIRANDA WARNING RIGHTS.

12 Q DID HE SEEM TO UNDERSTAND THOSE RIGHTS?

13 A YES, HE DID. HE ACKNOWLEDGED BY MARKING YES, SIGNING
14 AND DATING IT. ALSO, HE READ THE WAIVER OF RIGHTS. AND HE
15 ALSO SIGNED AND DATED THE FORM ACKNOWLEDGING IT. AND ONLY
16 AFTER HE ACKNOWLEDGED IT DID I LISTEN TO ANYTHING THAT HE
17 HAD TO SAY TO ME.

18 Q AND YOU SAW ON THE PREVIOUS FORM THAT MR. HILL HAD
19 SIGNED AND INDICATED THAT HE WANTED TO SPEAK TO YOU. DID MR.
20 WELCH SIGN THAT SAME PART OF THAT SAME FORM INDICATING MR.
21 WELCH WANTED TO SPEAK TO YOU?

22 A YES, HE DID.

23 Q JUST SO THE JURY UNDERSTANDS, THE TOP PORTION WAS THE
24 ACTUAL WAIVER OF RIGHTS. SO, DID YOU HAND THAT TO MR. WELCH

1 TO ALLOW HIM TO READ IT, OR DID YOU GO OVER IT WITH HIM IN
2 MORE DETAIL?

3 A OH, I GO OVER EACH LINE. I READ, YOU HAVE THE RIGHT TO
4 REMAIN SILENT. DO YOU UNDERSTAND YOUR RIGHTS. I MAKE IT
5 VERY CLEAR WHAT'S ON THIS FORM SO THERE WILL BE NO
6 MISUNDERSTANDING. BECAUSE IF SOMEONE DOESN'T UNDERSTAND
7 THEIR RIGHTS, I AM THERE TO EXPLAIN EACH LINE AND TO MAKE
8 SURE AND NOT TO CONFUSE ANYONE.

9 Q HE APPEARED TO UNDERSTAND THEM?

10 A YES MA'AM.

11 Q DID HE HAVE ANY QUESTIONS ABOUT THEM?

12 A NO.

13 Q WHEN YOU THEN WENT TO SPEAK TO HIM AFTER YOU HAD
14 GONE OVER THE MIRANDA RIGHTS FORM, WHAT DID HE SAY TO YOU
15 AT THAT PARTICULAR TIME?

16 A MR. WELCH TOLD ME VERY CLEARLY THAT HE DIDN'T WANT ME
17 TO CHARGE HIM WITH BURGLARY FIRST; THAT HE COULD PROVIDE ME
18 WITH INFORMATION. AND THE INFORMATION THAT HE COULD
19 PROVIDE WAS WHERE THE LARGEST JEWELRY FENCING OPERATION
20 THERE IS IN NORTH AND SOUTH CAROLINA.

21 Q IF YOU COULD, EXPLAIN TO THE JURY WHAT A JEWELRY
22 FENCING OPERATION IS, BASED ON YOUR EXPERIENCE IN LAW
23 ENFORCEMENT.

24 A THAT IS AN AREA WHERE THIEVES WILL TAKE JEWELRY TO
25 EXCHANGE FOR MONEY, TO RECEIVE MONEY OR OTHER ITEMS. IT

1 COULD BE DRUGS. THAT'S HOW A LOT OF THIEVES DISPOSE OF THE
2 ITEMS THAT THEY STEAL FROM RESIDENCES AND BUSINESSES.

3 Q AND MR. WELCH TOLD YOU THAT HE COULD TAKE YOU TO THE
4 BIGGEST ONE IN SOUTH CAROLINA AND NORTH CAROLINA?

5 A THAT HE COULD PROVIDE ME INFORMATION ON THE LOCATIONS
6 OF THOSE OPERATIONS.

7 Q DID HE INDICATE THAT HE COULD GIVE YOU ANYTHING IN
8 REGARD SPECIFICALLY TO THE WATKINS' JEWELRY?

9 A HE SURE DID. HE SAID HE COULD PROVIDE ME WITH THE
10 LOCATION OF WHERE THE VICTIMS', THE REMAINDER OF THE JEWELRY
11 WAS LOCATED.

12 Q WHAT DID MR. WELCH WANT IN RETURN FOR THIS
13 INFORMATION?

14 A THAT I DROP THE CHARGE.

15 Q SPECIFICALLY WHICH CHARGE?

16 A THE BURGLARY, FIRST.

17 Q DID YOU AGREE TO DO THAT?

18 A NO MA'AM. I TOLD HIM I WAS NOT IN A POSITION TO MAKE ANY
19 BARGAIN WITH HIM OR REDUCE ANY CHARGES. I SAID THAT I COULD
20 DOCUMENT WHAT HE HAD TO SAY AND PRESENT IT TO THE COURT IN
21 THE GENERAL SESSIONS SUMMARY THAT I HAVE TO PROVIDE.

22 Q AS A RESULT OF THAT RESPONSE FROM YOU DID MR. WELCH
23 PROVIDE YOU WITH THE INFORMATION HE HAD REGARDING EITHER
24 THE FENCING OPERATION OR THE WATKINS' PROPERTY?

DAN HALL-DIRECT EXAMINATION BY MS. LIPINSKI

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1 DANIEL HALL, DULY SWORN,

2 TESTIFIED AS FOLLOWS:

3 DIRECT EXAMINATION BY MS. LIPINSKI:

4 Q MR. HALL, WITH WHOM ARE YOU EMPLOYED?

5 A SIXTEENTH CIRCUIT SOLICITOR'S OFFICE.

6 Q WERE YOU PREVIOUSLY INVOLVED IN THE PROSECUTION OF MR.
7 HILL AND MR. WELCH?

8 A I WAS.

9 Q DID YOU PARTICIPATE IN THE PLEA OF MR. HILL?

10 A I DID.

11 Q WHAT WAS THE BASIS OF REDUCING HIS BURGLARY, FIRST,
12 CHARGE, TO A BURGLARY, SECOND DEGREE CHARGE?

13 A HE WAS ACTUALLY NOT-- THERE WAS NO BASIS TO CHARGE
14 HIM WITH BURGLARY, FIRST DEGREE. A REVIEW OF HIS RECORD
15 INDICATED THAT HIS CERTIFIED CONVICTIONS WERE FOR BURGLARY,
16 THIRD DEGREE, AND ACCESSORY AFTER THE FACT.

17 THE STATUTE FOR BURGLARY, FIRST DEGREE, REQUIRES THAT
18 THERE HAS TO BE TWO PRIOR BURGLARY CONVICTIONS, AT LEAST
19 TWO PRIOR BURGLARY CONVICTIONS TO BE A BASIS FOR BURGLARY,
20 FIRST DEGREE, IF SOMEONE HAS BROKEN INTO A RESIDENCE.

21 IN THIS CASE, THERE WAS A BURGLARY OF A RESIDENCE, BUT
22 MR. HILL DID NOT HAVE THE REQUISITE TWO, PRIOR BURGLARY
23 CONVICTIONS.

24 Q SO, WHAT DID MR. HILL PLEAD TO?

25 A HE PLEAD TO BURGLARY, SECOND DEGREE.

1 Q VIOLENT OR NON-VIOLENT?

2 A NON-VIOLENT, BECAUSE IT WAS A RESIDENCE DURING THE
3 DAYTIME. UNDER THE BURGLARY STATUTE, IF ONE IS CONVICTED OF
4 BREAKING INTO A RESIDENCE DURING DAYLIGHT HOURS, THAT'S A
5 BURGLARY, NON-VIOLENT.

6 Q DID YOU MAKE ANY RECOMMENDATION, ANY SENTENCING
7 RECOMMENDATION TO THE JUDGE?

8 A IT WAS A STRAIGHT-UP PLEA.

9 Q EXPLAIN TO THE JURY WHAT A STRAIGHT-UP PLEA MEANS.

10 A A STRAIGHT-UP PLEA MEANS THAT HE PLEAD TO WHAT HE
11 CHARGED WITH. THERE WAS NO REDUCTION OF CHARGE EVEN
12 THOUGH THERE WAS-- THERE WAS A REDUCTION OR A CHANGE FROM
13 BURGLARY, FIRST. HE IN ESSENCE SHOULD NOT HAVE BEEN CHARGED
14 WITH BURGLARY, FIRST. SO, THE CHARGES HE SHOULD HAVE BEEN
15 LEGALLY CHARGED WITH, AND WAS INDICTED FOR, WAS A
16 BURGLARY, SECOND, NON-VIOLENT.

17 HE PLEAD STRAIGHT-UP WITHOUT RECOMMENDATION.

18 Q WHAT WAS HE FACING AT THAT TIME?

19 A A FIFTEEN-YEAR SENTENCE.

20 Q WHAT DID THE JUDGE GIVE HIM?

21 A EIGHTEEN MONTHS.

22 Q AT THE TIME OF THE PLEA DID MR. HILL INDICATE WHETHER HE
23 WOULD TESTIFY AGAINST MR. REICO WELCH?

24 A HE DID. HE INDICATED THAT HE WOULD TESTIFY. IN FACT, I
25 ASKED HIM A SERIES OF QUESTIONS ABOUT HIS INVOLVEMENT AND

1 MS. LIPINSKI: THAT'S ALL, YOUR HONOR.

2 MR. SCHUSTERMAN: NOTHING FURTHER, YOUR HONOR.

3 THE COURT: THANK YOU, MR. HALL.

4 MS. LIPINSKI: YOUR HONOR, THE STATE RESTS.

5 THE COURT: LADIES AND GENTLEMEN OF THE JURY, WE'RE
6 GOING TO BREAK FOR LUNCH. I'LL ASK YOU TO BE BACK IN THE JURY
7 ROOM AT 2:30.

