

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ALBERT JAMES CAVE, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001533

APPENDIX

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S.C. SUPREME COURT

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State of South Carolina)
County of Aiken) Court General Sessions
) 2011-GS-02-1031, 1032

State of South Carolina)
) vs.) Transcript of Record
James Albert Cave, Jr.,)
) DEFENDANT)

August 22, 2011
Aiken, South Carolina

B E F O R E:

Honorable Doyet A. Early, Judge.

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

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Attorneys for the State

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Attorneys for the Defendant

Joy E. Holston
Official Court Reporter

1 I N D E X O F W I T N E S S E S

2 (IC) - Denotes In Camera
3 (DW) - Denotes Defense Witness
4 (SW) - Denotes State's Witness

5 (SW) Ronnie Smiley

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7 Cross-examination by Mr. Hayes: 20
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10 (SW) Krystal Allen

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18 (SW) Darryl Kostyk

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1 (Whereupon, Holly Jenkins was the Court Reporter for
2 the voir dire and drawing a jury for this case.)

3 THE COURT: Is the defense ready to proceed?

4 MR. HAYES: Yes, Your Honor.

5 THE COURT: Bring the jury in, please.

6 MR. HAYES: I had a couple of motions.

7 THE COURT: What kind of motions do you have.

8 MR. HAYES: One would be to exclude the witnesses
9 under 615, Your Honor. To limit the use of the two prior
10 convictions under 609 and 404.

11 THE COURT: We will do the convictions when he
12 decides whether or not he is going to testify.

13 MR. HAYES: And I had a small motion for suppression
14 based on the chain of custody.

15 THE COURT: We will go through the chain of custody
16 when they try to put it into evidence. Any objection to
17 the sequestration?

18 MR. MILLER: No, Your Honor.

19 THE COURT: We will sequester the witnesses. Bring
20 the jury.

21 (Whereupon, the jury came into open court at
22 approximately 2:10 p.m.)

23 THE COURT: Thank you. I wanted to start right at
24 2:00 o'clock but I had some matters with some death
25 penalty lawyers out of a case in Lexington, it took a

1 little while. And then we had a right significant bond
2 hearing out of Barnwell that was involved in criminal
3 sexual conduct matter so we went over for just a few
4 minutes. I wanted to start right at 2:00 but we are not
5 too far behind. The first thing we have to do is stand
6 and raise your right hand to be sworn in for this
7 particular case and the Clerk will do so.

8 (Whereupon, the jury was sworn at approximately 2:11
9 p.m.)

10 THE COURT: Let me just make a few comments to get
11 started and sort of to tell you where we are going and
12 what you can expect. First of all, in this case as I told
13 you when we selected the jury, Mr. Cave is charged in two
14 indictments. One is burglary in the first degree and the
15 other is grand larceny involving goods between the value
16 of \$2,000.00 dollars to \$10,000.00 dollars. He has plead
17 not guilty to both of those indictments. And as I told
18 you by a plea of not guilty, that puts the burden on the
19 State of South Carolina to prove his guilt to you beyond a
20 reasonable doubt. I have been doing this now going on
21 eight years and we try cases all over the State. There
22 are two types of cases that we try. We try, like Judge
23 Barber is trying today, you could have easily gotten on
24 one of those jurys. Those are civil cases, automobile
25 wreck, you are suing your lawyer for messing up, your

1 doctor for deviating from the standard of care, breach of
2 contract, those are civil cases where the person suing is
3 asking for monetary damages from the defendant. And in
4 those kind of cases those parties come into court on equal
5 ground which is the scales of justice. And for the
6 plaintiff to prevail he has to prove his case or her case
7 by what we call the preponderance or greater weight of the
8 evidence. They have to tip the scales ever so slightly if
9 you weigh in evidence to prove the case, they come in
10 equal. To win he has to tip the scales ever so slightly,
11 that is his burden of proof in a civil case. In a
12 criminal case such as this where people are charged with,
13 in this particular situation burglary first degree and
14 grand larceny which is stealing, they come in and under
15 the Constitution they are presumed to be innocent. So the
16 scales of justice are tilted heavily in their favor under
17 the Constitution of the United States and the State of
18 South Carolina, they are presumed to be innocent. For the
19 State to prevail they have to prove their case by not the
20 preponderance of the evidence but by, beyond a reasonable
21 doubt. So they have to tip the scales in that manner. So
22 it is your job as jurors to determine whether or not the
23 State has met their burden of proof in presenting their
24 case. As I told you earlier you and I have two distinct
25 jobs to perform. My job is twofold, I instruct you, I

1 tell you what the law is in the case, in other words I am
2 the Judge of the law in the case. So you have agreed by
3 your oath to accept the law as I give it to you. If you
4 come into the courtroom with some preconceived idea about
5 what the law is or what it should be and it doesn't agree
6 with what I tell you you have to set aside those notions
7 and accept the law as I give it to you. And I normally
8 charge you on the law at the conclusion of the case. My
9 other function is to rule on the admissibility of
10 evidence. What you will be considering is evidence that
11 comes from this witness stand and/or from exhibits that
12 are relevant to the case. These lawyers have to play by
13 the rules of evidence and the rules of criminal procedure.
14 Ninety-nine percent of what they will ask will be proper,
15 if they object I have to rule on that. But once it is
16 admitted into the trial of the case that is where your
17 responsibility or your duties take over because the twelve
18 of you collectively acted as one, you are the Judges of
19 the facts in the case. And if this case is like any other
20 case I have ever tried you will hear different versions of
21 the facts, a different spin on the facts. Some witnesses
22 may say one thing, some may say another. It is up to you
23 to determine what the true facts are, you judge the
24 credibility or the believability of the witnesses who
25 testified. Use your ordinary common sense in doing that,

1 you all deal with husbands, wives, children, employees,
2 employers, friends, whatever. You know how to judge when
3 someone is telling the truth. You judge the credibility
4 or believability of the witnesses so at the end you decide
5 what the true facts are and you take those true facts and
6 you apply it to the law as I give it to you and you will
7 be in a position to render a verdict in the case. So that
8 is how it works. The State has the burden of proof as I
9 told you. They go first so they will be presenting their
10 witnesses first. At the conclusion of their witnesses
11 then the defense, if they choose to do so, has the right
12 to call witnesses, et cetera. And then the State may have
13 something in reply. That gets us through the testimony.
14 Before the testimony starts the lawyers will make an
15 opening statement. After the testimony they will make
16 their final arguments, after the final arguments are made
17 I will charge and instruct you on the law and then you
18 will go back to your jury room and start deliberating
19 whether or not the State has proven the case beyond a
20 reasonable doubt. We will go to about 5:00 o'clock this
21 afternoon, we will start in the morning probably 9:30 if
22 that is okay. I will try to buy you some breakfast in the
23 morning. I am not trying to run an endurance race up here
24 but I am trying to be efficient. But at the same time if
25 any of you become uncomfortable, if you need to go to the

1 bathroom, need to get something to drink or you are tired
2 and you get tired of listening to me raise your hand and
3 we will take a break. We normally take a break in the
4 afternoon and we normally take one in the mornings but if
5 we need an extra one that is no problem, we will do that.
6 Don't get uncomfortable, raise your hand and I will make
7 sure that anything you need is taken care of. From time
8 to time you will recess back to your jury room whether it
9 be a break or whether I am having to handle a matter of
10 law that I need to do outside of your presence. And I am
11 going to tell you now and I will tell you that each time
12 we take a break please do not start deliberating the case,
13 talking about the case until it is completely finished.
14 You can talk about anything you want to in the jury room
15 but don't talk about the case until it is finished. I
16 will ask you when we take a break to select a foreperson
17 among the twelve of you. The foreperson is simply the
18 spokesperson for the jury. You will head up the
19 deliberations, you will bring any concerns any of the
20 jurors may have to my attention. It is not a real
21 tremendous responsibility but we need someone to serve in
22 that position and I normally let my jurors select among
23 them. If y'all can't decide on somebody then I will
24 randomly pick somebody's name. In just a few minutes you
25 will hear what we call the opening statements, the State

1 goes first followed by the defendant. Please bear in mind
2 that the opening statements is not, is not evidence in
3 this case. It is simply what the lawyers will contend or
4 the issues in the case, what they intend to prove to you,
5 sort of a road map to their case, which way they are going
6 and the defenses they intend to use but that is not
7 evidence. As I said earlier, the only evidence you can
8 consider comes from the witness stand from sworn witnesses
9 who have sworn to testify truthfully. So without having
10 anything further we are going to start. Any objections to
11 my opening remarks by the State?

12 MR. MOLONY: None by the State.

13 THE COURT: By the defendant.

14 MR. HAYES: No, Your Honor.

15 THE COURT: The State will make the first opening
16 statement followed by the defendant and then we will start
17 by having testimony. Mr. Molony.

18 MR. MOLONY: Thank you, Your Honor, if it please the
19 Court.

20 THE COURT: Yes, sir.

21 MR. MOLONY: Ladies and gentlemen, good afternoon. A
22 witness, no crime in the history of our criminal lawsuits
23 can be solved without a witness. Sometimes witnesses will
24 come in many different forms. We have all heard of an
25 eyewitness, someone who actually sees a crime take place

1 and then later can go and testify that I saw so and so
2 commit this crime. When you have videos in businesses
3 where there are surveillance images you can later go back
4 and look at those videos and see this person committing
5 this crime. You also have evidence that is found at the
6 scene that will be some of our best witnesses and that is
7 why we are here today. On May 2nd of 2011 the defendant
8 in this case, Albert Cave, decided that he was going to
9 break into the home of Mr. and Ms. Smiley located at [REDACTED]
10 [REDACTED] Road in North Augusta, South Carolina.
11 He did that, he took two televisions and he took a laptop
12 computer. See, Mr. Cave the defendant realized that no
13 one was going to be home, he waited until no cars were
14 there and made sure there would be no eyewitness. He did
15 it at a residence, he didn't go to a gas station or a
16 Walmart, something that had video surveillance. He made
17 sure there would be no videos in doing this. But what he
18 didn't count on, what he didn't count on was leaving a
19 witness so distinct to himself that it is impossible for
20 him to escape the culpability in this crime. He left
21 behind his fingerprint. You will hear from the victim in
22 this case, both of them. You will hear from Ms. Smiley,
23 she will testify that she left, she left her home in
24 working order, the TV is still there, the computer is
25 still there. When she came home everything had changed,

1 the TV is gone, the computer is gone and she went through
2 that house and was able to identify pieces of paper that
3 she knew had been moved from when she left that home until
4 she got back home. And you will hear why she knows that.
5 The papers are moved, she tells Deputy Kostyk with the
6 Aiken Sheriffs Office and you will hear from him, he takes
7 that evidence of those papers. Those papers later end up
8 at the forensic lab at the Aiken County Sheriffs Office.
9 Well you will get to see the pieces of paper, you will see
10 the fingerprints that were taken off of it and you will
11 see the fingerprints of the defendant. You will see them
12 side by side and you will hear almost like the TV shows,
13 exactly how they matched that piece of paper to the
14 fingerprints of the defendant. See Mr. Cave planned
15 everything to make sure no one or nothing saw him commit
16 this crime so he wouldn't be caught. But what he didn't
17 count on was actually catching himself to what he did.
18 Now, at the end of this trial Judge Early is going to tell
19 you what the law is in this case. Ultimately the
20 defendant is charged with burglary in the first degree and
21 grand larceny. So the State must prove beyond a
22 reasonable doubt that the defendant broke into the
23 Smiley's home without consent and that he had the intent
24 when he breaks into that home to commit a crime and that
25 crime is the grand larceny, the taking of the television

1 and the computer. And you will hear throughout the trial
2 that the case bears the burden of proving to you beyond a
3 reasonable doubt, you will hear what reasonable doubt is
4 But I just want you to know that, Mr. Miller and I, that
5 it is the burden that we welcome with open arms. And we
6 will prove to you at the end of this case, you will go
7 back and deliberate, and we will have proven to you that
8 the defendant is guilty beyond a reasonable doubt of both
9 burglary and grand larceny. Thank you.

10 THE COURT: Mr. Hayes.

11 MR. HAYES: May it please the Court.

12 THE COURT: Yes, sir.

13 MR. HAYES: Ladies and gentlemen, you just heard the
14 Solicitor state that they take on this burden with open
15 arms. They have got this burden to prove beyond a
16 reasonable doubt that a crime happened and that Mr. Cave
17 is the one that did it. Now, they do that by bringing you
18 evidence. And I pose this, in trying to think how I am
19 going to make my opening. I came across two different
20 quotes by Colin Powell and one is this. Don't be afraid
21 to challenge to pros even on their home field, in their
22 own back yard. And I am going to put it this way. The
23 State is the pros and I am saying challenge them, they
24 have to bring this, they have to bring to you enough
25 evidence for you to believe beyond a reasonable doubt that

1 a crime happened. He also says this, keep looking below
2 surface appearances, don't shrink from doing so just
3 because you might not like what you find. And I ask
4 y'all, take that quote into consideration and when you are
5 hearing the testimony and you are looking at possible
6 exhibits that are entered into evidence, look at them,
7 look deep past them. And in doing so you are challenging
8 the State. You are challenging the State to bring the
9 evidence. If they don't bring the evidence your job as
10 the jury would be to acquit Mr. Cave. If you believe they
11 brought the evidence your job is to find him guilty. All
12 I ask is that y'all listen carefully to each and every
13 individual who testifies, look closely at every exhibit
14 that is placed into evidence and then consider it in your
15 deliberations.

16 THE COURT: You may call your first witness.

17 MR. MOLONY: Judge, the State calls Ronnie Smiley.

18 RONNIE SMILEY, being
19 first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 By Mr. Molony:

22 Q Mr. Smiley, where do you live?

23 A [REDACTED] Road, North Augusta, South
24 Carolina.

25 Q Can you explain to the jury where that is in North

- 1 Augusta?
- 2 A That is in Aiken County.
- 3 Q And who lives with you in this home?
- 4 A Me and my wife.
- 5 Q And how long have y'all lived there?
- 6 A 28 years.
- 7 Q Mr. Smiley, I am going to go back to May the 2nd of
- 8 this year. Do you recall what happened that day?
- 9 A Yes.
- 10 Q And what happened?
- 11 A My wife called me later on that evening and told me
- 12 the house had been burglarized.
- 13 Q I am going to show you what has been marked as
- 14 State's exhibit 1. Do you know what that is?
- 15 A That is the front of my house.
- 16 Q And is this picture a true and accurate photograph of
- 17 how the front of your house would have looked on or about
- 18 May the 2nd of 2011?
- 19 A Yes, it is.
- 20 MR. MOLONY: Your Honor, at this time the State moves
- 21 to introduce 1 into evidence.
- 22 THE COURT: Any objection?
- 23 MR. HAYES: No, Your Honor.
- 24 THE COURT: Without objection.
- 25

1 (Whereupon, State's Exhibit 1 was admitted into
2 evidence.)

3 Q Now, Mr. Smiley, I am going to show you what has been
4 marked as State's exhibit 2. Do you recognize this, just
5 yes or no.

6 A Yes.

7 Q And what is this?

8 A That is a board I put up after the one that has been
9 broken out of my house.

10 Q And what is the board over?

11 A It is covering a hole that was knocked out.

12 Q And when did you put this board up under this window?

13 A The day after the, the officer left after he did his
14 investigation and I went and got that board and put it up
15 at my house.

16 Q Now, is this photograph a fair and accurate
17 representation of how your window would have looked after
18 you boarded it up on May the 2nd of 2011?

19 A Yes, that is it.

20 MR. MOLONY: Your Honor, the State moves to introduce
21 exhibit 2 into evidence.

22 MR. HAYES: No objection.

23 THE COURT: Without objection.

24 (Whereupon, State's Exhibit 2 was admitted into
25 evidence.)

- 1 Q Mr. Smiley, what time did you leave your house that
2 morning?
- 3 A About 6:00 in the morning.
- 4 Q And where were you going?
- 5 A I was going to work.
- 6 Q And where do you work?
- 7 A I work in Augusta at Richmond County School System in
8 the maintenance department.
- 9 Q And how long have you been employed there, had that
10 job?
- 11 A 25 years.
- 12 Q What time did you return to your house that day?
- 13 A I came home after my wife called me and told me it
14 had been broken in, it was probably about 3:30. I get off
15 at 4:00.
- 16 Q You said your wife called you?
- 17 A Yes, she did.
- 18 Q And when you got there what did you notice?
- 19 A She was in the street waiting on the officer to come
20 do a report. We never did go into the house until he got
21 there.
- 22 Q Once you got in what did you notice had been taken
23 from your home?
- 24 A We noticed after we walked through with the officer
25 that two TV's was missing and my wife's laptop was

1 missing.

2 Q What was the value of those two television sets and
3 that computer that was taken?

4 A About \$2,200.00 dollars.

5 Q Mr. Smiley, do you know the defendant in this case?

6 A No, I do not.

7 Q Have you ever seen him before today?

8 A No, I did not.

9 Q Is there any reason he should be in your home on May
10 the 2nd of 2011?

11 A No, no reason.

12 Q Thank you, I don't have any more questions.

13 THE COURT: Mr. Hayes, cross.

14 CROSS-EXAMINATION

15 By Mr. Hayes:

16 Q How are you doing, Mr. Smiley?

17 A Doing good.

18 Q Mr. Smiley, in State's exhibit number 1, you are
19 saying that is your house?

20 A Yes, it is.

21 Q Where is State's exhibit 2, the window?

22 A It is on the back side of the house.

23 Q Is it behind the carport or is it on the other side
24 of the house?

25 A It will be behind the carport.

- 1 Q Okay. Behind your carport. How many windows do you
2 have back there?
- 3 A Two.
- 4 Q Is this one the farthest one out or is it closer in?
- 5 A It is, you have got one, two, three, big picture
6 window. It is right next to the picture window.
- 7 Q Then there is a corner right there by that picture
8 window, right?
- 9 A Yes.
- 10 Q Picture window is here if you are looking at it and
11 then this one?
- 12 A It would be right next to the picture window, yes
13 sir.
- 14 Q Do you store your trashcans underneath that window?
- 15 A We have got some trashcans, yes sir.
- 16 Q Is that the common place for them?
- 17 A Yes.
- 18 Q Were any of those moved?
- 19 A I am not sure.
- 20 Q When you got home did you notice any of them outside
21 of where you normally would store them?
- 22 A There was a lot of glass around so I guess they had
23 been moved.
- 24 Q Was the glass outside or was the glass inside?
- 25 A It was both, inside and outside.

- 1 Q How high up is that window from the ground?
- 2 A I would say about eight foot.
- 3 Q About eight feet from the ground to the ledge of this
- 4 window?
- 5 A To the ledge?
- 6 Q Yes, sir.
- 7 A The top would be about eight foot, the bottom
- 8 probably would be about five foot.
- 9 Q Okay. So when you are saying top--
- 10 A -- where the board is.
- 11 Q The top of the board or just where the board is here?
- 12 A Where the top of the frame is.
- 13 Q Okay. And at the bottom window, the windowsill is
- 14 how far off the ground?
- 15 A I would say about four or four and a half, five foot.
- 16 I am not sure.
- 17 Q Is there any ledges or steps or anything underneath
- 18 that window?
- 19 A No, sir.
- 20 Q Can you tell me a little bit about the inside of your
- 21 house. Do you have other items of value, other TV's?
- 22 A Yes, sir.
- 23 Q How many?
- 24 A In the den there was another flat screen mounted on
- 25 the wall. In my grandson's room there was another TV.

- 1 And in the kitchen there is one mounted.
- 2 Q Do you have any jewelry?
- 3 A Just watch and rings, that is it.
- 4 Q Do you have a jewelry box that you keep them in?
- 5 A Yes.
- 6 Q Was it disturbed?
- 7 A Our bedroom was ramshacked, yes.
- 8 Q Was any of those items taken?
- 9 A No, sir.
- 10 Q Do you have any guns?
- 11 A No, sir.
- 12 Q Do you have a Wii or a PSP or a Nintendo or a gaming
13 console?
- 14 A No, sir.
- 15 Q Do you have any cameras?
- 16 A No.
- 17 Q Do you have a DVD player or a Blue-Ray?
- 18 A DVD player.
- 19 Q DVD. Were any of those items disturbed or taken?
- 20 A No.
- 21 Q Where was the DVD player kept?
- 22 A In the den next to the TV that is mounted on the
23 mantle.
- 24 Q What is behind this window here?
- 25 A That is the dining room.

1 Q What is on the other side of the window, is there a
2 table or is there chairs or is there shelving?

3 A No.

4 Q So you come through your window and you are in your
5 dining room?

6 A Yes.

7 Q If you were to look left, what is left?

8 A Left you would be looking into the den.

9 Q Den. To the right?

10 A Kitchen.

11 Q Do you have a printer or a wireless router that you
12 use for your computer?

13 A Yes.

14 Q Do you have a desktop?

15 A Yes.

16 Q Mr. Smiley, what rooms were the TV's in that were
17 taken?

18 A One was in our bedroom, me and my wife's bedroom.
19 The other one wasn't used yet, it was still sitting in the
20 box we had bought at Christmas holidays.

21 Q How big were these TV's?

22 A One in our bedroom was a 37 inch and one in the box
23 was a 32 inch.

24 Q Tell me a little bit about your bedroom, what else is
25 in your bedroom?

1 THE COURT: Mr. Hayes, let's, if you want to know
2 what specifically is in his bedroom, I can sit here all
3 day long and tell you what is in my bedroom.

4 MR. HAYES: Yes, sir.

5 THE COURT: Clothes, how is that relevant. Go ahead,
6 ask specific questions.

7 Q Any other items of value in your bedroom, you said
8 you had some jewelry, was that in your bedroom?

9 A Yes.

10 Q You said you had the one in the box, the TV, that was
11 from Christmas. What room was it sitting in?

12 A That was in the front room.

13 Q What do you mean by front room?

14 A The very front room, it is my wife's office where the
15 laptop was.

16 Q Is there a filing cabinet in that office?

17 A A very small file cabinet.

18 Q There is paper stored I assume in that filing
19 cabinet?

20 A Yes.

21 Q Any other furniture in that room?

22 A Just a desk, a work desk, chairs.

23 Q Is there a lamp?

24 A Yes.

25 Q Is that where the wireless router was at?

- 1 A No.
- 2 Q Or the printer?
- 3 A There was a printer in there.
- 4 Q Where is your printer and wireless router at?
- 5 A The router is in the den.
- 6 Q Your den would be the living room?
- 7 A No, the living room, the den and the dining room.
- 8 When you come through the, the window he came through, you
- 9 go to the left you will be in the den.
- 10 Q And then from the den you would go into another room
- 11 and that would be your living room?
- 12 A You have to go through the dining room to get to the
- 13 den, that is right to the front door.
- 14 Q Okay. Mr. Smiley, how do you get the value of the TV
- 15 at Christmas. Do you have a receipt for it?
- 16 A Yes, we did.
- 17 Q Where was it purchased from?
- 18 A It was purchased from Sam's Warehouse.
- 19 Q And the TV in your bedroom, how old is it?
- 20 A We bought it at the same time.
- 21 Q And you have the receipt for it?
- 22 A Yes.
- 23 Q Do you remember specifically what the value of each
- 24 one was?
- 25 A No, not specifically.

1 Q How about the laptop, Mr. Smiley?

2 A That was purchased by my wife. I don't know exactly
3 how much that was.

4 Q Did you get any of the items back?

5 A Yes, sir.

6 Q What items did you get back?

7 A The laptop.

8 Q You got that back because Richland County brought it
9 to you?

10 A They found it, yes sir.

11 Q They call you and tell you to come get it or did they
12 bring it to you?

13 A They called my wife and I think she went and picked
14 it up.

15 Q Nothing further.

16 THE COURT: Anything on redirect?

17 MR. MOLONY: Very briefly, Your Honor.

18 REDIRECT EXAMINATION

19 By Mr. Molony:

20 Q Mr. Smiley, I want to show you State's exhibit 2.
21 The window. Can you step down for one second. I just
22 want you to tell the jury, this is the top part of the
23 window?

24 A Yes.

25 Q And it was broken out?

1 A It was.

2 Q Now, how was the window opened?

3 A He broke the whole lock and let the window up.

4 Q To where the bottom part of the window would actually
5 have been opened?

6 A Yes.

7 Q I don't have any more questions.

8 THE COURT: You may step down.

9 MR. MILLER: The State calls Krystal Allen.

10 KRYSTAL ALLEN, being
11 first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 By Mr. Miller:

14 Q Ms. Allen, where do you live?

15 A I live in Augusta, Georgia.

16 Q And how long have you lived in Augusta?

17 A Since January the 28th of this year.

18 Q Do you have any family in North Augusta?

19 A Yes, I do.

20 Q And what family lives in North Augusta?

21 A Ronnie and Delane Smiley.

22 Q And how are you related to them?

23 A Aunt and Uncle.

24 Q Okay. Going back to the day of May the 2nd of this
25 year did you go to your Aunt and Uncle's house at [REDACTED]

1 [REDACTED] Road on May the 2nd?

2 A Yes, I did.

3 Q And what time did you arrive there?

4 A I first arrived there around 11:00, I came to speak
5 with my Aunt and she wasn't there and I came back again a
6 little before 3:00.

7 Q When you were there at 11:00 o'clock what did you do
8 while you were at the house?

9 A I knocked on the window in the back because I thought
10 she was inside, I thought her car was parked in the garage
11 and I rang the doorbell and everything and she wasn't
12 there. I even sat there for a little while and waited on
13 her.

14 Q When you say you rang the doorbell, where is the
15 doorbell located?

16 A It is in the front yard, the front yard.

17 Q Let me show you this picture real quick, this is
18 State's exhibit 1. Is the doorbell, is that the door
19 where the doorbell is located?

20 A Yes.

21 Q When you rang that doorbell was the door open?

22 A No, the door was not open.

23 Q Where was your car parked while you were waiting?

24 A The car was parked in the back by the garage.

25 Q Okay. Did you eventually leave your Aunt's house?

- 1 A Yes, I did.
- 2 Q Where did you go after that?
- 3 A I went back to Augusta, Georgia to call her.
- 4 Q Okay. And did you get in touch with her?
- 5 A Yes, I did.
- 6 Q What happened next?
- 7 A We discussed meeting up with one another to help for
- 8 the banquet that night.
- 9 Q What kind of banquet was it, do you know?
- 10 A It was a scholarship banquet for our church.
- 11 Q Did you eventually go back to your Aunt's house?
- 12 A Yes, I did.
- 13 Q And where was your Aunt at that time?
- 14 A Actually I pulled up first and she pulled up right
- 15 behind me.
- 16 Q Where did you park?
- 17 A I parked in the front right in front of the front
- 18 yard, the picture you just showed.
- 19 Q And where did your Aunt park?
- 20 A She pulled up along the side, not going into the
- 21 carport.
- 22 Q So she stopped, she was going--
- 23 A --she stopped, yes.
- 24 Q What happened after you parked your car?
- 25 A Well, when I parked my car, first of all when my Aunt

1 was pulling up she was in my Uncle's truck so I thought it
2 was my Uncle and I thought she was already inside because
3 I seen the front door open. And as I was getting out of
4 the car she rolled the window down and I realized it was
5 her. And she said did I open the front door and I said
6 no. And so she told me to go up and look and I went up to
7 the door and looked and seen the black bag in the middle
8 of the hallway floor toppled over that is normally not
9 there.

10 Q What did you do next?

11 A I told her what I saw and then she said someone has
12 broken into my house. So she reached for her cell phone
13 but I took it upon myself to go around in the carport and
14 look in the back and that is where I seen the glass
15 knocked out onto the ground, the glass window.

16 Q Did you call the police or did your Aunt call the
17 police?

18 A My Aunt called the police.

19 Q And when did you leave the house?

20 A I left the house when the police arrived.

21 Q Okay. And why did you leave the house?

22 A Because we were on a time schedule still for the
23 banquet, I had to go pick up the table cloths from the
24 cleaners for her.

25 Q Did you ever talk to the police that day?

1 A No, I never got a chance to talk to the police.

2 Q Did you ever, actually go inside of your Aunt's house
3 on May 2nd of 2011?

4 A No..

5 Q Do you know the defendant in this case, Mr. Albert
6 Cave?

7 A No.

8 Q Have you ever seen the defendant before sitting here
9 in this courtroom?

10 A No, sir.

11 Q Did you let the defendant or anybody else into the
12 house that day?

13 A No, sir.

14 Q Please answer any questions Mr. Hayes has for you.

15 CROSS-EXAMINATION

16 By Mr. Hayes:

17 Q Ms. Allen, you were there at 11:00 o'clock?

18 A Yes.

19 Q Did you see any cars?

20 A No.

21 Q Did you see anybody?

22 A No.

23 Q Did you notice anything out of the ordinary?

24 A No, sir.

25 Q And you came back at what time?

Krystal Allen - Cross by Mr. Hayes

33

- 1 A A little before 3:00.
- 2 Q A little before 3:00?
- 3 A P.M., yes.
- 4 Q That is when you saw the front door open?
- 5 A Yes.
- 6 Q Nothing further.
- 7 THE COURT: Anything else?
- 8 MR. MILLER: Nothing.
- 9 THE COURT: Thank you, Ma'am.
- 10 MR. MILLER: Your Honor, the State would request Ms.
- 11 Allen to be released from her subpoena.
- 12 THE COURT: Okay. Next witness.
- 13 MR. MOLONY: The State calls Delane Smiley.
- 14 DELANE SMILEY, being
- 15 first duly sworn, testified as follows:
- 16 DIRECT EXAMINATION
- 17 By Mr. Molony:
- 18 Q Ms. Smiley, where do you live?
- 19 A I live at [REDACTED] Road, North Augusta,
- 20 South Carolina.
- 21 Q Do you live there with your husband?
- 22 A I do.
- 23 Q And how long have y'all lived there?
- 24 A Twenty plus years.
- 25 Q Is that in Aiken County?

1 A Yes, it is.

2 Q Ms. Smiley, I am going to take you back to May the
3 2nd of this year. Do you remember what happened that day?

4 A Yes, sir. I was coming home from Augusta and when I
5 got home I was supposed to be meeting my niece there and
6 she got there a little before I did. Both of us kind of
7 pulled up into the--

8 Q I am just going to stop you real quick, I am sorry.
9 Overall do you remember what happened that day?

10 A Yes, my house was broken into when I got home.

11 Q What time did you leave your house that morning?

12 A It was early, before 10:00.

13 Q Before 10:00?

14 A Before 10:00 a.m.

15 Q And where were you going?

16 A I went to Julian Smith Casino.

17 Q And where is that?

18 A That is in Augusta, Georgia, Broad Street.

19 Q What were you going there for?

20 A I was setting up for a church function for that
21 evening.

22 Q When did you return to your house?

23 A It was about ten minutes to 3:00.

24 Q Ten minutes to 3:00?

25 A Yes.

1 Q Who was with you, anybody when you returned home?

2 A My niece was in front of me in another vehicle.

3 Q Your car was behind her's?

4 A Yes, I was behind her in my husband's truck.

5 Q And where did your niece park?

6 A She parked directly in front of my front door.

7 Q And where did you park?

8 A I drove up the right side of my driveway.

9 Q When you got out and your car was parked could you

10 see your niece where she was parked?

11 A She got out of the vehicle when she parked. And when

12 I drove up the right side I saw that the front door was

13 open so I didn't get out, I rolled my window down to tell

14 her, ask her why was my door open. She had already went

15 up the steps to my door.

16 Q And then what happened next?

17 A I told her, I said the door is open. And she said I

18 thought you left it open for me. And she was telling me

19 she saw my black case on the door. I said, don't come in

20 the house, come out, somebody has broken into the house.

21 I said, come out, come down the steps and she did and went

22 around to my carport and when she looked on the back side

23 of the house she said the whole window is out, Aunt

24 Delane. I said come get in the truck, just get in the

25 truck.

1 MR. HAYES: Objection.

2 THE COURT: What is the objection.

3 MR. HAYES: Hearsay.

4 MR. MOLONY: I will ask another, Your Honor.

5 Q Who, if anybody, called the cops?

6 A I did.

7 Q And where were you when you called law enforcement?

8 A I was still in the truck backing out of my drive.

9 Q During this whole time did you see anybody enter the
10 home?

11 A I did not.

12 Q Did you see anybody exit the home?

13 A No.

14 Q Did a deputy ultimately arrive at your house?

15 A Yes.

16 Q And what happened after the deputy arrived?

17 A He went in to investigate and everything and we
18 stayed outside until he came back out to get us.

19 Q Okay. And then after he came back out what did y'all
20 do next?

21 A We went inside and he did a walk through in the house
22 for us to tell him what was missing and everything.

23 Q And during this walk through what, if anything, did
24 you see that was out of place?

25 A My dining room window was broke and the glass and

1 everything was all over the floor. There was a shovel
2 leaning up against the outside of the window. Our bedroom
3 was basically tore up, stuff was just everywhere all over
4 the floor. We had a flat screen in there, it was gone.
5 Everything else was on the floor. And then also in my
6 living room, half of that is my office and so I had a
7 laptop that was sitting up there, the Dell laptop was gone
8 and stuff was just turned around and throwed around in my
9 office part.

10 Q Ms. Smiley, I am going to show you what has been
11 marked as State's exhibit 3. And this is a photocopy,
12 this is not the exact document but do you recognize this,
13 yes or no?

14 A Yes.

15 Q And what is this?

16 A Those are papers that were laying on the inside of my
17 laptop.

18 Q How do you know that these papers were all on the
19 inside of your laptop before you left to go to Augusta?

20 A Because I put them there the night before. I was in
21 my office that night working and so when I finished I laid
22 those papers on the top of the laptop.

23 Q And when you left to go to Augusta they were on the
24 top of that laptop?

25 A Yes, sir.

1 Q Where were they when you got back?

2 A They were in the chair, in the office chair.

3 Q And upon realizing that those papers had been moved
4 what happened next?

5 A The officer, the deputy asked me was I sure that I--

6 MR. HAYES: Objection, hearsay, Your Honor.

7 THE COURT: Sustained.

8 Q Did you eventually tell law enforcement that those
9 papers had been moved?

10 A Yes.

11 Q And what did the deputy do with those papers?

12 A He told me that he was going to--

13 MR. HAYES: Objection.

14 THE COURT: Stop. What did he do with them?

15 A He removed the papers, he dusted the papers, he was
16 going to take the papers for evidence to dust them for
17 fingerprints.

18 Q So he collected the papers?

19 A Yes.

20 Q Ms. Smiley, do you know the defendant in this case?

21 A No.

22 Q Have you ever seen Albert Cave before today in this
23 courtroom?

24 A No.

25 Q Is there any reason his fingerprints should have been

1 on those papers in your house?

2 A No.

3 Q I don't have any more questions.

4 THE COURT: Mr. Hayes.

5 CROSS-EXAMINATION

6 By Mr. Hayes:

7 Q Ms. Smiley, those papers, where did they originally
8 come from?

9 A They were papers that I had typed up.

10 Q So you created those documents?

11 A Yes.

12 Q How long had you had them?

13 A Since probably February of this year.

14 Q Were they always in your office?

15 A Yes.

16 Q So they never left the house?

17 A No, not those papers.

18 Q Where do you keep your papers?

19 A Those papers?

20 Q Where were they kept, where did you store them?

21 A In my office.

22 Q Did you have a filing cabinet that you stored them
23 in, did you have a folder that you stored them in or did
24 you just have them stacked up off to the side on the desk?

25 A They were previously; those were never in a folder or

1 anything. They were right there where that laptop is from
2 the time I printed them off.

3 Q When did you print them?

4 A Back in February.

5 Q Okay. And where did they go in February when you,
6 you just left them on top?

7 A No, there was several other copies. Those were
8 copies that were left, those were prepared for a meeting
9 that I chaired and so the other copies were taken to the
10 meeting and given to the members of those meetings, they
11 were extra copies that were left there.

12 Q How did you know that they didn't go to the meeting?

13 A Because I didn't take them.

14 Q But you took other copies?

15 A Yes, they were in a folder. I have a folder for that
16 specific meeting and I had the other copies in that
17 folder.

18 Q When was that meeting?

19 A That was in February.

20 Q What meeting is that?

21 A That was the Augusta District Scholarship meeting
22 that I chair. It is a church committee.

23 Q That is for scholarships?

24 A Yes.

25 Q Any particular school?

1. A Church scholarships.
2. Q Now your laptop, you purchased it?
3. A Yes.
4. Q You know what the value of it was?
5. A It was over \$1,200.00 dollars when I purchased it.
6. Q You still have your receipt?
7. A I do.
8. Q Where did you purchase it from?
9. A I purchased it from a, one of my church members has a
- 10 computer business and he ordered it for me from Dell.
11. Q How long have you had it?
12. A Five years or more.
13. Q The TV's, do you know how much you paid for each one
- 14 of the TV's?
15. A Total, over \$700.00 dollars.
16. Q Do you remember what each one cost by chance?
17. A No.
18. Q So they were purchased together?
19. A Yes, they were purchased together.
20. Q Your laptop, you had left it in the office?
21. A Yes.
22. Q Was it sitting in the chair or was it sitting on the
- 23 desk?
24. A It was sitting on a little side table, little side
- 25 desk table that set up where I always sit it on the top of

1 the fan, desktop fan.

2 Q Was the table moved that it was sitting on by any
3 chance?

4 A It was, the top of it was twisted and then the file
5 cabinet was moved.

6 Q How big is your filing cabinet?

7 A It is a two drawer filing cabinet.

8 Q How far was it moved?

9 A It was tilted sideways a little bit from the position
10 it usually sits in.

11 Q Anything in it disturbed?

12 A No, the drawers weren't open.

13 Q Now you testified about a black bag in the doorway,
14 what is this black bag?

15 A The black bag, it looks like a laptop bag but it was
16 my EKG machine that I usually use to work with, it was in
17 the middle of the floor going out of the door.

18 Q How big is it?

19 A It is about the size of a, a little bit bigger than,
20 it is about this wide.

21 Q That is two feet wide?

22 A Yeah, about two or three feet wide. It is a little
23 bit bigger than a laptop I guess.

24 Q Where do you normally store it?

25 A It is usually sitting in my office next to a chair

- 1 that is there, a green lounge chair.
- 2 Q How heavy is it?
- 3 A A couple of pounds.
- 4 Q Two pounds?
- 5 A Yes, two pounds.
- 6 Q When did you purchase those two TV's?
- 7 A We got those in December during the Christmas
- 8 holidays, I believe it was Black Friday we went out
- 9 shopping.
- 10 Q Can you tell me where you got those two TV's on Black
- 11 Friday?
- 12 A Sam's.
- 13 Q Sam's Club?
- 14 A Yes.
- 15 Q And you paid \$700.00 dollars for both of the TV's?
- 16 A It was over \$700.00 dollars.
- 17 Q Was it less than \$800.00?
- 18 A I believe it was.
- 19 Q It was less than \$800.00?
- 20 A Yes.
- 21 Q You paid \$1,200.00 for a laptop?
- 22 A Yes, I believe it was a little over \$1,200.00 dollars
- 23 for the laptop.
- 24 Q Five years ago?
- 25 A Yes.

1 Q Nothing further.

2 THE COURT: Redirect?

3 MR. MOLONY: No redirect, Your Honor.

4 THE COURT: You may step down. Next witness.

5 MR. MOLONY: Your Honor, may Ms. Smiley be released
6 from her subpoena?

7 THE COURT: Yes.

8 MR. MILLER: The State calls Deputy Darryl Kostyk to
9 the stand.

10 DARRYL KOSTYK, being
11 first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 By Mr. Miller:

14 Q Deputy Kostyk, who are you employed by?

15 A The Aiken County Sheriffs Office.

16 Q And how long have you been working at the sheriffs
17 office?

18 A For two years.

19 Q Prior to working in Aiken County did you have any
20 other experiences as a law enforcement officer?

21 A Yes, I did. I worked for approximately five years in
22 Orangeburg and approximately ten years in Pennsylvania.

23 Q What did your job duties consist of when you were in
24 Pennsylvania?

25 A I was a detective.

1 Q What are your current duties with the Aiken County
2 Sheriffs Office?

3 A I am a road patrol deputy.

4 Q Deputy Kostyk, were you working with the Aiken County
5 Sheriffs Office on May the 2nd of 2011?

6 A Yes, sir.

7 Q Did you respond to the burglary call at [REDACTED]
8 [REDACTED] Road, North Augusta in reference to a burglary?

9 A Yes, I did.

10 Q When you got to that incident location who did you
11 speak with?

12 A I spoke with and I am sorry if I mess up your last
13 name, sir, it is Smile's, Mr. Smile's.

14 Q Smiley?

15 A Smiley, yes.

16 Q Is this the first time you had ever worked a
17 burglary?

18 A No, sir.

19 Q What is your normal routine when you respond to a
20 home that has been reported as burglarized?

21 A I always meet with the complainant or victim that is
22 there and I ask them what happened, kind of walk me
23 through what you perceive as happened. I go through and
24 have them show me what was taken from where, go through
25 the whole thing from start to end. And from there I would

1 go back and start doing some of the paperwork. While we
2 are doing that, as we go through everything I take mental
3 notes about what areas I am going to focus on to see about
4 obtaining any possible evidence. And after we get the
5 paperwork started I go back and try to collect that
6 evidence.

7 Q Moving back to the incident at [REDACTED]
8 Road is that the process generally you went through that
9 day?

10 A Yes, sir.

11 Q Did you take any pictures of the scene?

12 A I did not.

13 Q Why didn't you take any pictures?

14 A I didn't have a department issued camera.

15 Q After walking through the home to identify things
16 that had been stolen or moved what did you do next?

17 A I am sorry, sir, can you repeat that?

18 Q After you had walked, you testified that you walked
19 through the home with the Smiley's to identify what had
20 been stolen or moved. What did you do next after you had
21 that discussion with them?

22 A I went back through and started looking for evidence
23 to collect.

24 Q What kind of equipment do you have that is issued by
25 the County to help you discover potential evidence?

1 A All I have is what we call basic fingerprint kit.

2 Q Can you kind of describe that fingerprint kit?

3 A I can. It is a small amount of fingerprint dust and
4 a small applicator to spread it around with and some what
5 we call fingerprint lifting tape.

6 Q Were you able to identify any prints that would be of
7 value for identification using your equipment at the crime
8 scene?

9 A I was not.

10 Q There has been discussion previously about a shovel
11 that may have been used to break a window to gain entry
12 into the residence. Did you collect any fingerprints off
13 of the shovel?

14 A I did not.

15 Q And why not?

16 A The shovel was old with a wooden handle. It has been
17 my training and experience, it is extremely difficult and
18 unusual to be able to obtain any--

19 MR. HAYES: Objection, he is not an expert, he hasn't
20 been qualified as an expert.

21 THE COURT: He is not giving an opinion, he is
22 talking about his opinion, he is talking about experience,
23 overruled.

24 A It has been my training and experience that you are
25 not going to get any fingerprints off of it with what I

1 had available to me. In addition to that, I wasn't
2 one-hundred percent convinced that afternoon that that
3 shovel had actually been used in the commission of the
4 crime.

5 Q Were you able to collect any evidence out of the
6 Smiley's home?

7 A I was. The area that the laptop computer was taken
8 from was a desk, it had a filing cabinet and like a little
9 computer desk and Ms. Smiley had indicated to me that some
10 papers that had been on top of her laptop computer were
11 now laying in the chair. So I wanted to collect those and
12 it appeared the area there with the filing cabinet was had
13 been disturbed. So I did utilize the fingerprint kit in
14 an attempt to find some latent fingerprints on the filing
15 cabinet without any success. And I did then collect the,
16 from the papers that had been moved, I don't remember how
17 many sheets of paper it was but using a little bit of
18 experience the top piece of paper and the bottom piece of
19 paper is what someone is going to touch, they are not
20 going to rifle through all of the papers. So I collected
21 the top piece of paper and the bottom piece of paper for
22 further, for better processing at our laboratory.

23 Q I am going to show you what has been previously
24 marked for identification as State's exhibit 3. Do you
25 recognize those two pieces of paper?

1 A I do, sir.

2 Q And are those true and accurate representations of
3 the two pieces of paper that you collected in evidence
4 that day?

5 A They are, sir.

6 Q I want to show you what has been marked for
7 identification as State's exhibit 4. Without opening that
8 do you recognize that item?

9 A I do, sir.

10 Q And how do you recognize that item?

11 A This is the envelope that I used to package the
12 actual pieces of paper that I collected on that particular
13 day.

14 Q And what did you do with that envelope after you had
15 it sealed up?

16 A I sealed it up and put all of the information
17 required on it and I then passed them on to Deputy Roberts
18 for further transportation to the sheriffs office.

19 Q After you finished your paperwork on the case and
20 when you say, paperwork, are you referring to your report
21 when you say you would start your paperwork, is that your
22 report?

23 A Yes, sir. I had to do a complete initial report and
24 also the chain of custody sheet and also the forensic
25 analysis request.

1 Q Okay. And how do you do a forensic analysis request?

2 A It is just a simple sheriffs department form that you
3 fill out and request what you think should be done.

4 Q I am going to show you what has been previously
5 marked for identification as State's exhibit 3A. Can you
6 identify that document?

7 A That is the forensics request form.

8 Q And is that your handwriting on the document?

9 A It is, sir, with the exception of this number here
10 which I believe is a control number.

11 Q And if you compare that number that is written on
12 there that you didn't write on the forensics request form
13 with the State's exhibit number 4, is that the evidence
14 control number?

15 A Yes, sir.

16 Q And is that forensic request form, a photocopy that
17 you have in your hand 3A, is that a fair and accurate copy
18 of the document that you filled out?

19 A Yes, sir.

20 Q With the exception of that one number?

21 A Yes sir, it is.

22 MR. MILLER: Your Honor, at this time we would move
23 to introduce State's exhibit 3A.

24 THE COURT: Any objection?

25 MR. HAYES: No, Your Honor.

Darryl Kostyk - Direct by Mr. Miller

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1 THE COURT: Without objection.

2 (Whereupon, State's Exhibit 3A was admitted into
3 evidence.)

4 Q Deputy, referring to State's exhibit 3A can you
5 explain to the jury what it was you were asking the
6 forensic section to do whenever you submitted that form?

7 A Yes, sir. I knew that with the equipment that I had
8 available to me at the scene there really wasn't much I
9 could do with the pieces of paper. I knew that better
10 methods were available at the lab. So what I did is I
11 submitted the paperwork and the documents I collected to
12 the lab and requested that they process them which would
13 give better methods for latent prints. A latent
14 fingerprint is a fingerprint that is not easily visible.

15 Q Thank you. Please answer any questions Mr. Hayes
16 might have.

17 THE COURT: Mr. Hayes.

18 CROSS-EXAMINATION

19 By Mr. Hayes:

20 Q Deputy Kostyk, is that how you pronounce it?

21 A Yes, sir.

22 Q You said you were two years here in Aiken, five years
23 in Orangeburg and then ten years as a detective in
24 Pennsylvania?

25 A Eight years as a detective in Pennsylvania, ten years

1 total with the agency.

2 Q Now, what training do you have to collect forensic
3 evidence?

4 A I have had multiple trainings to include a forty hour
5 crime scene investigation course and also, I am not sure
6 the exact name of the course was but it was a methods and
7 techniques class, various methods to collect evidence.

8 Q Now, they talk about using photography in these
9 courses in collecting evidence and preserving a crime
10 scene?

11 A Yes.

12 Q Is that something you would have done when you were a
13 detective?

14 A Yes, I would have.

15 Q Now, in Aiken County the policy would be for the road
16 deputy to show up and make a decision call whether a
17 forensic analyst needs to come out?

18 A No, sir.

19 Q No?

20 A No, sir.

21 Q So you wouldn't call for Clay Adams?

22 A Not as a road deputy, no sir.

23 Q No?

24 A No, sir.

25 Q Is it common for a forensic team to come out to a

1 crime scene?

2 A It depends on what the crime scene is, sir, and what
3 the supervisor determines needs to be done.

4 Q Who would let the supervisor know?

5 A Know what?

6 Q Who would let, who would contact the supervisor and
7 ask if a forensic team is needed?

8 A Well typically the supervisor would overhear the call
9 dispatched via radio. And if he thought it was going to
10 be a substantial incident he would automatically respond.
11 If you got to a, if a deputy got to a crime scene and it
12 was unusual or was going to be more involved then the
13 deputy would contact the road supervisor.

14 Q Okay. You said you didn't take a photograph because
15 you didn't have a department issued camera?

16 A Right, I did not have a camera, I don't have a
17 camera.

18 Q Wouldn't a road supervisor have a camera?

19 A He may have one, yes sir.

20 Q The sheriffs department has many cameras?

21 A I would assume they do, sir.

22 Q And you could have called and asked for one?

23 A I could have called and asked for one.

24 Q You could have called and asked for one?

25 A Technically I could have.

1 Q Do you have a cell phone?

2 A Yes, I do.

3 Q Does your cell phone have a camera on it?

4 A My cell phone?

5 Q Yes.

6 A My personal cell phone has a camera on it.

7 Q And there is several stores right there in that
8 location, isn't it?

9 A I am not sure.

10 Q Well, let's say within about a mile of that crime
11 scene would there be a Walgreen's, a Kroger?

12 A I am not sure, sir.

13 Q Do you normally patrol in North Augusta?

14 A I do not, sir.

15 Q You could have also left and gone and picked up a
16 camera, right?

17 A From where, sir?

18 Q From the store, you could have run back to the
19 precinct, you could have called and radioed and had
20 somebody to meet you half way?

21 A I could not do that, sir.

22 Q You could not?

23 A No, sir. There is no way I could run all the way
24 back to the sheriffs department and then back to the
25 scene.

1 Q And you said Ms. Roberts, was there somebody else
2 there present with you, any other deputies?

3 A Deputy Roberts showed up as I was finishing things
4 up.

5 Q Was she in another vehicle?

6 A Yes, sir.

7 Q She could have went and picked up a camera?

8 A No, sir.

9 Q She couldn't have left you there while you were
10 caring for the scene and picked up a camera?

11 A No sir, we have to continue to answer the calls. We
12 can't leave and go all the way back to the sheriffs
13 office.

14 Q Now you did a forensic request form for the papers.
15 You were saying that on the papers you knew what you had
16 available to you, you could not lift any prints, correct?

17 A That is correct.

18 Q Did you do a form for the shovel?

19 A No sir, I didn't collect the shovel.

20 Q That is because you believe it wasn't used or you
21 didn't think there was anything of value?

22 A I wasn't convinced that it was used and even if it
23 had been used it was my experience and training that I
24 wasn't going to be able to get anything off of it.

25 Q With what you had?

1 A With any method that I am aware of.

2 Q Couldn't you have collected it and requested for a
3 forensic analysis to be done?

4 A You can collect anything, sir, but you have to try to
5 use your training and your experience in what you collect.
6 You can't collect the entire household. So what you try
7 to do is focus on what you know was touched or tampered
8 with.

9 Q Was the shovel in the shed?

10 A No, sir.

11 Q Did they indicate whether that was a normal storage
12 place for their shovel?

13 A They indicated that it was out of place.

14 Q They indicated to you that the shovel was out of
15 place?

16 A Yes, sir.

17 Q What about the glass. Was any of the glass shards
18 dusted?

19 A I looked at the glass shards.

20 Q Were you able to retrieve anything from it?

21 A No, sir.

22 Q From the windowsill?

23 A No, sir.

24 Q Now there was some trashcans that was testified to
25 below that window?

- 1 A Yes.
- 2 Q Was any of the lids checked to see if there was any
3 shoe impressions?
- 4 A I looked at the lids, I didn't see anything.
- 5 Q Now you said you processed the filing cabinet and
6 that was because Ms. Smiley told you it was moved.
- 7 A That there was items that had been moved around on
8 it, she indicated. And it did look like things were
9 askew.
- 10 Q You weren't able to lift anything actually from it?
- 11 A I didn't get anything from it.
- 12 Q Did you process any of the doors to the house,
13 doorknobs?
- 14 A No, sir.
- 15 Q Did you process the garage door?
- 16 A No, sir.
- 17 Q In your experience wouldn't they have checked the
18 doors breaking a window to see if it was unlocked?
- 19 A I don't know what they would have done, sir.
- 20 Q Did you process the tops of the garage cans?
- 21 A No, sir.
- 22 Q Did you talk to any neighbors?
- 23 A No, sir.
- 24 Q Where were the papers that you collected, where did
25 you get them from?

- 1 A From the chair in front of the desk.
- 2 Q Did you process that chair?
- 3 A No, sir.
- 4 Q What was the shovel made of, what was the materials?
- 5 A The handle was wood.
- 6 Q It was wood?
- 7 A Yes, sir.
- 8 Q What was the actual spade part of it, was it metal,
- 9 plastic?
- 10 A I am not one-hundred percent sure. I believe it was
- 11 metal, it was old.
- 12 Q Was it rusty?
- 13 A I believe it was. I am not one-hundred percent sure.
- 14 Q When was the last time you had a class or training on
- 15 fingerprints?
- 16 A Specifically on fingerprints?
- 17 Q Yes, sir.
- 18 A Never.
- 19 Q In your report you stated that you believe that the
- 20 shovel was used to bust the window, correct?
- 21 A I said that is what they told me, that they indicated
- 22 it was apparently used.
- 23 Q Now, you used discretion on whether you collect it.
- 24 Now, on collecting fingerprints or processing it, are you
- 25 familiar with all the different ways to raise a

1 fingerprint from an item?

2 A I am not sure if I am familiar with all of them.

3 Q So there is methods out there beyond just dusting?

4 A Yes, sir.

5 Q You are aware of that but you are not aware of how
6 many different procedures there are?

7 A I wouldn't say that I am aware of every method that
8 there is, no.

9 Q On getting a fingerprint off of an item, wouldn't
10 that be something more appropriate left to forensics?

11 A It depends on what it is.

12 Q You are telling me you don't know all the different
13 methods?

14 A No, sir. But I do know what I can get off of an
15 object with this small kit that I have.

16 Q Right. How high was that window open?

17 A I can't be sure, sir.

18 Q Do you have a rough estimate?

19 A I don't know how high it was, it was higher than, you
20 know, ground level.

21 Q Was there anything under the window?

22 A I believe as you indicated there was trashcans under
23 it or a bucket.

24 Q Did you test the windowsill?

25 A I am sorry?

1 Q Did you test the windowsill?

2 A I don't know what test the windowsill is.

3 Q Did you dust the windowsill for fingerprints?

4 A I don't recall if I specifically dusted the
5 windowsill. There would be many, many reasons why I might
6 or might not.

7 Q Why would you dust a windowsill?

8 A If it is covered with dirt I would not dust it.

9 Q Was it covered with dirt?

10 A I don't recall sitting here today.

11 Q Did you see the black bag in the house?

12 A Did I see what?

13 Q A black bag?

14 A I don't recall a black bag.

15 Q Nothing further, Your Honor.

16 THE COURT: Any redirect?

17 MR. MILLER: No redirect, Your Honor.

18 THE COURT: You may step down. How many more
19 witnesses do you have?

20 MR. MILLER: Your Honor, we have got two real quick
21 ones and then we have two pretty lengthy ones.

22 THE COURT: Let's take a break, it is 3:30. Ladies
23 and gentlemen, we are going to take a short break.
24 Stretch your legs, please do not discuss the case, don't
25 deliberate and I would ask that you get me a foreperson.

1 Thank you. Everybody else remain seated.

2 (Whereupon, the jury was excused from open court for
3 a break.)

4 THE COURT: Anything for the record before we break
5 by the State?

6 MR. MILLER: Nothing from the State, Your Honor.

7 THE COURT: From the defense?

8 MR. HAYES: No, Your Honor.

9 THE COURT: The defendant is in custody, we will take
10 about a ten minute break.

11 (Whereupon, a short break was taken.)

12 THE COURT: Let's bring the jury in.

13 (Whereupon, the jury came into open court at
14 approximately 3:40 p.m.)

15 THE COURT: Are you ready?

16 MR. MILLER: Yes, Your Honor. Your Honor, the State
17 calls Jessica Roberts.

18 JESSICA ROBERTS, being
19 first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 By Mr. Miller:

22 Q Deputy Roberts, who are you employed by?

23 A Aiken County Sheriffs Office.

24 Q And how long have you been employed there?

25 A I have been a deputy for a year but I was a

1 dispatcher five years before that.

2 Q And as a deputy what are your job responsibilities
3 with the sheriffs office?

4 A To patrol Aiken County and enforce the laws of South
5 Carolina, the State of South Carolina and County of Aiken
6 and handle complaints for crimes.

7 Q Were you performing those responsibilities on the
8 date of May the 2nd of 2011?

9 A Yes, sir.

10 Q I am going to show you what has been previously
11 marked for identification as State's exhibit number 4 and
12 ask you if you know what this is?

13 A That is the envelope that I transported to the
14 sheriffs office.

15 Q Okay. And why did you transport that envelope to the
16 sheriffs office?

17 A I responded to the location and took it from Deputy
18 Kostyk for evidence.

19 Q And the location, are you referring to [REDACTED] Carolina
20 Springs Road?

21 A Yes, sir.

22 Q Okay. Did you actually open up the envelope and mess
23 with anything inside of it?

24 A No, sir.

25 Q Did you look inside the envelope?

- 1 A No, sir.
- 2 Q Were you working on the same shift as Deputy Kostyk?
- 3 A Yes, sir.
- 4 Q What did you do with that evidence after you got back
- 5 to the sheriffs office?
- 6 A I put it in an evidence locker and locked the locker.
- 7 Q And while the envelope was in your possession did you
- 8 change or alter it in any way, any of the contents in any
- 9 way?
- 10 A No, sir.
- 11 Q No further questions.
- 12 THE COURT: Cross.
- 13 CROSS-EXAMINATION
- 14 By Mr. Hayes:
- 15 Q Deputy Roberts, do you have a fingerprint testing kit
- 16 in your car?
- 17 A Yes, sir.
- 18 Q Can you describe that kit for me. Is it the little
- 19 tiny, little brush and a little bit of powder and that is
- 20 it?
- 21 A It is like a blue box about this big. It has got the
- 22 fingerprint dust container in it and then it has got a
- 23 brush in it about that long. And it has got tape in it.
- 24 Q Okay.
- 25 A I am sorry, I was going to say it has got tape.

- 1 Q Do you have a camera in your car?
- 2 A Yes, sir.
- 3 Q Like a digital camera you can take photographs of the
4 scene with?
- 5 A I do now but I didn't at the time, I just got it.
- 6 Q Did you collect anything?
- 7 A No, sir.
- 8 Q Do you have a cell phone?
- 9 A Yes, sir.
- 10 Q The cell phone you had there, was a camera on it?
- 11 A Yes sir, I got a new phone between then and now. So
12 I was trying to remember. But, yes sir, I did.
- 13 Q So your old phone did have a camera?
- 14 A Yes, sir.
- 15 Q Now could you have called for a camera to be brought
16 to the scene?
- 17 A I don't know, usually we call an investigator or a
18 sergeant or a lieutenant if we need a camera. But I don't
19 know.
- 20 Q So you are telling me a deputy would call if they
21 needed a camera?
- 22 A Not necessarily. If they needed a camera the
23 sergeant or lieutenant or the investigator would determine
24 if they needed one to be at the scene.
- 25 Q Did anybody else, any other supervisors of yours or

1 any other deputies show up at the scene other than you and
2 Deputy Kostyk?

3 A Not that I am aware, no sir.

4 Q Why were you so late arriving at the scene?

5 A Because I was taking paperwork to the sheriffs office
6 and I was told to stop and get the evidence to take it to
7 the sheriffs office because we were busy and we didn't
8 need two people at the sheriffs office.

9 Q So he didn't call you for support or backup or
10 anything like that?

11 A No.

12 Q Isn't it true that there is a Circle K about a half
13 mile from that location and a Walmart within a mile?

14 A I am not good at distances but if you are talking
15 about the one in North Augusta and the Circle K on
16 Jefferson Davis, I mean about a half mile and a mile, I
17 don't know.

18 Q Jefferson Davis would be 1.1 miles. I was referring
19 to the one on Atomic Road, 602 Atomic Road. Would that be
20 half a mile from there?

21 A I don't know, I really do not know.

22 Q Could you have taken photographs from your cell
23 phone?

24 A I guess I could have.

25 Q And downloaded it onto a computer if need be?

1 A I don't know how to do that.

2 Q Nothing further.

3 THE COURT: Redirect.

4 MR. MILLER: Nothing from the State.

5 THE COURT: You are excused.

6 MR. MILLER: Your Honor, can Deputy Roberts and
7 Deputy Kostyk be released from their subpoenas?

8 THE COURT: Yes.

9 MR. MILLER: Thank you, Your Honor. Your Honor, the
10 State calls Gerald Turner.

11 GERALD TURNER, being
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 By Mr. Miller:

15 Q Mr. Turner, who are you employed by?

16 A I am the evidence custodian with Aiken County
17 Sheriffs Office.

18 Q And how long have you been with the sheriffs office?

19 A Since November of 2003.

20 Q And what are you job responsibilities with the
21 sheriffs office?

22 A I receive evidence, make sure it is properly
23 packaged, paperwork is correct, I place all pertinent
24 information in the computer, create a file for it and then
25 place it into storage until needed.

1 Q Okay. Is the evidence room an open area that any
2 deputy could enter?

3 A No, sir.

4 Q How does evidence get turned into the evidence room?

5 A We have five different size lockers that it is placed
6 in depending on what the evidence is and it is locked up
7 and I have the only set of keys.

8 Q Okay. And when evidence is checked out of the
9 evidence room how do you account for that evidence?

10 A By a chain, they sign the chain to make sure I know
11 where it is going.

12 Q And do you also back up that written chain with a bar
13 coding system through the computer?

14 A Yes sir, it is bar coded and placed into the
15 computer.

16 Q I am going to show you what has been previously
17 marked for identification as State's exhibit number 4 and
18 utilizing that bar code number there can you explain to
19 the jury what that is?

20 A Yes, sir. It is two pieces of paper. According to
21 the chain, moved, touched by unknown subject.

22 Q And how did that evidence get into your possession?

23 A It was placed in the evidence locker by J. Roberts
24 and of course like I said, I unlock it and get it out.

25 Q And what did you do with that piece of evidence in

1 particular when you took it out of the evidence locker?

2 A Once I made sure everything was correct I placed it
3 into storage until needed.

4 Q And did you open the envelope?

5 A No, sir.

6 Q And did you alter or change the contents of that
7 envelope in any way while it was in your possession?

8 A No, sir.

9 Q Did you ever release that envelope to anyone else at
10 the sheriffs office?

11 A Yes sir, to Chris Johnson.

12 Q And do you know when you released it to Chris
13 Johnson?

14 A Yes sir, on 5/4/11.

15 Q So that is May the 4th of 2011?

16 A May 4th.

17 Q And why would you have released it to Investigator
18 Johnson?

19 A There was a request for processing for latent prints.

20 Q No further questions.

21 THE COURT: Cross.

22 CROSS-EXAMINATION

23 By Mr. Hayes:

24 Q Mr. Turner, you received this envelope and then it
25 was processed the next day?

1 A I received on 5/3, that is when I took it out of the
2 locker.

3 Q Okay. And then you went through and did the bar
4 coding and placed it into storage?

5 A And placed all of the information into the computer.

6 Q Now you said it was released to Chris Johnson. How
7 did he go about getting a piece of evidence if he was
8 going to test it or if there was a request for forensics
9 to be done?

10 A What happens is they fill out a form for it to be
11 done and I take the evidence, I would have taken this, put
12 the, a copy of the request to it and then I have got a
13 special box in my secure area that I place all evidence in
14 to be lab tested. And then when he gets his chance or
15 whenever he comes down and picks it up and signs it out.

16 Q And so once it was signed in you see that there is a
17 forensic request form. On the top you have a metal box,
18 filing cabinet, something you sit it in until somebody
19 comes and says, Mr. Turner, I need this evidence?

20 A Right. I have got, it is a plastic container, it is
21 set in a certain area, it is labeled for processing. And
22 what Chris does, he comes down to see what he has got, he
23 takes the information, well actually the case number and
24 then he will come and pull my file. Then he and I
25 together sign it out. I make sure he signs it out, let's

1 put it that way.

2 Q Okay. Now if it were to be brought back to you after
3 processing would he have to sign?

4 A No, when it comes back I would sign for it accepting
5 it and then I would place that information into the
6 computer, the date, time and who I got it from.

7 Q Was that done in this case?

8 A No, sir. This was, in this case right here Chris
9 turned it over to Lieutenant Clay Adams who brought it
10 down to me and then Clay signed it out for identification.

11 Q When was that?

12 A That was on 5/5/11.

13 Q Okay. So Chris didn't bring it back to you, Clay
14 Adams brought it back?

15 A Clay Adams brought it back, right.

16 Q One day later?

17 A Yes, sir.

18 Q Is it a common procedure to have something out and
19 have it tested beyond office hours?

20 A No sir, because that should be a secure area also.

21 Q What do you mean that should be a secure area?

22 A In other words, it is taken to the forensic lab and
23 in the forensic lab those doors are locked and of course
24 you have got to have a special ID to get in there too.

25 Q Where is the forensic lab compared to where your

1 office is at?

2 A It is actually on the side of the building probably
3 about fifty yards from me.

4 Q Is that the same building?

5 A Yes sir, same building.

6 Q And you said that Lieutenant Clay Adams brought it
7 back to you on 5/5?

8 A Well he brought it back to me to sign it out. In
9 other words he is telling me that, hey, Chris is giving me
10 this and I am taking possession of it at this point.

11 Q I assume you are referring to, what are you referring
12 to?

13 A This is my chain that I use. This goes with the,
14 let's put it like this. This is my records of who has got
15 it and who hadn't got it and all the information to that
16 case.

17 Q So it reflects that on the 3rd is when you received
18 it out of the locker?

19 A Right. It was placed in the locker on the 2nd, the
20 next day on 5/3 is when I got it out and processed it.

21 Q And then on May 4th?

22 A On May 4th Chris Johnson came through and took
23 possession of it at that point.

24 Q And it stayed with him until May 5th?

25 A May 5th.

1 Q What happened after May 5th?

2 A It has been in Clay Adams possession ever since then.

3 Q Can I look at what you are referring to. May I
4 approach, Your Honor.

5 THE COURT: Yes, sir.

6 A I have three of those bar codes. One goes on the
7 file, one goes on the evidence and one on that sheet
8 there.

9 Q Do you remember these particular incidences
10 specifically that you testified to today?

11 A No sir, I handle literally hundreds of pieces of
12 evidence.

13 Q So you don't remember specifically this chain?

14 A No, sir.

15 MR. HAYES: Can we have a sidebar?

16 (Whereupon, a bench conference was held in the
17 presence of the jury but out of the hearing of the
18 jury.)

19 Q Mr. Turner, did Chris do a form to request or how,
20 did he come because--

21 A He makes a regular check. If he is the one on duty
22 to do that. There is two forensics people that does it
23 and he would have been on that day.

24 Q So he just swings by your office at some point in the
25 day and--

1 A -- actually several times, yes sir.

2 Q Clay Adams returned it on 5/5 and after that point
3 that was only to--

4 A -- to sign it out. In other words, that let's me
5 know that he has got it in his possession.

6 Q Did he tell you how he got it?

7 A Yes, sir. In other words he tells me, well, he is
8 Chris' boss. So he and Chris looked at it and he came to
9 me and told me he wanted it in his office.

10 Q Is it common for him to keep evidence in his office?

11 A Yes, sir. He does his lab testing and all there.

12 Q Is it common for him to keep it overnight or for a
13 period of an extended time?

14 A Yes, sir. We have had various situations, yes sir.

15 Q What do you mean by that?

16 A Well it depends on the situation. In other words, we
17 have some evidence that might take a little longer to
18 process than others. They use, I am not really up-to-date
19 as far as what all they do down there but they do quite a
20 bit and I give them quite a bit to work on.

21 Q Nothing further.

22 THE COURT: Redirect?

23 MR. MILLER: Nothing on redirect, Your Honor.

24 THE COURT: You may step down. Next witness.

25 MR. MILLER: Your Honor, may Mr. Turner be released

1 from his subpoena.

2 THE COURT: Yes.

3 MR. MOLONY: The State calls Investigator Chris
4 Johnson.

5 CHRIS JOHNSON, being
6 first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 By Mr. Molony:

9 Q Mr. Johnson, who do you work for?

10 A I work for the Aiken County Sheriffs Office.

11 Q How long have you been employed by them?

12 A I started at the Aiken County Sheriffs Office
13 December the 19th of 2003.

14 Q What are your duties with the sheriffs office?

15 A Currently I am a forensic investigator with the Aiken
16 County Sheriffs Office.

17 Q Now focusing on the part of your job involving
18 fingerprints, do you have any specialized training or
19 experience to allow you to identify, collect, examine and
20 compare fingerprints?

21 A Yes, I have took a 40 hour class through the South
22 Carolina Criminal Justice Academy for basic fingerprinting
23 which was basically powder, excuse me, pattern recognition
24 and also the NCIC Classification and Henry Classification
25 System of Fingerprints.

1 Q What type of technical equipment is available for you
2 to use in this line of work?

3 A At the sheriffs office we have a number of chemicals
4 we can use to develop fingerprints. We have a fuming
5 chamber which is cyanoacrylate or super glue fuming. We
6 also have a number of powders, anywhere from magnetic
7 powder to basic black powder, bichromatic powder. Along
8 with those powders we do have the AFIS work station which
9 is the Automated Fingerprint Identification System.

10 Q How many cases have you worked over the years
11 involving the collection by identification or examination
12 of fingerprints?

13 A A good estimate would be in the thousands.

14 Q And in your professional experience have you had
15 occasion to identify a person by comparing their latent
16 fingerprints with their own ink fingerprints?

17 A Yes.

18 Q What is a latent fingerprint?

19 A Latent fingerprints as far as the terminology we use
20 in our office, a latent fingerprint is an unknown
21 fingerprint that is deposited at a crime scene that we
22 either develop at the crime scene or an officer or
23 ourselves will collect an item from a crime scene and
24 process it at the lab and develop an unknown fingerprint.

25 Q What is an ink fingerprint?

1 A An ink fingerprint, the best way to describe it would
2 be a known fingerprint. A fingerprint that was deposited
3 by somebody who had their fingers rolled in ink and the
4 fingerprints were deposited on a surface, mainly a ten
5 print card.

6 Q I am going to show you what has been marked as
7 State's exhibit 4. Do you recognize this? You can open
8 it actually.

9 A Yes.

10 Q And what is that?

11 A These are the pieces of paper that I processed.

12 Q How do you know those are the, you can actually bring
13 them all the way out if you want.

14 A That is my handwriting right here.

15 Q Where did you get this exhibit from originally?

16 A This was, I got this from the evidence room at the
17 sheriffs office.

18 Q And you say evidence room, we have already been
19 through that. Just briefly where is the evidence room?

20 A The evidence room is a secure location at the
21 sheriffs office, it is on the back side where evidence is
22 stored.

23 Q And why did you get this evidence?

24 A It is part of my responsibility as a forensic
25 investigator to go to the evidence room and deputies and

1 other investigators will collect evidence from crime
2 scenes and submit the evidence for processing. Part of my
3 responsibility is to get that evidence from the evidence
4 room and process it for whatever they are wanting
5 collected or tried to be developed from it. So I went to
6 the evidence room and it was one of the items that I was
7 requested to process.