8 (WHEREUPON THE JURY EXITED THE COURTROOM)

9 ALL RIGHT, I'LL HEAR FROM YOU, MR. SCHUSTERMAN.

10 MR. SCHUSTERMAN: THANK YOU, YOUR HONOR. MAY IT
11 PLEASE THE COURT. YOUR HONOR, FOR THE RECORD, AT THIS TIME, I
12 WOULD ASK THE COURT TO CONSIDER A DIRECTED VERDICT OF
13 ACQUITTAL, BASED ON THE FACT THAT VIEWED IN THE LIGHT MOST
14 FAVORABLE TO THE STATE I BELIEVE THAT THERE IS REALLY NO
15 EVIDENCE TYING MY CLIENT TO THIS ACTUAL, TO THE BURGLARY, NO
16 EVIDENCE WHATSOEVER, OTHER THAN THE POTENTIALLY LESS THAN
17 RELIABLE, RECANTED STATEMENT BY A CO-DEFENDANT.

18 AND AS SUCH, YOUR HONOR, I BELIEVE THAT THE STATE HAS
19 FAILED TO MEET THEIR BURDEN TO ALLOW THIS TO GO TO THE JURY. I
20 WOULD ASK YOU TO CONSIDER THAT.

21 THE COURT: THANK YOU, MR. SCHUSTERMAN. I WOULD
22 RESPECTFULLY DENY YOUR MOTION. THERE WAS CERTAIN
23 TESTIMONY THAT HE WAS FOUND IN A VEHICLE A SHORT TIME AFTER
24 THIS BURGLARY, AT SOME DISTANCE FROM IT, WITH A CO-
25 DEFENDANT. AND THAT VEHICLE CONTAINED AT LEAST SOME OF THE

1 MATERIALS OR GOODS THAT HAD BEEN STOLEN DURING THE
2 BURGLARY. THEY WERE IN FAIRLY CLOSE PROXIMITY, AGAIN, TO THE
3 SITE.

4 WE'VE HAD THE CO-DEFENDANT TESTIFY-- WELL, HE TESTIFIED
5 TO JUST ABOUT EVERYTHING. ONE OF THE THINGS THAT HE TESTIFIED
6 TO IS THE FACT THAT-- OR HIS STATEMENT WOULD INDICATE THAT HE
7 WAS INVOLVED IN THIS WITH THE DEFENDANT.

8 THE DEFENDANT ALSO MADE A STATEMENT TO LAW
9 ENFORCEMENT CONCERNING HIS KNOWLEDGE, CONCERNING A
10 FENCING OPERATION AND THINGS OF THAT NATURE.

11 I BELIEVE THAT THERE IS SUFFICIENT EVIDENCE TO TAKE THIS
12 CASE TO A JURY.

13 MS. LIPINSKI, I MADE THAT RULING ON MY OWN. OKAY?
14 ANYTHING FURTHER?

15 MS. LIPINSKI: NOTHING FROM THE STATE, YOUR HONOR.

16 THE COURT: MR. SCHUSTERMAN, I BELIEVE YOU DO HAVE A
17 MATTER THAT WE DISCUSSED AT THE SIDEBAR, AND I DEFERRED TO
18 HAVE THAT PUT ON THE RECORD UNTIL WE HAD A BREAK, IN THE
19 INTEREST OF ECONOMY.

20 MR. SCHUSTERMAN: YES SIR. I WOULD-- I TOOK EXCEPTION,
21 YOUR HONOR, TO DETECTIVE GURGANUS TAKING A STATEMENT IN
22 PURSUING TALKING TO MR. HILL WHEN MR. HILL WAS UNWILLING TO
23 WAIVE HIS RIGHTS.

24 IT'S MY BELIEF THAT, WHILE I DO NOT REPRESENT MR. HILL,
25 THAT WHICH CAME OUT OF MR. HILL'S MOUTH IS OBVIOUSLY

1 BE EQUAL. I RESPECT THAT. THERE WAS A RISK OF GOING TO TRIAL,
2 TO EVERYTHING THAT WE DID. THERE WAS ALWAYS A RISK NOT TO
3 ACCEPT PLEA OFFERS OR THE LIKE.

4 AT THE SAME TIME THE FACT REMAINS THAT I BELIEVE THAT IF
5 ONE DOES AN ANALYSIS OF MR. HILL'S RECORD VERSUS MR. WELCH'S
6 RECORD, I DON'T THINK THE COURT'S GONNA FIND VERY MUCH
7 DIFFERENCE.

8 CERTAINLY, I UNDERSTAND THE CONCEPT THAT PREVENTED
9 MR. HILL FROM GOING TO A BURGLARY, FIRST; THAT HIS HOUSE
10 BREAKING TURNED INTO A PLEA TO ACCESSORY AFTER THE FACT.
11 BUT I BELIEVE THAT MR. HILL'S GUILT IS EVERY BIT OF WHAT MR.
12 WELCH'S IS. AND I WOULD ASK THE COURT TO CONSIDER THE
13 MINIMUM SENTENCE. A FIFTEEN-YEAR SENTENCE IS A VERY
14 SUBSTANTIAL SENTENCE, SIR.

15 THE COURT: ANYTHING FROM THE STATE?

16 MS. LIPINSKI: YOUR HONOR, JUST BRIEFLY. AND I'M NOT
17 REALLY TRYING TO TAKE EXCEPTION TO WHAT MR. SCHUSTERMAN
18 SAID. MR. HILL HAD AN ACCESSORY AFTER THE FACT HOUSE
19 BREAKING, AND A BURGLARY, BOTH FROM THE MID-EIGHTIES. MR.
20 WELCH'S RECORD FOR BURGLARY OR BREAKING AND ENTERING WAS
21 NOT ONLY TWO CONVICTIONS, BUT THREE, AS YOU WELL KNOW, AS IT
22 WAS A SUBJECT OF GREAT DEBATE. AND THAT THAT OCCURRED IN
23 2005.

24 SO, WHILE THE SHEER NUMBER OF CONVICTIONS ON THEIR
25 RECORDS MAY BE EQUAL, I THINK CERTAINLY MR. WELCH HAD BEEN

1 IN TROUBLE MORE RECENTLY, AND SIGNIFICANT TROUBLE AND
2 OBVIOUSLY WAS NOT LEARNING HIS LESSON.

3 HIS OTHER RECORD INVOLVED A POSSESSION OF COCAINE. HE
4 WAS ON PROBATION. HE'S BEEN VIOLATED ON PROBATION. FOR THAT
5 REASON THE STATE DOES THINK THAT THE COURT NEEDS TO TAKE
6 THAT INTO CONSIDERATION IN SENTENCING.

7 I WILL AT THIS TIME ASK JUDGE WATKINS IF HE HAS ANYTHING
8 HE WOULD LIKE TO SAY. HE DID STAY FOR THE TRIAL.

9 THE COURT: VERY WELL.

10 MR. WATKINS: A FEW BRIEF COMMENTS.

11 THE COURT: YES SIR.

12 MR. WATKINS: IF IT PLEASE THE COURT, YOUR HONOR. FIRST OF
13 ALL, I WOULD LIKE TO THANK THE YORK COUNTY SHERIFF'S OFFICE,
14 THE SOLICITOR'S OFFICE, AND THIS COURT FOR THE EFFORTS THEY
15 SHOWED IN THIS CASE.

16 I SPEAK MORE FOR MY WIFE THAN MYSELF. WE WERE VERY
17 CONCERNED ABOUT MR. WELCH BEING FREED HERE TODAY. WE STILL
18 FEEL, DESPITE THE RECOVERY OF A PORTION OF OUR BELONGINGS, WE
19 LOST STUFF, WHICH AS MY WIFE EXPRESSED ON THE STAND, HAD A
20 GREAT DEAL OF SENTIMENTAL VALUE TO US.

21 WE WERE MORE CONCERNED ABOUT THE FACT THAT A MAN
22 LIKE THIS WOULD BE ON THE STREET, AND COULD COME BACK AND
23 POSSIBLY SEEK TO STRIKE US AGAIN, AND TO STRIKE THE CITIZENS OF
24 YORK COUNTY AGAIN.

1 I'LL LEAVE HERE WITH A GREAT SENSE OF RELIEF TODAY THAT
2 THAT WILL NOT HAPPEN. AND I'D LIKE TO THANK EVERYONE HERE
3 FOR MAKING THAT POSSIBLE.

4 THE COURT: THANK YOU. WHAT WAS THE DEFENDANT'S
5 SENTENCE IN NORTH CAROLINA IN 1985?

6 MS. LIPINSKI: GEORGE HILL WAS CONVICTED IN 1985. HE AT
7 THAT TIME GOT FIVE. MR. WELCH'S THREE CONVICTIONS: IN 2005, HE
8 WAS GIVEN EIGHT TO ELEVEN, OR EIGHT TO TEN MONTHS, WAS HIS
9 SENTENCE AT THAT TIME.

10 THE COURT: WHAT WOULD YOU LIKE TO TELL ME, MR. WELCH?

11 MR. WELCH: SIR, I RESPECT THE COURT'S DECISION AS FAR AS
12 HOW THE JURY CAME BACK ON THE DECISION. BUT I STAND HERE TO
13 TELL YOU I BEEN GUILTY OF A LOT OF THINGS IN LIFE, BUT I STAND
14 TOTALLY INNOCENT OF THE CHARGE THAT I BEEN ACCUSED OF, AND
15 AM NOT GUILTY OF.

16 I'M NOT SAYING THAT I'M A ANGEL OR LED THAT KIND OF LIFE.
17 BUT I DID DO WRONG ON THE SITUATION I BEEN ACCUSED OF AND
18 DON'T DENY MY RECORD. YES, I HAVE HAD A CRIMINAL CONVICTION.
19 I BEEN CONVICTED OF COCAINE. I HAD A COCAINE ADDICTION IN '95.
20 AND AS YOU CAN SEE, I WAS CONVICTED OF B&E IN 2005.