8 Q Did you develop latent fingerprints on State's
9 exhibit 4?

10 A Yes, I did.

11 Q And how do you examine pieces of paper, in this case,
12 how do you examine this piece of paper to discover whether
13 or not there are latent fingerprints present?

14 A Well typically with a paper, paper is considered a
15 porous item or a porous medium. In other words the
16 fingerprint or whatever we are looking for can be absorbed
17 into the paper. What I, the first step I do is when I am
18 looking at this evidence of course I wear gloves. I pull
19 it out and visually inspect it and I am looking for any
20 fingerprints that might be visible to the eye. Maybe it
21 is left in blood, maybe it is left in grease, maybe it is
22 left in dirt just transferred from fingers. If I don't
23 see any visible fingerprints what I do is I will photocopy
24 the paper document especially if it has any type of
25 writing on it whatsoever. I will photocopy the document

1 and then from there, in this case I widely used developers
2 ninhydrin-acetone. I used ninhydrin-acetone for this
3 process and I dipped the paper in the ninhydrin-acetone
4 and saturate it, allow it to dry. And then in the
5 development stage of this particular chemical developer
6 you have to use high heat and high humidity in order for
7 it to develop. So typically you use an iron, steam from
8 an iron and you just go over and let the steam heat the
9 paper, you have humidity and you have temperature right
10 there and the fingerprints will develop.

11 Q So just take you back real quick. The beginning
12 process is to photocopy the original you stated?

13 A Yes.

14 Q And why do you photocopy?

15 A The ninhydrin-acetone, in itself is a solvent so what
16 we run into is if we use the ninhydrin-acetone, if there
17 is any written, anything handwritten with ink on the paper
18 it will tend to distort it and make it run. So we always
19 photocopy it to preserve what it looked like before we
20 processed it.

21 Q I am going to now show you State's exhibit 3. Do you
22 recognize this?

23 A Yes.

24 Q And what is that?

25 A This is the photocopy before it was processed.

1 Q Referring to the photocopy of State's exhibit 4 that
2 I just showed you earlier?

3 A Yes.

4 Q Before it was processed for latent fingerprint?

5 A Yes.

6 Q And is this a true and accurate copy of State's
7 exhibit 4?

8 A Yes.

9 MR. MOLONY: Your Honor, at this time the State moves
10 to introduce exhibit 3 into evidence.

11 THE COURT: Any objection?

12 MR. HAYES: No, sir.

13 THE COURT: No objection, move along.

14 (Whereupon, State's Exhibit 3 was admitted into
15 evidence.)

16 Q After you put this in the chemical, exhibit 4 into
17 the chemical what happened next?

18 A Once a fingerprint is developed I look at the
19 fingerprint and determine if the fingerprint is a good
20 enough quality to be manually compared or entered in AFIS.
21 And in this case it was enough quality so I could enter it
22 into the Automated Fingerprint Identification System.

23 Q And how do you do that?

24 A If we don't have any suspect information or we don't
25 have any names that we can go and look on existing cards

1 that we have we enter it into AFIS. AFIS, the Automated
2 Fingerprint Identification System is a computer. In this
3 case the fingerprints actually developed on the paper so
4 there is nothing that I can lift, it has to stay on the
5 paper. The fingerprint on the paper is put underneath a
6 camera at the work station and it takes a digital image of
7 that fingerprint. Once the image is captured it is saved
8 on the computer. And it is, at that point it is given a
9 run number or we give it a run number. And then after the
10 image is saved on the actual computer we go in and we mark
11 the individual characteristics of that fingerprint. Once
12 those characteristics have been entered into the computer
13 we send it off on the computer for a search. So it sends
14 it off to search what we have in put.

15 Q And how long does this search usually take to
16 develop?

17 A It could take anywhere from just a few minutes to
18 days, there are a number of variables that determine the
19 length of time it takes for the computer to search and get
20 back to us.

21 Q And ultimately when the search gets back to you what
22 do you see?

23 A When the computer is ready for us to look at the
24 results the run ID number is going to be bold. In other
25 words it is not going to be just plain written, it is

1 going to be bold and we are going to know that it is ready
2 for us to look at. Once we pull it up on the computer,
3 what the computer shows us is a fingerprint that we
4 entered, the one we captured from the item and it is going
5 to give us a list, a preset number of respondents or a
6 preset number of fingerprints that that computer thinks is
7 similar to what we in put at the start of it. So we will
8 get thirty different fingerprints that the computer says
9 you need to look at these closely.

10 Q Thirty that you just described for the jury, why
11 thirty?

12 A Well thirty is a preset number. That is what our
13 computer is preset at. You could preset it at what number
14 that you want but thirty is the number that our computer
15 is set at so it sends us fingerprints for us to look at.

16 Q And out of these thirty prints that are displayed on
17 the screen how are they, how are you able to identify,
18 keep them separated?

19 A Well each fingerprint, each fingerprint is displayed
20 with an SID number and the SID is an acronym for state
21 identification number. So each fingerprint is going to
22 have a state identification number attached to it.

23 Q And is there a name attached to it?

24 A No. There is no names, we don't have any names when
25 it comes back from the computer.

1 Q So what is a ten print card?

2 A A ten print card, typically a ten print card is a
3 card that is generated whenever somebody is booked into a
4 detention facility. And the ten print card is going to
5 display twenty fingerprints. It is a ten print card but
6 it is going to display twenty fingerprints. It is going
7 to displayed a rolled impression of each finger and it is
8 going to display a simultaneous impression and the
9 simultaneous simply is that. And then this for the four
10 fingers. And the rolled impression, the difference
11 between the two is the rolled impression is you are going
12 from one side of the finger to the other. So you are
13 going to have ten rolled impressions and then ten
14 simultaneous impressions.

15 Q When do you find out the name of the person you have
16 drawn a ten print card?

17 A Whenever we get our results back from the AFIS
18 computer and I look at the results that it sent back or
19 the respondents that it sent back. Say number one or
20 number three or whatever, the one that I am looking at,
21 that I am thinking or I have got a pretty good idea that
22 it is going to be a match then I can take that SID number
23 and there is one of two ways that I can look it up. In
24 the AFIS, the work station itself we can in put that ID
25 number into a different area of the computer. And a

1 majority of the time it will give us a name and a date of
2 birth, sometimes it doesn't. Sometimes we have to call
3 SLED, give SLED, the person at SLED on the phone, we have
4 to give them the State ID number and they have to look it
5 up. And in this case I was able to look it up on the
6 computer and get a name from the computer.

7 Q Prior to May 4th of 2011 did you ever, to your
8 knowledge, personally work on a case involving the
9 defendant?

10 A No, sir.

11 Q Albert Cave, Jr?

12 A No, sir.

13 Q I am going to show you what has been previously
14 marked as State's exhibit 10. Do you recognize that?

15 A Yes, I do.

16 Q And what is that?

17 A This is a copy or photocopy of a ten print card
18 belonging to Albert James Cave, Jr.

19 Q And does this photocopy of this ten print card, is it
20 a fair and accurate representation of the actual ten print
21 card you used in this case?

22 A Yes, it is a photocopy of the card I used.

23 Q Thank you. Did you compare the fingerprints on
24 number 10 which I just showed you, State's exhibit 10 to
25 the fingerprint that was developed on State's exhibit 4

1 that you looked at earlier?

2 A Yes.

3 Q And what were the results of that comparison?

4 A The fingerprint that I--

5 MR. HAYES: Objection.

6 THE COURT: What is your objection?

7 MR. HAYES: Mr. Johnson has not been qualified as an
8 expert.

9 THE COURT: Sustained.

10 Q Investigator Johnson, when you look at these two
11 fingerprints, when you looked at these two fingerprints
12 that was on the ten print card and that was on State's
13 exhibit 4 what process did you do to compare them?

14 A The process or the protocol that we use is called
15 ACEV, A-C-E-V. It is a acronym. The A stands for analyze
16 and that step of the process is you are developing a
17 fingerprint. When you get your fingerprint you are
18 analyzing it, you are seeing if its the quality, you are
19 looking at the quality of the fingerprint to see if it is
20 identifiable and you are also seeing if, what the quality
21 is. If it is identifiable can you run it on AFIS or do
22 you have to do a manual comparison. The C part of the
23 ACEV is comparison. That is when if I have somebody that
24 I can compare it to, the investigator might find somebody
25 on the scene and you need to compare the fingerprints to

1 this person. That is when we are doing a comparison. If
2 we don't have anybody, like I said before we will run it
3 on the AFIS computer. That is the comparison aspect of
4 it. The evaluation aspect of it is actually looking at
5 the fingerprints. When you have somebody that you know
6 and you have something that you don't know when you are
7 making your comparison, the evaluation is your lining up
8 these points of identification or minutiae, what is being
9 marked as you are entering it into the computer and you
10 are evaluating if they are going to be the same or not.
11 And once you have reached a conclusion that you think they
12 are the same fingerprint then the last step is called
13 verification. You get somebody to come behind you and
14 they look at your work and they verify your work.
15 Q And have you used that process in this case?
16 A Yes, I did.
17 Q And you ultimately, did you ultimately come to the
18 conclusion that before it was ready to go to be verified
19 and who would verify your work?
20 A Lieutenant Clay Adams.
21 Q And is he your boss?
22 A Yes, he is. He is my lieutenant.
23 Q Okay. And before it goes to him what do you have to
24 do, what conclusions do you come to before it goes to be
25 verified by your superior officer, the last step?

1 A The last step is, everything that I have worked on to
2 this point, the developed fingerprint, the ten print card
3 I am using, any paperwork that is generated, if it is a
4 run sheet through AFIS or if it is my actual lab report it
5 gets given to him and he comes behind me and he takes a
6 look at everything and he is basically saying, yes, I
7 agree one-hundred percent with you, it is an
8 identification.

9 Q Throughout this process, from when you actually put
10 the chemicals on the original piece of paper until you
11 pull the ten print card and did your comparison did you
12 keep paperwork, some kind?

13 A Yes, I generated a lab report where I developed the
14 fingerprints on the item and then when we are entering
15 something into AFIS we use a form called the worksheet or
16 the AFIS worksheet and that basically just is a running
17 track of what finger you ran, what your results were, how
18 many points of minutiae you had. So it is a running track
19 while you are entering stuff into AFIS.

20 Q I am going to show you what has been previously
21 marked as State's exhibit 5. Do you recognize those two
22 sheets of paper?

23 A Yes, I do.

24 Q And how do you recognize those?

25 A This is my lab report, it shows the bar code of the

1 item which is on that develop over there. It gives a
2 description of the item and the description comes from the
3 sheet that the officer turns in requesting a process or
4 latents to be done on it. And then my results down at the
5 bottom. Here it says identifiable fingerprints were
6 developed on the above item. The above item being two
7 pieces of paper touched/moved by unknown subject. And
8 then it says the fingerprints will be forwarded to AFIS
9 for further examination. And this is a automated
10 fingerprint identification system worksheet, this is the
11 worksheet I was telling you about. It has got a case
12 number, the originating agency, the date that the
13 fingerprint was entered, the offense, the AFIS run number
14 that is generated whenever we run the AFIS and then the
15 date that the incident occurred. In this case I ran one
16 fingerprint, it was latent number 1 on item number 1. I
17 ran it as a right loop and I ran it as finger number one
18 with 36 points of minutiae and I got positive results from
19 SLED or from the AFIS.

20 Q Now, these two pieces of paper, State's exhibit 5
21 are, these are photocopies?

22 A Yes.

23 Q Does these photocopies fairly and accurately
24 represent the actual worksheet and laboratory reports that
25 you conducted throughout the investigation in this trial?

1 A Yes.

2 Q In this case?

3 A Yes.

4 MR. MOLONY: Your Honor, at this time the State moves
5 to introduce exhibit 5 into evidence.

6 MR. HAYES: I would object, Your Honor, to hearsay.
7 On the second page, not the first page.

8 THE COURT: Let me see it. What is the hearsay part?

9 MR. HAYES: They are putting in information that they
10 received from a computer, Your Honor.

11 THE COURT: The SID result?

12 MR. HAYES: Yes, sir.

13 THE COURT: Y'all step back to your jury room just
14 for a second, please. Don't discuss the case.

15 (Whereupon, the jury was excused from open court for
16 a break.)

17 THE COURT: All right, Mr. Hayes, as I understand,
18 exhibit 5, the second sheet.

19 MR. HAYES: That is based on information that
20 somebody had placed into--

21 THE COURT: Hold on a second. Your objection to the
22 SID number that he got back from the computer. Is that
23 correct?

24 MR. HAYES: Yes, sir. The SID number under SC0545432
25 stating that it was Mr. Albert James Cave and his

1 date-of-birth, race and sex.

2 THE COURT: Mr. Johnson, the SID number, is it
3 identified SC0545432, that number is given to you from the
4 computer?

5 A Yes sir, that is the number that shows up on the
6 fingerprint.

7 THE COURT: Is the name given to you by the computer?

8 A Yes, sir.

9 THE COURT: Date-of-birth?

10 A Yes, sir.

11 THE COURT: Race and sex?

12 A Yes, sir.

13 THE COURT: Mr. Molony, why is that not hearsay?

14 MR. MOLONY: When you pull--

15 THE COURT: Answer my question.

16 MR. MOLONY: I am sorry, Your Honor. What was your
17 question.

18 THE COURT: How can they cross-examine the computer
19 on how it came up with this? Show me a case that allows
20 the, AFIS, allows AFIS computer results be admitted
21 wherein the defense does not have the opportunity to
22 cross-examine how they came up with that result. In other
23 words, he is taking some information and plugging it into
24 a computer program which is not here and getting the
25 results. What allows you to do that?

1 MR. MOLONY: Your Honor, there is two possible ways
2 that he can get these numbers. One is through SLED, the
3 State Law Enforcement Division that keeps track of all of
4 these numbers as well as our secured server here. He
5 testified he used our secured server.

6 THE COURT: Well, I know that. The server is one
7 giving him the information.

8 MR. MOLONY: Right which goes in directly after the
9 arrest.

10 THE COURT: Prior arrest.

11 MR. MOLONY: After a prior arrest, yes Your Honor.
12 These ten print cards are made to go directly--

13 THE COURT: I understand how it is done. What do you
14 have that allows this type of evidence. You haven't
15 qualified him as an expert, as an expert in the analysis
16 of fingerprints. You haven't done that. If you were to
17 do that and obviously he can give opinion testimony and
18 obviously this document or means, which expert will
19 normally rely upon rendering opinion. Talk to Mr. Miller
20 and tell me how you are going to get it in.

21 MR. MOLONY: Your Honor, we can qualify the
22 investigator as an expert, Your Honor.

23 THE COURT: Qualify him as an expert so we can render
24 an opinion and then ask him if this AFIS computer
25 generated information is information that is normally

1 relied upon by fingerprint experts in rendering opinions.
2 And if it is then the rules of evidence will allow him to
3 use it but you haven't gotten to that point yet. That is
4 one way of doing it.

5 MR. MOLONY: Your Honor, we can qualify him as an
6 expert. The ultimate AFIS report that he gets back shows
7 30 possible fingerprints.

8 THE COURT: I understand that.

9 MR. MOLONY: And then it is up to the investigator at
10 that point and time to go through each individually and
11 decide which one he believes is an exact match.

12 THE COURT: And then he does, then he has to plug in
13 that SID number into AFIS to get the result. And what
14 they are complaining about, they don't have anybody here
15 to cross-examine him on that result unless you do it the
16 way I suggested.

17 MR. MOLONY: Yes sir, Your Honor. We can qualify the
18 investigator.

19 THE COURT: Mr. Hayes, what do you say.

20 MR. HAYES: Under State v. Anderson you would have to
21 have a SLED Agent present to qualify anything from the
22 AFIS report.

23 THE COURT: Why is that. Show me the case.

24 MR. MOLONY: Your Honor, that is just not an accurate
25 statement under the law.

1 THE COURT: Show me the case. Tell me where you are
2 looking. There is a 2009 case by Justice Beatty.

3 MR. HAYES: The case, in this case it says, evidence
4 matched with a fingerprint card on page five, Your Honor.
5 The fourth paragraph. Evidence as to when and by whom the
6 card was made and the time the prints were in fact those
7 of the defendant. I am not opposing the actual
8 fingerprint card, Your Honor. The computer generated
9 document I am opposed.

10 THE COURT: This is not a computer generated
11 document. This is, he wrote it down, this is what he
12 wrote down after reviewing the computer. This is all
13 about identification of fingerprint cards.

14 MR. HAYES: In Anderson, Your Honor, to go on to page
15 seven on the third paragraph. They had the SLED agent
16 present and talked about how the accurate records were
17 kept at SLED and they testified to that. We don't have
18 that here today as to this information that he is relying
19 on from SLED.

20 THE COURT: What do you say to that, Mr. Molony?

21 MR. MOLONY: Your Honor, Mr. Hayes has taken a, if
22 you look at page five of the opinion in Anderson. It said
23 Anderson never challenged the admissibility of the
24 fingerprint card on the ground, that it constituted
25 inadmissible hearsay.

1 THE COURT: That is correct.

2 MR. MOLONY: But if you look at the footnote it says,
3 even assuming Anderson had raised the hearsay challenge
4 such an argument would be without merit. So what he has
5 done is he has tried to work into the exception to the
6 rule, whatever the Court blows the exception to the rule
7 out in the very same footnote on the same paragraph. The
8 SLED agent who was called to testify in that case was
9 testifying that this ten print card was requested from
10 SLED and SLED maintains the secure facility that has the
11 ten print cards in it. And the Court specifically said
12 under a number of different exceptions that the ten print
13 card, he didn't have to testify who the officer was that
14 took it, he didn't have to testify about when the ten
15 print card was taken. All he had to do was testify to is
16 SLED regularly receives these ten print cards and when we
17 receive these ten print cards then we keep them secure
18 until somebody tells us that they need one. The way that
19 they tell them that they need one is because they get an
20 AFIS hit. So he then testified and this is all concerning
21 the testimony of Lieutenant Joe Means who was a SLED agent
22 that was in charge of their record section at that time.
23 Your Honor, in this case and he has not gotten to the
24 point in his testimony yet but in this case Investigator
25 Johnson is going to explain that whenever they get a hit

1 on the ten print card and they go to check the SID the
2 first place that they check is the Aiken County Sheriffs
3 Office on an internal server which has a digital copy of
4 the ten print card.

5 THE COURT: He hasn't done all of that and you are
6 trying to get it into evidence now.

7 MR. MOLONY: Understanding that, Your Honor, that is
8 the issue is that we need to put forth the evidence in a
9 different order but I think that the Court is correct, the
10 more logical way to go about it is just to introduce the
11 expert opinion and also to let him testify as to where the
12 actual ten print card came from in this case. It didn't
13 come from the SLED server, it came from the internal Aiken
14 County Sheriffs Office server because whenever the ten
15 print is taken, whenever the digital image of the ten
16 print is taken it has duplicate copies. It sends one to
17 SLED electronically and one stays on Aiken County server.
18 And he is going to testify to all of that information. We
19 got a little bit out of order but what we were trying to
20 do which is why he hasn't established that foundation yet.

21 THE COURT: Very well. Well I am not going to
22 introduce it yet.

23 MR. MOLONY: Yes, sir.

24 THE COURT: Do we have 25 more minutes of testimony
25 we can get?

1 MR. MOLONY: Not from the State's side, Your Honor.

2 THE COURT: Well you have got to get all of that in,
3 get this in.

4 MR. MOLONY: There is not much other than what we
5 have to do to get this ten print card in. Maybe a
6 question or two, he has basically answered everything
7 else.

8 THE COURT: All right, objection sustained. Bring
9 the jury in.

10 (Whereupon, the jury came into open court at
11 approximately 4:36 p.m.)

12 THE COURT: Mr. Foreman and ladies and gentlemen,
13 every now and then somebody makes an objection, I have to
14 get into things that may or may not be admissible. That
15 is why I had to ask y'all to step out. What we are going
16 to do is we are going to continue the testimony until the
17 State finishes this witness. And then we will break and
18 before we dismiss for the afternoon we will discuss what
19 time to start in the morning.

20 MR. MOLONY: Your Honor, at this time the State would
21 offer Investigator Johnson as an expert in fingerprint
22 analysis.

23 THE COURT: Before you do that you have got to
24 qualify him, education, training and experience.

25 CONTINUE DIRECT EXAMINATION

1 By Mr. Molony:

2 Q Investigator Johnson, going back to the very
3 beginning of this.

4 THE COURT: Ladies and gentlemen, I have been
5 practicing for 30 years and been on the bench up here 8
6 years. These two young lawyers, they are a little bit wet
7 behind the ears and when I was doing like they would I was
8 so scared that I would mess up and sometimes I did. So I
9 am trying to go, I am not fussing at them, just they have
10 got to ask a certain question. They are doing a great
11 job. It is not an easy thing to get up here and remember
12 all of the law. Don't think I am fussing at either one of
13 them. They are moving along fine. Plus Mr. Molony just
14 got married, he is somewhere else in Jamaica.

15 Q Investigator Johnson, at the beginning of this trial,
16 at the beginning of your testimony you stated. Let me
17 just ask you, how long have you been working in this
18 capacity at the sheriffs office in Aiken?

19 A Here in Aiken I have been a forensic investigator
20 since June the 16th of 2006.

21 Q And prior to that what was your experience, if any?

22 A Prior to coming to the Aiken County Sheriffs Office I
23 was a forensic investigator in Greenville, South Carolina
24 for approximately three and a half years.

25 Q And what classes, if any, have you taken to help you

1 in your field of studying for fingerprint analysis?

2 A As mentioned before I took a forty hour class, basic
3 fingerprinting at the South Carolina Criminal Justice
4 Academy which allowed me to recognize fingerprint
5 patterns, allowed me to classify fingerprints in the NCIC
6 Classification System and in the Henry Classification
7 System. The Henry Classification System allows me to be
8 able to take a ten print card or a ten finger roll and go
9 to the master fingerprint card file in Greenville with no
10 name, just a ten print card and be able to do what we call
11 a ten finger roll, take those fingerprints and make an
12 identification with the Henry Classification System, pull
13 a fingerprint card from a drawer of thousands of
14 fingerprint cards, go to a specific drawer, pull out a
15 handful of fingerprint cards that were in that range of
16 that classification system and make an identification or
17 on an unknown compared to a known. The Henry
18 Classification System is no longer used. I have also had
19 in Greenville six months on the job training. It was a
20 year before I was considered a senior forensic
21 investigator, was able to go and process crime scenes
22 without any question. Anything that came in I went on,
23 myself and other people if I needed help. Since I have
24 been a forensic investigator I am a member of the South
25 Carolina Division of the IAI. I have published an article

1 dealing with process of obtaining fingerprints from
2 plastic bags. The articles is named Easy Lifting. It was
3 published in the South Carolina IAI E-News letter. It was
4 also published in the Chesapeake Bay Division of the IAI,
5 their publication. And the Arizona branch of the IAI,
6 also published the same article. Gone to numerous
7 training, numerous training opportunities through the
8 South Carolina IAI. I try to attend a conference every
9 year.

10 Q How many cases have you been involved in such as this
11 in your experience?

12 A I have answered, documented in Greenville, 1,744
13 crime scene calls in Greenville alone. Probably another
14 500 or so while I have been here in Aiken.

15 MR. MOLONY: Your Honor, at this time the State does
16 move to introduce---

17 THE COURT: Moves what?

18 MR. MOLONY: Moves to--

19 THE COURT: Introduce this witness as an expert in
20 the field of fingerprint analysis?

21 MR. MOLONY: Yes, sir.

22 THE COURT: Any objection or any cross-examination on
23 his qualifications?

24 MR. HAYES: Yes, sir.

25 THE COURT: On his qualification only.

1 MR. HAYES: Yes, sir.

2 CROSS-EXAMINATION

3 By Mr. Hayes:

4 Q Mr. Johnson, is it Lieutenant?

5 A Investigator. My rank is sergeant but I am just

6 Investigator Johnson.

7 Q Investigator, on your training, you said you had
8 attended one class?

9 A Yes, sir. One class at the Criminal Justice Academy
10 but several other training seminars to the South Carolina
11 IAI.

12 Q I am having a hard time hearing you.

13 THE COURT: South Carolina what?

14 A The South Carolina Division of the International
15 Association for Identification.

16 Q Do you own any certificates or diplomas or degrees as
17 to that. Was there a certificate issued at the end of
18 them?

19 A Yes sir, there was. At the end of that forty hour
20 class and normally we do get, yes sir.

21 Q Beyond that you said you also had a class the very
22 first, the very first class?

23 A The South Carolina Criminal Justice Academy.

24 Q Yes.

25 A Yes sir, that was that basic fingerprinting.

- 1 Q How long was that class?
- 2 A That was a forty hour class.
- 3 Q When was that?
- 4 A That was probably 2001.
- 5 Q And then when was the other forty hour class?
- 6 A The other classes have been the conference and the
- 7 seminars and training opportunities through the South
- 8 Carolina IAI.
- 9 Q How many conferences and seminars?
- 10 A I would say a good estimate is three of the annual
- 11 conferences and then probably five to ten of the training
- 12 opportunities throughout the years.
- 13 Q Do you have a certification, is there a certification
- 14 for fingerprints?
- 15 A A certified latent print examiner?
- 16 Q Yes, is there a certification?
- 17 A There is a certain certified latent examiner.
- 18 Q Are you certified?
- 19 A No, I am not a certified latent print examiner.
- 20 Q What would it take to become a certified latent print
- 21 examiner?
- 22 A You have to take, you have to read, there is I
- 23 believe three books you have to read. You have to take a
- 24 written test and you also have to take and match a certain
- 25 number of fingerprints as part of the test.

Chris Johnson - Direct by Mr. Molony

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1 Q Are you in any one of these process steps?

2 A Not currently at this time.

3 Q Who gives out that certification?

4 A The International Division, the IAI, the
5 International Association for Identification.

6 Q Is there one for the State?

7 A Yes, it is the South Carolina Chapter, yes sir.

8 MR. HAYES: Your Honor, I would object to him being a
9 certified expert under latent print examination based on
10 one, that he is not certified yet and number two he has
11 only attended two classes and several seminars.

12 THE COURT: I overrule your objection. I let doctors
13 testify in here all the time who aren't Board Certified
14 but they are doctors nevertheless. Ladies and gentlemen,
15 the rules of evidence normally will not allow a person to
16 give an opinion. But when we have a topic dealing with
17 some scientific situation such as fingerprints and the
18 witness has by way of education, training and experience
19 has gained knowledge in those areas then the law allows
20 him to render an opinion, i.e. whose fingerprint is this,
21 that is an opinion. And at the conclusion of the case I
22 will charge you on what weight you give to someone I
23 qualify as an expert. So I am going to qualify him as an
24 expert and that simply allows him to give opinion
25 testimony as to fingerprints involved in this case. And

1 like I say, I will instruct you at the conclusion of the
2 case on what weight you can give people who have been
3 qualified as an expert. Move along.

4 Q Investigator Johnson, did you compare the latent
5 fingerprints in exhibit 4 with the prints on exhibit 10?

6 A Yes, I did.

7 Q And what was your conclusion of the analysis of these
8 two sets of prints?

9 A Yes, sir. The fingerprint that I looked at which was
10 the thumb on the item that I processed was the same
11 fingerprint as the thumb, the number one thumb on the ten
12 print card.

13 Q And what factors did you base this conclusion on?

14 A All of the minutiae that I in put into the computer
15 and the minutiae that I saw on the ten print card matched
16 the same minutiae on the item that I processed.

17 Q You say minutiae, what did you do to match State's
18 exhibit 10 to State's exhibit 4, what is minutiae?

19 A Minutiae is the points of identification. Minutiae
20 is a verification where a ridge, it will separate and it
21 will be one ridge, it will separate into two. A ridge
22 ending or one ridge comes up and it just stops, that is a
23 ridge ending or there is dots or short ridges, just little
24 bitty small dots or little bitty short ridges. Those are
25 all points of identification inside of a fingerprint.

1 Q How many points of comparison did you find on these
2 fingerprints?

3 A Thirty-six points of identification.

4 Q And is that a relatively high or low number of
5 points?

6 A That is a very good number.

7 Q Good meaning?

8 A Good meaning, it is not the highest that you can get
9 but it is definitely a good bit away from the lowest
10 number that you can get.

11 Q Okay. What is live scan?

12 A Live scan is the electronic way to capture somebody's
13 fingerprint when they are being booked into the system.
14 It used to be you would go in and get your fingers inked
15 and roll your fingerprints. Now we have a live scan
16 computer which electronically captures your fingerprints
17 when you are booked into a detention facility.

18 Q Okay. And what happens when a ten print card is
19 created in live scan, where does that information go?

20 A The information is stored on the local data base and
21 it is also sent to SLED. And those are the two places
22 that I know it is sent, one is electronically transferred
23 to SLED and one is transferred to the local data base.

24 Q And when you say local data base?

25 A A secured server.

1 Q And where is, for the Aiken County Sheriffs Office?

2 A I don't know the physical location of the server, I
3 just know it is in the county.

4 Q That is fine. When you pulled the ten print card for
5 this case where did you get it from?

6 A I got it from our server, it was printed on a
7 dedicated printer on a secure line. That printer doesn't
8 print anything except for ten print cards and palm prints.

9 Q Okay. I am going to show you again what has been
10 marked as State's exhibit 5.

11 A It is my lab report and an AFIS worksheet.

12 Q And the AFIS worksheet, could you explain the process
13 of how you filled that worksheet out?

14 A When I am entering a fingerprint in the automated
15 fingerprint identification system I am going to be keeping
16 track of one of these, this is what I try to keep track
17 of, helps me keep track of what I have entered. The first
18 blank here, well actually if you go up here, this is just
19 the basic information as I explained before. It is our
20 case number, whatever case number is attached to the
21 fingerprint or the item that I processed. The originating
22 agency, Aiken County Sheriffs Office, that is what ACSO
23 stands for. The date of entry, that is the date that I
24 physically entered the fingerprint into the computer for
25 the search. The AFIS number is the number that is

1 assigned--

2 MR. HAYES: Your Honor, I want to object, he is
3 publishing that to the jury and it has not been entered.

4 THE COURT: Sustained.

5 MR. MOLONY: Your Honor, the State moves to introduce
6 exhibit 5 into evidence.

7 THE COURT: Any objection now?

8 MR. HAYES: I still object to the second page.

9 THE COURT: Overruled.

10 (Whereupon, State's Exhibit 5 was admitted into
11 evidence.)

12 Q After you made your conclusion and in your opinion
13 found that the ten print card matched that of State's
14 exhibit 4 which was found at the scene of the crime in
15 this case what did you do next?

16 A I sent my findings to be verified by Lieutenant
17 Adams.

18 Q Thank you. I have no more questions.

19 THE COURT: All right. We are going to break at this
20 time and will cross-examine in the morning. Mr. Foreman
21 and ladies and gentlemen, I have two bond hearings at 9:15
22 in the morning so we will start at 9:45. So please be in
23 the jury room ready to go shortly before that. We can get
24 you some sausage and ham biscuits or we can get fruit or
25 pastries. I always ask the women, what would y'all like.

1 They want biscuits. We will have that and some coffee.
2 Please be here by 9:30 because you can't bring it in here.
3 We have got this witness and one more and then I am not
4 sure how many the defense has but you should be getting
5 this case to deliberate around the lunch hour. I will
6 excuse you, please don't discuss the case tonight and do
7 not let anyone discuss it with you. Please do not go on
8 your computer, on the internet, Twitter, Facebook,
9 Myspace, don't look at stuff on the computer about
10 fingerprints and all of that other stuff. Enjoy your
11 evening and I will see you back in the morning. Everybody
12 remain seated.

13 (Whereupon, the jury was excused from open court for
14 the day.)

15 THE COURT: Investigator, you are right in the middle
16 of your testimony so the rules preclude you tonight from
17 discussing the case with anyone so don't discuss it with
18 the solicitors office or defense counsel. Be ready to
19 proceed in the morning at 9:45. Thank you, you are
20 excused. The defendant is in custody. Mr. Hayes, I want
21 to see y'all in chambers before we break for the evening.

22 MR. MILLER: Your Honor, there is a brief power point
23 presentation which Lieutenant Adams has done. If the
24 Court would like to review that before tomorrow and we
25 would like to leave all of our exhibits with the court

1 reporter.

2 (Whereupon, the trial will continue the next morning
3 at 9:45 a.m.)

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5 THE COURT: Anything on behalf of the State before we
6 start back?

7 MR. MILLER: No sir, Your Honor.

8 THE COURT: Anything on behalf of the defendant
9 before we start back?

10 MS. ALVES: Yes, sir.

11 THE COURT: What is it?

12 MS. ALVES: Your Honor, we would like to revisit the
13 issue regarding the admission of the machine generated
14 data from the AFIS.

15 THE COURT: I have already ruled on it and you know
16 what the rules are when I rule.

17 MS. ALVES: Yes sir, Your Honor. But yesterday you
18 did indicate that you would allow us to revisit this issue
19 and I do have a new ground on which I would like to bring
20 to the Court's attention.

21 THE COURT: All right, go ahead.

22 MS. ALVES: Your Honor, at this point I object to
23 that, I further object to the introduction of the AFIS
24 report and the AFIS information under the, as it violates
25 the Sixth Amendment confrontation clause. Judge, in

1 arguing this I am relying on the U.S. Supreme Court case
2 of Bullcoming versus New Mexico which was decided on June
3 23rd of this year. In that case the defendant was charged
4 with driving while intoxicated. A blood sample was
5 obtained and sent to a lab and the analyst used a gas
6 chromatograph machine to determine the BAC. The analyst
7 in that case found a blood alcohol content of .21.
8 However the analyst was not available at the trial or
9 rather he just didn't testify at the trial because for
10 some reason he wasn't working. A different analyst
11 testified regarding that analyst's report. The Supreme
12 Court in New Mexico upheld the case arguing that the
13 initial analyst was merely the scrivener who transcribed
14 the machine generated report and that the second analyst
15 was qualified to discuss the testing machine and the
16 procedures. The Supreme Court did reverse. Judge,
17 specifically, going specifically into the discussion on
18 that case on page two they discussed what their holding
19 was. That the confrontation clause does not permit the
20 prosecution to introduce a forensic lab report containing
21 testimonial certification in order to prove a fact at
22 trial through in-court testimony of an analyst who didn't
23 personally perform or observe the performance of the test.
24 Judge, and we are saying in this case that would be the,
25 Investigator Johnson was not the person who in put the

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1 information into the machine or who can determine whether
2 the information that was in put and the SID number that
3 came out was accurate. So I think that that would violate
4 the confrontation clause. Judge, the Supreme Court does
5 talk about specific examples, both on page two. Page two
6 and the paragraph that starts A, section I and they also
7 reference it again on page eight. They talk about
8 specific examples. One of their concerns was an analyst
9 testifying about machine generated data. And one example
10 they showed concern about was when one officer has a radar
11 gun and another officer testifies about the findings
12 because they have expert experience in using a radar gun.
13 They said that that would not be proper for that testimony
14 to come out even though that officer would have only been
15 testifying about the use of the radar gun and the report
16 of the number that was obtained by the first officer.
17 Judge, one of the things that this Court considered is
18 whether or not the testimony, well the report that came in
19 would be testimonial. And the Court did say yes. They
20 specifically say this in three places to the opinion that
21 I could find. They specifically talk about whether the
22 report is testimonial on page three of the opinion where
23 the Court does say that the--

24 THE COURT: So you are saying it violates Crawford.

25 MS. ALVES: It violates Crawford, it violates

1 Melendez-Diaz and it also violates this case. Judge, they
2 are saying it is testimonial and they specifically talk
3 about what is testimonial. They talk about it, in one
4 place it is in foot note six where there is a definition
5 of or an interpretation what is testimonial. Footnote six
6 is, on page 14 it says to write this testimonial a
7 statement must have a primary purpose of establishing or
8 proving past events potentially relevant to weigh the
9 prosecution. That is exactly what we have here. We have
10 information that was obtained from the AFIS computer
11 system that the primary purpose is to establish or prove
12 past events, whether or not the fingerprints in the AFIS
13 belong to, who did the fingerprints belong to. And in
14 this case the AFIS is saying they belong to the defendant.

15 THE COURT: Ms. Alves, do you have a case that deals
16 not with the BA test but with the AFIS fingerprint ten
17 print card and SSI number. Do you have a case?

18 MS. ALVES: Judge, no sir, I don't have a case with a
19 ten print card. What we are arguing is not the ten print
20 card coming in because of course the ten print card could,
21 the State could have put up evidence that they compared
22 the defendant's fingerprints to the ten print card and
23 that would have come in. But I don't think that the AFIS
24 information is saying that the State generated
25 information. I don't think it was proper for the officer

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1 to testify about that or for the report to be introduced
2 because that is machine generated data that the officer
3 did not have a hand in creating.

4 THE COURT: Anything else?

5 MS. ALVES: Yes, sir. Your Honor, yesterday there
6 was some discussion about whether this is a business
7 record and in this court, it is actually in the concurrent
8 opinion but it quotes Melendez-Diaz which talks about
9 whether that business record would be admitted except if
10 the regularly conducted business activity is the
11 production of evidence to use at trial which this is what
12 we have in this case. So this would not be a business
13 record under Melendez-Diaz. Also, Your Honor, the Court
14 does talk about, specifically about, the Court does not,
15 it does clearly state in the opinion that the Court never
16 specifically addresses whether or not the State could
17 introduce raw data generated by a machine including,
18 assuming that they had an adequate chain to that data. So
19 the opinion is clear that it doesn't address that.
20 However the opinion does address concerns regarding
21 testing, it does, the opinion does address both in
22 footnote one and footnote eight the Supreme Court's
23 concerns over the possibility of human error in inputting
24 data into a machine. And also the Judge, the Court does
25 address that. A document created solely for an

1 evidentiary purpose made in aid of a police investigation
2 ranks as testimonial. Also one more thing that I would
3 like to point out, Your Honor. On page eight of the
4 opinion they do talk about the fact that, in a quote from
5 them they say that the comparative reliability of an
6 analyst's testimonial report drawn from machine produced
7 data does not overcome the sixth amendment bar. That this
8 Court settled in Crawford that the obvious reliability of
9 a testimonial statement does not dispense with the
10 confrontation clause. I think that that specifically
11 relates to this case because I know that the fingerprint,
12 the testimony was that the fingerprint that was submitted
13 to AFIS came back with the SID number that corresponded to
14 Mr., to the defendant. However, in this case the officer
15 and I know that the testimony was that the officer did
16 examine the fingerprint and then ultimately decided and
17 determined that it was his fingerprint. I don't think it
18 matters that the data was found to be reliable. The Court
19 clearly says that the reliability of the testimonial
20 statement does not dispense with the confrontation clause.
21 And unless we have and they go on to talk about the only
22 way the confrontation clause can be satisfied is through
23 the crucible of cross-examination. Since we are not able
24 to cross-examine the people who input the data and
25 created the report on the computer that Investigator

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1 Johnson testified about I think that the, that any mention
2 of the data obtained by the AFIS would violate the
3 confrontation clause and we would ask you to reconsider
4 allowing them to, the State to have entered the report, I
5 believe it is exhibit number 5, if I am correct, into
6 evidence. And we further renew our objection to the
7 testimony that Investigator Johnson gave detailing what
8 the AFIS information was from his computer.

9 THE COURT: I am going to stand by my ruling. I
10 carefully reviewed last night and again this morning the
11 State versus Anderson, 386 SC 120, that is a 2009 case
12 offered by Justice Beatty dealing with AFIS card, a ten
13 print card and the identification system and the assigning
14 of SSI number. They go through a thorough analysis
15 dealing with AFIS and allows the admissibility of it under
16 the public record exception to the hearsay as well as a
17 number of other exceptions which I found to be almost the
18 same testimony here as it was set forth in Anderson. I
19 find further that the records were authenticated as set
20 forth in this case. Further this case talks about the
21 confrontation clause and Crawford. Because here was a
22 hearsay challenge all raised yesterday and a footnote that
23 says, even assuming that Anderson in that case raised a
24 hearsay challenge such an argument would be without merit.
25 And Rich which was another case. This Court definitely

1 held that police fingerprint cards do not violate the
2 prohibition against hearsay given, they fall within the
3 business records exception or the public records
4 exception. Notably appellate courts have continued to
5 recognize this principle and have emphasized that
6 fingerprint cards are not, "testimonial", and thus do not
7 violate the rule. And Crawford versus Washington and they
8 cite a number of cases particularly in the Fourth Circuit
9 and that case in the Fourth Circuit relied on decisions of
10 the Fifth, Sixth and Ninth Circuits that concluded that
11 fingerprint cards were not testimonial and that the
12 admission of such business and public records does not
13 violate the rule set forth in Crawford. So I am going to
14 rely on the latest decision based on our Supreme Court
15 dealing with the AFIS card. Now, if you can find me a
16 U.S. Supreme Court that deals with the fingerprinting
17 situation which I think would be totally different, a
18 blood alcohol analysis I may reconsider it. But reading
19 an entire opinion in Anderson it appears that the
20 presentation yesterday by the State falls in all four
21 corners of that decision almost like a template or like a
22 protocol. They have used what was required for them in
23 Anderson and the testimony here yesterday. So I
24 respectfully stand by my decision. Anything by the State?

25 MR. MOLONY: Nothing by the State, Your Honor.

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1 THE COURT: Additionally, on Anderson they also
2 talked about where the evidence did not precisely fit
3 within one of the numerated examples under Rule 901 which
4 is the authenticity rule. And they said the case or the
5 State in that case provided expert testimony which linked
6 the latent fingerprints with Anderson's known prints. A
7 sergeant in that case, Anderson testified as an expert as
8 did the officer yesterday in the field of fingerprint
9 analysis. And they said that that was a proper means of
10 putting it in through the expert witnesses opinion after
11 he was qualified and obviously these are the type of
12 records that an expert relies upon in rendering his
13 opinion. Any of those scenarios I find it to be
14 admissible. Anything else by the State before we proceed?

15 MR. MOLONY: None from the State, Your Honor.

16 THE COURT: By the defendant?

17 MR. HAYES: None, Your Honor.

18 THE COURT: All right, sir, come on back up. You are
19 still under oath. I have been informed by the Clerk that
20 a juror, Talbert Reid called in this morning and has a
21 child that was sick and had to go to the doctor or
22 hospital or somewhere. Anyway we all know children come
23 ahead of everything. So he has been excused and I will
24 elevate the alternate to the jury, to the regular jury
25 panel.

1 MR. MOLONY: No objection from the State, Your Honor.

2 MR. HAYES: No objection.

3 THE COURT: Bring the jury.

4 (Whereupon, the jury came into open court at
5 approximately 9:47 a.m.)

6 THE COURT: Ladies and gentlemen, I have excused
7 juror number 175, Mr. Reid has some issues with one of his
8 children, got sick last night. So, Mr. Jones, I am
9 elevating you to the regular jury panel. You are good
10 sitting right there, you can move down if you want to. We
11 are going to get started back with the cross-examination
12 of this witness. As I understand the State has one more
13 witness after this and I am not sure how many witnesses
14 the defense has if any and we will go from there. Good
15 morning. Right on time.

16 CROSS-EXAMINATION

17 By Mr. Hayes:

18 Q Good morning, Mr. Johnson.

19 A Good morning.

20 Q In your direct testimony you had said you had been to
21 1,744 crime scenes?

22 A Yes, sir.

23 Q And then was that an additional 500 in Aiken County
24 or was that included in that?

25 A It is an additional.

1 Q It is an additional. Of those crime scenes how many
2 of them were burglaries?

3 A A good majority of them were. That was normally the
4 most common type of call.

5 Q So burglaries would be the most common call that you
6 would go on?

7 A Yes.

8 Q Do you know how many of them are in Aiken?

9 A No, I can't give you an exact number of how many
10 burglaries I have responded to in Aiken County, it is a
11 good number.

12 Q Would it be, would it still be the majority of your
13 calls?

14 A Yes.

15 Q How do you get called out to a crime scene?

16 A The officer is dispatched to the crime scene or to
17 the call, he goes out to the call. From that point he
18 determines what he has and basically he advises his
19 supervisor of what is going on and the supervisor makes
20 the decision to give us a call and have us respond or have
21 CID respond.

22 Q When you get to a crime scene what do you do, what
23 would be your role at a crime scene?

24 A When I respond to a crime scene the first thing that
25 I am going to do is an initial survey of the scene. I am

1 going to look at where I am at as far as what type of
2 residence I am at, mobile home, house, business. I am
3 just going to take an initial survey then what I would do
4 is document the crime scene. I would photograph the
5 evidence and then I would go into collecting the evidence,
6 the physical evidence and I can take away from the crime
7 scene that an unknown person has came into, has come into
8 the house and has moved items. Those items I can either
9 process on the scene or if I have to collect them I will
10 collect them for later processing. And then typically I
11 will process the house, if there is anything that is
12 considered a good surface or a surface that would hold a
13 decent fingerprint I would process for fingerprints on the
14 crime scene. And once that is done I would come back to
15 the office and work on the evidence if I collected any,
16 put everything on a property receipt that I collected from
17 the crime scene and eventually would be submitted into
18 evidence.

19 Q When you get to the crime scene you said you would
20 photograph it to preserve what you are seeing and then you
21 would collect evidence?

22 A Yes, sir.

23 Q How do you determine what you would actually collect?

24 A The practice that I follow is if the victim is on the
25 scene I like to ask the victim, like if your house is

1 broken into you would know more what was moved than I
2 would. So my practice is to, once I have surveyed and I
3 have documented and I know, documented the crime scene as
4 I responded to it I would ask the victim to come in behind
5 me and tell me what has been moved. What do you see that
6 has been moved from one point to another point or what has
7 been disturbed in your house and I would work from that
8 point as far as what has been moved and what I can
9 process.

10 Q So you would start trying to dust for prints at the
11 scene as well or for the items that they told you were
12 moved?

13 A If it is an item that I can process on the scene, I
14 typically like to process it on the scene. The less stuff
15 I have to take away from the house it is better for me and
16 it is better for the victim.

17 Q So you can do it two different ways. You can process
18 it there at the scene or you can collect it and take it
19 back to the lab and process it for prints?

20 A There are certain items that you can't process on the
21 scene like paper items. I can't process paper on the
22 scene, I don't have the chemical with me. It wouldn't be
23 a good idea to carry around these chemicals in a truck.
24 If there is something like paper or something like that
25 that I have to treat and there is a good chance that there

1 is fingerprints on it I will collect that and process it
2 at the office. If there is other items that I can't
3 process on the scene because I don't have the equipment I
4 will collect it and process it back at the office. But
5 otherwise if I can leave it I typically process it there
6 on the scene and leave it there.

7 Q So there is more than one way to collect
8 fingerprints. You can dust for them. You heard earlier
9 about another method called ninhydrin. I believe you also
10 testified something that was similar to super glue?

11 A Yes sir.

12 Q Can you tell us a little bit about each one of those?

13 A Sure. When you are dusting with powders a
14 fingerprint is composed of, majority of a fingerprint is
15 composed of water and amino acids and other secretions
16 from the pores in your fingerprints. Once you have
17 touched an item and you have left your fingerprints on the
18 items I can come back with a powder, it is a fine powder,
19 use a brush and I can develop those fingerprints. That is
20 one way. After I develop the fingerprints I put tape on
21 it, lift tape and then I pull the fingerprint off the
22 surface and I put it back on a fingerprint lift card.
23 That is one way to get a fingerprint. Another way to get
24 a fingerprint is if you have a porous item and what I mean
25 by porous is I mean it will absorb, it will absorb the

1 fingerprint. So paper, if you touch a pice of paper with
2 your hands that fingerprint will be absorbed into the
3 paper. Just like if you take a drop of water and drop it
4 on a piece of paper eventually the paper will absorb the
5 water and it will dry. The same thing happens with a
6 fingerprint. The fingerprint is transferred onto the
7 paper and then it is absorbed into the paper. And we can
8 process that with ninhydrin acetone and then develop the
9 fingerprint. The fingerprint will turn a purple color
10 because it is reacting with the amino acids left behind in
11 the fingerprint. Another way that we can fingerprint and
12 it is more of a development and a preservation is using
13 what we call super glue fuming. I don't know if anybody
14 has seen Beverly Hills Cop, kind of the same thing. When
15 he puts the super glue in the coke can and puts it in a
16 light bulb and puts it in a fish tank. The super glue
17 fumes will adhere to the fingerprints if you have an item
18 that has been touched. It is a good idea on a rigid
19 surface or a surface that has got a little bit of a
20 texture, you can actually put it in there and develop the
21 fingerprint and it will actually preserve it. It will
22 preserve it somewhat. I am not going to say it is not
23 going to be indestructible but it will be preserve it
24 somewhat. It will make it more stable, more sturdy where
25 you can put powder on it and then lift it and the

1 fingerprint will still be together, the fumes and the
2 super glue will still be there and you come back if you
3 had to and apply more powder and lift it again. That is
4 another way we can collect fingerprints. It is just like
5 the first way, the only thing we are doing is we are using
6 a cyanoacrylate for the super glue to make the print more
7 rigid and more durable.

8 Q And there is other possible methods as well or are
9 these the only ways?

10 A There is a number of different chemicals. There is a
11 number of different, you can use iodine fuming which is, I
12 am not sure if I can, go ahead.

13 Q You were saying about the print being more stable
14 with the super glue. Isn't it possible that even after it
15 has been super glued and try to be dusted the print could
16 just disappear?

17 THE COURT: That is an improper question, anything is
18 possible. Ask a proper question. The proper way to do
19 it, is more likely than not.

20 Q Is it more likely than not that after having been
21 fumed that once you go to dust the print that it could
22 disappear to the visible eye and that other methods would
23 have to be used to collect the print?

24 A Are you questioning if the fingerprint is going to
25 disappear?

1 Q Not that it would disappear, it would still be
2 present but you wouldn't be able to see it with your naked
3 eye.

4 A Once you apply the powder?

5 Q Right.

6 A I am, yes that is possible.

7 THE COURT: No sir, we are not dealing with
8 possibilities. That calls for speculation which I can't
9 allow. We have to deal, you are an expert witness, you
10 have to give an opinion to a reasonable degree of
11 certainty in the fingerprint world, more likely than not,
12 not possible, more likely than not.

13 A Yes, sir.

14 THE COURT: If you are going to render an opinion it
15 has to be more likely than not.

16 A Yes, sir. When you fume it and you put powder on it
17 the fingerprint doesn't go anywhere. It is still there,
18 you just might not be able to see it with your eye. And
19 one, like I had said yesterday. I stumbled upon a way
20 that you can get a fingerprint from a plastic bag and that
21 is typically what happens. You develop a fingerprint
22 using super glue on a plastic bag. You put powder on it
23 and it is, you can't see the fingerprint anymore. The
24 fingerprint was still there, you just had to lift it
25 differently or obtain it differently from that surface.

1 Q So the dust, necessarily you can dust something and
2 not see a print but, if you would use another method you
3 may been able to develop a print that was existing on that
4 item?

5 A Different items like porous and non-porous, there is
6 different ways to process for fingerprints. I wouldn't
7 treat a piece of glass with ninhydrin acetone.

8 Q Let's go back to a crime scene when you go to a
9 burglary. What type of items would you actual dust, would
10 you dust the doorknobs?

11 A You can dust the doorknobs, yes.

12 Q Would you dust the windowsills?

13 A Yes.

14 Q If that was a point of entry, a presumed point of
15 entry?

16 A I would, I like to say I would dust for fingerprints
17 or try and get fingerprints from all affective areas. And
18 by affected is, I try to follow as far as if he came in
19 the window, you know, the area around the window. If he
20 came in the door the area around the door and any of the
21 areas affected inside the residence where he has actually
22 moved stuff around. That just limits turning the whole
23 house black with powder.

24 Q If the point of entry was a broken window, a presumed
25 broken window would you dust the shards of glass around

1 the window?

2 A I would, yes sir.

3 Q On the shovel, there was testimony about a shovel.

4 Is it possible to, is it more likely--

5 THE COURT: Just ask him, can you.

6 Q Can you get a fingerprint off of a shovel handle be
7 it plastic and/or wood?

8 A It depends on the condition of the shovel handle. A
9 fiberglass, a nice smooth fiberglass shovel handle that
10 has not been used and not all scratched up and tore to
11 pieces, yes you can get a fingerprint from. An old wooden
12 weathered shovel handle, more likely than not you are not
13 going to get an identifiable fingerprint off of it. A
14 brand new wooden handle that is nice and shiny that still
15 as the lacker coating and everything on it you can get a
16 fingerprint from it, yes. So it all depends on the
17 condition of the handle that you are dealing with.

18 Q When you say, if you had gone to a crime scene and
19 you were told that these items were on a desk and the
20 items were moved around would you dust the desk itself?

21 A It depends on the surface, a lot of things depend on
22 the surface that you are dealing with. If I go to a house
23 and there is an antique table or an antique desk that the
24 victim said they moved so and so and such and such off of
25 this desk. And I will instruct the victim that I can

1 permanently damage this piece by putting powder to it and
2 I would let the victim make the decision whether or not
3 they want me to damage their property. So I mean it all
4 deals with the type of surface you are talking about.

5 Q How about the pull handles on drawers?

6 A Typically the pull handles on drawers are not going
7 to give you enough surface area. Now when you are talking
8 about pull handles I am just thinking of the little small,
9 the beveled and the decorative handles that are looped on
10 a drawer. Is that what you are talking about?

11 Q Any kind of handle that would be on a front of a
12 drawer. You would have a round knob on some. I don't
13 know what was in the, the possibilities, I don't know what
14 was in the house in this case. But are there some handles
15 that are pull handles that you would be able to get a
16 print off of?

17 A It all depends on the handle itself. There are some,
18 it is almost like trying to fingerprint this right here.
19 There is not enough surface area on this cord to leave an
20 identifiable fingerprint. But a larger pull knob or
21 something, yes, you could probably get an identifiable
22 fingerprint from it. There is a lot of factors involved
23 in fingerprinting.

24 Q Would you fingerprint, if TV's were taken would you
25 fingerprint any remaining TV's in the house?

1 A Once again, I will go back to the victim. If the
2 victim says that TV has been moved then yes I am going to
3 fingerprint it, I am going to try to get a fingerprint
4 from it. But the victim says that TV has been sitting
5 there and it has been sitting there for years and you can
6 see the dust around it, it has not been disturbed why
7 create more of a mess.

8 Q Have you ever had a case where items of evidence were
9 collected by another jurisdiction?

10 A Have I been on a scene where evidence, are you asking
11 where I have been on a scene--

12 Q Where evidence has been recovered from another
13 jurisdiction?

14 A And they have submitted it to me for processing?

15 Q What would happen on that.

16 THE COURT: First of all ask him has he ever.

17 Q Have you ever worked on a case where evidence was
18 collected or recovered in another jurisdiction?

19 A I have assisted other agencies with crime scenes, yes
20 sir. I hope that answers your question.

21 Q Have you ever been involved, it was in Aiken County,
22 a case or when you were in Greenville and evidence from
23 one of the crimes scenes that you were working was
24 collected or recovered in another jurisdiction?

25 A Yes.

1 Q How would you, would you get the evidence back or
2 what would be the process in that?

3 A Typically if we have a burglary in Aiken County and
4 they find property and recover property in Edgefield
5 County. If they recover it typically the investigators
6 will handle recovering the evidence and it will be their
7 decision if they want it processed or if they even think
8 it needs to be processed.

9 Q So the recovery agency will decide whether or not to
10 process the evidence that they collected?

11 A The investigator, say my house was broken into and I
12 had a flat screen TV missing and the serial number was
13 entered into the NCIC computer and my TV was found in
14 Edgefiled County. The investigator that was assigned to
15 my burglary case would be the one that would be
16 coordinating getting that TV back. I wouldn't, as a
17 forensic investigator and I am probably using me as a bad
18 example, just I am a citizen. But the forensic
19 investigator that came out to the burglary of my house
20 would be the one to coordinate the recovery of the
21 property.

22 Q Okay. How long could a fingerprint stay on an item?

23 A I am trying to stay away from possibilities. The
24 environment which the fingerprint is in will have a great,
25 will be a very strong determining factor as far as how

1 long a fingerprint can last. So I mean there is no set
2 time a fingerprint can last this long or this long. There
3 is no set factor, it is all environmental. It is all what
4 is around the fingerprint as to how long it is going to
5 last.

6 Q I asked you earlier about a windowsill. If a
7 windowsill was dirty and had soot on it or dirt is it
8 possible to get a fingerprint from that surface.

9 THE COURT: Can, I am not going to tell you again.

10 Q Can you get a print on that surface?

11 A It is possible. I mean, excuse me, sorry, Your
12 Honor.

13 THE COURT: I mean it is not me, it is the rules of
14 evidence. You have got to comply with it. I am not
15 fussing at you, just the rules require that.

16 A Depending on the amount of dirt or dust that is
17 involved and depending on how heavy or a secreteer the
18 individual who is going through the window is you can get
19 a fingerprint. But it is a lot of variables involved.

20 Q You were stating that you got 36 points of minutiae
21 that was entered into AFIS in this case?

22 A Yes.

23 Q How many points does it require before you can enter
24 a point or a print into AFIS?

25 A Are you asking about what does AFIS require?

1 Q What does AFIS require you to have before you can
2 enter a print?

3 A AFIS requires 8 points.

4 Q Now is there a maximum number of points that you can
5 enter into AFIS?

6 A You can enter as many points as you can find. There
7 is not a set maximum number to my knowledge.

8 Q How many points is there on a finger or a thumb?

9 A On average there is 50 to 60 points of identification
10 on a fingerprint.

11 Q Now once that print is entered into AFIS you told us
12 earlier, you testified earlier it kicks back a set number
13 of 30?

14 A Yes, sir.

15 Q Individual cards or numbers?

16 A It sends back 30 respondents.

17 Q And you said that was a number that y'all had chosen
18 as what you wanted to receive. What is the possibilities,
19 how high can you go in that number?

20 A I have never tried to increase the number.

21 Q How, do you know how many cards are stored or how
22 many print identification cards are stored in AFIS?

23 A I do not know an exact number of how many
24 fingerprints cards are stored into AFIS.

25 THE COURT: You can give us a guesstimate.

1 A Millions, there would literally be millions, probably
2 millions of cards.

3 Q AFIS doesn't actually give you, like you see on TV,
4 one-hundred percent match, is that correct?

5 A No sir, it doesn't. It doesn't give you the CSI
6 picture and overlay and everything like that, no sir.

7 Q That is sort of, identification is up to the
8 investigator that is looking at it?

9 A Yes sir, ultimately it is up to a human being to look
10 at and make the determination. The computer does not make
11 the determination.

12 Q Okay. But it narrows from several million for you
13 based on a set of little patterns and minutiae that there
14 is possibilities within this 30?

15 A Yes. Think of, think of the AFIS computer as a tool.
16 That is exactly what it is, it is a tool. Previously when
17 I was asked what tools or what can we use, what is
18 provided. One of the things that I said was the AFIS
19 workstation. The AFIS workstation is a tool. It allows
20 us to take this huge database and narrow it down. It is a
21 tool, it allows us, rather than looking at every
22 fingerprint that has ever been rolled we can narrow it
23 down to 30.

24 Q Did you look at the other 29 prints in this case or
25 how many cards did you go through before you stopped?

1 A If I am not mistaken the first one that I looked at
2 was matched, I want to be careful to say not an
3 identification. When we, there was a match. The first
4 print is what I went on to look at further. And it was
5 such a strong match and such a, I was you know one-hundred
6 percent sure that this was the match. So there is not any
7 reason to go look at the other 30.

8 Q So none of the other or 29 other cards were not
9 examined?

10 A No sir, after that initial match and the following,
11 the protocol that we use, the ACEV. After going through
12 those steps there was not a reason to go back and look at
13 the other 29. We had already made the match.

14 Q And that would be by 36 points, the 36 points.

15 A My work, yes, 36 points is what I entered and 36
16 points is what I matched.

17 Q And you said there is a possibility of 56 to 60
18 possible points?

19 A 50 to 60, yes sir, that is what I said.

20 Q 50 to 60?

21 A Yes sir, 50 to 60.

22 Q But if one of them points doesn't match it wouldn't
23 be one-hundred percent identification then?

24 A If one of those points does not match, yes sir. If
25 one of those 36 that I was looking at did not match then I

1 would not have made the match.

2 Q So there was only 36 possible points in that
3 fingerprint to identify?

4 A The 36 is what I entered.

5 Q What I am asking is, is there, you are telling me 50
6 to 60 possible points a finger that can be used at any one
7 time?

8 A On average.

9 Q On average. If any point from 0 to 60 was not
10 identical to the other it would not be a match?

11 A Yes.

12 Q On this paper that, the print that was developed on
13 was there any other prints on this paper?

14 A There were two sheets of paper.

15 Q On any of those papers, was there any other prints?

16 A Yes.

17 Q Were they able to be identified?

18 A I did not, I did not identify anything of those. I
19 did not make any type of comparison on those.

20 Q Was it because they weren't of quality to make an
21 identification or was it because you didn't look at them?

22 A Once I made the initial match I submitted it to
23 Lieutenant Adams.

24 Q Okay.

25 A And that was as far as I went in the case, as far as

1 the match.

2 Q Was there any exclusion cards taken, any prints taken
3 from the homeowners or the officers to say, hey, these
4 possible prints may be found on these items that we
5 collected so that you could look at it to the exclusion of
6 homeowner or anyone else?

7 A To my knowledge that was the only thing that was
8 submitted to me.

9 Q So you couldn't tell me if Ms. Smiley's prints were
10 on that piece of paper then today?

11 A Whose?

12 Q Ms. Smiley, the victim, the homeowners?

13 A No, I could not tell you if her fingerprints were on
14 that piece of paper at this point and time today.

15 Q Is there an error rate in fingerprint science. Kind
16 of like in SLED reports, you do a DNA report and they come
17 back with so many trillion that there is a possibility,
18 their exclusion of one person versus another?

19 A No. It is all or nothing in a fingerprint
20 identification.

21 Q Have you ever had a situation where you and
22 Lieutenant Adams disagreed on a identification?

23 A Yes, sir.

24 Q What happens on those situations?

25 A I don't make the identification, I don't make the

1 match. If he cannot see what I see it is not him.

2 Q On items how long, I think I have already asked this
3 one. How long can a print last and you said it would
4 depend on a different timeframe?

5 A It depends on the environment, it depends on what
6 that fingerprint is in, what it is on, what is around it.

7 Q How long could it remain on a piece of paper in an
8 air-conditioned home?

9 A It could last quite a while.

10 Q What do you mean by quite a while, can you quantify
11 that to a number possibly?

12 A I can't get you an exact number of days, no. Like I
13 said, it depends on a number of different variables. I am
14 not going to tell you a fingerprint can last one-hundred
15 years. I am not going to tell you that a fingerprint can
16 last one-hundred days because it all depends on the
17 environment.

18 Q Do you have the list that AFIS gave to you with the
19 30 different individuals?

20 A Do I have the printout of the screen?

21 Q Yes.

22 A There is a printout of the screen, I don't have it
23 with me but the screen was printed out, yes sir.

24 Q Was Mr. Cave's name the first one on the list?

25 A There are no names on the list.

1 Q Was his identification the first one on the list
2 going down the list?

3 A Yes, as far as the SID number, the first fingerprint
4 I looked at.

5 Q Nothing further.

6 THE COURT: Redirect?

7 MR. MOLONY: No redirect, Your Honor.

8 THE COURT: You may step down.

9 MR. MILLER: The State calls Lieutenant Clay Adams.

10 MR. HAYES: We would object, Your Honor.

11 THE COURT: Object on what?

12 MR. HAYES: Bolstering and cumulative.

13 THE COURT: Overruled.

14 CLAY ADAMS, being
15 first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 By Mr. Miller:

18 Q Lieutenant Adams, who do you work for?

19 A I work for the Aiken County Sheriffs Office.

20 Q And how long have you been employed by the sheriffs
21 office?

22 A Since February 23rd of 2001.

23 Q What are your job responsibilities with the sheriffs
24 office?

25 A I am the forensic lieutenant for the sheriff.

1 Q And how many people do you supervise in the forensics,
2 office there?

3 A Four people.

4 Q And so you have experience involving fingerprints,
5 specifically do you have any specialized education,
6 training or experience to allow you to identify collecting
7 and examining and compare fingerprints?

8 A I do.

9 Q What kind of classes have you taken?

10 A I have had advanced classes through the criminal
11 justice academy and basic fingerprint identification,
12 fingerprint processing, crime scene processing, advanced
13 fingerprint identification and other forensic courses.

14 Q What kind of certifications do you hold?

15 A I currently hold two statewide certifications as a
16 certified law enforcement officer and a firefighter. I
17 hold a national certification as a certified fire arson
18 and explosions investigator. And I hold an international
19 certification as a certified latent print examiner.

20 Q As a what?

21 A Certified latent print examiner.

22 Q What type of technical equipment do you use to
23 identify, collect, examine and compare fingerprints?

24 A We typically use just magnifying glasses or we can
25 also use the automated fingerprint identification system

1 or AFIS.

2 Q How many cases have you worked on over the years
3 involving the collection, identification and examination
4 of fingerprint evidence?

5 A I cannot give an exact number but it is well in the
6 thousands.

7 Q And in your professional experience have you had
8 occasion to identify a person by comparing latent
9 fingerprints with their own ink fingerprints?

10 A I do on a daily basis.

11 Q Have you ever been qualified as an expert witness to
12 testify about fingerprints in the courts of this State?

13 A I have fifteen times.

14 MR. MILLER: Your Honor, at this time the State would
15 offer Lieutenant Adams as an expert in the field of
16 fingerprint analysis subject to any voir dire that Mr.
17 Hayes may have.

18 THE COURT: Any voir dire as to qualifications?

19 MR. HAYES: No, sir.

20 THE COURT: Mr. Foreman and ladies and gentlemen, he
21 will be qualified as an expert in the identification of
22 latent and/or fingerprints and will be allowed to give
23 opinions in that field.

24 Q Lieutenant Adams, what is an ink print?

25 A An ink print is a known fingerprint of a person.

1 Q What is a latent print?

2 A A latent print is basically an unknown fingerprint.
3 Those are ones that we will develop at a crime scene or
4 from items taken from a crime scene that need to be
5 identified.

6 Q Are there different distinguishing characteristics of
7 fingerprints?

8 A Yes.

9 Q What are some of those?

10 A Each person's fingerprints are completely different
11 to everybody else's. They are very specific to you and
12 inside those fingerprints are what we call minutiae or
13 points of identification. And basically what that is is
14 we look for those characteristics such as bifurcations
15 which is where a ridge in the fingerprint would travel and
16 then split into two or a ridge ending where the ridge will
17 travel and stop and dots which are very short ridges. So
18 we look for those individual characteristics and where
19 they are located in the fingerprint that makes that unique
20 to that person.

21 Q What kind of surfaces can a person leave a
22 fingerprint on?

23 A Numerous. There is really only two types of surfaces
24 in this world, a porous surface and a non-porous surface.
25 Non-porous surface being metals, wood, any hard surface

1 where the fingerprint will actually stay on top of the
2 surface. Then you have a non-porous surface such as
3 paper, cardboard that will absorb the fingerprint so the
4 fingerprint is actually in it.

5 Q I am sorry, I might have misheard you. The porous
6 surfaces are the ones that absorb and the non-porous
7 surfaces like for metal would be stuff that doesn't
8 absorb?

9 A Correct.

10 Q Is it possible for a person to touch a surface and
11 not leave his fingerprint on it?

12 A Very.

13 Q What types of surfaces are not conducive of leaving
14 identifiable fingerprints?

15 A Your surfaces such as cloth, carpet, anything that is
16 very rigid and very sporadic. A fingerprint typically
17 requires a very smooth surface or a kind of a dimpled
18 surface, something that the fingerprint would actually
19 adhere to.

20 Q Are fingerprints impaired for purposes of
21 identification?

22 A We take an unknown or latent fingerprint and we
23 compare them to inked prints or the known prints.

24 Q Are everyone's fingerprints unique?

25 A Yes.

- 1 Q I want to call your attention to the exhibit
2 previously marked as State's exhibit 4. Are you familiar
3 with this exhibit and you can take a look inside if you
4 need to.
- 5 A I am.
- 6 Q Why are you familiar with that exhibit?
- 7 A Because I have done a comparison on this exhibit.
- 8 Q Where did you get that exhibit from?
- 9 A From Investigator Chris Johnson.
- 10 Q Do you know when you got it from Investigator
11 Johnson?
- 12 A May 5th of 2011.
- 13 Q Where did you get that exhibit, where were you when
14 you got it?
- 15 A In my office.
- 16 Q Did you examine that exhibit for latent prints?
- 17 A I did.
- 18 Q I want to call your attention to what has been
19 previously marked for identification as State's exhibit 10
20 and can you tell the jury what that is?
- 21 A This is a copy of a ten print card with the name,
22 Albert James Cave, Jr.
- 23 Q Is that photocopy of that ten print card fairly and
24 accurately represent the actual ten print card of Albert
25 James Cave, Jr. that you used during this case?

1 A It does.

2 Q And where did you get that, where did you get the ten
3 print card that that is a photo copy of from?

4 A From Investigator Johnson.

5 Q And what day did you get that, would that have been
6 the same day, May the 5th of 2011?

7 A Yes.

8 MR. MILLER: Your Honor, at this time the State would
9 move to introduce exhibit 4 and exhibit 10 into evidence.

10 MR. HAYES: No objection, Your Honor.

11 (Whereupon, State's Exhibit 4 and 10 were admitted
12 into evidence.)

13 Q Lieutenant Adams, did you compare the latent print
14 marked number 1 on State's exhibit 4 with the fingerprints
15 on this card, State's exhibit number 10?

16 A I did.

17 Q What was the result of your comparison?

18 A My results were that developed on the front of AD
19 Scholarship Committee piece of paper as identified as the
20 number one for the right thumb finger of the person whose
21 prints appear on the fingerprint card bearing the name,
22 Albert James Cave, Jr.

23 Q And what factors did you base that conclusion on?

24 A The individual characteristics of the fingerprints.

25 Q And you actually looked at the individual

1 characteristics of the fingerprints or did you just rely
2 on what Investigator Johnson told you?

3 A No, sir. I did the examination.

4 Q And how many points of comparison did you find?

5 A At the end of the identification process I identified
6 50 points of reference.

7 Q And based on your experience and training how many
8 points of comparison are needed to render an opinion as to
9 the identification of a person?

10 A It really depends on the clarity of the fingerprint
11 itself. We can make identifications as low as 6 to 8
12 points of reference.

13 Q But you had 50?

14 A Yes.

15 Q Based upon your experience in the field of
16 fingerprint analysis are the points of comparison
17 conclusive as to the identity of the latent print marked
18 number 1 on State's exhibit 4 with the known ink print of
19 the defendant's, State's exhibit 10?