21 BUT SINCE THEN I BEEN TRYING TO DO RIGHT AND LIVING
22 RIGHT, YOU KNOW. BUT THE SITUATION DON'T ALWAYS GO THAT
23 WAY. THE SITUATION THEY GOT ME IN RIGHT NOW, YOU OBVIOUSLY,
24 GOT TO MAKE A DECISION ON THAT. BUT AS FAR AS MY RECORD AND
25 BY ME BEING FREE TO STRIKE BACK AT THE VICTIMS IN THE MATTER,

West's North Carolina General Statutes Annotated Currentness

Chapter 15A. Criminal Procedure Act (Refs & Annos)

Subchapter XIII. Disposition of Defendants (Refs & Annos)

▣ Article 81B. Structured Sentencing of Persons Convicted of Crimes (Refs & Annos)

→ Part 1. General Provisions

→ § 15A-1340.10. Applicability of structured sentencing

This Article applies to criminal offenses in North Carolina, other than impaired driving under G.S. 20-138.1 and failure to comply with control measures under G.S. 130A-25, that occur on or after October 1, 1994. This Article does not apply to violent habitual felons sentenced under Article 2B of Chapter 14 of the General Statutes.

§ 15A-1340.11. Definitions

<Text of section eff. Dec. 1, 2009. See, also, section eff. until Dec. 1, 2009.>

The following definitions apply in this Article:

- (1) Active punishment.--A sentence in a criminal case that requires an offender to serve a sentence of imprisonment and is not suspended. Special probation, as defined in G.S. 15A-1351, is not an active punishment.
- (2) Community punishment.--A sentence in a criminal case that does not include an active punishment, an intermediate punishment, or any of the conditions of probation listed in subdivision (6) of this section.
- (3) Day-reporting center.--A facility to which offenders are required, as a condition of probation, to report on a daily or other regular basis at specified times for a specified length of time to participate in activities such as counseling, treatment, social skills training, or employment training.
- (3a) Drug treatment court program. -- Program to which offenders are required, as a condition of probation, to comply with the rules adopted for the program as provided for in Article 62 of Chapter 7A of the General Statutes and to report on a regular basis for a specified time to participate in:
 - a. Court supervision.
 - b. Drug screening or testing.
 - c. Drug or alcohol treatment programs.

(4) Deleted by Law 1997, c. 57, § 2, eff. Dec. 1, 1997.

<Text of subd. (4a) eff. until Dec. 1, 2009.>

(4a) House arrest with electronic monitoring.--Probation in which the offender is required to remain at his or her residence unless the court or the probation officer authorizes the offender to leave for the purpose of employment, counseling, a course of study, or vocational training. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition electronically.

<Text of subd. (4a) eff. Dec. 1, 2009.>

(4a) House arrest with electronic monitoring.--Probation in which the offender is required to remain at his or her residence. The court, in the sentencing order, may authorize the offender to leave the offender's residence for employment, counseling, a course of study, vocational training, or other specific purposes and may modify that authorization. The probation officer may authorize the offender to leave the offender's residence for specific purposes not authorized in the court order upon approval of the probation officer's supervisor. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition.

<Text of subd. (5) eff. until Dec. 1, 2009.>

(5) Intensive probation.--Probation that requires the offender to submit to supervision by officers assigned to the Intensive Supervision Program established pursuant to G.S. 143B-262(c), and to comply with the rules adopted for that Program. Unless otherwise ordered by the court, intensive supervision also requires multiple contacts by a probation officer per week, a specific period each day during which the offender must be at his or her residence, and that the offender remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the offender for suitable employment.

<Text of subd. (5) eff. Dec. 1, 2009.>

(5) Intensive supervision.--Probation that requires the offender to submit to rules adopted by the Division of Community Corrections for intensive supervision, including, but not limited to, multiple contacts by a probation officer per week, a specific period each day during which the offender must be at his or her residence, and that the offender remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the offender for suitable employment.

<Text of subd. (6) eff. until Dec. 1, 2009.>

(6) Intermediate punishment. -- A sentence in a criminal case that places an offender on supervised probation and includes at least one of the following conditions:

- a. Special probation as defined in G.S. 15A-1351(a).
- b. Assignment to a residential program.
- c. House arrest with electronic monitoring.
- d. Intensive probation.
- e. Assignment to a day-reporting center.
- f. Assignment to a drug treatment court program.

<Text of subd. (6) eff. Dec. 1, 2009.>

(6) Intermediate punishment.--A sentence in a criminal case that places an offender on supervised probation and includes at least one of the following conditions:

- a. Special probation as defined in G.S. 15A-1351(a).
- b. Assignment to a residential program.
- c. House arrest with electronic monitoring.
- d. Intensive supervision.
- e. Assignment to a day-reporting center.
- f. Assignment to a drug treatment court program.

(7) Prior conviction.--A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:

- a. In the district court, and the person has not given notice of appeal and the time for appeal has expired; or

b. In the superior court, regardless of whether the conviction is on appeal to the appellate division; or

c. In the courts of the United States, another state, the armed services of the United States, or another country, regardless of whether the offense would be a crime if it occurred in North Carolina,

regardless of whether the crime was committed before or after the effective date of this Article.

(8) Residential program.--A program in which the offender, as a condition of probation, is required to reside in a facility for a specified period and to participate in activities such as counseling, treatment, social skills training, or employment training, conducted at the residential facility or at other specified locations.

§ 15A-1340.12. Purposes of sentencing

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

§ 15A-1340.13. Procedure and incidents of sentence of imprisonment for felonies

(a) Application to Felonies Only.--This Part applies to sentences imposed for felony convictions.

(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences.--Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment.

(c) Minimum and Maximum Term.--The judgment of the court shall contain a minimum term of imprisonment that is consistent with the class of offense for which the sentence is being imposed and with the prior record level for the offender. The maximum term of imprisonment applicable to each minimum term of imprisonment is, unless otherwise provided, as specified in G.S. 15A-1340.17. The maximum term shall be specified in the judgment of the court.

(d) Service of Minimum Required; Earned Time Authorization.--An offender sentenced to an active punishment shall serve the minimum term imposed. The maximum term may be reduced to, but not below, the minimum term by earned time credits awarded to an offender by the Department of Correction or the custodian of the local confinement facility, pursuant to rules adopted in accordance with law.

(e) Deviation from Sentence Ranges for Aggravation and Mitigation; No Sentence Dispositional Deviation Allowed.--The court may deviate from the presumptive range of minimum sentences of imprisonment specified for a class of offense and prior record level if it finds, pursuant to G.S. 15A-1340.16, that aggravating or mitigating circumstances support such a deviation. The amount of the deviation is in the court's discretion, subject to the limits specified in the class of offense and prior record level for mitigated and aggravated punishment. Deviations for aggravated or mitigated punishment are allowed only in the ranges of minimum and maximum sentences of imprisonment, and not in the sentence dispositions specified for the class of offense and prior record level, unless a statute specifically authorizes a sentence dispositional deviation.

(f) Suspension of Sentence.--Unless otherwise provided, the court shall not suspend the sentence of imprisonment if the class of offense and prior record level do not permit community or intermediate punishment as a sentence disposition. The court shall suspend the sentence of imprisonment if the class of offense and prior record level require community or intermediate punishment as a sentence disposition. The court may suspend the sentence of imprisonment if the class of offense and prior record level authorize, but do not require, active punishment as a sentence disposition.

(g) Dispositional Deviation for Extraordinary Mitigation.--Except as provided in subsection (h) of this section, the court may impose an intermediate punishment for a class of offense and prior record level that requires the imposition of an active punishment if it finds in writing all of the following:

- (1) That extraordinary mitigating factors of a kind significantly greater than in the normal case are present.
- (2) Those factors substantially outweigh any factors in aggravation.
- (3) It would be a manifest injustice to impose an active punishment in the case.

The court shall consider evidence of extraordinary mitigating factors, but the decision to find any such factors, or to impose an intermediate punishment is in the discretion of the court. The extraordinary mitigating factors which the court finds shall be specified in its judgment.

(h) Exceptions When Extraordinary Mitigation Shall Not Be Used.--The court shall not impose an intermediate sanction pursuant to subsection (g) of this section if:

- (1) The offense is a Class A or Class B1 felony;
- (2) The offense is a drug trafficking offense under G.S. 90-95(h) or a drug trafficking conspiracy offense under G.S. 90-95(i); or
- (3) The defendant has five or more points as determined by G.S. 15A-1340.14.

§ 15A-1340.14. Prior record level for felony sentencing

(a) Generally. -- The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or with respect to subdivision (b)(7) of this section, the jury, finds to have been proved in accordance with this section.

(b) Points. -- Points are assigned as follows:

(1) For each prior felony Class A conviction, 10 points.

(1a) For each prior felony Class B1 conviction, 9 points.

(2) For each prior felony Class B2, C, or D conviction, 6 points.

(3) For each prior felony Class E, F, or G conviction, 4 points.

(4) For each prior felony Class H or I conviction, 2 points.

(5) For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.

(6) If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point.

(7) If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

For purposes of determining prior record points under this subsection, a conviction for a first degree rape or a first degree sexual offense committed prior to the effective date of this subsection shall be treated as a felony Class B1 conviction, and a conviction for any other felony Class B offense committed prior to the effective date of this subsection shall be treated as a felony Class B2 conviction. G.S. 15A-1340.16(a5) specifies the procedure to be used to determine if a point exists under subdivision (7) of this subsection. The State must provide a defendant with written notice of its intent to prove the existence of the prior record point under subdivision (7) of this subsection as required by G.S. 15A-1340.16(a6).

(c) Prior Record Levels for Felony Sentencing.--The prior record levels for felony sentencing are:

- (1) Level I--Not more than 1 point.
- (2) Level II--At least 2, but not more than 5 points.
- (3) Level III--At least 6, but not more than 9 points.
- (4) Level IV--At least 10, but not more than 13 points.
- (5) Level V--At least 14, but not more than 17 points.
- (6) Level VI--At least 18 points.

In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed.

(d) Multiple Prior Convictions Obtained in One Court Week. -- For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

(e) Classification of Prior Convictions From Other Jurisdictions. -- Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

(f) Proof of Prior Convictions. -- A prior conviction shall be proved by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record. Evidence presented by either party at trial may be utilized to prove prior convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. If a motion is made pursuant to that section during the sentencing stage of the criminal action, the court may grant a continuance of the sentencing hearing. If asked by the defendant in compliance with G.S. 15A-903, the prosecutor shall furnish the defendant's prior criminal record to the defendant within a reasonable time sufficient to allow the defendant to determine if the record available to the prosecutor is accurate. Upon request of a sentencing services program established pursuant to Article 61 of Chapter 7A of the General Statutes, the district attorney shall provide any information the district attorney has about the criminal record of a person for whom the program has been requested to provide a sentencing plan pursuant to G.S. 7A-773.1.

§ 15A-1340.15. Multiple convictions

(a) **Consecutive Sentences.**--This Article does not prohibit the imposition of consecutive sentences. Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.

(b) **Consolidation of Sentences.**--If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

§ 15A-1340.16. Aggravated and mitigated sentences

<Text of section eff. Dec. 1, 2009. See, also, section eff. until Dec. 1, 2009.>

(a) **Generally, Burden of Proof.** -- The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggrav-

ating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(a1) Jury to Determine Aggravating Factors; Jury Procedure if Trial Bifurcated. --The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. Admissions of the existence of an aggravating factor must be consistent with the provisions of G.S. 15A-1022.1. If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense. The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue. A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

(a2) Procedure if Defendant Admits Aggravating Factor Only. -- If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying felony, a jury shall be impaneled to dispose of the felony charge. In that case, evidence that relates solely to the establishment of an aggravating factor shall not be admitted in the felony trial.

(a3) Procedure if Defendant Pleads Guilty to the Felony Only. -- If the defendant pleads guilty to the felony, but contests the existence of one or more aggravating factors, a jury shall be impaneled to determine if the aggravating factor or factors exist.

(a4) Pleading of Aggravating Factors. -- Aggravating factors set forth in subsection (d) of this section need not be included in an indictment or other charging instrument. Any aggravating factor alleged under subdivision (d)(20) of this section shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924.

(a5) Procedure to Determine Prior Record Level Points Not Involving Prior Convictions. -- If the State seeks to establish the existence of a prior record level point under G.S. 15A-1340.14(b)(7), the jury shall determine whether the point should be assessed using the procedures specified in subsections (a1) through (a3) of this section. The State need not allege in an indictment or other pleading that it intends to establish the point.

(a6) Notice of Intent to Use Aggravating Factors or Prior Record Level Points. -- The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

(b) When Aggravated or Mitigated Sentence Allowed.--If the jury, or with respect to an aggravating factor under G.S. 15A-1340.16(d)(12a) or (18a), the court, finds that aggravating factors exist or the court finds that mitigating factors exist, the court may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

(c) Written Findings; When Required. -- The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If the jury finds factors in aggravation, the court shall ensure that those findings are entered in the court's determination of sentencing factors form or any comparable document used to record the findings of sentencing factors. Findings shall be in writing. The requirement to make findings in order to depart from the presumptive range applies regardless of whether the sentence of imprisonment is activated or suspended.

(d) Aggravating Factors. -- The following are aggravating factors:

- (1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.
- (2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.
- (2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.
- (3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (4) The defendant was hired or paid to commit the offense.
- (5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance at-

tendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

<Text of subd. (d)(6a) eff. until Dec. 1, 2009 .>

- (6a) The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal or assistance animal as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties.

<Text of subd. (d)(6a) eff. Dec. 1, 2009.>

- (6a) The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal, an assistance animal, or a search and rescue animal as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties.

- (7) The offense was especially heinous, atrocious, or cruel.

- (8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

- (9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.

- (10) The defendant was armed with or used a deadly weapon at the time of the crime.

- (11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.

- (12) The defendant committed the offense while on pretrial release on another charge.

- (12a) The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

- (13) The defendant involved a person under the age of 16 in the commission of the crime.

- (14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.
- (15) The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.
- (16) The offense involved the sale or delivery of a controlled substance to a minor.
- (16a) The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.
- (16b) The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings.
- (17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.
- (18) The defendant does not support the defendant's family.
- (18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.
- (19) The serious injury inflicted upon the victim is permanent and debilitating.
- (20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 15A-1340.16A may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial.

Notwithstanding the provisions of subsection (a1) of this section, the determination that an aggravating factor under G.S. 15A-1340.16(d)(18a) is present in a case shall be made by the court, and not by the jury. That determination shall be made in the sentencing hearing.

(e) Mitigating Factors.--The following are mitigating factors:

- (1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- (2) The defendant was a passive participant or played a minor role in the commission of the offense.
- (3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
- (4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.
- (5) The defendant has made substantial or full restitution to the victim.
- (6) The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.
- (7) The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
- (8) The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
- (9) The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.
- (10) The defendant reasonably believed that the defendant's conduct was legal.
- (11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
- (12) The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.
- (13) The defendant is a minor and has reliable supervision available.
- (14) The defendant has been honorably discharged from the United States armed services.
- (15) The defendant has accepted responsibility for the defendant's criminal conduct.

- (16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.
- (17) The defendant supports the defendant's family.
- (18) The defendant has a support system in the community.
- (19) The defendant has a positive employment history or is gainfully employed.
- (20) The defendant has a good treatment prognosis, and a workable treatment plan is available.
- (21) Any other mitigating factor reasonably related to the purposes of sentences.

§ 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm or deadly weapon during the commission of the felony

(a), (b) Repealed by Session Laws 2003-378, s. 2, effective August 1, 2003.

(c) If a person is convicted of a Class A, B1, B2, C, D, or E felony and it is found as provided in this section that: (i) the person committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and (ii) the person actually possessed the firearm or deadly weapon about his or her person, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 60 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 60 months, as specified in G.S. 15A-1340.17(e) and (e1).

(d) An indictment or information for the Class A, B1, B2, C, D, or E felony shall allege in that indictment or information the facts set out in subsection (c) of this section. The pleading is sufficient if it alleges that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and the defendant actually possessed the firearm or deadly weapon about the defendant's person. One pleading is sufficient for all Class A, B1, B2, C, D, or E felonies that are tried at a single trial.

(e) The State shall prove the issues set out in subsection (c) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to the issues. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issues set out in subsection (c) of this section, then a jury shall be impaneled to determine the issues.

(f) Subsection (c) of this section does not apply if the evidence of the use, display, or threatened use or display of the firearm or deadly weapon is needed to prove an element of the felony or if the person is not sentenced to an active term

of imprisonment.

§ 15A-1340.16B. Life imprisonment without parole for a second or subsequent conviction of a Class B1 felony if the victim was 13 years of age or younger and there are no mitigating factors

(a) If a person is convicted of a Class B1 felony and it is found as provided in this section that:

(i) the person committed the felony against a victim who was 13 years of age or younger at the time of the offense and

(ii) the person has one or more prior convictions of a Class B1 felony, then the person shall be sentenced to life imprisonment without parole.

(b) Repealed by S.L. 2003-378, § 3, eff. Aug. 1, 2003.

(c) Repealed by S.L. 2003-378, § 3, eff. Aug. 1, 2003.

(d) An indictment or information for the Class B1 felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony against a victim who was 13 years of age or younger at the time of the felony and that the defendant had one or more prior convictions of a Class B1 felony. One pleading is sufficient for all Class B1 felonies that are tried at a single trial.

(e) The State shall prove the issues set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to the issues. The issues shall be presented in the same manner as provided in G.S. 15A-928(c). If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issues set out in subsection (a) of this section, then a jury shall be impaneled to determine the issues.

(f) Subsection (a) of this section does not apply if there are mitigating factors present under G.S. 15A-1340.16(e).

§ 15A-1340.16C. Enhanced sentence if defendant is convicted of a felony and the defendant was wearing or had in his or her immediate possession a bullet-proof vest during the commission of the felony

(a) If a person is convicted of a felony and it is found as provided in this section that the person wore or had in his or her immediate possession a bullet-proof vest at the time of the felony, then the person is guilty of a felony that is one class higher than the underlying felony for which the person was convicted.

(b) Repealed by S.L. 2003-378, § 4, eff. Aug. 1, 2003.

(b1) This section does not apply to law enforcement officers, unless the State proves beyond a reasonable doubt, pursuant to subsection (d) of this section, both of the following:

(1) That the law enforcement officer was not performing or attempting to perform a law enforcement function.

(2) That the law enforcement officer knowingly wore or had in his or her immediate possession a bulletproof vest at the time of the commission of the felony for the purpose of aiding the law enforcement officer in the commission of the felony.

(c) An indictment or information for the felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony while wearing or having in the defendant's immediate possession a bulletproof vest. One pleading is sufficient for all felonies that are tried at a single trial.

(d) The State shall prove the issue set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to that issue. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issue set out in subsection (a) of this section, then a jury shall be impaneled to determine that issue.

(e) Subsection (a) of this section does not apply if the evidence that the person wore or had in the person's immediate possession a bulletproof vest is needed to prove an element of the felony.