20 A Very conclusive, yes sir.

21 MR. HAYES: Objection.

22 THE COURT: What is the objection?

23 MR. HAYES: He is saying he goes to the ultimate
24 decision as conclusively, Your Honor.

25 THE COURT: Overruled.

1 Q Did you compare the latent fingerprint marked number
2 3 on State's exhibit 4 with the fingerprints on State's
3 exhibit 10?

4 A I did.

5 Q And what was the result of that comparison?

6 A Developed on backup exam 1 HIV consent form is
7 identified as the number 3 or the right middle finger of
8 the person whose prints appear on the card bearing the
9 name, Albert James Cave, Jr.

10 Q And did you also base that conclusion on the
11 identified characteristics of the number 3 versus the
12 latent print that you found?

13 A I did.

14 Q Based upon your experience in the field of
15 fingerprint analysis are the points of comparison
16 conclusive as to the identity of the latent print marked
17 number 3 on State's exhibit 4?

18 MR. HAYES: Objection.

19 THE COURT: All right, rephrase your question, more
20 likely than not.

21 Q Based upon your experience in the field of
22 fingerprint analysis do you have an opinion more probable
23 than not regarding the identity of the latent print marked
24 number 3 on State's exhibit 4 with that ten print card?

25 A I do. It is my opinion that the same contributor

1 made the same marks from the ten print card to the latent.

2 MR. MILLER: Your Honor, at this time we would like
3 to publish State's exhibit 4 to the jury and I would like
4 to note, because of the materials that were used to
5 identify the fingerprint they are in plastic sheets now
6 because if you touch them you can actually get, it can
7 turn your fingers purple is what I have been told. So we
8 don't want that to happen. And I am pointing out to the
9 jury the circled fingerprint that was developed off of the
10 page.

11 MR. HAYES: We would object, Your Honor, he is
12 pointing out, he can publish it without showing and
13 pointing directly to it.

14 THE COURT: Overruled. Mr. Foreman and ladies and
15 gentlemen, y'all will have all of that evidence back in
16 the jury room. You will have ample opportunity to look at
17 it.

18 Q Lieutenant, did you prepare a power point
19 presentation to explain in detail how the comparison of
20 the latent print marked number 1 and the ink card was done
21 in this case?

22 A I did.

23 Q And did you prepare a power point presentation to
24 explain in detail how the comparison of the latent print
25 number 3 of the ink card was done?

1 A I did not.

2 Q And why didn't you do that?

3 A For court purposes the number 1 finger identification
4 shows a lot of clarity and that is what we wanted to
5 present to show how we do our fingerprint comparisons.

6 MR. MILLER: Your Honor, with the Court's permission
7 we would like to have Lieutenant Adams step down so we can
8 go through the power point presentation on the big screen
9 here and it will take just a second to get it set up and
10 put it into position.

11 MR. HAYES: I would object, it is cumulative and they
12 have already had testimony on that point.

13 THE COURT: Overruled. This is just a demonstrative
14 situation, Mr. Miller?

15 MR. MILLER: It is, Your Honor, it is demonstrative
16 for explaining how the process went.

17 (Whereupon, the witness steps down from the witness
18 stand to present a power point presentation.)

19 A The first thing I have done is I have taken an
20 additional picture of the latent that was developed. This
21 is the latent print, this is a digital photograph of the
22 inked print of the right thumb from the ten print card. I
23 then put them side by side so that I could see them. The
24 first thing that we do when we are doing a fingerprint
25 examination is first we have to determine if the pattern

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1 is correct. We are looking for three different patterns.
2 You have a loop pattern, you have a whorl pattern and you
3 have an arched pattern. Once we identify that we are of
4 the same pattern type then we can proceed. Had the two
5 pattern types been different then it is obviously not a
6 match and we stop right then. So once we identified this
7 right slope loop meaning that the ridge comes into the
8 pattern area from the right side, travel around the center
9 or the core of the fingerprint and go back out the right
10 side, vice versa, left slope loop, the ridge detail would
11 come in from the left side of the fingerprint, go around
12 the patterned core area and back out the left side. A
13 whorl would look like a circle and an arch would just be a
14 little bump. So we have identified that both of these are
15 right slope loops so it allows me to proceed on with my
16 identification. Now what we do is we take the latent
17 print and we look for the minutiae, the ridge detail that
18 makes it very specific to that person. Like I said, the
19 detail that we are looking for are bifurcations, ridge
20 endings and dots. And what I do is I map out the ones
21 that we can see. And in this case I have done 24. And
22 this is for court presentation purposes only otherwise it
23 would be too jumbled and you wouldn't be able to see it
24 very well. So here on the latent print I have identified
25 24 points of reference. I take the ink print and I look

1 for the same ones. Now in this case even though I have
2 identified 24 for the court presentation purposes I went
3 ahead and I marked all of the bifurcations, the ridge
4 endings and the dots that were visible in the print. In
5 this case I have identified 50 in each. Each one of these
6 x's represents a ridge ending, a bifurcation or a dot.
7 Now what we do is we can also take away the fingerprint so
8 that you can see the pattern or what we call the
9 constellation. This is actually what AFIS looks for.
10 When we enter a fingerprint into the AFIS system and we
11 plot those points of minutiae it is looking for these
12 constellations and it is mathematically looking for a
13 similar constellation. That is how the AFIS system
14 generally works without getting into its algorithms and
15 such like that. So by looking for the same constellation
16 that is how it narrows the search down to us. But we do
17 the exact same thing when we are doing our comparisons.
18 We are looking for--

19 MR. HAYES: Objection, narrative, Your Honor.

20 THE COURT: Overruled.

21 A So our fingerprints also have what we call, we have
22 three levels of detail. We have level one detail of a
23 fingerprint. That is where we can maybe see what the
24 pattern type is but we can't see any of the ridges. We
25 have level two detail of a fingerprint which we can see

1 the ridges and we can make an identification. On level
2 one detail we cannot. We can simply say that they have a
3 similar pattern but we cannot say that it is specific to
4 one person. Level two detail which is we identified the
5 pattern, we can also see the ridges, we can specifically
6 say that it is a person or it isn't a person. Now level
7 three detail gets it down almost to a micro level where we
8 can actually see great details as far as the ridge
9 structure, sweat pores. So in this case I have identified
10 the delta region of this fingerprint and the pattern type.
11 We are going to get a little bit closer. I have
12 identified even closer part of the delta region of the
13 fingerprint and we are going to get even closer so that
14 you can really see the micro detail of the fingerprint. I
15 draw your attention to the two dots, the third dot. See
16 how this ridge travels up and stops. The two dots on the
17 other side, a dot, this ridge comes up and stops, another
18 short little ridge, this ridge comes in that ridge. That
19 is the same thing. Once again we have got the 50 points
20 of reference.

21 MR. MILLER: Your Honor, at this time the State would
22 move, I am sorry.

23 Q Lieutenant Adams, you did create this power point
24 presentation yourself?

25 A I did.

1 Q And is the copy of the power point presentation that
2 was just shown to the jury?

3 A It is.

4 MR. MILLER: Your Honor, at this time we would move
5 to introduce State's exhibit 11 into evidence.

6 THE COURT: Any objection?

7 MR. HAYES: Nothing.

8 (Whereupon, State's Exhibit 11 was admitted into
9 evidence.)

10 Q Lieutenant Adams, I want to ask you if you can
11 identify this photograph, State's exhibit 7?

12 A I can.

13 Q And is that a photograph of the inked print pointing
14 out the points of comparison that you identified from the
15 slide show?

16 A It is.

17 Q And State's exhibit 8, is that a photograph pointing
18 out the points of comparison from the slide show of the
19 latent print in this case?

20 A It is.

21 Q And State's 9, can you identify that?

22 A I can.

23 Q Is that the photograph of the two prints side by side
24 for comparison purposes?

25 A It is.

1 THE COURT: Your Honor, at this time the State would
2 move to introduce exhibits 7, 8 and 9 into evidence. And
3 they have previously been shown to defense counsel.

4 MR. HAYES: They are cumulative, Your Honor.

5 THE COURT: They are cumulative but a lot easier to
6 handle than the slide so I am going to allow it.

7 (Whereupon, State's Exhibits 7, 8 and 9 were admitted
8 into evidence.)

9 Q From the standpoint of an expert witness in
10 fingerprint comparison and identification when is an
11 identification of a fingerprint made?

12 A An identification, an official identification of the
13 fingerprint is made once we followed all of our steps.
14 And we have protocol in place at the sheriffs office that
15 we call ACEV.

16 THE COURT: Called what?

17 A ACEV, A-C-E-V. That stands for analysis, comparison,
18 evaluation and verification. Once we have completed all
19 the steps through the verification process then the
20 identification is made.

21 Q So it is your testimony that no identification of the
22 fingerprint was made in this case until you verified
23 Investigator Johnson's findings?

24 A That is correct.

25 Q What would happen if you disagreed with Investigator

1 Johnson's findings regarding the fingerprint?

2 A Then an identification is not made.

3 Q Okay. In your experience as an expert witness
4 regarding fingerprints what is your opinion of the quality
5 of the latent prints developed in this case?

6 A The two fingerprints that were developed, that were
7 identifiable, the one that was identified as the right
8 thumb had level 3 clarity. The 1 of the number 3, the
9 right middle finger had level 2 clarity.

10 Q And level 3 clarity again, is that the third level
11 that you were talking about of the magnification on the
12 slide show?

13 A The third level detail is a greater quality.

14 Q Did you prepare a written report on your findings in
15 this case?

16 A I did.

17 Q I am going to show you what has been marked for
18 identification as State's exhibit 6. Is that a true and
19 accurate photocopy of your written report in this case?

20 A It is.

21 MR. MILLER: Your Honor, at this time the State would
22 move to introduce State's exhibit 6 into evidence.

23 MR. HAYES: Without objection.

24 (Whereupon, State's Exhibit 6 was admitted into
25 evidence.)

1 Q Lieutenant Adams, we have heard a little bit about
2 the terms come up a couple of times, secreter. What does
3 that mean?

4 A A secreter, we are all secreters. And when we say
5 secretion, that is the release of the sweat through your
6 sweat pores, be it under your arms, your groin area but
7 also on your hands where you have your sweat pores. So a
8 secreter is one that allows for the sweat to leave the
9 pores.

10 Q Do people secrete at different rates?

11 A Yes.

12 Q Is one sex more likely, does one sex secrete heavier
13 than another sex?

14 A Sometimes. It all goes back to the amount of sweat
15 pores that you have. If you have a lot of sweat pores you
16 are going to sweat a lot. If you don't have very many
17 sweat pores then you typically are not going to sweat as
18 much.

19 Q Based upon your examination of the fingerprints in
20 this case, specifically level 3 detail examination can you
21 offer an opinion as to Mr. Cave's level of secretion?

22 MR. HAYES: Objection. Improper question.

23 THE COURT: Improper question? Overruled.

24 Q Can you offer an opinion?

25 A I can.

1 Q And what would you base that opinion on?

2 A The amount of detail in the fingerprint.

3 Q And what would your opinion be as to his level of
4 being a secreter, would he be a high secreter or not?

5 MR. HAYES: Objection, Investigator Adams is not an
6 expert in biology or human anatomy or analysis.

7 THE COURT: Sustained, move along.

8 Q What would you be looking at to make a determination
9 such as that, Lieutenant Adams?

10 THE COURT: You haven't qualified him as an expert in
11 human secretion now.

12 MR. MILLER: Can we have a sidebar, Your Honor?

13 THE COURT: You may but I don't think you are going
14 to change my mind.

15 (Whereupon, a bench conference was held in the
16 presence of the jury but out of the hearing of the
17 jury.)

18 Q Lieutenant Adams, when you looked at the level three
19 details on the defendant's fingerprint were you able to
20 visually identify his sweat glands in that level three
21 magnification?

22 A Sweat pores were identified.

23 Q No further questions.

24 CROSS-EXAMINATION

25 By Mr. Hayes:

1 Q Lieutenant Adams, when you are looking at a
2 fingerprint or a latent unknown how many points are
3 possible for identification?

4 A Depending whether it is a finger or a palm. There is
5 a greater amount of detail in palms because the surface
6 area is obviously greater.

7 Q In a thumb print, how many possible points of
8 minutiae would you use to find for identification is there
9 in a fingerprint, in a thumb print?

10 A Typically in a full rolled fingerprint there is
11 anywhere from 60 and 80 points on average. Everybody is
12 different but on average.

13 Q So it is plus or minus some as well?

14 A Yes.

15 Q Okay. Did you examine the paper yourself for prints
16 or were you given the findings from Investigator Johnson
17 to review?

18 A No, I actually examined the pieces of paper.

19 Q When you were given the pieces of paper from
20 Investigator Johnson had he told you what his conclusion
21 was before you viewed it?

22 A Yes.

23 Q So you knew when you were looking at it he came to a
24 conclusion and who that suspect he believed it was?

25 A Yes.

1 Q I guess my question would be, it is not double blind?
2 In a double blind experiment he had no answer before he
3 looked at it and you didn't know his answer before you
4 looked at it, you knew his answer?

5 A Yes, on the first print.

6 Q Okay. Do you ever get called to crime scenes?

7 A I do.

8 Q Do you have an idea to how many you have been to?

9 A No, sir.

10 Q Okay. Do you go to burglaries?

11 A Yes, sir.

12 Q When you get to a burglary how do you get there?

13 A By my county issued vehicle.

14 Q Who gives you the call and request your presence?

15 A It can depend, it can be the road supervisor or it
16 could be an investigator with the criminal investigations
17 division or their lieutenant, really anyone at the
18 sheriffs office can, with rank, can request that forensics
19 be requested.

20 Q Once you get to a crime scene what would be your
21 role, what would be your job for you to do once you
22 appeared?

23 A Would be to process the scene for any physical
24 evidence.

25 Q And processing the scene, how would you determine

1 what you need to process?

2 MR. MILLER: Judge, he didn't go to the crime scene
3 in this case, he is asking about speculating what he would
4 do at an imagined crime scene.

5 THE COURT: We are getting a little off field in this
6 case. I am going to give him a little bit of lead way
7 but, Mr. Hayes, the crime scenes can be anything from
8 murder down to you writing a bad check.

9 Q At a burglary what do you base what you needed to
10 collect or dust on?

11 A Based on what I see and what the homeowners that are
12 familiar with the house tell me.

13 Q Is it possible to get--

14 THE COURT: Not possible.

15 Q Can you get prints off of wood items?

16 A Depending on the wood.

17 Q How many prints did you find on the paper other than
18 Mr. Cave's?

19 A I am sorry?

20 Q How many other prints, were you able to identify any
21 other prints on the paper?

22 A No sir, there was only two identifiable prints on the
23 two pieces of paper.

24 Q So there was only two prints that you were able to
25 make identification. Was there any other prints on the

1 paper?

2 A Yes.

3 Q They were just too smudged, too small, not enough
4 clarity?

5 A Yes, sir.

6 Q Were any of the other 29 cards also examined by you
7 from AFIS?

8 A No.

9 Q The only card you reviewed was Mr. Cave's?

10 A That is correct.

11 Q Looking at a fingerprint, if there is one minutiae
12 different that would mean it wouldn't be one-hundred
13 percent match, correct?

14 A Not necessarily, no sir.

15 Q How is that?

16 A A fingerprint which we call in motion, it could be a
17 double tap, it could be a tap and a turn. But sometimes
18 there are forces of the pressure of the fingerprint that
19 can allow for distortion. So it really depends on the
20 clarity, if it was a very high clarity fingerprint with no
21 motion or distortion and there is a obvious ridge ending
22 or an obvious bifurcation then yes. If it is not there
23 and it cannot be explained due to the slipping or the
24 pressure of the fingerprint then yes, you can say that it
25 is not a match.

1 Q And the only way to know that would be to go and find
2 all of the minutiae, correct?

3 A I am sorry, I don't understand.

4 Q The only way to know if there was not one minutiae
5 not matching would be to go through and look and compare
6 each minutiae until you ran out of possible minutiae?

7 A No sir, not necessarily. When we look at the clarity
8 of the print we look at the areas that are identifiable
9 because a full fingerprint is not captured typically.

10 Q Was a full fingerprint captured in this case?

11 A It is very rare to have a full fingerprint capture
12 and it is by the way we handle items.

13 Q My question is, was there one found in this case?

14 A I am sorry, ask the question again.

15 Q Was there a full fingerprint found in this case?

16 A No, sir.

17 Q How much of that print then would you say is
18 captured?

19 A I would say probably nine-tenths of it?

20 Q Nine-tenths of it?

21 A About ninety percent of that fingerprint. A full
22 fingerprint is what we call a full roll which is cuticle
23 to cuticle. Because we have ridge detail all the way to
24 the sides of our fingers. However when we handle an item
25 we are not really handling it with the side of the

1 fingers. So typically we wind up with the core and delta
2 regions of the fingerprint.

3 Q Is there any way to tell how long a fingerprint is on
4 one piece of paper?

5 A No, sir.

6 Q How long can a fingerprint survive on a piece of
7 paper?

8 A There is no way for us to tell. It all depends on
9 environmental factors, it depends on a lot of factors as
10 to how long a fingerprint's life span will last.

11 Q On your report, you wrote your report on the 11th of
12 2011 however Gerald Turner has testified that you
13 collected it from Chris Johnson on the 4th. What is the
14 difference in timeframe?

15 A I am not sure.

16 MR. MILLER: Objection, Your Honor, that is not what
17 the testimony was.

18 THE COURT: What was your question?

19 MR. HAYES: His report was written on the 4th, I am
20 sorry, written on the 11th. However he picked up the
21 print from Gerald Turner or brought the print from Gerald
22 Turner that he collected from Chris Johnson on the 4th.

23 THE COURT: What is your question?

24 Q Why the discrepancy in the timeframe?

25 A First of all, that is wrong. I got it from Chris

1 Johnson on the 5th.

2 Q You got it on the 5th?

3 A Yes, sir.

4 Q Why the discrepancy then from the 5th to the 11th?

5 A Well, there are several probably factors to it. One,
6 the second fingerprint identified was of poor quality. It
7 takes a while to do a fingerprint examination as well.

8 Also I believe we were in general sessions court at the
9 time of, the week of the 11th, the early part of the week.

10 Q So you got the print the week before?

11 A Yes sir, on the 5th which I believe was a Thursday.

12 Q How come on your report you don't have any mention of
13 the number of points of minutiae on any of the prints?

14 A Because the points of the minutiae, how many we get
15 is irrelevant. It is whether or not we have come to a
16 conclusion that we have identified.

17 Q When you get evidence, you are suppose to sign it out
18 yourself?

19 A I am sorry?

20 Q You go to Mr. Turner and tell him you want to pick
21 something up and you would have to sign for it?

22 A It really depends on what the evidence is. Typically
23 the fingerprints, no sir. When they are developed they
24 come straight to me.

25 Q Once they are developed they come to you?

1 A Yes, sir.

2 Q But the processing wouldn't be completed until you
3 confirm the findings of Chris Johnson?

4 A That is correct. What the chain of custody is
5 showing is that Chris Johnson had control of the
6 fingerprint, he then signed it over to me and then I had
7 control of the fingerprint.

8 Q Where do you store your fingerprints?

9 A The identified latent fingerprints are identified,
10 they are stored in what we call ID one which is in a
11 filing cabinet inside my office.

12 Q Which is not in the evidence locker, with under the
13 supervision of Gerald Turner?

14 A No sir, it is under my supervision. It is stored in
15 my office which is a secured facility of the sheriffs
16 office.

17 Q Nothing further.

18 THE COURT: Redirect.

19 REDIRECT EXAMINATION

20 By Mr. Miller:

21 Q Lieutenant Adams, you testified that a rolled print,
22 you described that as cuticle to cuticle would have 60 to
23 80 points of minutiae on average?

24 A On average.

25 Q How about a slap print, would it have fewer points of

1 minutiae because of the fact that it would have less
2 detail?

3 A It will have--

4 MR. HAYES: Objection, leading.

5 THE COURT: Sustained. Rephrase your question.

6 Q Would a slap print have more points of minutiae than
7 a rolled print or fewer points of minutiae than a rolled
8 print?

9 A Fewer.

10 Q No further questions.

11 THE COURT: You may step down.

12 MR. MILLER: Your Honor, at this point the State
13 would put its stipulation on the record.

14 THE COURT: Ladies and gentlemen and Mr. Foreman, a
15 stipulation is just an agreed upon facts that both sides
16 agree that is truth. They are going to enter the
17 stipulation that deals with one of the elements of
18 burglary first. And I will tell you all about that at the
19 conclusion. There are many elements to burglary first and
20 many ways to prove it but one of the elements deals with
21 this stipulation and I will tell y'all about that when I
22 charge you. A stipulation means that both sides agree.

23 MR. MILLER: Your Honor, as to indictment
24 2011-GS-02-1031, the indictment for burglary in the first
25 degree. The State and the defense stipulate that the

1 defendant, Albert Cave, Jr. has two prior convictions for
2 burglary. And that is dated yesterday's date, August 22nd
3 of 2011.

4 Your Honor, the State rest.

5 THE COURT: Mr. Foreman and ladies and gentlemen of
6 the jury, that means that the State has completed all of
7 its evidence. I have to take up a couple matters of law
8 and motions with them before I bring you back out. I have
9 asked the bailiff and she has got the menu from the Bowery
10 which is up the street. Go ahead and place your order and
11 it looks like you will be deliberating around lunch time
12 so I will have that order delivered to you so we don't
13 have to waste time going out to eat. Go on back and take
14 a break and please don't talk about the case.

15 (Whereupon, the jury was excused from open court for
16 a break at 11:00 a.m.)

17 THE COURT: Anything else by the State?

18 MR. MILLER: Nothing from the State, Your Honor.

19 THE COURT: By the defendant?

20 MR. HAYES: Your Honor, as to the charge of grand
21 larceny the defense would make a motion for a directed
22 verdict taking the evidence in the light most favorable to
23 the State, Ms. Delane Smiley testified that the laptop was
24 purchased five years ago--

25 THE COURT: For about \$1,300.00 dollars or \$1,200.00

1 and the TV's are about \$700. So right at \$2,000.00
2 dollars. The laptop is more than five years old. Mr.
3 Miller.

4 MR. MILLER: Your Honor, the testimony from Mr.
5 Smiley was the value of the items was \$2,200.00 dollars
6 and for the purposes of a directed verdict motion that
7 should be sufficient to submit the question to the jury as
8 to the value of the items that were stolen.

9 THE COURT: Mr. Hayes.

10 MR. HAYES: She actually had specifics though, Your
11 Honor, as to the value and when they were purchased. And
12 she was able to tell that the laptop was purchased five
13 years ago and for the purposes of the grand larceny the
14 value is not the replacement or the purchase value but the
15 value of the property at the current time.

16 THE COURT: I will take that under advisement. What
17 if I grant the motion for the directed verdict on the
18 value. Isn't there another grand larceny less than
19 \$2,000.00?

20 MR. MILLER: It would be just lessor included of
21 grand larceny, less than \$2,000.00, Your Honor. Your
22 Honor, what the defense is doing is putting Mr. Smiley's
23 testimony against Ms. Smiley's testimony and saying her's
24 is more credible. If you take it in the light most
25 favorable to the State then Mr. Smiley said without any

1 equivocation it was \$2,200.00 dollars worth of stuff that
2 had been stolen.

3 MR. HAYES: Your Honor, she was the one that claimed
4 she purchased the laptop.

5 THE COURT: I understand that. As in all cases you
6 have got a little bit of difference in the testimony. I
7 will charge the lessor included grand larceny. What is
8 the next one down.

9 MR. MILLER: It would just be petty larceny is less
10 than \$2,000.00.

11 THE COURT: Okay. I will do a lessor included.

12 MR. MILLER: Without any objection from the State,
13 Your Honor.

14 MR. HAYES: As to the burglary first, Your Honor, the
15 defense would make a motion for a directed verdict taking
16 the evidence most favorable to the State that a reasonable
17 jury could not possible conclude that Mr. Cave burglarized
18 this home based on a single fingerprint.

19 THE COURT: Well we have a lot of cases, cases that
20 you handed up to me yesterday. The Anderson case where
21 there was a single fingerprint on a burglary case. And I
22 seen a lot of fingerprint testimony over the years. And
23 this new power point presentation with the comparisons is
24 awfully compelling. From my review of it there is
25 obviously evidence in the record that if the jury believes

1 that it is his fingerprint. He wasn't suppose to be in
2 there and the victims don't know him and they could
3 reasonably conclude that he was the burglar. At this
4 stage of the game I have to be concerned not with the
5 weight of the evidence but the existence of the evidence.
6 Not only the power point presentation and the evidence in
7 the record but the testimony by Lieutenant Adams believed
8 by the jury it can certainly support a conviction.
9 Respectfully denied.

10 MR. HAYES: I will also like to add, they couldn't
11 add a date as to when the print was placed.

12 THE COURT: Respectfully denied. That all goes to
13 the weight of the evidence, not the existence of it. Tell
14 me about your defense, how many witnesses do you intend to
15 call?

16 MR. HAYES: The defense would rest, Your Honor.

17 THE COURT: Let me make sure Mr. Cave understands.
18 Mr. Cave, if you will stand and raise your right hand,
19 please.

20 ALBERT CAVE, JR., being
21 first duly sworn, testified as follows:

22 THE COURT: Mr. Cave, we have reached the stage of
23 the trial where obviously you can present a defense and
24 included in that presentation you have the right to take
25 the witness stand and testify about the facts in this

1 case. You also have the right to claim the protections
2 that are given to you or any defendant among the Fifth
3 Amendment of the Constitution of the United States which
4 basically says that no person shall be compelled in any
5 criminal case to be a witness against themselves. Which
6 means this, if you take the witness stand which you have a
7 right to do you will be subject to the same rules of
8 evidence that everyone else has, in other words you will
9 be subjected to cross-examination. I am informed that you
10 also have a prior record, one is more than ten years old
11 but one is within the ten years and it could be used
12 against you for impeachment purposes or to attack your
13 credibility if I determine it is more relevant than
14 prejudicial to you. If you decide not to testify like
15 your lawyer says you have made that decision, then I will
16 tell that jury that they cannot hold the fact that you did
17 not testify against you in any manner whatsoever. And I
18 would further tell them that you have the absolute right
19 to remain silent and I will further tell them that they
20 can't consider the fact that you did not testify during
21 their deliberations. It is a matter that cannot be
22 discussed by them at all when they decide your guilt or
23 innocence. Now, do you understand your rights to remain
24 silent and do you understand your right to testify?

25 MR. CAVE: Yes, sir.

1 THE COURT: And you will need to make a decision
2 whether you want to testify or don't want to testify. And
3 I assume you made that decision and do you need any
4 additional time to review it?

5 MR. CAVE: No, sir.

6 THE COURT: And I assume you do not want to testify?

7 MR. CAVE: No, sir.

8 THE COURT: Any questions you need to ask me about
9 that decision?

10 MR. CAVE: No, sir.

11 THE COURT: All right. So by not testifying, Ms.
12 Alves, you have got the last argument, correct?

13 MS. ALVES: Yes, sir.

14 THE COURT: Since you haven't put in any evidence in
15 you get the last argument. Is that correct, Mr. Miller?

16 MR. MILLER: Yes sir, Your Honor.

17 THE COURT: It is ten after 11:00. We will take
18 about a ten minute break. As far as the charge goes, we
19 have the standard charge, the burglary first charge that
20 y'all handed me yesterday dealing with the elements, two
21 prior burglaries, I will charge grand larceny, lessor
22 included offense of petty larceny or I might just say find
23 the defendant guilty or not guilty of the crime of grand
24 larceny and I will have a interrogatory, please state the
25 amount of goods or the value of the goods or I will do it

1 however you want to.

2 MR. MILLER: We will be at ease to just put larceny.

3 MS. ALVES: Put it at larceny over \$2,000.00 and
4 larceny less than \$2,000.00.

5 THE COURT: I will do that. We find the defendant
6 guilty of larceny over \$2,000.00 or under \$2,000.00 or not
7 guilty.

8 MS. ALVES: Yes, sir.

9 THE COURT: There are three checks.

10 MR. MILLER: That is fine, Your Honor.

11 THE COURT: There will be two verdict forms. We find
12 the defendant not guilty or guilty of burglary first
13 degree. We find the defendant guilty or not guilty of,
14 guilty of larceny over \$2,000.00, under \$2,000.00, not
15 guilty. We will take a break.

16 (Whereupon, a short break was taken.)

17 THE COURT: Is the State ready to proceed?

18 MR. MILLER: The State is ready, Your Honor.

19 THE COURT: Mr. Hayes?

20 MR. HAYES: Yes, sir.

21 THE COURT: Bring the jury in.

22 (Whereupon, the jury came into open court at
23 approximately 11:30 a.m.)

24 THE COURT: The State has completed their testimony
25 and the defendant is not going to offer any testimony so

1 we have concluded all of the testimony in the case. What
2 we have left are the final arguments of the lawyers.
3 Under our rules where the defendant does not put up any
4 evidence they go last in the argument so the State will
5 argue first followed by the defendant. Once they have
6 completed their arguments then I will charge and instruct
7 you on some general propositions of law and then the law
8 dealing with burglary first and grand larceny. Please
9 bear in mind that you have heard all of the testimony,
10 that is what you will consider the case on. That is what
11 you will determine what the true facts are. The lawyers
12 final arguments is not evidence in the case, obviously
13 their adversaries for each others particular side and they
14 will be arguing the evidence in the light most favorable
15 to their side but that is not evidence in the case, you
16 have already heard all of the evidence. But please pay
17 close attention and we will complete the arguments, I will
18 charge you and your lunch ought to be here about the time
19 if everything goes according to plan, by the time we
20 finish this and you can have the case and you can start
21 your deliberations. Mr. Miller.

22 MR. MILLER: Thank you, Your Honor, may it please the
23 Court, Mr. Hayes, Ms. Alves. Ladies and gentlemen of the
24 jury, I don't have any quotes from Colin Powell but this
25 case does bring to mind something that my father used to

1 tell me all of the time. When I went to law school I came
2 home after that first semester and I was ready to argue
3 the finer points of everything. It didn't matter what we
4 were talking about, I was going to take the contrary
5 review and I was going to try to prove that something was
6 or something wasn't. My father told me, just because you
7 have a law degree and just because we are paying all of
8 this money for you to go to law school doesn't mean you
9 don't have any common sense. And that is something that
10 is interesting to me because realistically this case is
11 about common sense. Common sense tells you Mr. Smiley and
12 Ms. Smiley and Ms. Allen, none of them know Albert Cave,
13 none of them has ever laid eyes on Albert Cave before they
14 saw him sitting here in this courtroom. But Albert Cave's
15 fingerprints are inside of the Smiley's home. Common
16 sense, only one way that Albert Cave's fingerprints got
17 inside the Smiley's home, because Albert Cave's
18 fingerprints were attached to his fingers, they were
19 attached to the rest of him and Albert Cave was inside the
20 Smiley's home. He was in their home when it got
21 burglarized. Common sense. What was taken. You heard
22 the testimony. The flat screen televisions, one 37 inch I
23 believe and one 32 and a laptop. Those televisions and
24 that laptop were valued at more than \$2,000.00 dollars
25 then that is the cutoff in our law, there is a cutoff

1 there. If is more than \$2,000.00 dollars it is one
2 charge, if it is less than \$2,000.00 dollars it is another
3 charge. But that is where the cutoff is is the \$2,000.00
4 dollars. And Mr. Smiley testified yesterday it was
5 \$2,200.00 dollars worth of stuff that got stolen. Okay.
6 But the value of the stuff that was stolen doesn't tell
7 you who did it. There has to be some other evidence of
8 who actually was the one that took it. And so when Ms.
9 Smiley calls the sheriff's department and Deputy Kostyk
10 comes out there, Deputy Kostyk from his testimony told you
11 what he did. And that had a lot of common sense to it.
12 You heard the same thing from Investigator Johnson and
13 Lieutenant Adams. He did exactly what one of the crime
14 scene guys would have done. Talked to occupants of the
15 home, find out from them where stuff has been disturbed,
16 work your way from the point of entry, suspected point of
17 entry through the house and try to process it. And Deputy
18 Kostyk is there with admittedly not a whole lot of
19 resources and Deputy Kostyk is looking for fingerprints
20 and he is not seeing any. You heard him testify, he
21 dusted several areas on the house, didn't find any
22 identifiable fingerprints anywhere else but Ms. Smiley
23 knew these papers had been moved. Ms. Smiley knew that
24 those papers had been taken off of her laptop and put into
25 that chair. And Deputy Kostyk knew that if he was going

1 to get a fingerprint off of those pieces of paper he
2 didn't have the equipment to do that. So what did he do.
3 He testified he used rubber gloves so he wouldn't leave
4 any of his own prints on the paper and he secured them in
5 an envelope, he wrote all of the information on the
6 envelope and he filled out the forensics request form and
7 he gives it to Deputy Roberts and Deputy Roberts goes and
8 turns it into evidence. And then Gerald Turner says,
9 okay, log in the evidence and keep it secure, nobody else
10 is putting fingerprints on that stuff, keep it secure and
11 get it to Investigator Johnson so he can see what is on
12 it. And you have heard all about the process of how they
13 pulled that fingerprint out, how they made that
14 fingerprint stand out so that they could compare it to the
15 known fingerprint images. And all of this talk about
16 AFIS, all this talk about how that works. Ladies and
17 gentlemen, the testimony leaves me to believe that it was
18 similar to Google. You tell Google what you are looking
19 for and Google comes back with a bunch of responses. How
20 do you figure out if Google has gotten the right responses
21 for you. You click on the link and when you click on the
22 link it takes you to a web page and it is either what you
23 want or it is not. If it is not you click on the next
24 link down. And in this case all of this information gets
25 submitted into evidence and it comes back with 30

1 possibilities and they go to the number one possibilities
2 and Investigator Johnson starts making those comparisons
3 between the known print of the defendant and that thumb
4 print that is on State's exhibit 4. And after he does all
5 of the things that he needs to do he says I think this is
6 a match. But the process doesn't end there. He has to
7 submit it to Lieutenant Adams who has to verify what he
8 does and how does he verify what he does. He goes through
9 and replicates the matching process. Investigator Johnson
10 said 36 points of comparison when I submitted it to AFIS,
11 36 points of minutiae. He looked at those 36 points.
12 Investigator or excuse me, Lieutenant Adams came up with
13 50, 50 points of comparison. Ladies and gentlemen, there
14 is no doubt, none whatsoever Albert Cave's thumb print is
15 on State's exhibit 4. So what do we know about State's
16 exhibit 4. Well the defense claims you don't know why
17 that fingerprint got put there, you don't. But you are
18 not checking your common sense at the metal detector
19 whenever you came up here and served on jury duty.
20 State's exhibit 4, top page, bottom page, the pages all
21 stacked up together like you would expect them to be
22 stacked up if they were in your house and you take four
23 prints right there and a thumb print right there. Pick
24 them up, set them down. Where did these pages come from.
25 If you want to just argue about something where did those

1 pages come from. Well maybe Mr. Cave was the person at
2 the paper mill who put the papers into the ream of papers
3 that Ms. Smiley later put into her printer and printed
4 them out. That is not reasonable. Maybe these papers
5 made it out of their house, went somewhere, Mr. Cave got
6 this fingerprint on them somewhere else and then Ms.
7 Smiley brought them back into the house but completely
8 forgot that she had ever taken these pages out of her
9 house. This is really, really bad luck that Mr. Cave's
10 fingerprints are on this paper. That is not reasonable.
11 Maybe Albert Cave is on the AD Scholarship Committee and
12 that is where he touched them at. Come on. The Judge is
13 going to talk to you about reasonable doubt and he is
14 going to tell you that reasonable doubt under our law is
15 proof that leaves you firmly convinced of the defendant's
16 guilt. And why. Because, ladies and gentlemen, although
17 it is the highest standard in our legal system we as the
18 State are not required and are not commanded to prove
19 something to you beyond any doubt because most often it
20 just can't be done. So we have to look at and we have to
21 require of you and we have to impress upon you that proof
22 beyond a reasonable doubt does not mean proof beyond any
23 conceivable way, there is just no way that this could have
24 happened any other way. It is that proof that leaves you
25 firmly convinced of the defendant's guilt. Albert Cave

1 was in their house and Albert Cave left his fingerprints
2 on these two pieces of paper. Thumb print on the top,
3 third finger, middle finger, sorry it was upside down,
4 third finger on the bottom. Matched by Investigator
5 Johnson, verified by Lieutenant Adams. I want you to
6 think back to all of the cross-examination questions that
7 were asked by the defense in this case. There has never
8 been a question asked of any member of law enforcement or
9 of the Smiley's or of their niece, not one question asked
10 that challenged their credibility. There were questions
11 that ask them to clarify some things that they said.
12 There were questions that ask them to explain some things
13 that they said. But nobody challenged their credibility
14 and credibility simply means believability. And the Judge
15 is going to tell you when he charges you that credibility
16 is something that you have to weigh as a juror when you
17 are deciding how much of a witnesses testimony you
18 believe. How much of that testimony you believe and how
19 much weight do you give to that. You do that by judging
20 their credibility. And when Mr. Smiley says \$2,200.00
21 worth of equipment was, electronic equipment was stolen
22 from his house that day and Ms. Smiley comes up and says
23 well, I think the total of the TV's was over \$700.00
24 dollars but I am not entirely sure, it was probably under
25 \$800.00 dollars. And I think that the laptop cost

1 \$1,200.00 dollars. Neither one of them, at least the
2 defense has not alleged that either one of them is not
3 being truthful. They are testifying as to what they know
4 and what they remember. But when it comes to Deputy
5 Kostyk, he is not challenged either on whether or not he
6 is being believable or he is being honest. Deputy Kostyk,
7 why didn't you take the shovel. I didn't think we would
8 get any identifiable prints off of the shovel.
9 Investigator Johnson, would you expect to get identifiable
10 prints off of a shovel. Not if it was an old shovel with
11 a wooden handle. They weren't in the room, I don't know
12 if you noticed this but they weren't in the room,
13 Investigator Johnson wasn't in here whenever Deputy Kostyk
14 was testifying. Lieutenant Adams wasn't in here when
15 either one of them were testifying. And yet their
16 testimony is remarkable somewhere all the way through.
17 Well, would you take the wooden shovel. I looked at the
18 wooden shovel to determine what kind of condition it was
19 in and then probably wouldn't expect to get any prints off
20 of it. Let me ask you something else. What does a wooden
21 shovel prove. The wooden shovel is outside the house.
22 Uncontradicted that the wooden shovel was outside the
23 house. Now the defense wants them to take the shovel and
24 the defense wants them to take all of these pictures and
25 the defense suggests that he could go to Walgreens or the

1 Circle K and go buy a camera so that he could take all of
2 these photographs. Ladies and gentlemen, this is a very
3 disturbing and sad fact but a lot of burglaries don't get
4 solved. That is just the way it is. Whenever you don't
5 have an eyewitness and you don't have video surveillance
6 very often burglaries go unsolved. And Investigator
7 Johnson and Lieutenant Adams and the other two people that
8 work under Lieutenant Adams, they don't go to every
9 burglary scene, they testified to that. They go to some
10 where they think there is going to be evidence that can be
11 collected. But what happened with Deputy Kostyk that day.
12 Deputy Kostyk told you, I got there, I looked in all of
13 these places, I didn't find any identifiable fingerprints.
14 So is he going to call his Lieutenant and tell his
15 Lieutenant, hey Lieutenant, you better send out the crime
16 scene guys because I haven't been able to find anything
17 here. Of course not. The one thing that he felt like
18 there was a really good chance he could get fingerprints
19 off of, Investigator Johnson said you don't develop those
20 prints in the field, you send them to the lab. So what
21 did he do, he took the best chance to recover evidence
22 that he had. He secured State's exhibit 4 and he sent
23 State's exhibit 4 to the lab. And fortunately,
24 fortunately for the Smiley's that evidence was there. The
25 defense wants a disposable camera from Walgreens. Ladies

1 and gentlemen, that picture tells a thousand words, that
2 picture is unique to that man. That picture tells you
3 that he was there better than any video, better than any
4 eyewitness because we have all seen surveillance footages
5 on television and we have all seen the websites in the
6 newspaper and they say, authorities are looking for these
7 people and you can't tell who they are. We have all heard
8 stories about eye witnesses who got involved. I was
9 absolutely convinced it was this guy but it turned out
10 later I was wrong. Ladies and gentlemen, this doesn't
11 lie, it doesn't have a dog in the fight. And as far as
12 pictures go, pictures that could have been taken by Deputy
13 Kostyk or pictures that could have been taken by Deputy
14 Roberts if she had only driven all the way back from North
15 Augusta to the Aiken County Sheriffs Office on Hampton
16 Avenue to go get a camera. This is better than any
17 picture they could have taken. Why didn't Deputy Kostyk
18 take the shovel. Why is Albert Cave's fingerprint on
19 these documents inside of the house. Why didn't Deputy
20 Kostyk take photographs. Why are Albert Cave's
21 fingerprints on these documents inside of the house.
22 Ladies and gentlemen, Albert Cave's fingerprints, no
23 matter what shortcomings the defense argues there are to
24 the investigation that was done, this is all the proof
25 that you need. This is proof beyond a reasonable doubt

1 that Albert Cave was inside of the home of the Smiley's.
2 This is it. Here is how you know he was in that home.
3 Because his fingerprints are on that piece of paper and
4 this isn't a piece of paper that was found in the kitchen.
5 This isn't a piece of paper that was found underneath the
6 kitchen. These are the pieces of paper that were found in
7 the chair in front of the desk where the laptop was taken
8 from. They are the pieces of paper that Ms. Smiley
9 testified were sitting on top of that laptop before that
10 laptop was taken. They were the pieces of paper that
11 Albert Cave picked up and moved so that he could steal
12 that laptop and those TV's. Let's talk about common sense
13 some more and reasonableness. Ladies and gentlemen,
14 reasonableness, Albert Cave got careless. He picks up a
15 shovel, he busted out not the bottom window, the top
16 window. Think about that for a second. He busted out the
17 top window so he could unlock the latches on the window
18 and raise the window up so he doesn't have to climb over
19 the glass go get into the house. He is going to do what
20 he can do whether it is just pulling his sleeves over his
21 hand, whether it is just using his arm and not using his
22 hand. He is going to do whatever he thinks he needs to do
23 to make sure he doesn't leave fingerprints right there
24 where everybody is going to look for fingerprints. By
25 that same token, because he is going out the door, he is

1 going to do whatever he thinks he needs to do not to leave
2 fingerprints on the door. Cover up his hand in some way.
3 He got careless because the one place he didn't realize
4 that they would look for fingerprints was on the one item
5 he picked up and left sitting there. And we heard
6 Investigator or Lieutenant Adams, I am sorry, we heard
7 Lieutenant Adams talk a good bit about what kind of
8 materials do you get fingerprints from and what kind of
9 materials do you not get fingerprints from. And
10 Investigator Johnson talked about the same type of thing.
11 You are looking for hard non-porous surfaces to get
12 fingerprints from. So if the bedroom is ransacked there
13 might not be anything in there. And, ladies and
14 gentlemen, that is another thing that we need to really
15 concentrate on. Nobody has testified that there were no
16 fingerprints. Deputy Kostyk said I was unable to find any
17 identifiable fingerprints. Lieutenant Adams testified
18 that you could touch stuff and you could move stuff around
19 and you could manipulate stuff without leaving an
20 identifiable fingerprint. It may be smudged to the point
21 that it is useless. You may not have made contact with
22 that item where it would transfer something that could be
23 compared, looked at, compared to another image. There is
24 lots of ways you wouldn't leave a fingerprint which is why
25 this is so significant. This is everything that they want

1 out of a fingerprint, 50 points of comparison Lieutenant
2 Adams testified to. Why would it leave such a good
3 looking print on that piece of paper. Ladies and
4 gentlemen, it is common sense. It is May in South
5 Carolina when you are burglarizing a house, your hands are
6 going to be sweaty. You are carrying TV's, you are
7 snatching up laptops, your hands are going to be sweaty,
8 you are going to leave a print on that porous paper
9 whenever you handle it. Ladies and gentlemen, when you go
10 back into the jury room and deliberate you are going to
11 have to answer a couple of questions and you have to
12 answer them unanimously. And the first question I submit
13 that you need to answer is does everybody agree this is
14 Albert Cave's fingerprint. And if everybody agrees this
15 is Albert Cave's fingerprint then common sense tells you
16 Albert Cave was inside the Smiley's house. Ms. Smiley,
17 Mr. Smiley and Ms. Allen all testified he had no business
18 in that house. Now you have got the, the defense is going
19 to say, well we don't know when that fingerprint got put
20 on there. Well Ms. Smiley testified she printed these
21 documents off of her computer at her home. These papers
22 had never left her home. So common sense and my
23 recollection is that Ms. Smiley said that she had done
24 that sometime in February and they have been there since
25 February. So common sense gives you two options. Option

1 number one is, on the day of the burglary Albert Cave
2 moved these papers and that is when his fingerprint got on
3 him or the other possibility that sometime in February or
4 March or April or the first day of May Albert Cave somehow
5 got into their home with anybody knowing about it, put his
6 fingerprints on this item and left without disturbing
7 anything. That is not realistic, that is completely
8 unbelievable. These documents put Albert Cave in the
9 house. The testimony of Deputy Kostyk and all of our
10 chain witnesses and Investigator Johnson and Lieutenant
11 Adams proved beyond a reasonable doubt that these are
12 Albert Cave's fingerprints. So what is reasonable, what
13 is common sense. That Albert Cave went into the house on
14 May the 2nd, sometime between the time that it was
15 burglarized or maybe before and put his fingerprints on
16 there but didn't do anything else in the house and left or
17 that Albert Cave touched those documents while he was
18 burglarizing the house, while he was stealing those two
19 televisions, those two flat screen televisions, while he
20 was stealing the laptop. Just because it can be argued
21 another way doesn't mean that argument makes any sense.
22 That is what my dad was trying to tell me. Just because
23 you can come up with some hypothesis out there of how this
24 set of circumstances happened doesn't mean it makes any
25 sense. Common sense, ladies and gentlemen. Albert Cave

1 went in the house, moved these papers, put his
2 fingerprints on those documents, left the house with the
3 TV's, left the house with the laptop. That is a burglary.
4 The Judge will tell you burglary in the first degree is
5 entering into a dwelling house, all that means is a place
6 where somebody leaves. Both Mr. and Ms. Smiley testified
7 they live there. Entering into a dwelling house without
8 consent, they both told you that we never told him he
9 could come in our house. With the intention to commit a
10 crime inside, and you can infer intent from other
11 circumstances. Well, the TV is missing and the laptop
12 missing, it is pretty good evidence that there was an
13 intent to steal what was inside. And the last thing the
14 Judge is going to tell you is and it is committed by a
15 person who has two prior convictions for burglary. That
16 is what that stipulation was, that was the last thing that
17 we talked about. It is an element that we have to prove
18 beyond a reasonable doubt that he has two prior
19 convictions for burglary. The defense agreed, we agreed,
20 every ones agrees he has got two prior convictions for
21 burglary. That is why it is a stipulation and that is
22 what makes some other types of burglaries into a burglary
23 first. It is a burglary of someones house by a person who
24 has two prior convictions for burglary. Ladies and
25 gentlemen, when you go back and you look at all of the

1 evidence in this case and you consider the facts through
2 the commons sense that you all have and you apply those
3 facts to the law as the Judge gives it to you there is
4 only one verdict as to the burglary first charge and that
5 is guilty. Albert Cave broke into the Smiley's house with
6 the intent to commit a crime and he has two prior
7 convictions for burglary. It is up to you to decide
8 whether or not during the course of that burglary he stole
9 more than \$2,000.00 dollars worth of stuff or less than
10 \$2,000.00 dollars worth of stuff. And quite frankly, I
11 will be the first to admit, there is contradictory
12 evidence on that. But you can decide from listening to
13 the witness who you felt was more confident and you can
14 decide which one of the witnesses you want to believe was
15 more confident than the value of the items. And you can
16 decide whether or not it was \$2,000.00 dollars or less
17 than \$2,000.00 dollars, more than \$2,000.00 dollars. But
18 ladies and getnlemen, common sense will not let you reach
19 a verdict other than guilty as to burglary in the first
20 degree because we all know that your fingerprints don't
21 get on a piece of paper without them being attached to
22 you. We know the only way those prints got on that page
23 was because of the fact that Albert Cave touched it. And
24 we know from Ms. Smiley that those papers, until that day
25 on May 2nd when Deputy Kostyk put them in this envelope

1 never left that house. I thank you for your time and I
2 appreciate the fact that you have a difficult decision
3 ahead of you. But when you apply common sense and you
4 look at all of the facts and you consider the evidence you
5 will find the defendant guilty. Thank you.

6 MR. HAYES: Ladies and gentlemen, at the beginning of
7 the trial I gave you two quotes from Colin Powell. One
8 was don't be afraid to challenge the pros even in their
9 own backyard. That is what you are here for. Y'all will
10 determine whether the evidence is sufficient or not. And
11 the second one was, keep looking below the surface of
12 appearance, don't shrink from it because you are afraid of
13 what you might find. Well, as the Solicitor is stating,
14 he is saying on appearance it looks like Mr. Cave went
15 into that house. Well, what I submit to you that the only
16 thing we do know beyond a reasonable doubt is that the
17 papers were touched. And I would ask you to look at the
18 orientation. Does it look like where somebody handed it
19 to somebody and they read it or does it look like where
20 somebody just slid it off of a computer to move it to
21 steal it and that is a decision you will have to make
22 about that. And backing up, let's talk about Mr. Ronnie
23 Smiley. He tells you there was trashcans underneath the
24 window. They could have been processed, we don't know if
25 they were. It could be photographs but there is none. He

1 also tells you about lots of glass outside of his house,
2 there is lots of glass outside of his house. Whether any
3 of it was touched, we don't know. He also tells you there
4 are two TV's, a 37" TV and a 32" TV as well as a laptop.
5 He gave us just a ballpark one sum of \$2,200.00 dollars.
6 But asked specifically about the values he really couldn't
7 tell me. When asked specifically about the laptop he said
8 it was his wife's, he really didn't know. Ms. Smiley,
9 when she got on the stand then told you she purchased this
10 laptop at \$1,200.00 dollars or thereabouts more than five
11 years ago or five years ago. When asked about the TV's
12 she says specifically \$700.00 dollars but less than
13 \$800.00 dollars. And she had receipts from Sam's Club.
14 But I also asked her the question as to these documents,
15 where did they come from. You remember what she said, the
16 printer. And she was very adamant in February, very
17 adamant. I also asked her, did you create them. Yes, she
18 created them. I could see that on the first one, she
19 created it. But look at the bottom corner, it says it was
20 updated on January 11th, she was very adamant though that
21 she printed it in February. Look at this second point -
22 Exam one. Notice of consent for blood, urine, saliva
23 which may include aids virus, HIV. This looks like a
24 corporate waiver for some kind of test. I highly doubt
25 that she created it. Maybe she was mistaken as to my

1 question but she was very adamant when I asked her more
2 than once. Then I asked her about, well, why did you
3 create it, why did you print it. Well she printed
4 numerous to take to a meeting. Okay. Why would you print
5 a document and leave one at the house when you are making
6 numerous copies to take to this meeting. I don't know.
7 And I will argue that the fingerprints are oriented on the
8 paperwork is as if somebody had picked it up and looked it
9 over and read it. There is no testimony as to this. But
10 could there have been in a conference, could they have
11 when she got back, taken some that she had in her folder
12 out and switched them out not knowing. She also told us
13 about an EKG machine that she had in the office that was
14 found in the hallway, in the living room. Obviously it
15 had been moved. Deputy Kostyk got up on the stand and
16 started telling us about how he goes through a house and
17 taken mental notes and a walk through as to what has been
18 disturbed. Then afterwards he comes back out, starts
19 doing paperwork and then goes back in the home with the
20 victims and starts analyzing and deciding whether or not
21 he was going to test something or not. How do you
22 determine what you are going to test. What if the victim
23 tells me it was moved, what if the victim tells me it was
24 disturbed. When I asked him about the photographs, I
25 didn't have a department issued camera. Well, cell phone,

1 he could bother to use his personal cell phone, too much
2 to download a photograph off of your cell phone, erase the
3 memory on your cell phone and leave it at the data base at
4 the sheriffs department. Too much to ask for them to
5 bring me one to preserve what he saw, to preserve where he
6 found items. He also, asked him about the testing, the
7 fingerprint dust. He had a little brush, he was aware of
8 other methods, couldn't name any. Also Deputy Roberts
9 came and I asked her, do you have anything. Yes, I have a
10 little kit. She said she could use her camera. She
11 didn't know how to download it but I am certain she could
12 with help. Deputy Kostyk also said he was an investigator
13 or detective in Pittsburg for eight years. I think that
14 he would know the value of a photograph, preserving a
15 crime scene. And he did five years after that in
16 Orangeburg, South Carolina. And he had another two years
17 here in Aiken. When I asked him about how do you get an
18 investigator there he really didn't answer. He didn't
19 really know. He said well, they hear it over the radio
20 and they send somebody sometimes. I asked Investigator
21 Johnson and Lieutenant Adams, how do you get to a crime
22 scene. I am usually requested. By who, deputy, shift
23 patrol, superiors. When I asked Chris Johnson too. Where
24 do you go to, what kind of crime scenes. Majority of them
25 are burglaries. And I asked him, what do you decide when

1 you are there looking at it what you need to collect.
2 What they tell me was moved and then I look at it and
3 start collecting. If it is something that I can get a
4 print off of I do it there. If it is something that I
5 cannot process on the scene I will take it back with me to
6 the lab because there are other numerous ways to collect a
7 fingerprint. And he also stated, when you dust often it
8 does not necessarily mean that the fingerprint is going to
9 arise to the human eye. And there are sometimes other
10 methods that you have to use to develop this fingerprint.
11 It is like a photograph, you have to develop it, you can't
12 see it with the naked eye until it is developed and it is
13 brought up. Mr. Turner tells you that he is the gate
14 keeper of the evidence. Evidence is checked into him and
15 then has to be checked out. We also heard that Lieutenant
16 Adams had to come back to him to get a signature on the
17 report as to the fingerprint on the 5th because he had
18 picked it up from Chris Johnson. And I asked, why are you
19 doing that. Chris Johnson is directly supervised by
20 Lieutenant Clay Adams, he has to check his work. When
21 asked, did you know who he suspected. Yes. So he has
22 taken a print that he knows, a conclusion he knows and is
23 checking it. And I asked him about, well, how many other
24 ones were looked at. None, just the first one. But you
25 are telling me a computer kicked back 29 other

1 possibilities, out of the 30 you just picked the first one
2 and bam, we got absolute answer right then. I also asked
3 him, how many points of minutiae. And they contradict
4 each other on that a little bit. One says 50 to 60, one
5 says 60 to 80. Lieutenant Clay Adams says 60 to 80.
6 Chris Johnson says 50 to 60.

7 THE COURT: Hold on a second. Are you okay.

8 JUROR: I will be in a minute.

9 (Whereupon, a juror takes a short break.)

10 THE COURT: You may proceed.

11 MR. HAYES: When I asked Lieutenant Adams and Johnson
12 as to the number of points they differ a little bit. Now
13 Chris Johnson is telling you you have got 36 points out of
14 a possible of 50 to 60 or 60 to 80. When I asked
15 Lieutenant Adams he says he got 50. But the ultimate
16 decision is yours. When I asked Investigator Johnson
17 about it, at one point of minutiae is different, is it a
18 one-hundred percent match. His answer was no. Lieutenant
19 Adams contradicted that a little bit stating there could
20 be distortion or something other in nature as to the
21 print. That is a decision for you. I asked both of them
22 specifically can you tell me when did it get there. No
23 was the answer. I asked them how long can it survive.
24 They were very unspecific answers as to how long it could
25 survive. That would depend on a multiple of situations.

1 I am not asking you to check your common sense as the
2 Solicitor suggest. What I suggest is this, there was a
3 burglary, the whole scene was processed. The only thing
4 that is going to have a print is a piece of paper. Now
5 there was a laptop recovered by Richland County and it was
6 returned back to the Smiley's. Why wasn't it gone and
7 picked up, why was it not tested. If the prints can
8 survive for any period of time wouldn't there possibly be
9 prints from the perpetrator on this laptop that we don't
10 have. I would suggest this, how does one man rampage the
11 house, just destroy it from what the testimony sounded
12 like and carrying out a 37" TV, a 32" TV and a laptop and
13 manage to leave an EKG machine right there at your feet at
14 the front door. We don't even know if the front door was
15 even processed. And there was no other prints found in
16 the house. So why was somebody who was burglarizing the
17 house take their glove off to touch a piece of paper that
18 is irrelevant that has absolutely no value. And it is the
19 way it is being held here I submit that when it was
20 touched it was being read, not snatched around and thrown
21 or moved. If you were going to take a piece of paper off
22 of something and you were going to steal wouldn't you just
23 swipe it out of the way and take it or would you carefully
24 place it over somewhere. That doesn't make sense to me.
25 We heard a lot of testimony about this thing called AFIS,

1 this computer that has two million prints, cards in it
2 from various people for various reasons. There was 30
3 returns. Only one of those returns was identified and
4 looked at. Is that sufficient. The Solicitor talked
5 about a Google search, you type it in and you get all of
6 these returns and you check and start reading, what are
7 you looking for. When you do a Google search do you stop
8 it at the first link. You might look at it and say, okay,
9 this looks relevant but let me see what the other couple
10 are. We know the first one is always advertising or has
11 some kind of payment to Google to be placed at the top.
12 Why wasn't there any further move into it. Why should we
13 settle on 50 or 36, why aren't we after the full 80. We
14 are trying to determine whether or not somebody is guilty
15 of a crime that has got the highest burden in our legal
16 system. Are we satisfied with a percentage. Some
17 percentages are failing. Some are average and some are
18 perfect. That is your scale. You have to determine on
19 that scale where does this fall. If he found 50 why
20 couldn't he do a few more and find out whether or not all
21 points of minutiae matched. Why did Chris Johnson stop at
22 36. Why does AFIS have a minimum of 8. If you add more
23 points does it narrow the search for AFIS, I don't know.
24 So could the other 30 people, could there have been one
25 that could have been identical. Could there be one point

1 of minutiae that doesn't match. We talked about the
2 value. The Solicitor says there are issues there and
3 frankly that is a decision that you have to make. It is a
4 question of fact. Mr. Smiley testified \$2,000.00 dollars,
5 just a round ballpark price. I asked Ms. Smiley. Ms.
6 Smiley was very specific, very firm as in what the price
7 of each was. And the value of the laptop was based on a
8 price that she paid five years ago. I am sure it has
9 fallen in value being that a computer that was produced
10 last year within a few weeks is already outdated and the
11 price has dropped. You have to determine what the value
12 is. When I asked her about the TV's, she was very
13 specific. Somewhere around \$700.00, maybe a little more
14 but not more than \$800.00. The value was less than
15 \$2,000.00 dollars because we add it that way. You have
16 probably one of the hardest task in a trial in front of
17 you and it is to determine whether or not, what facts to
18 believe. As the Solicitor stated and the Judge is going
19 to tell you you can believe all, you can believe some, you
20 can believe portions of each witnesses testimony. After
21 you make that determination you then weigh it as to what
22 those facts come to. You ultimately are the producers of
23 the story as to how it becomes together. Me and the
24 Solicitor, we are the story tellers, the Judge is the
25 director. Y'all are going to be in the editing room in

1 making this decision. I asked you this, is it sufficient
2 to have a couple of smudges on the back of a piece of
3 paper to convict somebody of burglary in the first degree.
4 If you believe or you have a hesitation to act on your
5 feelings then it is reasonable doubt and you must find in
6 favor of the defendant. If you don't your job then would
7 be to come back with a guilty. Thank you.

8 THE COURT: Mr. Foreman and ladies and gentlemen, my
9 instructions are about 10 to 12 minutes. Is everybody
10 okay, do you need a break.

11 (No response.)

12 THE COURT: Mr. Foreman and ladies and gentlemen, the
13 first part of the charge, when I say charge that simply
14 means instructions deals with general propositions of law
15 that I charge all over the State in criminal cases. The
16 second part of the charge will be specific as to the two
17 indictments in this case. Let me remind you once again
18 that the indictments charges the defendant with two
19 offenses, burglary in the first degree and grand larceny
20 of goods between the values of \$2,000.00 and \$10,000.00
21 dollars. I remind you that the fact that the defendant
22 was arrested, charged and indicted is not evidence in this
23 case and it cannot be considered by you as evidence in the
24 case and cannot be considered as guilt in the case nor
25 does it create any presumption or inference of guilt. The

1 indictments are simply the formal documents by way the
2 defendant comes into the courtroom.

3 We have two indictments in this case as I said,
4 burglary first and grand larceny. Each indictment
5 contains a separate and distinct offense and you must
6 decide each indictment separately on the evidence and the
7 law applicable to it uninfluenced by your decision as to
8 any other indictment. So you will be asked to consider
9 both indictments in the case. As I said, the defendant
10 has plead not guilty to both indictments and that plea
11 puts the burden on the State of South Carolina to prove
12 the defendant's guilt beyond a reasonable doubt. A person
13 charged with committing a criminal offense in South
14 Carolina is never, ever required to prove himself
15 innocent. I charge and instruct you it is an important
16 constitutional rule of law that a defendant in a criminal
17 trial no matter what the seriousness of the crime may be
18 will always be presumed innocent of the crimes which he
19 was indicted unless guilt has been proven by evidence
20 satisfying you of that guilt beyond a reasonable doubt.
21 The presumption of innocence does not end when you begin
22 your deliberations but it stays with the defendant
23 throughout the trial until you reach a verdict of guilt
24 based on the evidence satisfying you of that guilt beyond
25 a reasonable doubt. The presumption of innocence is not a

1 mere legal theory and it is not just a legal phrase. It
2 is a substantial constitutional right to which every
3 defendant is entitled unless you the jury are satisfied
4 from the evidence of the defendant's guilt beyond a
5 reasonable doubt. Reasonable doubt has been defined by
6 our courts, rather simply it says a reasonable doubt is
7 the kind of doubt that would cause a reasonable person to
8 hesitate to act. A reasonable doubt is the kind of doubt
9 that would cause a reasonable person to hesitate to act.
10 And I described what reasonable doubt was at the beginning
11 of the case by illustrating the scales of justice. Proof
12 beyond a reasonable doubt and it has also been said it is
13 proof that leaves you firmly convinced of the defendant's
14 guilt. There are very few things in this world that we
15 know with absolute certainty and in criminal cases the law
16 does not require proof that overcomes every possible
17 doubt. If based on your consideration of the evidence you
18 are firmly convinced that the defendant is guilty of the
19 crimes charged you must find the defendant guilty. If on
20 the other hand you think there is a real possibility that
21 the defendant is not guilty you must give him the benefit
22 of the doubt and find him not guilty.

23 I remind you that during the trial of this case you
24 and I have had certain duties to perform. As the trial
25 Judge it is my responsibility to rule on the admissibility

1 of evidence and it is also my duty to charge you on the
2 law in the case. I am or my position makes me the Judge
3 of the law in the case and you must accept the law as I
4 give it to you. But like importance, you are the judges
5 of the facts in the case. You determine what the true
6 facts are in the case. So if at any time during the trial
7 of this case I have yawned or stretched or rolled my eyes
8 or did something that you thought I may have some opinion
9 about the facts please disregard that. The law does not
10 allow me to have any opinion about the facts. You are the
11 sole finders of the facts in the case. Your job is to
12 find what the true facts are and apply it to the law as I
13 give it to you and at that time you will be in a position
14 to render a true and just verdict.

15 Because you are the finders of the facts you
16 necessarily must determine the credibility of the
17 witnesses who have testified in this case. Credibility
18 means believability. It becomes your duty as jurors to
19 analyze and evaluate the evidence and determine which
20 evidence convinces you of its truth. In determining the
21 believability or credibility of witnesses who have
22 testified in this case you may believe one witness over
23 several witnesses. You may believe several witnesses over
24 one witness. You can believe a part of what a witness
25 says and disregard the other part. You can believe

1 everything a witness says or you can disregard everything
2 that a witness says. You may consider whether the witness
3 has exhibited to you any interest, bias, prejudice, or
4 other motive in the case. You may also consider the
5 appearance and manner of a witness while on the witness
6 stand.

7 Ladies and gentlemen, I instruct you and charge you
8 and emphasize that the fact the defendant did not testify
9 in this case is not a factor to be considered by you in
10 any way in your deliberations and in your consideration on
11 the question of the guilt or innocence of the defendant.
12 It must not be considered by you in any manner whatsoever.
13 A defendant has the constitutional right to remain silent.
14 And the assertion of that constitutional right must not be
15 considered by you in your deliberations. I repeat, under
16 your oath you are to draw no conclusion whatsoever from
17 the fact that the defendant in this case did not testify.
18 The fact that he did not testify should not be discussed
19 at all in the jury room. The burden of proof, as I have
20 stated to you is on the State. The defendant is not
21 required to prove his innocence. The burden of proof
22 remains on the State to prove his guilt beyond a
23 reasonable doubt.

24 Let's turn now to the charges that are set forth in
25 the indictment. In the first indictment I will talk about

1 he is charged with burglary in the first degree. That is
2 set out in our code of laws in section 16-11-0311. The
3 defendant is charged with first degree burglary. The
4 State must first prove beyond a reasonable doubt that the
5 defendant entered a dwelling without consent, must prove
6 beyond a reasonable doubt that the defendant entered a
7 dwelling without consent. A dwelling is any building or
8 portion of a building in which a person ordinarily sleeps.
9 A building is a dwelling even if the residents are
10 temporarily absent from the building. In order to prove
11 that the defendant entered the dwelling the State does not
12 have to show that the defendant's entire body entered the
13 dwelling, the smallest entry is sufficient. It may be any
14 part of the body such as a hand, foot or even an
15 instrument. In addition, the State does not have to prove
16 that force was used to gain entry. So the first thing
17 they have to prove beyond a reasonable doubt is that he
18 entered a dwelling. Then the State must prove beyond a
19 reasonable doubt that the defendant intended to commit a
20 crime, either a felony or a misdemeanor at the time of the
21 entry. The mere entry into a dwelling without consent is
22 not a burglary. If the intent to commit a crime is formed
23 after the entry, it is not burglary. On the other hand,
24 if the defendant intended to commit a crime at the time of
25 the entry it is a burglary even if the intent was

1 abandoned after the entry. It does not matter that the
2 intended crime was not completed. Intent may be shown by
3 acts and conduct of the defendant and other circumstances
4 from which you may naturally and reasonably infer intent.
5 And finally the State must prove to you beyond a
6 reasonable doubt that the defendant has a prior record of
7 two or more convictions for burglary. In this case the
8 State and the defense have stipulated or agreed that the
9 defendant has two prior convictions for burglary. Now,
10 notwithstanding the fact that they have stipulated that he
11 has two prior offenses for burglary, the stipulation
12 concerning these prior offenses committed by the defendant
13 was not offered to prove the defendant has a bad character
14 or to prove the defendant committed the burglary on this
15 occasion. The prior convictions may be considered by you
16 only for the purpose of determining whether or not it
17 satisfies that element of the offense that makes it first
18 degree burglary if you have entered a dwelling without
19 consent to commit a crime and you have two prior
20 convictions for burglary.

21 Before you can even consider the evidence of the
22 defendant's prior burglary convictions you must first find
23 the State has proved beyond a reasonable doubt that a
24 burglary was committed by the defendant. If you find
25 beyond a reasonable doubt that the burglary was committed

1 and the defendant has two prior convictions for burglary,
2 prior convictions would make the burglary first degree
3 burglary.

4 The other offense that is charged is grand larceny
5 and that is simply stealing. The State must prove beyond
6 a reasonable doubt that the defendant took and carried
7 away property of another against the will or without the
8 consent of the person. The slightest removal of the
9 property or the complete possession of the property even
10 for an instance by the defendant is enough to show a
11 taking and a carrying away of the property. The State
12 must also prove beyond a reasonable doubt that the
13 defendant intended to permanently deprive the owner of the
14 property. Under our law we have several degrees of
15 larceny. In this case you will be asked to, if you find
16 him guilty of stealing of grand larceny you will have to
17 make a determination as to the value of the goods taken.
18 \$2,000.00 dollars is the cutoff line. You will have to
19 find whether the goods were worth more than \$2,000.00 or
20 less than \$2,000.00.

21 Mr. Foreman and ladies and gentlemen, your verdict
22 obviously has to be unanimous. You have no friends to
23 reward or enemies to punish. You want to base your
24 verdict simply on the evidence that you have heard today
25 determining what evidence is true, applying it to the law

1 as I have given it to you so you will be in a position to
2 render a true and just verdict. You will be asked to
3 render a verdict as to each indictment. I have a verdict
4 form. This is the one on burglary in the first degree,
5 very simple. You either find him not guilty or guilty.
6 Obviously if you find him not guilty then he couldn't have
7 taken anything out of the house. But if you find him
8 guilt of burglary then you would obviously look at the
9 grand larceny charge and then the grand larceny charge you
10 find whether or not he is guilty or not guilty of grand
11 larceny and then you have to decide whether or not it is
12 \$2,000.00 dollars or more. If you think it is less than
13 \$2,000.00 then you would go to the lesser included which
14 means the value of the goods was less than \$2,000.00, not
15 guilty or guilty on either of those. Your food should be
16 back there. We can do one of two things. You can go back
17 and eat your lunch and not deliberate, you can go back and
18 deliberate while you eat. That is entirely up to y'all.
19 I will let you go back to the jury room in just a second.
20 I am going to ask you not to start deliberating quite yet.
21 I have to ask the lawyers if I have left anything out and
22 then I have to gather the exhibits. That shouldn't take
23 but about two minutes. Once that is done the bailiff will
24 bring back the verdict forms and the exhibits. If during
25 your deliberations you have any questions about anything

1 please write it out on a piece of paper, knock on the door
2 and one of the bailiffs will bring it to me. Sometimes I
3 can answer it and sometimes I can't. I will send you back
4 whatever is proper. So at this time I am going to let you
5 go back to the room, you can start eating but don't
6 deliberate until I send all of this back. Go with Mr.
7 Whittle.

8 (Whereupon, the jury was excused from open court.)

9 THE COURT: Any exceptions, additions or deletions by
10 the State?

11 MR. MILLER: Nothing from the State, Your Honor.

12 THE COURT: By the defendant?

13 MR. HAYES: No, sir.

14 THE COURT: Please come agree upon the exhibits.

15 (Whereupon, the court reporter and attorneys go over
16 exhibits.)

17 THE COURT: The stipulation is a court exhibit so we
18 will keep it up here.

19 (Whereupon, Court's Exhibit 1 was marked for
20 identification only.)

21 THE COURT: Let the record reflect that both the
22 State and the defense have reviewed the exhibits and all
23 are in order. The bailiff is turning it over to the jury
24 for deliberations at 12:41. We will stand at ease.

25 (Whereupon, the jury starts deliberations at 12:41

1 p.m.)

2 THE COURT: Bring the jury in.

3 (Whereupon, the jury came into open court at
4 approximately 2:02 p.m. with a verdict.)

5 THE COURT: Let the record reflect that we have the
6 defendant present and all of the people are present. Mr.
7 Foreman, have y'all reached a verdict.