§ 15A-1340.16D. Enhanced sentence if defendant is convicted of manufacture of methamphetamine and the offense resulted in serious injury to a law enforcement officer, probation officer, parole officer, emergency medical services employee, or a firefighter

(a) If a person is convicted of the offense of manufacture of methamphetamine under G.S. 90-95(b)(1a) and it is found as provided in this section that a law enforcement officer, probation officer, parole officer, emergency medical services employee, or a firefighter suffered serious injury while discharging or attempting to discharge his or her official duties and that the injury was directly caused by one of the hazards associated with the manufacture of methamphetamine, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 24 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 24 months, as specified in G.S. 15A-1340.17(e) and (e1).

(b) An indictment or information for the offense of manufacture of methamphetamine under G.S. 90-95(b)(1a) shall allege in that indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the offense of manufacture of methamphetamine and that as a result of the offense a law enforcement officer, probation officer, parole officer, emergency medical services employee, or firefighter suffered serious injury while discharging or attempting to discharge his or her official duties. One pleading is sufficient for all felonies that are tried at a single trial.

(c) The State shall prove the issue set out in subsection (b) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the offense of manufacture of methamphetamine unless the defendant pleads guilty or no contest to the issue. If the defendant pleads guilty or no contest to the offense of manufacture of methamphetamine but pleads not guilty to the issue set out in subsection (b) of this section, then a jury shall be impaneled to determine the issue.

(d) This section does not apply if the offense is packaging or repackaging methamphetamine, or labeling or relabeling the methamphetamine container.

§ 15A-1340.17. Punishment limits for each class of offense and prior record level

<Text of section eff. Dec. 1, 2009. See, also, section eff. until Dec. 1, 2009.>

(a) Offense Classification; Default Classifications.--The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines.--Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a fine only. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

<Text of subsec. (c) eff. until Dec. 1, 2009.>

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described.--The authorized punishment for each class of offense and prior record level is as specified in the chart below. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

- (1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.
- (2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G. S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.
- (3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

- (4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A 240-30 0	A 288-360	A 336-42 0	A 384-480	A Life Imprisonment Without Parole	A	DISPOSITION Aggravated
B1	192-24 0	230-288	269-336	307-384	346-433	384-480	PRESUMPTIVE
	144-19 2	173-230	202-269	230-307	260-346	288-384	Mitigated
	A 157-19 6	A 189-237	A 220-276	A 251-313	A 282-353	A 313-392	DISPOSITION Aggravated
B2	125-15 7	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE
	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A 73-92	A 100-125	A 116-145	A 133-167	A 151-188	A 168-210	DISPOSITION Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A 64-80	A 77-95	A 103-129	A 117-146	A 133-167	A 146-183	DISPOSITION Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A 25-31	I/A 29-36	A 34-42	A 46-58	A 53-66	A 59-74	DISPOSITION Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A 16-20	I/A 19-24	I/A 21-26	A 25-31	A 34-42	A 39-49	DISPOSITION Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated

	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

<Text of subsec. (c) eff. Dec. 1, 2009.>

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described.--The authorized punishment for each class of offense and prior record level is as specified in the chart below. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

- (1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.
- (2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G. S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.
- (3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.
- (4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

I	II	III	IV	V	VI
0-1 Pt	2-5 Pts	6-9 Pts	10-13 Pts	14-17 Pts	18+ Pts

A Life Imprisonment Without Parole or Death as Established by Statute							
	A 240-30 0	A 276-345	A 317-39 7	A 365-456	A Life Imprisonment Without Parole	A 386-483	DISPOSITION Aggravated
B1	192-24 0	221-276	254-317	292-365	336-420	386-483	PRESUMPTIVE
	144-19 2	166-221	190-254	219-292	252-336	290-386	Mitigated
	A 157-19 6	A 180-225	A 207-258	A 238-297	A 273-342	A 314-393	DISPOSITION Aggravated
B2	125-15 7	144-180	165-207	190-238	219-273	251-314	PRESUMPTIVE
	94-125	108-144	124-165	143-190	164-219	189-251	Mitigated
	A 73-92	A 83-104	A 96-120	A 110-138	A 127-159	A 146-182	DISPOSITION Aggravated
C	58-73	67-83	77-96	88-110	101-127	117-146	PRESUMPTIVE
	44-58	50-67	58-77	66-88	76-101	87-117	Mitigated
	A 64-80	A 73-92	A 84-105	A 97-121	A 111-139	A 128-160	DISPOSITION Aggravated
D	51-64	59-73	67-84	78-97	89-111	103-128	PRESUMPTIVE
	38-51	44-59	51-67	58-78	67-89	77-103	Mitigated
	I/A 25-31	I/A 29-36	A 33-41	A 38-48	A 44-55	A 50-63	DISPOSITION Aggravated
E	20-25	23-29	26-33	30-38	35-44	40-50	PRESUMPTIVE
	15-20	17-23	20-26	23-30	26-35	30-40	Mitigated
	I/A 16-20	I/A 19-23	I/A 21-27	A 25-31	A 28-36	A 33-41	DISPOSITION Aggravated
F	13-16	15-19	17-21	20-25	23-28	26-33	PRESUMPTIVE
	10-13	11-15	13-17	15-20	17-23	20-26	Mitigated
	I/A 13-16	I/A 14-18	I/A 17-21	I/A 19-24	A 22-27	A 25-31	DISPOSITION Aggravated
G	10-13	12-14	13-17	15-19	17-22	20-25	PRESUMPTIVE
	8-10	9-12	10-13	11-15	13-17	15-20	Mitigated
	C/I/A 6-8	I/A 8-10	I/A 10-12	I/A 11-14	I/A 15-19	A 20-25	DISPOSITION Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated

	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for Class F through Class I Felonies.--Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class F through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22
19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51
43-52	44-53	45-54	46-56	47-57	48-58	49-59	

(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months.--Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.

15-27	16-29	17-30	18-31	19-32	20-33	21-35	22-36
23-37	24-38	25-39	26-41	27-42	28-43	29-44	30-45
31-47	32-48	33-49	34-50	35-51	36-53	37-54	38-55
39-56	40-57	41-59	42-60	43-61	44-62	45-63	46-65
47-66	48-67	49-68	50-69	51-71	52-72	53-73	54-74
55-75	56-77	57-78	58-79	59-80	60-81	61-83	62-84
63-85	64-86	65-87	66-89	67-90	68-91	69-92	70-93
71-95	72-96	73-97	74-98	75-99	76-101	77-102	78-103
79-104	80-105	81-107	82-108	83-109	84-110	85-111	86-113
87-114	88-115	89-116	90-117	91-119	92-120	93-121	94-122
95-123	96-125	97-126	98-127	99-128	100-129	101-131	102-132
103-133	104-134	105-135	106-137	107-138	108-139	109-140	110-141
111-143	112-144	113-145	114-146	115-147	116-149	117-150	118-151
119-152	120-153	121-155	122-156	123-157	124-158	125-159	126-161
127-162	128-163	129-164	130-165	131-167	132-168	133-169	134-170
135-171	136-173	137-174	138-175	139-176	140-177	141-179	142-180

143-181	144-182	145-183	146-185	147-186	148-187	149-188	150-189
151-191	152-192	153-193	154-194	155-195	156-197	157-198	158-199
159-200	160-201	161-203	162-204	163-205	164-206	165-207	166-209
167-210	168-211	169-212	170-213	171-215	172-216	173-217	174-218
175-219	176-221	177-222	178-223	179-224	180-225	181-227	182-228
183-229	184-230	185-231	186-233	187-234	188-235	189-236	190-237
191-239	192-240	193-241	194-242	195-243	196-245	197-246	198-247
199-248	200-249	201-251	202-252	203-253	204-254	205-255	206-257
207-258	208-259	209-260	210-261	211-263	212-264	213-265	214-266
215-267	216-269	217-270	218-271	219-272	220-273	221-275	222-276
223-277	224-278	225-279	226-281	227-282	228-283	229-284	230-285
231-287	232-288	233-289	234-290	235-291	236-293	237-294	238-295
239-296	240-297	241-299	242-300	243-301	244-302	245-303	246-305
247-306	248-307	249-308	250-309	251-311	252-312	253-313	254-314
255-315	256-317	257-318	258-319	259-320	260-321	261-323	262-324
263-325	264-326	265-327	266-329	267-330	268-331	269-332	270-333
271-335	272-336	273-337	274-338	275-339	276-341	277-342	278-343
279-344	280-345	281-347	282-348	283-349	284-350	285-351	286-353
287-354	288-355	289-356	290-357	291-359	292-360	293-361	294-362
295-363	296-365	297-366	298-367	299-368	300-369	301-371	302-372
303-373	304-374	305-375	306-377	307-378	308-379	309-380	310-381
311-383	312-384	313-385	314-386	315-387	316-389	317-390	318-391
319-392	320-393	321-395	322-396	323-397	324-398	325-399	326-401
327-402	328-403	329-404	330-405	331-407	332-408	333-409	334-410
335-411	336-413	337-414	338-415	339-416			

(e1) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms of 340 Months or More.--Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is 340 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus nine additional months.

§§ 15A-1340.18, 15A-1340.19. Reserved

§§ 15A-1340.18, 15A-1340.19. Reserved

§ 15A-1340.20. Procedure and incidents of sentence of imprisonment for misdemeanors

(a) Application to Misdemeanors Only.--This Part applies to sentences imposed for misdemeanor convictions.

(b) Procedure Generally; Term of Imprisonment.--A sentence imposed for a misdemeanor shall contain a sentence disposition specified for the class of offense and prior conviction level, and any sentence of imprisonment shall be within the range specified for the class of offense and prior conviction level, unless applicable statutes require otherwise. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment. Except for the work and earned time credits authorized by G.S. 162-60, or earned time credits authorized by G.S. 15A-1355(c), if applicable, an offender whose sentence of imprisonment is activated shall serve each day of the term imposed.