8 MR. FOREMAN: We have, Your Honor.

9 THE COURT: If you will hand it to the bailiff,
10 please. Madam Clerk, if you will publish it.

11 CLERK OF COURT: Your Honor, we have the State of
12 South Carolina, County of Aiken versus Albert James Cave,
13 Jr. Indictment number 2011-GS-02-01031, as to the offense
14 of burglary in the first degree we find the defendant
15 guilty. We unanimously agree on August 23rd, 2011,
16 Foreperson, Gil Greytak.

17 Your Honor, we have the State of South Carolina,
18 County of Aiken versus Albert James Cave, Jr. Indictment
19 number 2011-GS-02-01032, as to the offense of grand
20 larceny of goods valued at more than \$2,000.00 dollars.
21 We, the jury, find the defendant not guilty.

22 The verdict as to grand larceny of goods valued at
23 more than--

24 THE COURT: Less than.

25 CLERK OF COURT: Okay. As to the lessor included--

1 THE COURT: Let me hold it. Grand larceny of goods
2 valued at less than \$2,000.00.

3 CLERK OF COURT: Less than \$2,000.00. We the jury
4 find the defendant guilty. We unanimously agree August
5 23rd, 2011. Signed by the Foreperson, Gil Greytak.

6 THE COURT: Anything for the jury before I dismiss
7 them?

8 MR. HAYES: We would like them polled, Your Honor.

9 MR. MILLER: Nothing from the State, Your Honor.

10 THE COURT: I am going to ask you a question, I will
11 call each of your names. The question is this, is this
12 your verdict and is it still your verdict. Kenneth
13 Parkman, is this your verdict and is it still your
14 verdict?

15 JUROR: Yes, sir.

16 THE COURT: Ronald D. Staggs, is this your verdict
17 and is it still your verdict?

18 JUROR: Yes.

19 THE COURT: Marcus A. Schoultz, is this your verdict
20 and is it still your verdict?

21 JUROR: Yes, sir.

22 THE COURT: Julia D. Jordan, is this your verdict and
23 is it still your verdict?

24 JUROR: Yes, sir.

25 THE COURT: Peter E. Burrows, is this your verdict

1 and is it still your verdict?

2 JUROR: Yes, sir.

3 THE COURT: Marites R. Fonte, is this your verdict
4 and is it still your verdict?

5 Juror: Yes, sir.

6 THE COURT: Gil G. Greytak, is this your verdict and
7 is it still your verdict?

8 JUROR: Yes it is, Your Honor.

9 THE COURT: Betty J. Smith, is this your verdict and
10 is it still your verdict.

11 JUROR: Yes.

12 THE COURT: Becky S. Brown, is this your verdict and
13 is it still your verdict?

14 JUROR: Yes, it is.

15 THE COURT: Jennifer H. Bice, is this your verdict
16 and is it still your verdict?

17 JUROR: Yes, sir.

18 THE COURT: Helen K. Williamson, is this your verdict
19 and is it still your verdict?

20 JUROR: Yes, sir.

21 THE COURT: Joanne Jones, is this your verdict and is
22 it still your verdict?

23 JUROR: Yes, sir.

24 THE COURT: Thank you. Let the record reflect that
25 the jury has been polled. They all answered

1 affirmatively. Anything else for the jury before I
2 dismiss them?

3 MR. HAYES: No, sir.

4 THE COURT: Mr. Foreman and ladies and gentlemen, I
5 want to thank you, y'all have paid wonderful attention and
6 you have really performed your civic duty. It is not easy
7 sitting in this type of situation but all you have got to
8 do is turn on the TV tonight and look at what is going on
9 in Libya and other places and how they resolve their
10 disputes. We run our country under the rule of law and
11 that is the way it should be done. I appreciate all of
12 y'all participating in the judicial system. I don't know,
13 we have got another jury starting the other case at 2:00
14 o'clock. They are trying a civil case over in another
15 courtroom. I am not sure if we will have anything else.

16 MR. MILLER: Nothing from general sessions, Your
17 Honor.

18 THE COURT: I am not sure if they have anything left
19 on the civil side. I am going to ask you to call back
20 again tonight after 6:00. I doubt there will be anything
21 else but I will have to make sure. Thank you on behalf of
22 the citizens of Aiken and the judiciary. Thank you. You
23 are free to go out this door. Everybody else remain
24 seated.

25 (Whereupon, the jury was excused from open court at

1 2:10 p.m.)

2 THE COURT: We will sentence late this afternoon. I
3 just got a handful of stuff right now.

4 MR. HAYES: I would like to renew you my directed
5 verdict motion and also a motion for a new trial.

6 THE COURT: Why don't you do this, give you a little
7 time to think about it and when we come back and before
8 sentencing you can do all of that.

9 (Whereupon, there is a break in the case, the
10 sentencing will be held at 4:15 p.m.)

11 THE COURT: We are ready to go back on the record of
12 the State versus Albert James Cave, Jr. Mr. Cave, the
13 jury has found you guilty of burglary in the first degree
14 and that carries a minimum of 15 years to life. It is
15 classified as violent and most serious. And I assume this
16 is your second strike now. Is that correct, Mr. Miller?

17 MR. MILLER: Third, Your Honor, I believe the other
18 burglary was a non-violent if I remember correctly for the
19 record.

20 THE COURT: The lawyer can explain to you what
21 serious or most serious and violent mean. It also
22 convicted you on what we call petty larceny, it is a
23 larceny less than \$2,000.00. It carries up to 30 days.
24 Mr. Miller, tell me about his record please and anything
25 else the State wants to say.

1 MR. MILLER: Your Honor, Mr. Cave was convicted of
2 burglary in the third degree in 1986, he had two forgery
3 convictions in 1990, a forgery conviction in 1992, a
4 forgery conviction, another forgery conviction in 1992,
5 two forgeries and a resisting arrest in 1993, he had a
6 possession of cocaine in 2001, a burglary in the second
7 degree in 2004; another forgery, excuse me, four counts of
8 forgery in 2004, and a possession marijuana second offense
9 and resisting arrest from 2008. Your Honor, we have
10 additional burglary first charges pending against Mr.
11 Cave. Actually we have another fingerprint case pending
12 against him now. I will be meeting with the Solicitor
13 later on this week or after the term of court for us to
14 determine whether or not we intend to notice him for life
15 without parole and try him on one of those additional
16 burglary cases. In all candor, Your Honor, I think that
17 the other burglary cases are actually even stronger than
18 this one. And in one of those cases they did have the
19 crime scene unit go out and take photographs and do the
20 full blown investigation at the scene. Your Honor,
21 present in the courtroom are Mr. and Ms. Smiley who have
22 been here throughout the trial. The Court has heard from
23 them and they didn't feel like they needed to say anything
24 else at this time except they did point out something to
25 me during the course of getting ready for this trial, that

1 this was the fifth time their home had been burglarized in
2 the 20 plus years that they have lived there and this is
3 the first time that somebody has ever actually been caught
4 and prosecuted for breaking into their home. They have
5 been very cooperative with our office and they echo the
6 sentiments of some of the, expressed by some of the jurors
7 as they were leaving after the verdict was announced that
8 they want to see justice done in this case. And it is
9 apparent from the State's perspective that Mr. Cave is not
10 going to stay out of peoples houses so Mr. Cave needs to
11 stay away from peoples houses and be put somewhere where
12 he cannot get to peoples houses. And the State would
13 accordingly ask the Court to sentence him in light of his
14 record, in light of his conviction on this date to an
15 appropriate sentence in the Department of Corrections.

16 THE COURT: Mr. Cave, you want to sign the sentence
17 sheet or do you choose not to?

18 MR. HAYES: Judge I would like to also, at this time
19 while we are on the record. I would like to renew the
20 motion for a directed verdict for all the previous reasons
21 stated while we were in trial. I also would like to make
22 a motion for a new trial based on the fact that the
23 testimony from the AFIS results in accordance with
24 Anderson which is a 2009 case and Bullcoming which is a
25 six month old case from the Supreme Court was more

1 prejudicial that South Carolina could give more
2 constitutional protection to its citizens. However I
3 don't believe that South Carolina can actually take away
4 constitutional protection that would have been afforded
5 under Bullcoming.

6 THE COURT: Bullcoming was a breathalyzer test.

7 MR. HAYES: Yes, sir. The statements in between the
8 two is that Bullcoming wasn't truly about the breathalyzer
9 or a DUI. It was about the results that were obtained
10 from a machine and the person who entered the actual data
11 into the machine was not present to testify as to the
12 results that were obtained to it.

13 THE COURT: Suggestion in order to use the AFIS
14 system that I would require the State to bring in the
15 people who did the original, fingerprints that were
16 originally entered into AFIS?

17 MR. HAYES: That which was addressed under Anderson
18 and of course that is not an issue or having a person who
19 at SLED can testify how they had come about receiving and
20 entering into the actual AFIS program, the fingerprints.
21 And that was also, I believe one of the issues that was
22 addressed in Anderson and in Anderson they also had the
23 SLED agent present who testified to that process.

24 THE COURT: I find the investigator covered it all in
25 his testimony. It is simply entered into a computer

1 system when anybody is arrested and then the system takes
2 over, the program takes over and they send back 30 closest
3 matches and then the investigator does the actual matching
4 or the actual identification confirmed by the detective
5 and confirmed by the lieutenant in this case, Clay Adams.
6 I don't know how much more protection you can get.

7 MR. HAYES: And in Bullcoming and under Crawford
8 stated, it wasn't about the reliability, it was about
9 protection afforded under the Sixth Amendment. They are
10 not saying that the credibility was at an issue, it is the
11 confrontation issue.

12 THE COURT: I think you have protected your client on
13 the record on that issue and I stand by my rule that was
14 made during the trial of the case and I respectfully deny
15 your motion for a new trial and I find that obviously it
16 was a jury issue as to whether or not this man committed
17 the burglary. I mean the fingerprint to me, you could
18 have taken a picture of my face and another picture of my
19 face and put them right together and that is how those
20 fingerprints were to me, they were an absolute match when
21 I looked at them and I just think the evidence is
22 overwhelming that he was in that house and he wasn't
23 suppose to be at the time all of these items were missing.
24 It is a classic case of proving the case by fingerprint.

25 MR. HAYES: Yes, sir. I would also like to add for

1 the record that the testimony of one expert following a
2 subsequent expert was bolstering of expert witnesses and
3 all things taken in conjunction were, there was only one
4 fingerprint and all of it taken into conjunction would
5 have bolstered the State's evidence. And that would be
6 the grounds for my motion.

7 THE COURT: It might have been a tad cumulative but I
8 think the detective, strike that, I think the lieutenant's
9 testimony was different even though they came to the same
10 result. I mean, he explained part of how he came about
11 his opinion and demonstrated it and I don't find it to be
12 cumulative nor bolstering. I thought it was tried as
13 efficiently as could be done and I think both of the
14 testimonies were needed and both witnesses were needed.
15 Respectfully denied.

16 MR. HAYES: Yes, sir. Your Honor, Mr. Cave is 42
17 years of age. He is a lifelong resident of Aiken County,
18 he tells me he was born and raised here. Right before his
19 arrest he tells me he was working for an Anthony Concrete
20 and Finishing and that he had been there about a week.
21 Prior to that his work history is all labor, brick mason,
22 roofing. He also was a cook at the Bowery. Your Honor,
23 he attended South Aiken High School and made it to the
24 tenth grade. However, he had obtained his GED in 1992 at
25 Aiken Technical College. He tells me that currently he

1 any way and I don't believe Your Honor would even consider
2 that. But I want to put that on the record.

3 THE COURT: No, I didn't mean it that way. I would
4 just, Mr. Cave breaking into them, notwithstanding all the
5 rest of them. Here you have got, I watch them sit back
6 there, they are all like we all want to be. They both
7 work hard and they are probably like my mama and daddy. I
8 mean they work hard but don't have a whole, whole lot but
9 what they got they enjoy and don't want anybody taking it
10 away from them. And here is a young man, not a young man,
11 middle aged that has got a record that goes back a long
12 ways, a history of all of these break-ins.

13 MR. HAYES: Your Honor, also for the record, he was
14 not sure as to the forgery convictions of 2004.

15 THE COURT: I guess it just comes time after all of
16 this criminal activity, how else do you deal with somebody
17 like that other than getting them off the streets.

18 As to the petty larceny, the sentence of the Court,
19 you be committed to the County Detention Center for 30
20 days which is timed served.

21 As to the burglary first, the sentence of the Court
22 is you be committed to the State Department of Corrections
23 for a period of 25 years. Good luck to you.

24 MR. MILLER: Thank you, Your Honor.

25 MR. HAYES: Thank you, Your Honor.

1 (Whereupon, Court's Exhibit 1 was marked for
2 identification only.)
3 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Newberry)

I, Joy E. Holston, Official Court Reporter for the
Eighth Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete transcript of record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in Aiken County, South Carolina on the
22nd day of August, 2011.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

February 9, 2012



Joy E. Holston, Court Reporter

My Commission expires: March 13, 2016

WITNESSES

Aiken County Sheriff

Chuck Cain

Law Enforcement Case #: 11-027587

DOCKET NO. 2011GS0201031

The State of South Carolina

County of Aiken

DWM

ARREST WARRANT NUMBER

M041110

FILED

July 14 2011

L. Hodard
U.C.C.P. & G.S.

Am. Spade
F. H. H. H.

COURT OF GENERAL SESSIONS

JULY TERM 2011

THE STATE

VS.

ALBERT JAMES CAVE JR

ACTION OF GRAND JURY

TRUE B:11

W. Hodard

Foreperson of Grand Jury

Date: July 14, 2011

CDR #: 0079

Indictment for

VERDICT

BURGLARY FIRST DEGREE

§ 16-11-0311

Foreperson of Petit Jury

Date:

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
BURGLARY FIRST DEGREE

§ 16-11-0311

At a Court of General Sessions, convened on July 18, 2011, the Grand Jurors of Aiken County present upon their oath:

That ALBERT JAMES CAVE, JR. did in Aiken County on or about May 2, 2011, wilfully and unlawfully enter the dwelling of [REDACTED] located at [REDACTED] [REDACTED]s Road, North Augusta, without consent and with the intent to commit a crime therein and the defendant has two prior convictions for Burglary, all in violation of §16-11-311, Code of Laws of South Carolina (1976), as amended.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

8 day of July, 2011
Liz Godard
C.C.P. & O.S., Aiken County, S.C.
Deputy Clerk

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

J. Strom Thurmond
STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Chuck Cain

Law Enforcement Case #: 11-027587

DWM

ARREST WARRANT NUMBER

FILED *July 14* 2011

M041109

Lij. Hodland
C.C.P. & G.S.

James J. ...
SIGNED DATE

ACTION OF GRAND JURY

TALKE B. II
W. J. ...

Foreperson of Grand Jury
Date: July 14, 2011

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011GS0201032

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

JULY TERM 2011

THE STATE
vs.

ALBERT JAMES CAVE JR

CDR #: 3420

Indictment for

GRAND LARCENY MORE THAN
\$2,000 BUT LESS THAN \$10,000

§ 16-13-30(B)

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF AIKEN)
)

INDICTMENT FOR
 GRAND LARCENY MORE THAN
 \$2,000 BUT LESS THAN \$10,000

§ 16-13-30(B)

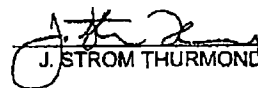
At a Court of General Sessions, convened on July 18, 2011, the Grand Jurors of Aiken County present upon their oath:

That ALBERT JAMES CAVE, JR. did in Aiken County on or about May 2, 2011, feloniously take and carry away a Dell Inspiron Laptop computer and two 32" Vizio Flat Panel televisions collectively valued at more than Two Thousand Dollars but less than Ten Thousand Dollars and belonging to [REDACTED], with intent to deprive the owner permanently of such property. All in violation of §16-13-30, Code of Laws of South Carolina (1976), as amended.

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

8 day of July 2013
 Liz Godard
 C.C.P. & G.S., Aiken County, S.C.
 Deputy Clerk

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


 J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF Aiken
STATE

VS.
Albert James Cave Jr

AKA:
Race: 2 Sex: M Age: 42
DOB: 1-1969 SS#: [REDACTED]
Address: CONGREE AVE
City, State, Zip: AIKEN, SC 29801
DL# [REDACTED] SID# SC00545432

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Burglary / Burglary (After June 20, 1985) - First degree

In violation of 16-11-0311

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense.

The plea is: ☐ Without Negotiations or Recommendation,

ATTEST

David [Signature] 9563 [Signature] [Signature]
Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,
for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment
of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:		\$	
\$14-1-206 (Assessments 107.5%)		\$	
\$14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$	<u>100.00</u>
\$14-1-211 (A)(2)(DUI Surcharge)	\$100	\$	
\$56-5-2095 (DUI Assessment)	\$12	\$	
\$56-1-286 (DUI Breath Test)	\$25	\$	
Proviso 47.8 (Public Def/Prob)	\$500	\$	
\$14-1-212 (Law Enforce. Funding)	\$25	\$	<u>25.00</u>
\$14-1-213 (Drug Court Surcharge)	\$150	\$	
\$50-21-114 (BLI Breath Test Fee)	\$50	\$	
\$56-5-2042(J) (Vehicle Assessment)	\$40/ea	\$	
Proviso 80.5 (SCDJA Surcharge)	\$5	\$	<u>5.00</u>
3% to County (if paid in installments)		\$	<u>2.96</u>

TOTAL \$ 133.90

Clerk of Court/Deputy Clerk [Signature]

Court Reporter: [Signature]

SCCA717 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS0201031

AW#: M041110

Date of Offense: 5/2/2011

S.C. Code §: 16-11-0311

CDR Code #: 0079

SENTENCE SHEET

15 yrs - life

☒ CONVICTED OF or ☐ PLEADS

(CSC w/minor 1st or Lowd Act)

Defendant Waives Presentment to Grand Jury. (def.'s initials)

Negotiated Sentence. Recommendation by the State.

Attorney for Defendant

County Detention Center,

under the Youthful Offender Act not to exceed _____ years

days/months/years and or payment

plus costs and assessments as applicable; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

prts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel.
\$47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge [Signature]

Judge Code: 0136

Sentence Date Aug 23, 2011

STATE OF SOUTH CAROLINA
COUNTY OF Aiken
STATE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS0201032

VS.
Albert James Cave Jr

A/V#: M041109

AKA:
Race: 2 Sex: M Age: 42
DOB: -1969 SS#: [REDACTED]

Date of Offense: 5/2/2011S.C. Code §: 16-13-30(B)CDR Code #: 3420

Address: CONGREE AVE
City, State, Zip: AIKEN, SC 29801

DL# [REDACTED] SID# SC00545432*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

SENTENCE SHEET

0-30 days

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADSTO: Larceny / Petit or Simple LarcenyIn violation of 16-13-0030(A) of the S.C. Code of Laws, bearing CDR Code # 0480☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ \$17-25-45(CSC w/minor 1st or Lowd Act)The charge is: ☐ As indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

(def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ANEST

David W. Moore 69553
Solicitor SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections ☒ County Detention Center,for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment

of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

Recipient:

*Fine		\$	
\$14-1-206 (Assessments 107.5%)		\$	
\$14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$	<u>100.00</u>
\$14-1-211 (A)(2)(DUI Surcharge)	\$100	\$	
\$58-5-2995 (DUI Assessment)	\$12	\$	
\$58-1-286 (DUI Breath Test)	\$25	\$	
Proviso 47.9 (Public Def/Prob)	\$500	\$	
\$14-1-212 (Law Enforce. Funding)	\$25	\$	<u>25.00</u>
\$14-1-213 (Drug Court Surcharge)	\$150	\$	
\$50-21-114 (BUI Breath Test Fee)	\$50	\$	
\$58-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	
Proviso 90.5 (SCCJA Surcharge)	\$5	\$	<u>5.00</u>
3% to County (if paid in installments)		\$	<u>3.90</u>

TOTAL \$ 133.90Clerk of Court/Deputy Clerk Ann SandersPresiding Judge W. B. CarterCourt Reporter: Gay Holston

SCCA217 (03/2011)

Judge Code: 0136Sentence Date Aug 23, 2011

m 541110

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Alameda

Albert James Cave Jr #199002
Full name and prison number (if any) of Applicant.

Y.

State of South Carolina

IN THE COURT OF

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention ME Carmick C.I.
2. Name and location of Court which imposed sentence Court of General Sessions, 103 Park Ave
Second Judicial Circuit Aiken ss. 29901
3. Name(s) of co-defendant(s) (if any) - None -
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
- (a) 2011G50201032 Grand Larceny
- (b) 2011G50201031 Burglary First Degree
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 0-30 days Aug 23, 2011
- (b) 25 years Aug 23, 2011

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. THE STATE OF SOUTH CAROLINA, IN THE COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. APPEAL DISMISSED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. SUBMITTED MAY 1, 2013 - FILED JUNE 12, 2013
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (u) PROSECUTORIAL MISCONDUCT
- (b) INEFFECTIVE ASSISTANCE OF COUNSEL
- (c) MALICIOUS PROSECUTION

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) The Facts to Support Each ground Are Set Forth on Additional
- (b) Page
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO - JUST DIRECT APPEAL
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____

- iv. _____
- (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

i. INEFFECTIVE ASSISTANCE OF COUNSEL

ii. _____

iii. _____

- (b) the proceedings in which each ground was raised:

i. MOTION TO BE RELIEVED OF COUNSEL DUE TO INEFFECTIVE ASSISTANCE

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES, with counsel who was assigned 12 days prior to hearing
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. Mr. David Hayes, Esq. Assigned to public Defender
 - ii. Mr. Bruce Richard Stevens whom left office and Benjamin Tripp
 - iii. whom was appointed after joining that office a week prior to hearing
- (b) the proceedings at which each such attorney represented you:
- i. Mr. David Hayes, trial and sentence
 - ii. Mr. Benjamin Tripp for Appeal
 - iii. _____

19. State clearly the relief you seek in filing this application:

TO VACATE Sentence AND Demand New Trial

20. Are you now under sentence from any other court that you have not challenged?

- NO -

STATE OF SOUTH CAROLINA)

County of Aiken)

VERIFICATION

I, AL, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

_____ Sam _____

SWORN to and subscribed before me this 24
day of June, 2013

_____ JA Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Gam Jr
Applicant

SWORN or affirmed to and subscribed before me this

24 day of June, 2013.

JA Franklin
Notary Public

My Commission Expires: 12-16-2019

DEAR Clerk OF COURT.

I had to put my paperwork in 2 envelopes. it was too heavy for one so I sent it like this. Sorry!

Thank you

Ganji

TO: Clerk OF Court,

Will you please file my per Application for me? And will you please send me a copy of all the paperwork for my personal files. And can you please send to me a copy of the motion and all reports pertaining to a motion my then appointed Attorney Mr. David Hayes filed to be relieved as my Attorney due to a conflict of interest. I'm not certain the date. But Mr Hayes filed this motion to be relieved as my Attorney after my trial on Aug 22, 2011 and before my other trial/court day of Sept 10, 2012. Mr. Brian Katonak was appointed to me afterwards. Can you please send me a copy of the motion he filed and all of the paperwork (motion being granted set, etc.) which you have on file. Thanks for your help in this matter!

Scmj

Additional page to support grounds set
forth for question #10.

(A) prosecutorial misconduct

1. prosecution showed misconduct when they used illegally obtained evidence in trial which should have been destroyed pursuant to the statute section 17-140 when I was acquitted of that charge. the judge found and ruled that the evidence should have been destroyed (after my trial he made this ruling)
2. prosecution showed misconduct and violated my rights under Brady, and violated the S.C.R.C.P. by withholding evidence from my motion of discovery material and used it at trial without first providing this material to me or my attorney prior to trial according to the S.C.R.C.P.
3. prosecution also showed misconduct by allowing a stipulation and not proving without a reasonable doubt every element of the offence at charge. leaving a substantial gap in the elements for me to be convicted of that charge.

(B) INEFFECTIVE ASSISTANCE OF COUNSEL

1. Counsel was ineffective by not filing a motion to suppress evidence (after being asked to do so) which the judge ruled after trial, should have been

destroyed pursuant to the Statute Section 17-1-40 of the SC Code of Laws. Counsel was ineffective by not challenging the use of this illegal evidence and allowing the state to break the law and use this evidence in trial violating my constitutional rights.

2. Counsel was ineffective by allowing the state to use evidence in trial which was never provided to him or me prior to trial according to the South Carolina Rules of Criminal procedure. Before trial Attorney informed judge that he wanted to make a motion to suppress this evidence. Judge denied us the right to make that motion and stated we could make it when it was tried to be admitted as evidence. At trial my Attorney allowed the state to use this evidence without making the motion, violating my Brady rights.

3. Counsel was ineffective by making and agreeing to a stipulation to an essential element of the offense at charge without my knowledge or knowingly agreeing. Allowing the state to a miscarriage of justice by not proving every element without a reasonable doubt.

4. Counsel was ineffective by not moving himself as my Attorney due to an conflict of interest which he later filed to be removed after my trial pending another case which he was already representing me on and had already had Court appearances on. Which I believe effective

his performance in Representing me at trial. this Conflict was known before trial. And Attorneys poor Representation was Brought to the Courts Attention prior to trial.

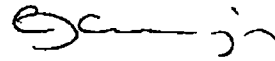
(C) malicious prosecution,

1. The prosecution (police officers) used Illegal Evidence to Establish A probable Cause to Charge and Arrest me for A Crime. Judge Early Found And Ruled that this Evidence which Came From the Record of A Charge that I was Found Not guilty to At trial, Should have Been destroyed pursuant the the Statute Section 17-1-40 of the South Carolina Code of Laws. the Statute demands the destruction of Said Evidence or they would be guilty of Contempt of Court. the prosecution Broke the Law to Wrongfully Arrest me violating my Constitutional Rights as An American Citizen.

2. prosecution used A invalid Warrant that was obtained by the use of Illegal Evidence And Without Establishing A Sufficient probable Cause.

I pray that this Honorable Court Correct these Misconducts And Vacate/set aside my Sentence And Conviction And Demand me A New And Fair Trial which I did Not Receive.

Thanks for your consideration



June 24, 2013

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

2013-CP-02-01498

Albert James Cave, Jr. #189002,

Applicant,

v.

State of South Carolina,

Respondent.

RETURN

Respondent, making its Return to the Application for post-conviction relief filed July 8, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted during the July 2011 term of the Aiken County Grand Jury for Grand Larceny more than \$2,000 but less than \$10,000 (2011-GS-02-01032) and Burglary in the First Degree (2011-GS-02-01031). David Hayes, Esquire, represented Applicant. On May 9-12, 2011, a jury trial was held before the Honorable Doyet A. Early, III. The jury convicted Applicant as indicted. On May 12, 2011, Judge Early sentenced Applicant to life imprisonment for each offense, with all three sentences to run concurrently.

A Notice of Appeal was filed with the South Carolina Court of Appeals and an Anders brief was submitted. The Court of Appeals affirmed Applicant's sentences and convictions on December 28, 2012. State v. Albert Cave, Jr., No. 2013-UP-245 (Ct. App. June 12, 2013). The Remittitur was issued on July 1, 2013.

Attached herewith and incorporated herein are the records of the Aiken County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the appellate records, and trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials

II.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.
 - a. Failed to file a motion to suppress the evidence.
 - b. Failed to object to a Brady Violation
 - c. Stipulating to an essential element of the offense without Applicant's knowledge or consent
 - d. Failing to file a motion to be relieved due to a conflict of interest
2. Prosecutorial Misconduct.
 - a. Used illegally seized evidence at trial.
3. Malicious Prosecution.
 - a. Police used illegally seized evidence to establish probable cause
 - b. Invalid arrest warrant was obtained

Any claims not specifically enumerated in the post-conviction Application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCRCP.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent submits that the second and third allegations should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann.

§ 17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Therefore, the Court should summarily dismiss these allegations as they are not proper in a post-conviction relief action.

V.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel.

Respectfully submitted,

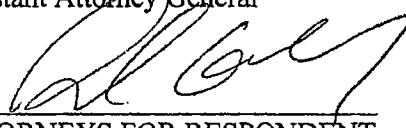
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

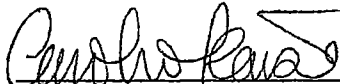
October 16, 2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
	)	2013-CP-02-01498
	)	
ALBERT CAVE, #189002,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Aimee Zmroczek, Esquire
A.J.Z. Law Firm, LLC.
PO Box 11961
Columbia, SC 29211

DATED this the 16th day of October, 2013.


 Caroline Kaiser, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF AIKEN)
)
)
)
 ALBERT CAVE, Jr., # 189002,)
)
)
 Applicant,)
 -v-)
)
 State of South Carolina,)
)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 IN THE SECOND JUDICIAL CIRCUIT

2013-CP-02-01498

AMENDED APPLICATION
 FOR
 POST-CONVICTION RELIEF

COMES NOW, Defendant Albert Cave, Jr., by and through his undersigned, pursuant to S.C. Code Ann. § 17-27-70(a), and amends the timely files this application.

1. Place of Detention: McCormick Correctional Institution.
2. Name and location of Court which imposed sentence: Aiken County General Sessions
3. Name(s) of co-defendant(s) (if any): none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-GS-02-01032-Grand Larceny
 - (b) 2011-GS-02-01031-Burglary 1st degree
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 23, 2011, 30 days
 - (b) August 23, 2011, 25 years
6. Check whether a finding of guilty was made:
 - (a) After a plea of not guilty
7. Did you appeal from the judgment or the imposition of sentence? yes

8. If you answered "yes" to (7) list:

(a) The name of each court to which you appealed: Court of Appeals

(b) Result: appeal dismissed

(c) Date: submitted May 1, 2013, filed June 12, 2013

9. If you answered "no" to (7) state your reasons for not so appealing: N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel for failure to recuse solicitor;

(b) Ineffective assistance of counsel to request a continuance pursuant to late provided evidence;

(c) Ineffective assistance of counsel for failure to object to improper judicial remarks;

(d) Ineffective assistance of counsel for failure to obtain pretrial ruling and file motions to suppress fingerprint evidence;

(e) Prosecutorial Misconduct for violating due process in forcing a plea and/or trial with the threat of LWOP when case was new to the docket;

(f) Prosecutorial Misconduct for failure to recuse office; and

(g) Ineffective assistance of appellate counsel to identify proper issues for appeal.

11. State concisely and in the same order the facts which support each of the grounds set out in (10): (a) , (f), and (g) will be shown through introduction of Judge Williams 2007 Order recusing the second circuit solicitor's office from prosecuting defendant when charged with burglaries and grand larcenies (b) Proof of

remaining failures will be proved through introduction of trial transcript, and testimony at hearing.

12. Prior to this application have you filed with respect to this conviction:

(a) Any petition in a State Court under South Carolina No

(b) Any petition in State or Federal Courts for habeas corpus or post-conviction relief
No

(c) Any petition in the United States Supreme Court for certiorari other than petitions, in any, already specified in (8) No

13. If you answers "yes" to any part of (12), list with respect to each petition, motion or application N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed: No

15. If you answered "yes" to (14) identify N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: N/A

17. Were you represented by an attorney at any time during the course of:

(a) Your arraignment and plea? Yes

(b) your trial (if any) N/A

(c) your sentencing Yes

(d) your appeal, if any from the judgment of conviction or the imposition of sentence? Yes

18. If you answered "yes" to one or more parts of (17) list:

(a) The name and address of each attorney who represented you

- i. David Hayes (public defender) Aiken County Public Defender
- ii. Wallis Alves (public defender) Aiken County Public Defender
- iii. Breen Stevens, Appellate defense

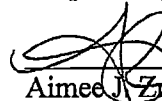
(b) The proceedings at which each such attorney represented you:

- i. Plea and sentencing

19. State clearly the relief you seek in filing this application: Vacate conviction and remand for a new trial.

20. Are you now under sentence from any other court that you have not challenged: No

Respectfully Submitted,



Aimee J. Zmroczek, Esq. #77193
P.O. Box 11961
Columbia, South Carolina 29211
(803) 403.1918 (telephone)
(803) 400.8005 (fax)
Attorney for Applicant

Columbia, South Carolina
March 1, 2014.

CERTIFICATE OF SERVICE

I did hereby serve a filed copy of the Amended Application for PCR on Daniel Gourley via E-Mail and depositing the same in U.S. Mail on February 25, 2014.. P.O. Box 11549, Columbia, SC 29211-1549



Aimee J. Zmroczek, Esq. #77193

1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2014-CP-02-00004
& 2013-CP-02-01498

3
4
5 ALBERT JAMES CAVE, JR.,
Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,
8 Respondent.

9
10 Post-Conviction Relief Hearing
Heard on Friday, September 23, 2016
11 Aiken, South Carolina

12 BEFORE:

13 THE HONORABLE ROBERT E. HOOD
14
15

16 APPEARANCES:

17 Counsel on Behalf of the Applicant:
Aimee J. Zmroczek, Esq.
18 Lance S. Boozer, Esq.

19 Counsel on Behalf of the Respondent, State of SC:
20 Julie A. Coleman, Esq.
21
22

23 Cheri L. Young, RPR
Circuit Court Reporter
24 P O Box 5232
Aiken, SC 29803-5232
25

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1 ON FRIDAY, SEPTEMBER 23, 2016 AT 12:05 P.M.:

2 THE COURT: Who's next?

3 MS. COLEMAN: We have Albert James Cave, Jr.,
4 up next.

5 This is an interesting situation because he
6 has two separate appeals and two different
7 attorneys on those.

8 THE COURT: All right.

9 MS. COLEMAN: And they might have a motion to
10 make.

11 THE COURT: Okay.

12 MS. ZMROCZEK: Your Honor, what we were doing
13 was moving to consolidate the testimony. I guess
14 keep the cases separate so they have separate CP
15 numbers. I've been working on my case and
16 Mr. Boozer has been working on his case but -- and
17 Mr. Boozer and I talked about it. He can address
18 you. I think it would be more judicially
19 efficient.

20 MR. BOOZER: Judge, just briefly.

21 Mr. Cave's first PCR case involves a --
22 time line wise, his first PCR with Ms. Zmroczek
23 involves a trial that was in 2011 when he was found
24 guilty. I'm on a case that was subsequent to that
25 on a plea where he pled guilty.

1 I think a lot of his allegations are going to
2 kind of intermingle and the testimony is going to
3 be about, pretty much very similar. So I think if
4 Your Honor would just consider having the testimony
5 and whatnot, everything consolidated, but keep two
6 separate CP numbers, two orders, I think it makes
7 sense time line wise.

8 THE COURT: Are you okay with that?

9 MS. COLEMAN: Yeah, I'm fine with that. No
10 objection.

11 THE COURT: Are you Mr. Cave?

12 THE APPLICANT: Yes, sir.

13 THE COURT: Stand up for me. How are you
14 doing?

15 THE APPLICANT: I'm doing okay.

16 THE COURT: Raise your right hand.

17 (Defendant placed under oath.)

18 THE COURT: All right. So, Ms. Zmroczek to
19 your right, do you know her?

20 THE APPLICANT: Yes, sir.

21 And Mr. Boozer to your left, do you know
22 him?

23 THE APPLICANT: Yes, sir.

24 THE COURT: So you got two PCRs, right?

25 THE APPLICANT: Yes, sir.

1 THE COURT: That stem out of two different
2 cases; is that right?

3 THE APPLICANT: Yes, sir.

4 THE COURT: Okay. And what they're asking me
5 to do is to essentially combine them into one
6 hearing just for the purpose of gathering the
7 information. Does that make sense?

8 THE APPLICANT: Yes, Your Honor.

9 THE COURT: And then when I rule on them I
10 will rule on them separately but instead of you
11 having to tell me the same thing twice or anything
12 like that we're just going to kind of do it all at
13 one time.