(c) Suspension of Sentence.--Unless otherwise provided, the court shall suspend a sentence of imprisonment if the class of offense and prior conviction level requires community or intermediate punishment as a sentence disposition.

(c1) Active Punishment Exception.--The court may impose an active punishment for a class of offense and prior conviction level that does not otherwise authorize the imposition of an active punishment if the term of imprisonment is equal to or less than the total amount of time the offender has already spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence.

(d) Earned Time Authorization.--An offender sentenced to a term of imprisonment that is activated is eligible to receive earned time credit for misdemeanant offenders awarded by the Department of Correction or the custodian of a local confinement facility, pursuant to rules adopted in accordance with law and pursuant to G.S. 162-60. These rules and statute combined shall not award misdemeanant offenders more than four days of earned time credit per month of incarceration.

§ 15A-1340.21. Prior conviction level for misdemeanor sentencing

(a) Generally.--The prior conviction level of a misdemeanor offender is determined by calculating the number of the offender's prior convictions that the court finds to have been proven in accordance with this section.

(b) Prior Conviction Levels for Misdemeanor Sentencing.--The prior conviction levels for misdemeanor sentencing are:

(1) Level I--0 prior convictions.

(2) Level II--At least 1, but not more than 4 prior convictions.

(3) Level III--At least 5 prior convictions.

In determining the prior conviction level, a prior offense may be included if it is either a felony or a misdemeanor at the time the offense for which the offender is being sentenced is committed.

(c) Proof of Prior Convictions.--A prior conviction shall be proved by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. Evidence presented by either party at trial may be utilized to prove prior convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. If a motion is made pursuant to that section during the sentencing stage of the criminal action, the court may grant a continuance of the sentencing hearing.

(d) Multiple Prior Convictions Obtained in One Court Week.--For purposes of this section, if an offender is convicted of more than one offense in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.

§ 15A-1340.22. Multiple convictions

(a) Limits on Consecutive Sentences.--If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

(b) Consolidation of Sentences.--If an offender is convicted of more than one offense at the same session of court, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. Any sentence imposed shall be consistent with the appropriate prior conviction level of the most serious offense.

§ 15A-1340.23. Punishment limits for each class of offense and prior conviction level

(a) **Offense Classification; Default Classifications.**--The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a misdemeanor for which there is no classification, it is as classified in G.S. 14-3.

(b) **Fines.**--Any judgment that includes a sentence of imprisonment may also include a fine. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. If a community punishment is authorized, the judgment may consist of a fine only. Unless otherwise provided for a specific offense, the maximum fine that may be imposed is two hundred dollars (\$200.00) for a Class 3 misdemeanor and one thousand dollars (\$1,000) for a Class 2 misdemeanor. The amount of the fine for a Class 1 misdemeanor and a Class A1 misdemeanor is in the discretion of the court.

(c) **Punishment for Each Class of Offense and Prior Conviction Level; Punishment Chart Described.**--Unless otherwise provided for a specific offense, the authorized punishment for each class of offense and prior conviction level is as specified in the chart below. Prior conviction levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offenses are indicated by the Arabic numbers placed vertically on the left side of the chart. Each grid on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; and "A" indicates that an active punishment is authorized; and

(2) A range of durations for the sentence of imprisonment: any sentence within the duration specified is permitted.

PRIOR CONVICTION LEVELS			
MISDEMEANOR OFFENSE CLASS	LEVEL I	LEVEL II	LEVEL III
	No Prior	One to Four Prior	Five or More
	Convictions	Convictions	Prior Convictions
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/I	1-60 days C/I/A
3	1-10 days C	1-15 days C/I	1-20 days C/I/A

§§ 15A-1340.24 to 15A-1340.33. Reserved

§§ 15A-1340.24 to 15A-1340.33. Reserved

END OF DOCUMENT

05CRS226010

STATE OF NORTH CAROLINA
MECKLENBURG County **CHARLOTTE** Seat of Court

NOTE: (This form is to be used for (1) felony offense(s) and (2) misdemeanor offense(s) which are consolidated for judgment with any felony offense(s). Use AOC-CR-222 for DWI offense(s).)

STATE VERSUS
WELCH, REICO, LAMONT
 Race: **Black** Sex: **Male** DOB: _____

Attorney For State: **HOMAN, ALLISON** ☐ Def. Found Not Indigent ☐ Def. Waived Attorney

Attorney For Defendant: **WOODS, MELISSA** ☒ Appointed ☐

In The General Court Of Justices
☐ District ☒ Superior Court C

**JUDGMENT AND COMMITMENT
 ACTIVE PUNISHMENT
 FELONY
 (STRUCTURED SENTENCING)**
 G.S. 15A-1301, 15A-1302

The defendant ☒ pled guilty to: ☐ was found guilty by a jury of: ☐ pled no contest to:

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.
05CRS226010	51	B/E				
05CRS226011	51	LARCENY @ B/E	06-06-2005	14-54 A	F	H
05CRS227331	51	B/E	06-06-2005	14-72 B2	F	H
05CRS227332	51	LARCENY @ B/E	05-26-2005	14-54 A	F	H
05CRS227337	51	POSS STOLEN GOODS	05-26-2005	14-72 B2	F	H
			05-26-2005	14-71.1	F	H

*NOTE: Enter punishment class if different from underlying felony class (punishment class represents a status or enhancement).

The Court:
☒ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 4.
 Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue. ☐ PLED NO CONTEST ☐ JURY ☐ PRIOR RECORD LEVEL: ☒ I ☐ II ☐ III ☐ IV

☐ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

The Court (NOTE: Block 1 or 2 MUST be checked):
☒ 1. makes no written findings because the prison term imposed is:
 under G.S. 15A-1340.17(c). ☐ (b) for a Class A felony. ☒ (a) within the presumptive range of sentences authorized by G.S. 14-7.12.
☐ (c) for drug trafficking offenses. ☐ (c) for an adjudication as a violent habitual felon. G.S. 14-7.12.

☒ 2. makes the Findings of aggravating and mitigating factors Determination as set forth on the attached AOC-CR-605.

☒ 3. imposes the prison term pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A.

☐ 4. finds the defendant has provided substantial assistance pursuant to G.S. 90-95(h)(5).

☐ 5. adjudges the defendant to be an habitual felon to be sentenced as a Class C felon pursuant to Article 2A of G.S. Chapter 14.

☐ 6. finds enhanced punishment pursuant to:
☐ violence; ☐ Other: _____ ☐ G.S. 90-95(e)(3) (drugs); ☐ G.S. 14-3(c) (hate crime); ☐ G.S. 50B-4.1 (domestic violence). This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 7. finds the above designated offense(s) is a reportable conviction involving a minor. G.S. 14-208.20. **FILED #31**

☐ 8. finds the defendant is classified as a sexually violent predator. G.S. 14-208.20.

☐ 9. finds that the defendant used, displayed, or attempted to use or display a firearm at the time of the felony and, pursuant to G.S. 15A-1340.16A, has increased the minimum term of imprisonment to which the defendant would otherwise be sentenced by sixty (60) months. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 10. finds the defendant is classified as a recidivist. G.S. 14-208.6.

☐ 11. finds this is an aggravated offense. G.S. 14-208.6.

☐ 12. finds that a ☐ motor vehicle ☐ commercial motor vehicle shall be reported to DMV.

☐ 13. finds this is an offense involving assault or communicating a threat, and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned for a minimum term of: 8 months for a maximum term of: 10 months

☐ Class A Felony: ☐ Life Imprisonment Without Parole ☐ Death (see attached Death Warrant and Certificates)

☐ Class B1 Felony: ☐ Life Imprisonment Without Parole

☐ Violent Habitual Felon: ☐ Life Imprisonment Without Parole

The defendant shall be given credit for 197 days spent in confinement prior to the date of this Judgment as a result of this charge(s).

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File Number	Offense	County	Court	Date

AOC-CR-601, Rev. 10/05
 © 2005 Administrative Office of the Courts

Material opposite unmarked squares is to be disregarded as surplusage.
 (Over)

(check all that apply)

☐ 1. The defendant shall pay the costs.☐ 2. The defendant shall pay a fine of \$ _____

The Court recommends:

☐ 3. Assignment to a substance abuse treatment unit. G.S. 15A-1351(h) (applies only to offenses committed before December 1, 2003).☐ 4. Psychiatric and/or psychological counseling.☒ 5. Work Release.☒ 6. Payment as a condition of post release supervision, if applicable, or from work release earnings, if applicable, of the items and amounts set out below.

Fines	Court Costs	Restitution*	Attorney's Fees	Total Amount Due
\$	\$	\$ 2,997.56	\$ 308.75	\$ (PB) 3306.31

*See attached "Restitution Worksheet, Notice And Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

The Court further recommends:

IT IS THE INTENT OF THIS JUDGEMENT TO RUN CONCURRENT W/FEDERAL JUDGEMENT NOW SERVING
REST IS J&S W/DONELLE POPE AND CHERITA FEISTER

Atty fee civil lien

The Court does not recommend:

☐ 1. Restitution as a condition of post release supervision or work release.☐ 2. Work release.

AWARD OF FEE TO COUNSEL FOR DEFENDANT

☒ A hearing was held in open court in the presence of the defendant at which time a fee, including expenses, was awarded the defendant's appointed counsel or assigned public defender.

ORDER OF COMMITMENT/APPEAL ENTRIES

☒ It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.☐ The defendant gives notice of appeal from the judgment of the trial court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
01-31-2006	JAMES W MORGAN	<i>James W Morgan</i>

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency two certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature	☐ Deputy CSC ☐ Assistant CSC
		☐ Clerk Of Superior Court

CERTIFICATION

I certify that this Judgment and Commitment with the attachment(s) marked below is a true and complete copy of the original which is on file in this case.

☐ Appeal Entries (AOC-CR-350)☐ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)☐ Victim Notification Tracking Form☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)

Date	Signature	SEAL
	<i>J. Baker</i>	

Date Certified Copies Delivered To Sheriff	☒ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court
01-31-2006	

Material opposite unmarked sources is to be disregarded as surplusage.

WITNESSES

CSO Gurganus

tr

ARREST WARRANT NUMBER

J-165291

ACTION OF GRAND JURY

TRUE BILL

Patricia S. man

Foreperson of Grand Jury

Date: 5/15/08

VERDICT

Cuethy

Henry Humphreys Jr

Foreperson of Petit Jury

Date: 3/11/09

DOCKET NO. 2008-0040 01800

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 15, Term 2008

THE STATE

vs.

REICO LAMONT WELCH

Indictment for

CRIMINAL CONSPIRACY

SC Code: 16-17-410

CDR Code: 049

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on May 15, 2008, the Grand Jurors of York County present upon their oath:

CRIMINAL CONSPIRACY

The Defendant, Reico Lamont Welch, did in York County, South Carolina, on or about March 13, 2008, willfully, knowingly, and feloniously unite, combine, conspire, confederate, agree or have tacit understanding with George Franklin Hill, for the purpose of committing the crime of Burglary. All in violation of Section 16-17-410, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

WITNESSES

YCSOI Gurganus

tr

ARREST WARRANT NUMBER

J-165293

ACTION OF GRAND JURY

TRUE BILL

Patricia S. Mason

Foreperson of Grand Jury

Date: 5/15/08

VERDICT

Guilty

Harvey Humphreys Jr.

Foreperson of Petit Jury

Date: 3/11/09

DOCKET NO. 2008-00407-01001

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 15, Term 2008

THE STATE

vs.

REICO LAMONT WELCH

Indictment for

GRAND LARCENY

SC Code: 16-13-30

CDR Code: 478

After being fully advised of my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on May 15, 2008, the Grand Jurors of York County present upon their oath:

GRAND LARCENY

The Defendant, Reico Lamont Welch, did in York County, South Carolina, on or about March 13, 2008, feloniously take and carry away from the dwelling of Lynne G. Watkins located at _____, Rock Hill, South Carolina the goods of Lynne G. Watkins, valued more than One Thousand Dollars, described as follows: jewelry, with intent to deprive the owner permanently of such property, all in violation of Section 16-13-30, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

WITNESSES

YOSOLGurganus

tr

ARREST WARRANT NUMBER

J-152547

ACTION OF GRAND JURY

TRUE BILL

Patricia S. Mason

Foreperson of Grand Jury

Date: 5/15/08

VERDICT

Guilty

Henry O. Humphreys Jr.

Foreperson of Petit Jury

Date: 3/11/09

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 15, Term 2008

THE STATE

vs.

REICO LAMONT WELCH

Indictment for

BURGLARY FIRST DEGREE

SC Code: 16-11-311

CDR Code: 079

legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on May 15, 2008, the Grand Jurors of York County present upon their oath:

BURGLARY FIRST DEGREE

The Defendant, Reico Lamont Welch, did in York County, South Carolina, on or about March 13, 2008, willfully and unlawfully entered the dwelling of Lynne G. Watkins located at Rock Hill, South Carolina without consent and with the intent to commit a crime therein and the defendant did have a prior record of two or more convictions for burglary or housebreaking or a combination of both. All in violation of Section 16-11-311, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Amended Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Amended Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 1st, 2011



Elizabeth A. Franklin-Best
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

REICO LAMONT WELCH,

APPELLANT

FINAL BRIEF OF APPELLANT

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUE ON APPEAL

Did the trial court judge err by allowing the solicitor to use a North Carolina consolidation of breaking and entering charges as the predicate for enhancing appellant's offense to burglary, first degree?

STATEMENT OF THE CASE

Reico Lamont Welch was indicted by the York County grand jury for burglary, 1st degree, grand larceny, and criminal conspiracy. He was tried before the Honorable Larry B. Hyman, Jr. and a jury between March 9- 11th, 2009. He was represented by Steven D. Schusterman, Esquire. He was convicted and sentenced to 20 years for burglary, and 5 years for grand larceny and conspiracy; the sentences were ordered to run concurrently.

This appeal timely follows.

ARGUMENT

The trial court judge erred by allowing the solicitor to use a North Carolina consolidation of breaking and entering charges as the predicate for enhancing appellant's offense to burglary first degree.

Appellant is serving 20 years in prison for participating, along with another person, in a day-time burglary of a judge's house in Rock Hill, South Carolina. Appellant's co-defendant, who had previously spent 17 years in prison and who had been convicted of burglary in the past, received 18 months for his participation. Amended ROA p. 51, ll. 4-20; 53, ll. 8-25. Appellant's prior record consisted of a cocaine offense for which he received probation, and he had previously spent 8-10 months incarcerated for 3 breaking and entering which were consolidated into one judgment in Charlotte, North Carolina. Amended ROA p. 72, ll. 3-6. The state used this Mecklenburg County consolidation for enhancing appellant's charge to burglary-1st degree.

Before trial started, the court held a hearing on whether the state would be allowed to use the consolidated judgment in North Carolina to enhance appellant's charge to burglary, first degree. The state relied on a true copy of appellant's conviction issued by Mecklenburg County, Clerk of Superior Court. It appears the conviction sheet was filed January 31, 2006 and reflects appellant's breaking and entering charges, with offense dates of June 6, 2005, May 26, 2005, and May 10, 2005. The breaking and entering charges appear to be pursuant to North Carolina statute 14 -- 54A. The charges also appear to be class H felonies.

Under South Carolina Code Ann. §16-11-311, a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a

crime in the dwelling, and the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both. (emphasis added). The issue in this case is whether the consolidation of charges in North Carolina constitutes one conviction or three.

North Carolina has a determinate sentencing framework that is embodied in North Carolina Gen. Statutes Article 81B. Structured sentencing of persons convicted of crimes. The North Carolina statute section 15 A-- 1340.15 Multiple convictions-- allows a judge to consolidate sentences if there are multiple offenses. It appears to be a different type of sentence than those available in South Carolina. The statute states:

(a) Consecutive sentences. -- This article does not prohibit the imposition of consecutive sentences. Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.

(b) Consolidation of sentences. -- If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, in its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

According to the certified conviction record for North Carolina, appellant's offenses were consolidated and the single judgment imposed was an 8 month to 10 month period of incarceration, with credit for 197 days that appellant had already spent in confinement. In other words, North Carolina has treated appellant's criminal acts as one consolidation. The state's position appears to be that the certified conviction reflects three separate convictions. Amended ROA p. 3-20.

The state did not call anyone from North Carolina to interpret the conviction sheet. Nor did the state enter the actual indictments into the record or otherwise use them during this hearing. For purposes of this hearing, the State believed that it could simply divine what had occurred in North Carolina by looking at a conviction sheet that offers no details regarding the actual events themselves, nor offers any reasoning as to why the sentencing judge in this matter determined that a consolidation was the appropriate sentence to pass. As the statute makes clear, the judge could have sentenced appellant without consolidating the judgment.

Additionally, section 15 A-- 1340.14(d) Prior record level for felony sentencing, states:

Multiple prior convictions obtained in one court week. -- For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single Superior Court during one calendar week, only the conviction for the offense that the highest point total is used. If an offender is convicted of more than one offense in a single session of the District Court, only one of the convictions is used (emphasis added).

Given that the official conviction sheet only reflects a file date of January 31, 2006, it is unclear when appellant pleaded to these charges. After all, the official sheet contains two pages, and it is unclear whether or these charges were resolved on one day or possibly two. In any event, the North Carolina statute makes clear that only one conviction should be used to determine prior record level, under their structured sentencing scheme. In other words, North Carolina treats as one conviction what the State of South Carolina may regard as three separate convictions.

Also, it appears from the North Carolina statute that class H felonies are not generally used for enhancement purposes. See North Carolina Gen. Statutes § 15 A. --

1340.16 A. Enhanced sentence if defendant is convicted of a class A., B1, B2, C, D, or E felony and the defendant used, displayed, or threaten to use or display of firearm or deadly weapon during the commission of the felony; §15 A. -- 1340. 16 B. Life imprisonment without parole for a 2nd or subsequent conviction of a class B1 felony if the victim was 13 years of age or younger and there are no mitigating factors. But see § 15 A. -- 1340. 16. Enhanced sentence if defendant is convicted of a felony and the defendant was wearing or had in his or her immediate possession a bulletproof vest during the commission of the felony.

The trial court judge erred by allowing the North Carolina consolidation to be used for enhancement purposes.

THE COURT: I understand that. But this is a question that I have, as I see it: can you point me to any indication in the statute that the Legislature intended that any consolidation or combination of charges would exclude those charges were combined as charges for the purposes of 16 -- 11 -- 311? I mean, what we have to do is look at the legislative intent here. . . .

Where in the statute or anything related to the statute do we find a similar intent on the part of the Legislature to exclude charges that may have been combined for the purposes of the plea, and that's just judicial expediency that results in that. We all-new that. You bring them altogether and it's to your client's benefit if you can wrap up all up and get it before one sentencing judge. We've all been there. We know that.

MR. SHUSTERMAN: I don't have anything. I'm not going to make a representation to the court. My argument would be -- and I certainly respect the court's position. My argument would be show me where the legislature said that one disposition shall be counted multiple times. I mean, that's the flip side of that argument, with all due respect to the court.

Amended ROA p.10-11.

The trial court judge erred because it is the State's burden to prove that the North Carolina consolidation reflects three separate convictions as understood under the South

Carolina statutory scheme since they have the burden to prove that element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

The issue arose again as the parties discussed a possible closing arguments. Amended ROA p. 28-50. Ultimately, the judge determined that appellant would not be allowed to argue consolidation to the jury, even though the prior convictions are an element of the offense. State v. Hamilton, 327 S.C. 440, 486 S.E. 2d 512 (Ct. App. 1997). Again, the judge placed the burden on the defense to prove that the state should not be allowed to go forward with their burglary first degree indictment:

“Certainly, I would think that under the burglary, first degree, statute, which does not put any condition at all upon which convictions may be used, under that statute, I believe that any two convictions, whether the convictions were obtained on the same day were not, could be used.

Now, tell me, here's what I'm looking for from you: if you want to argue consolidation, tell me where there is any authority in this state whatsoever that consolidation of charges under a recidivist -- type analysis, recidivist statute -- type analysis, would prevent the state from going forward on a first degree burglary or an enhanced burglary where there are two or more convictions for burglary or housebreaking? Just give me something.”

Amended ROA p.41, ll. 3-15.

The judge again directed his questioning to defense counsel:

THE COURT: Let me ask you this: has this Court ever made the distinction, the South Carolina Supreme Court or Court of Appeals, ever made any distinction about separate and distinct offenses, the fact that they are plead (sic) on the same day, having any bearing on whether they are separate and distinct? Ever? Has there ever been any issue addressed? Has there ever been any situation where –

I think under Koon¹ and Gordon², they say the opposite. It doesn't make any difference if you plead on the same day or on separate days. That's not what's in control here. And that seems to be the only thing that ties the

¹ Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (2007).

² State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003).

prior B&E together, that they were plead (sic) on the same day. They're almost a month apart. Okay?

Amended ROA p.44, ll. 10-22.

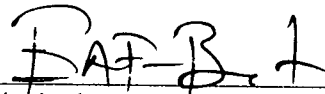
Trial counsel continued to assert that appellant received one consolidation and not multiple convictions. Amended ROA p.47-48. Counsel objected when the state moved the certified conviction record into evidence. Amended ROA p.54, ll. 12-19. The lead detective testified, before the jury, that appellant had two prior convictions for breaking and entering. Amended ROA p.63 4 – 9.

The trial court judge erred by attempting to analyze the situation under Koon, supra, and Gordon, supra. The state did not provide any factual information to the judge regarding the offenses resolved in North Carolina. Neither the judge (nor anyone else) was capable of analyzing these events as being “separate and distinct” since the state failed to provide any of the necessary information to the court. Even so, it was improper for the state to use a North Carolina state court consolidation as three “convictions” for purposes of enhancement. The state, simply, failed to meet their burden of proof on an essential element of the offense. State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). For this reason, appellant asks this Court to reverse his convictions and remand his case for trial.

CONCLUSION

For the preceding reason, appellant respectfully asks this Court to reverse his convictions and remand his case for trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "EAF-B. 1", written over a horizontal line.

Elizabeth A. Franklin-Best
Appellate Defender

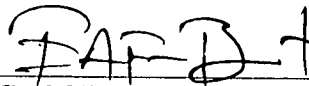
ATTORNEY FOR APPELLANT.

This 20th day of December, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 20, 2010



ELIZABETH A. FRANKLIN-BEST
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

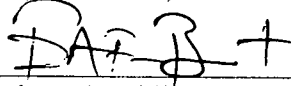
V.

REICO LAMONT WELCH,

APPELLANT

CERTIFICATE OF SERVICE

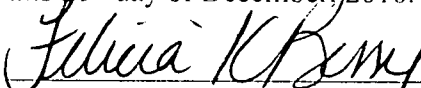
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of December, 2010.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 20th day of December, 2010.



(L.S.)

Notary Public for South Carolina

My Commission Expires: June 21, 2020

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STATEMENT OF ISSUE ON APPEAL

Appellant's three North Carolina convictions for breaking and entering a building are sufficient evidence that Appellant has two or more convictions to be guilty of First Degree Burglary, even if they were consolidated for one sentence.

STATEMENT OF THE CASE

Respondent agrees that Appellant's Statement of the Case is substantially correct.

ARGUMENT

Appellant's three North Carolina convictions for breaking and entering a building are sufficient evidence that Appellant has two or more convictions to be guilty of First Degree Burglary, even if they were consolidated for one sentence.

Appellant argues that his three convictions for breaking and entering a building in North Carolina, all committed on different days, should be treated as only one because they were consolidated for one sentence. The plain language of the North Carolina statute for consolidation says otherwise, which is as follows:

§ 15-A-1340.15. Multiple Convictions

(a) Consecutive Sentences. – this Article does not prohibit the imposition of consecutive sentences. Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.

(b) Consolidation of Sentences. – If an offender **is convicted of more than one offense** at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

N.C. Gen. Stat. § 15-A-1340.15 (emphasis added). Accordingly, the process is that a defendant is convicted of multiple offenses, then the convictions are consolidated. Contrary to Appellant's contention, consolidation is not the process of turning multiple convictions into one. Instead, it is simply handing a single sentence for all the consolidated convictions.

In North Carolina, “in situations where a defendant is convicted of two or more offenses, the General Assembly has given the trial court discretion to consolidate the offenses into a single judgment.” State v. Tucker, 588 S.E.2d 853, 855 (N.C. 2003) quoted by State v. Edwards, 595 S.E.2d 213 (N.C. Ct. App. 2004). Tucker cites with approval a case prior to enactment of the present statute, State v. Miller, 341 S.E.2d 531 (N.C. 1986). In that case, the North Carolina Supreme Court was determining whether offenses consolidated for judgment, as opposed to consolidated for a hearing, required separate findings at sentencing for each offense consolidated. The Court reasoned as follows:

... [T]he total sentence is limited by the maximum sentence for the most serious offense in the consolidated judgment. This is the very purpose of consolidation for sentencing purposes and works to the benefit of the defendant by limiting the maximum sentence that he can receive **for all of the convictions so consolidated**. Here, pursuant to the plea bargain, the kidnapping and second degree murder **convictions** were consolidated for judgment, thus insuring the defendants **only one sentence for two convictions** with a maximum prison sentence of fifty years or life. Without the consolidation, defendants could have been sentenced to the maximum prison sentence of fifty years or life. Without the consolidation, defendants could have been sentenced to the maximum prison sentences of fifty years or life for the second degree murders in addition to at the presumptive terms of twelve years for the first degree kidnapping convictions. ...

Miller, at 537-38 (emphasis added).

Accordingly, it is apparent that North Carolina would consider the three breaking and entering offenses to be three convictions with one sentence. Miller, supra. Appellant cites N.C. Gen. Stat. § 15 A – 1340.14(d) as a red herring. That statute states that if an offender is convicted of more than one offense in a single week “only one of the convictions is used”

for determining the prior record level in sentencing for a subsequent felony conviction. Assuming the statute applied solely to consolidated offenses, it would prove Respondent's rather than Appellant's point, since it uses the term "convictions" as opposed to "charges" or even "offenses". However, under the plain language of the statute, the statute would apply even if the convictions were sentenced consecutively.

Confoundedly, Appellant also attempts to prove his point by arguing North Carolina's usage of prior convictions for enhancement purposes. This is irrelevant, as its apodictic that South Carolina law controls how South Carolina will use out of state convictions in enhancing South Carolina offenses. Each conviction is eligible for use as proof of the aggravating element for burglary. See generally Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (2007) (determining that even if March 13 and 14, 1986 burglaries should be treated as one for purposes of sentencing, the March 28th burglary of a separate building two weeks later clearly constitutes a separate burglary for purposes of the recidivist statute).

Also, Appellant frames the issue in a manner not preserved for review. Appellant argues that the State failed to meet its burden of proof on that element of the offense. However, Appellant did not move for directed verdict on that ground. A party cannot argue one ground for directed verdict at trial and in turn argue an alternative ground on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

Further, contrary to Appellant's remonstrations, the trial court was reasonable in limiting Appellant's closing argument by not letting Appellant argue consolidation. Under North Carolina law, as shown above, three convictions consolidated for one sentence are still three convictions. The trial court was reasonable in not allowing Appellant to mislead the

jury by misstating the law. Appellant's complaints to the contrary are not preserved, since Appellant accepted the trial court's ruling. ROA. pp. 43-44. The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). An error is not preserved if the defendant affirmatively accepts the judge's ruling. State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1992).

Also, while Appellant may have objected when the certified convictions were moved into evidence, Appellant did not object when the lead detective testified as to the convictions. "The general rule is that the failure to object to, or failure to move to strike, testimony renders such competent and accordingly entitled to be considered to the extent it is relevant." State v. Frank, 262 S.C. 526, 205 S.E.2d 827 (1974). Admission of improper evidence is harmless where it is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989). The failure to object to the detective's testimony rendered the testimony competent, and Exhibit 13 is merely cumulative to the detective's testimony, rendering any error in admission harmless.

In conclusion, Appellant's three North Carolina breaking and entering convictions are three convictions with one sentence, and the Court properly allowed the State to admit evidence of two of these breaking and entering convictions as evidence of two or more convictions under S.C. Code §16-11-311.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Assistant Attorney General

KEVIN SCOTT BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: 

DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 20 , 2010

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Appeal From York County
Larry B. Hyman, Jr., Circuit Court Judge

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Respondent,

vs.

REICO LAMONT WELCH,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

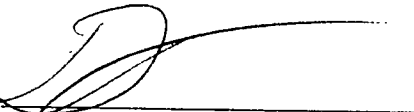
HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Assistant Attorney General

KEVIN SCOTT BRACKETT
Solicitor, 16th Judicial Circuit

By: 

DAVID SPENCER

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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ATTORNEYS FOR RESPONDENT

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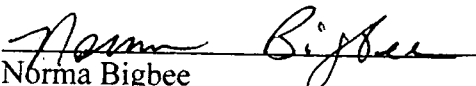
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served.

This 20th day of December, 2010.


Norma Bigbee
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727