14 THE APPLICANT: Yes, sir.

15 THE COURT: Is that okay with you?

16 THE APPLICANT: Yes, sir.

17 THE COURT: Are you sure?

18 THE APPLICANT: Yes.

19 THE COURT: Okay. Great. Let's do it.

20 MS. ZMROCZEK: Thank you.

21 Your Honor, since my case is chronologically
22 first I'll question him first and then Mr. Boozer
23 can question him.

24 THE COURT: All right. Let Ms. Coleman set
25 up where we are. Hold on one second.

1 MS. COLEMAN: Procedural history. This is
2 Albert Cave.

3 THE COURT: Hold on.

4 MS. COLEMAN: I'm sorry.

5 (Pause.)

6 THE COURT: All right. Ms. Coleman?

7 MS. COLEMAN: If it please the Court.

8 This is Albert Cave versus the State of South
9 Carolina, Docket Number 2013-CP-02-1498.

10 Applicant is presently confined in the South
11 Carolina Department of Corrections pursuant to
12 orders of commitment of the Aiken County Clerk of
13 Court. Applicant was true-bill indicted during the
14 July 2011 Term of the Aiken County Grand Jury for
15 grand larceny more than 2,000 but less than 10,000,
16 and burglary in the first degree. David Hayes,
17 Esquire, represented the Applicant.

18 On May 9th through the 12th, 2011, a jury
19 trial was held before the Honorable Doyet A. Early
20 the Third. The jury convicted Applicant as
21 indicted.

22 On May 12th, 2011, Judge Early sentenced
23 Applicant to 30 days for larceny and 25 years for
24 burglary first degree with the two sentences to run
25 concurrently.

1 A notice of appeal was filed with the South
2 Carolina Court of Appeals, and an Anders brief was
3 submitted. The Court of Appeals confirmed
4 Applicant's sentence and conviction on December
5 28th, 2012. Remittitur was issued on July 1st,
6 2013.

7 Applicant filed a timely application for
8 post-conviction relief on July 8th, 2013, alleging
9 that he was being held in custody unlawfully based
10 on the following allegations: Ineffective
11 assistance of counsel; prosecutorial misconduct;
12 and malicious prosecution.

13 The State filed its return October 16th,
14 2013. The Applicant subsequently filed an
15 amendment on March 1st, 2014, alleging the
16 following allegations: Ineffective assistance of
17 counsel; ineffective assistance of appellate
18 counsel; and prosecutorial misconduct.

19 He's present today and represented in this
20 matter by Ms. Aimee Zmroczek.

21 THE COURT: All right. Do you want to go on
22 and do the next one?

23 MS. COLEMAN: Sure.

24 The second PCR application is Albert James
25 Cave, Jr., versus the State of South Carolina,

1 Docket Number 2014-CP-02-0004. Applicant is
2 presently confined in the South Carolina Department
3 of Corrections pursuant to orders of commitment of
4 the Aiken County Clerk of Court.

5 Applicant was true-bill indicted at the
6 October 2011 Term of the Aiken County Grand Jury
7 for burglary first degree. Brian Katonak, Esquire,
8 represented the Applicant.

9 On September 10th, 2012, Applicant pled
10 guilty under North Carolina v. Alford before the
11 Honorable Doyet A. Early the Third. Judge Early
12 sentenced Applicant to a negotiated 25-year term of
13 imprisonment. This sentence was to run
14 concurrently to the 25-year sentence he was already
15 serving for 2011-GS-02-1031.

16 A timely notice of appeal was filed on
17 Applicant's behalf. By order filed March 18th,
18 2013, the South Carolina Court of Appeals dismissed
19 Applicant's appeal pursuant to Rule 203 for failing
20 to provide a sufficient reason for appealing a
21 guilty plea. The remittitur was issued on March
22 25th, 2013.

23 On March 18th, 2013, Applicant filed a motion
24 to reconsider which was construed as a petition for
25 rehearing. By order dated July 15th, 2013, the

1 South Carolina Court of Appeals gave Applicant 10
2 days to submit his explanation. Appellant failed
3 to provide an explanation and the South Carolina
4 Court of Appeals denied and dismissed Applicant's
5 appeal by order dated September 30th, 2013. The
6 remittitur was issued November 13th, 2013.

7 Applicant filed a timely application for
8 post-conviction relief on January 2nd, 2014,
9 alleging that he was being held in custody
10 unlawfully based on the following allegations:
11 Involuntary guilty plea; ineffective assistance of
12 counsel; prosecutorial misconduct; and Brady
13 violation. The State filed its return July 29th,
14 2014.

15 Applicant filed an amended application on
16 March 16th, 2015, adding an additional allegation
17 of ineffective assistance of counsel for failing to
18 move to recuse the solicitor.

19 Applicant is present today and is represented
20 in this matter by Mr. Lance Boozer.

21 THE COURT: All right. Ms. Zmroczek, are you
22 ready?

23 MS. ZMROCZEK: Yes, Your Honor.

24 THE COURT: All right. You may call your
25 first witness.

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 MS. ZMROCZEK: Thank you. Call Albert Cave.

2 THE COURT: Come on forward, Mr. Cave.

3 ALBERT JAMES CAVE, JR., having been duly
4 sworn, was examined and testified as follows:

5 THE CLERK: Please take a seat in the witness
6 box and state your full name for the Court.

7 THE APPLICANT: My name is Albert James Cave,
8 Jr.

9 DIRECT EXAMINATION

10 BY MS. ZMROCZEK:

11 Q. Mr. Cave, I know you're nervous but speak
12 up. Okay?

13 A. Yes, ma'am.

14 Q. How old are you?

15 A. I'm 47.

16 Q. 47?

17 A. Yes, ma'am.

18 Q. Where are you housed?

19 A. Ma'am?

20 Q. Where do you live?

21 A. In Aiken. Aiken, South Carolina.

22 Q. Right, right. Where are you housed right
23 now?

24 A. Oh, Lieber Correctional Institution.

25 Q. Which one?

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 A. Lieber.

2 Q. Okay. I want to talk a little bit about your
3 history with Aiken County, okay, because that's
4 part of the reason why we're here today.

5 A. Yes, ma'am.

6 Q. So, I want to talk about some charges that
7 you had -- talk about -- tell the Judge about how
8 many times you've been arrested in Aiken County.

9 A. Well, I've been arrested a few times. I
10 don't have the exact number. But, the rest of
11 them --

12 Q. What have you been accused of every time
13 you've been arrested in Aiken County?

14 A. Ma'am?

15 Q. What's the charge that you're always being
16 accused of?

17 A. Most of them is burglary, burglary charges.
18 I had a few forgery charges, but the last few years
19 everything been burglary charges.

20 Q. And sometimes grand larceny attached to those
21 burglary charges?

22 A. Yes, ma'am. Yes, ma'am.

23 Q. All right. So I want to go back to -- do you
24 remember 2008 when you were charged?

25 A. Yes, ma'am.

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 Q. All right. Tell, tell the Court a little bit
2 about what you were charged with in 2008.

3 A. Well, in 2008 I was wrongfully charged with
4 burglary, burglary first degree, grand larceny. I
5 went to trial and I was acquitted on them charges
6 after being found not guilty.

7 Q. Eventually you were acquitted?

8 A. I was acquitted; yes, ma'am.

9 Q. And when you went to trial, was -- who was
10 the prosecuting agency?

11 A. Well, when I went to trial the Attorney
12 General prosecuted my case because a order was done
13 recusing the Second Circuit Solicitor's Office
14 because the victim was the solicitor of the office,
15 a former deputy solicitor of the office.

16 Q. Okay.

17 Your Honor, may I approach the witness?

18 I'm handing you what's been marked as
19 Plaintiff's Exhibit 1 and ask if you recognize
20 that.

21 A. Yes, ma'am.

22 Q. Your Honor -- is that a copy of the order?

23 A. Yes, ma'am, just -- yes.

24 MS. ZMROCZEK: Your Honor, at this time we
25 would move Plaintiff's Exhibit 1 which is a filed

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 copy of the order recusing the solicitor's office.

2 MS. COLEMAN: No objection.

3 MS. ZMROCZEK: If you can hand that up. I
4 know it's hard.

5 THE COURT: I need to be able to see it.

6 THE APPLICANT: Yes, sir.

7 THE COURT: Thank you very much.

8 THE APPLICANT: Yes, sir.

9 (Applicant's Exhibit No. 1, order of recusal,
10 received into evidence.)

11 BY MS. ZMROCZEK:

12 Q. So, Mr. Cave, I want to focus on this order
13 because it kind of, it lays the foundation for a
14 lot of your claims subsequent, in your current
15 pending charges, right?

16 A. Yes, ma'am.

17 Q. Okay. So I want to talk to you about this
18 order. So the victim, the victim you said was the
19 solicitor?

20 A. Yes, ma'am.

21 Q. Or an assistant solicitor at the time,
22 correct?

23 A. He was a former deputy solicitor of that
24 office.

25 Q. A former deputy solicitor?

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 A. Yes, ma'am.

2 Q. And that was in 2008?

3 A. Yes, ma'am.

4 Q. And there was a hearing in front of, I
5 think -- oh, here it is -- a hearing in front of
6 Judge Williams, right?

7 A. Yes, ma'am.

8 Q. And he signed an order and it was your
9 understanding -- and, Your Honor, I'm referring to
10 the first paragraph, therefore it's ordered -- when
11 it said the Second Circuit Solicitor's Office shall
12 be recused from prosecuting the above-captioned
13 cases -- and those were for burglary and larceny,
14 right?

15 A. Yes, ma'am.

16 Q. -- or any charges or indictments stemming
17 from the same incident or indictments -- or, excuse
18 me, or incidents alleged to be related or part of a
19 pattern of criminal activity including the
20 above-captioned charges, including but not
21 specifically limited to the possible indictments
22 mentioned by Solicitor Morgan at the hearing,
23 right?

24 A. Yes, ma'am.

25 Q. So at that hearing what -- was there talk of

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 outstanding indictments that were also --

2 A. Yes, ma'am. When we had that hearing
3 Ms. Morgan which was the solicitor at the time and
4 she put me and the Courts on notice that they was
5 looking to indict me -- well, possibly indictment
6 me on some other charges.

7 Q. And were these the charges that you were
8 eventually indicted for and went to trial on later?

9 A. No, them charges never came.

10 Q. Those never came?

11 A. Dismissed. Yes, ma'am.

12 Q. But then you eventually got some more
13 burglary charges, right?

14 A. Yes, ma'am.

15 Q. And that -- that's what you went to trial on?

16 A. Yes, ma'am.

17 Q. When you met -- were you appointed an
18 attorney in this case?

19 A. Yes, ma'am.

20 Q. And that was who?

21 A. Mr. David Hayes.

22 Q. David Hayes. And did you tell Mr. Hayes
23 about this order?

24 A. No. At the time we did not discuss that
25 order but he knew about that prior case because we

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 discussed that prior case because they used
2 evidence in this case from that case. So he knew
3 about that and he knew about the misconduct that he
4 was seeing from that office. So, I mean...

5 Q. And I want to talk about that a little bit.
6 You said that he knew about the evidence they used
7 from that case in this case. What are you talking
8 about, specifically?

9 A. They charged me with this case because they
10 said that the prints that they found at the crime
11 scene matched the prints that they found from that
12 prior charge I was acquitted of.

13 Q. And that was -- and so those prints that they
14 were using were based on the charge that you
15 eventually were acquitted on that the solicitor's
16 office was removed from, right?

17 A. Yes, ma'am. Yes, ma'am.

18 Q. Okay. So -- so, their initial basis for your
19 arrest was that fingerprint card?

20 A. Yes, ma'am.

21 Q. Stemming out of that 2008 case?

22 A. Yes, ma'am.

23 Q. Okay. And so you had told him about that?

24 A. Yes, ma'am.

25 Q. What if anything did he -- did you ask him to

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 do about that?

2 A. I asked him to file a motion to have that
3 evidence suppressed.

4 Q. Okay. And we'll get to that. Did you also
5 ask him to have somebody else prosecute it instead
6 of the solicitors?

7 A. No, no, ma'am. No, ma'am, I did not.

8 Q. Okay. So you had told him about this case?

9 A. Yes, ma'am.

10 Q. So -- and the reason that you asked him to
11 suppress the evidence, he handed you all of your
12 discovery in this case, right? Or he gave you a
13 copy of the discovery?

14 A. Yes, ma'am.

15 Q. Sorry. I'm not trying to confuse you.

16 And one of those things he gave you was a
17 property receipt --

18 A. Yes, ma'am.

19 Q. -- that included fingerprints, right?

20 A. Yes, ma'am.

21 Q. I'm going to hand you what's been marked for
22 identification as Plaintiff's Exhibit 2 and ask you
23 if that's -- if that's the same evidence sheet that
24 you received?

25 A. Yes, ma'am.

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 Q. Okay.

2 Your Honor, at this point we would move
3 Plaintiff's 2 into evidence.

4 MS. COLEMAN: No objection.

5 THE COURT: Without objection.

6 (Applicant's Exhibit No. 2, evidence property
7 receipt, received into evidence.)

8 BY MS. ZMROCZEK:

9 Q. Okay. And that piece of paper which has been
10 handed up to Judge Hood, that is an evidence
11 property receipt that you had received in
12 discovery, right?

13 A. Yes, ma'am.

14 Q. And one of the motions that you had asked
15 your attorney to file and argue was to suppress the
16 fingerprint evidence, correct?

17 A. Yes, ma'am.

18 Q. And that was, one, because the prints that
19 they used to match it was off of a charge for which
20 you'd been acquitted?

21 A. Yes, ma'am.

22 Q. And from which the solicitor's office had
23 been recused?

24 A. Yes, ma'am.

25 Q. And then the second reason you said was that

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 you had an issue with the chain of custody, right?

2 A. Yes, ma'am.

3 Q. And one of your issues -- I know that he has
4 a copy of it. I'm going to hand you an unmarked
5 copy. So, what were one of the issues that you had
6 with the receipt?

7 A. The issue on the receipt is the investigator
8 officer, Mr. Clay Adams, who alleged to have
9 identified my print, on May the 11th his signature
10 is nowhere on the chain of custody showing that he
11 had possession of this evidence.

12 Q. And Mr. Adams, Mr. Clay Adams is the one who
13 testified to this evidence, correct?

14 A. Yes, ma'am.

15 Q. And, Your Honor, I'm referring to in the
16 trial transcript beginning on page 1 -- well, it's
17 136 on the trial transcript and 171 on the
18 appellate transcript. They provided me the
19 appellate transcript, so I'm not really sure which
20 one, which one they provided you.

21 MS. COLEMAN: You probably have the
22 appellate.

23 THE COURT: Okay.

24 MS. COLEMAN: So that would be 171, Your
25 Honor.

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 BY MS. ZMROCZEK:

2 Q. And so, the property receipt that you
3 received from your -- in your motion of
4 discovery --

5 A. Yes, ma'am.

6 Q. -- right, didn't list Mr. Adams anywhere on
7 here, correct?

8 A. Correct.

9 Q. But it did list that you were already
10 identified as the suspect, right?

11 A. Yes, ma'am, it did. The original copy shows
12 that I was identified. The evidence was stored in
13 ID only.

14 Q. And Mr. Adams was nowhere written on -- so
15 that was one of the bases for you to ask the
16 attorney to make those motions, correct?

17 A. Yes, ma'am. Yes, ma'am.

18 Q. And, when -- did your attorney discuss this
19 with the Court in trial?

20 A. Yes. Right before trial I had a pretrial
21 hearing. And he put the Court on notice that he
22 had a motion to suppress based on the chain of
23 custody evidence.

24 Q. And what, and what --

25 A. The Courts told him that, they informed him

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 that he could make this motion when the State tried
2 to introduce it as evidence at trial.

3 Q. And so, what -- so, that was prior to Mr. --
4 in your understanding, that was prior to Mr. Adams
5 getting up to testify, correct?

6 A. Yes, ma'am?

7 Q. And was that done?

8 A. No, ma'am.

9 Q. Okay.

10 A. He never objected. Never made his motion.

11 Q. And you talked about that they relied on
12 evidence. So was it the fingerprints? Did you
13 have any of these discussions with your appellate
14 counsel?

15 A. Yes, ma'am.

16 Q. Okay. And what kind of discussions did you
17 have with your appellate counsel regarding your
18 concerns for appeal?

19 A. All the issues that we are speaking on today
20 except for the order to recuse.

21 Q. Okay. So recuse and the fingerprints?

22 A. Yes, ma'am.

23 Q. And, did your appellate counsel raise -- he
24 didn't raise the accuse -- or, excuse me, the
25 recuse issue in front of the trial court, did he?

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1 A. No, he, he did an Anders brief to be relieved
2 because he didn't see no merits in my case.

3 Q. So he did an Anders brief, but he did argue
4 the testimony as to the fingerprints based on the
5 limited training that the --

6 A. Yes, ma'am.

7 Q. -- that the expert that was qualified had,
8 correct?

9 A. He was not certified.

10 Q. Okay. So that was the only thing that he
11 argued on your --

12 A. Yes, ma'am.

13 Q. -- appellate brief? Okay. And did you have
14 any contact with your appellate attorney after
15 that?

16 A. No, ma'am.

17 Q. After he filed the Anders brief?

18 A. No, ma'am.

19 Q. So going back to the case that, the trial
20 that we had. How often did you meet with
21 Mr. Hayes?

22 A. I'm not for sure how many times that we -- he
23 came to meet with me because all our meetings went
24 sour. All of them went terrible because he was,
25 like, you know, he was understanding -- he seen

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1 where the prosecution was acting out of order, but
2 he refused to do anything about. I even tried to
3 have him fired as my attorney to obtain another
4 attorney but the Court shot me down. They turned
5 it down.

6 Q. Okay.

7 A. But every time he came to see me we argued
8 about this, especially about the motion because I
9 asked him to file a motion to suppress the evidence
10 because he's telling me that the State's not
11 supposed to have this but he refused to file a
12 motion. So we argued about that.

13 Q. And so your biggest issue with him was always
14 this fingerprint card?

15 A. The fingerprint card, basically, yes, ma'am.
16 Yes, ma'am.

17 Q. Okay. All right. And you felt like
18 Mr. Hayes wasn't arguing those motions for you?

19 A. Right.

20 Q. And did Mr. Hayes ever provide you a copy of
21 that order that he -- do you know if he was aware
22 of it?

23 A. Which order?

24 Q. The order that we handed up recusing the
25 Second Circuit Solicitor's Office?

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1 A. No, ma'am.

2 Q. Okay. And during the trial did you remind
3 Mr. Hayes to object -- to make that motion to renew
4 or make that motion again during trial about the
5 fingerprints and --

6 A. Yes.

7 Q. -- the origination of them?

8 A. Yes, ma'am. Because -- you're talking about
9 the fingerprints or the chain of custody?

10 Q. Chain of custody. Sorry.

11 A. Yes, ma'am. Because the State introduced
12 into trial a chain of custody report, evidence that
13 was never provided to me or my attorney prior to
14 trial. They introduced into trial another chain of
15 custody that had an added signature on it that was
16 not on the original copy of the chain of custody
17 that was provided to us.

18 Q. So the evidence that they -- the chain of
19 custody that they entered in the trial, had you
20 ever seen that before?

21 A. No, ma'am.

22 Q. Prior to it being handed up at trial?

23 A. Never. Me or my attorney, because my
24 attorney admitted to me right then that they never
25 handed him the chain of custody but he still

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1 refused to make his motion.

2 Q. So Plaintiff's Exhibit 2, that chain of
3 custody was the only one that you had ever
4 received?

5 A. Yes, ma'am.

6 Q. Okay.

7 A. And the chain of custody that I did receive
8 was the same chain of custody that was presented
9 when I had my preliminary hearing.

10 Q. I'm sorry?

11 A. And the chain of custody that I did receive
12 was the same chain of custody that they presented
13 in court when I had my preliminary hearing. There
14 was never no other chain.

15 Q. So Defense {sic} Exhibit 2 was the same one
16 that they admitted into Court but it had an
17 additional signature on it? I mean, I'm sorry,
18 Plaintiff's Exhibit 2.

19 A. In trial?

20 Q. In trial.

21 A. In trial they came up with a different
22 receipt that we never seen, that had an added
23 signature.

24 Q. That had an added signature?

25 A. Yes, ma'am, right. And as you can see, the

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1 original copy of the chain of custody that we had
2 shows that. The investigator had to write this on
3 the chain of custody on or after May 11th after he
4 claimed he identified that print. At the time he
5 wrote that his signature was nowhere on the chain
6 of custody.

7 Q. Okay. And, I want to talk about one of the
8 things that you discussed in trial was that -- I'm
9 sorry. I'm sorry. Let me -- okay. Yeah.

10 And had you asked -- had you asked your
11 attorney to look into the latent print card
12 destruction and how that had -- before y'all got to
13 trial --

14 A. Yes, ma'am.

15 Q. -- did you ask him to explain to you why that
16 latent print card wasn't destroyed?

17 A. He told me that I never did an application
18 for expungement order. So that's why he refused to
19 do the motion and all. But then later after my
20 trial, because this evidence was also used against
21 me in another case, and Judge Early found and ruled
22 that I was correct that this evidence should have
23 been destroyed pursuant to the statute when I was
24 acquitted on that charge.

25 Q. And that's the case that Mr. Boozer --

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1 A. He told me the State's saying the same thing,
2 that I didn't do an expungement order and Mr. Early
3 let them know that there's nothing in the language
4 of the statute that says that the mandates are in
5 any way contingent on inactions by me. So he
6 explained that.

7 Q. All right. Thank you. And I think that
8 we'll segue now into Mr. Boozer's case, Your Honor.
9 And so that's all the questions that I have for him
10 on this case.

11 THE COURT: Anything else you want to say
12 about your trial?

13 THE APPLICANT: Yes. I had another issue
14 dealing with a stipulation.

15 THE COURT: Okay.

16 THE APPLICANT: The State never proved each
17 and every element of the offense or charge. They
18 charged me with a burglary because they said I had
19 a prior offense -- I mean, a prior charge of
20 burglary. But they never produced any evidence.
21 They did a stipulation. The stipulation was
22 never -- they signed the stipulation after my trial
23 had already started, after we had picked our jury.
24 I never seen the stipulation. The stipulation was
25 never provided to the jury during their

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1 deliberation. It was a Court Exhibit only and it
2 stayed with the Judge. It never --

3 THE COURT: Okay.

4 THE APPLICANT: So that was the other thing.

5 MS. ZMROCZEK: And that's something you
6 didn't agree to?

7 THE APPLICANT: Right. I never agreed to it.

8 MS. ZMROCZEK: Okay. Thank you. Thank you,
9 Your Honor.

10 THE COURT: Mr. Boozer?

11 MR. BOOZER: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. BOOZER:

14 Q. Mr. Cave, how are you doing?

15 A. I'm doing fine, sir.

16 Q. Good. I'm going to stay right here. Can you
17 see me from where you are?

18 A. Yes, sir.

19 Q. You can hear me okay?

20 A. Yes, sir. Yes.

21 Q. Mr. Cave, now following this trial that
22 you've already been testifying about where
23 Ms. Zmroczek is representing you in regards to that
24 PCR, did you then have a guilty plea in another
25 case?

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1 A. Yes, sir.

2 Q. Okay. When was that?

3 A. I'm not for sure the exact date.

4 Q. And that's fine, but would you agree with me
5 that it was sometime in September, 2012?

6 A. Yes, sir.

7 Q. And did you actually -- was it -- what's your
8 understanding, was it an Alford plea?

9 A. Well, I was at court to go to trial. I was
10 supposed to be having a trial. When I got to court
11 for trial, the State, the solicitor's office never
12 provided me with no evidence in my motion to
13 discovery. I brought this to the Judge attention
14 and the Judge, the Court never ordered them to
15 provide me with this information. So I had no
16 other alternative but to try to take an Alford plea
17 to escape from catching a life sentence because my
18 attorney was, like, you know --

19 Q. And let's get to that in a second when we
20 talk about your allegations.

21 A. Okay.

22 Q. But let's go back a little bit in time. In
23 2008, you had testified earlier that you had been,
24 you were acquitted in a trial on a burglary first
25 where the alleged victim was someone who worked for

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1 the solicitor's office?

2 A. Yes, sir.

3 Q. Did you have any other trials in which you
4 were either acquitted or found not guilty for --

5 A. Yeah.

6 Q. Hang on a second. Hang on a second.

7 A. Yes, sir.

8 Q. Let me finish my question.

9 Did you have any other trials during that
10 year or sometime around that time where you were
11 either found not guilty or acquitted or something
12 happened?

13 A. Yes, sir.

14 Q. Okay. Tell us about that.

15 A. I had two trials; one for the solicitor's
16 office, the other one was for the Mayor of Aiken
17 son.

18 Q. Okay. Were those tried together or separate?

19 A. No, they was tried separately. And both of
20 them was tried by the Attorney General's Office. I
21 had a mistrial with one, and they decided to
22 dismiss the charges. They was not going to re-try
23 me on that. So they dismissed them charges.

24 Q. And so that's the case that's different from
25 the case involving the solicitor?

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1 A. Yes, it's -- yes, yes.

2 Q. Okay. Who was alleged to have been the
3 victim in this case?

4 A. The mayor -- a relative of the Mayor of
5 Aiken.

6 Q. And your understanding is that the Attorney
7 General's Office prosecuted both of those cases?

8 A. Yes, sir.

9 Q. Now fast forward to this case in which you
10 had the plea in, the Alford plea. Who was alleged
11 to have been the victim in that case?

12 A. A police officer by the name of Jeffrey
13 Nations.

14 Q. Okay. A police officer where?

15 A. Was with, I think, Aiken County.

16 Q. Okay. Now you've made a number of
17 allegations with regard to your plea in your
18 original application. And I want us to walk
19 through those. Okay?

20 A. Yes, sir.

21 Q. You've alleged that your plea was
22 involuntarily entered because you felt you were
23 forced to take a plea against your will because the
24 Court abused its discretion when it decided -- when
25 it denied your motion to suppress evidence. Is

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1 that one of your allegations?

2 A. Yes, sir.

3 Q. Okay. If you would, explain what you mean by
4 that.

5 A. Well, it was dealing with the same evidence
6 that they used from that prior trial that I was
7 found not guilty on.

8 Q. What evidence are you talking about?

9 A. The fingerprint card from the arrest and
10 booking record of that prior charge.

11 Q. Okay. How was that used with your case that
12 you ended up entering the Alford plea?

13 A. They used that card to -- they initially used
14 that card for the -- to charge me with that crime,
15 the same as the other. They say that my print
16 matches the print that was on that fingerprint
17 card.

18 Q. Okay. And who was your lawyer at that time
19 for your plea?

20 A. Mr. Katonak.

21 Q. Was he appointed or retained to represent
22 you?

23 A. Appointed.

24 Q. Did Mr. Katonak actually make a motion with
25 regard to trying to keep any evidence out or what's

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1 your allegation with that?

2 A. Yes, sir. The same as I asked Mr. Hayes to
3 make, do an order to suppress. I asked him to do a
4 order to suppress that evidence. And he did a
5 order to suppress but his order to suppress was to
6 suppress the identification evidence that they
7 received after I was already arrested for this
8 charge. The State excluded the evidence from where
9 they used that fingerprint card and they only used
10 the identification that they did two months after
11 my arrest.

12 Q. Okay. So y'all -- did you actually proceed
13 to a trial initially in that case?

14 A. No. I was supposed to be going to trial but
15 the only evidence that I received in my motion to
16 discovery was the identification where I was
17 identified two months later. It was nothing else
18 in my motion to discovery so I couldn't go to trial
19 because I couldn't prepare a defense to defend
20 myself.

21 Q. What do you think your lawyer, Mr. Katonak,
22 should have done?

23 A. He should have got this evidence that was not
24 in my Rule Five. We never seen no fingerprints
25 from the crime scene, no chain of custody from

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1 where they collected no evidence, no investigative
2 report. There's no evidence showing where my print
3 was identified at the time that they arrested me
4 for that trial -- for that charge.

5 So I felt that he should have at least got
6 this evidence before, you know, he made a ruling
7 that, you know, because he told me if I go to trial
8 he felt like I was going to get life. And I don't
9 understand how he could make the allegations
10 without seeing the evidence that they had against
11 me.

12 Q. Let's kind of step back a little bit. When
13 did you -- how many times did you meet with
14 Mr. Katonak prior to your plea?

15 A. I'm not, I'm not for sure how many times we
16 met.

17 Q. Did you meet with him prior to the plea?

18 A. Yes, sir. Yes, sir.

19 Q. Okay. What did y'all discuss, if you can
20 recall, in any of your meetings?

21 A. Well, we discussed about the fingerprint
22 evidence, about them, you know, violating Section
23 17.4 of the South Carolina Code of Laws. And, we
24 discussed about the evidence, because when I was
25 here before I took the plea, when I first brought

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1 this to the Court's attention that I was taking
2 this plea because I never seen no evidence against
3 me, the Judge told them to just call my case for
4 trial. So me and Mr. Katonak went back there and
5 we talked and I explained to him about this
6 evidence.

7 He went and he was supposed to have been
8 talking to the solicitors about getting this
9 evidence. When he came back to see me, he came
10 back and told me that they agreed to accepting my
11 plea for a Alford plea. They still never provided
12 me with no evidence and -- in this case. So I had
13 to take a plea. If I wouldn't have, I was going to
14 get life in prison.

15 Q. Have you seen any evidence since your plea
16 that you didn't review with Mr. Katonak?

17 A. No. I still was never provided with no
18 evidence from that case.

19 Q. You got some other allegations that I want to
20 walk through those. You've also alleged under your
21 involuntary plea -- that you feel that your plea
22 was involuntary due to the fact the prosecution
23 held material evidence from your Rule Five
24 materials.

25 A. And this --

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1 Q. Is that what you're talking about?

2 A. Yes, sir. Yes, sir.

3 Q. Okay. Now, you've also got a couple of
4 claims of ineffective assistance of counsel. You
5 say that counsel failed to obtain and review
6 discovery material that he knew the prosecution
7 would rely on.

8 A. Yes, sir.

9 Q. What evidence are you talking about?

10 A. The chain of custody report showing where the
11 State collected evidence. No fingerprints were
12 ever seen where they say they obtained fingerprints
13 from the crime scene. The only evidence was in my
14 motion to discovery was showing that my
15 fingerprints matched two months after my arrest.
16 They didn't even show me where they even had a
17 probable cause to arrest me for this charge. They
18 said that they had a match but it's not in my
19 motion to discovery. Nothing's in my motion to
20 discovery.

21 Q. You've also got an allegation -- you may have
22 touched on this, but please explain it more if you
23 need to, that your lawyer was ineffective for not
24 filing the proper motion to suppress. Counsel was
25 asked to file a motion to suppress fingerprint

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1 card.

2 A. Yes, sir. Because my argument was based on
3 this fingerprint card because this is what they
4 used to arrest me. In that case they excluded all
5 evidence of that fingerprint card.

6 Q. And when --

7 A. And they --

8 Q. -- you're talking about the fingerprint card,
9 you're referring back to --

10 A. The prior fingerprint card from when I was
11 found not guilty at trial.

12 Q. And it's your opinion that under the South
13 Carolina statutes that that, that material should
14 not have ever been used again for any of your
15 cases?

16 A. No, sir, because up under 17-1-40 of the
17 South Carolina Code of Laws it says that all
18 evidence pertaining to that charge must be
19 destroyed.

20 Q. Okay. Now you've also got an allegation that
21 your lawyer was ineffective for advising you to
22 take a plea stating that this was your only chance,
23 and in this case was -- your only chance was to
24 plea and then he handled the appeal against the
25 Court's decision which he failed to properly advise

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1 you that at a plea you would surely receive life in
2 prison.

3 A. Yes, sir.

4 Q. Please explain that to the Court.

5 A. Well, like it shows in my trial transcript,
6 he felt that, you know, the State had a strong case
7 against me which I still don't understand how he
8 felt that without seeing the evidence. And he felt
9 that this plea would be my only, my best option.
10 So I had to take that plea.

11 Q. Okay. Now, you also have some claims that
12 you've alleged prosecutorial misconduct?

13 A. Yes, sir.

14 Q. And let's just go through one by one the ones
15 that you've alleged.

16 A. Okay.

17 Q. You've alleged that the prosecution did not
18 act in accordance with the laws and you refer back
19 to 17-1-40?

20 A. Yes, sir.

21 Q. Is that one of your claims?

22 A. Yes, sir, because they violated that statute
23 and illegally obtained evidence to be used against
24 me. That's one of the claims.

25 Q. Now you also have another allegation that

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1 you've alleged where you say the prosecution also
2 showed misconduct by violating the rules of
3 procedure by withholding material evidence from
4 your discovery material.

5 A. Yes, sir.

6 Q. Explain what -- explain that to the Court.

7 A. Well, like I said, it was nothing in my
8 motion to discovery. So the State, they withheld
9 all evidence against me. Either they withheld it
10 or they exclude it. Either way it was not in my
11 motion to discovery.

12 Q. All right. Now you've also got the
13 prosecution showed misconduct by obtaining a
14 warrant for your arrest without probable cause.
15 Please explain that allegation.

16 A. There's nothing in my record showing where
17 they had a probable cause to arrest me. I know
18 that they said they arrested me because my print
19 was a match but the only evidence showing that my
20 print was ever identified is two months after my
21 arrest.

22 Q. Let me ask you this. Did you ever discuss
23 having any sort of preliminary hearing with
24 Mr. Katonak?

25 A. No, sir. I hadn't -- already had my

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1 preliminary hearing for both charges.

2 Q. For this case?

3 A.. For that case.

4 Q. Was someone representing you?

5 A. Mr. Hayes, David Hayes represented me.

6 Q. Was Mr. Hayes initially representing you on
7 all of this?

8 A. Yes, sir. He was over both my charges.

9 After my trial he asked to be relieved for a
10 conflict of interest, but it already was a conflict
11 of interest before he even represented me in the
12 first trial. So he asked to be excused and that's
13 when the Court excused him and gave me Mr. Katonak.

14 Q. Okay. So let me get this straight.

15 Mr. Hayes was representing you with regard to the
16 charges you faced at that trial but also with
17 regard to this charge --

18 A. Yes, sir.

19 Q. -- that you pled to?

20 A. Yes, sir.

21 Q. And, he was relieved after the trial of
22 this --

23 A. After my first trial.

24 Q. -- after his representation on this charge?

25 A. With Ms. Aimee case. After I had my trial

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1 and I was convicted, then he removed his self.

2 Q. Was there a hearing held or how was that
3 done?

4 A. I received some papers that, you know, they
5 was appointing me Mr. Katonak because my counsel
6 asked to be relieved because of a conflict of
7 interest.

8 Q. Okay. You also have an allegation that the
9 prosecution showed misconduct by using illegal
10 evidence to charge, arrest, indict and convict you,
11 used evidence for the charge which you were found
12 not guilty to. Have we already discussed that?

13 A. Yes. That's still dealing with the violation
14 of 17-1-40.

15 Q. Now by amendment you've alleged that your
16 lawyer was ineffective for failing to make a motion
17 to have the solicitor's office recused from
18 prosecuting your case. Is that also one of your
19 allegations?

20 A. Yes, sir.

21 Q. Okay. And I know you've touched on that with
22 regard to your trial aspect. But as far as the
23 plea, explain to the Court what you mean by that
24 and why you feel like your lawyer should have made
25 such a motion.

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1 A. Because he seen all the misconduct that was
2 being done by the solicitor's office and all this
3 conduct was being done in connection to that prior
4 charge that involves their office. So I felt that
5 my attorney should have did a motion to recuse them
6 to prevent them from the unlawful misconduct that
7 was shown towards me.

8 Q. Did you ever have any discussions with
9 Mr. Katonak about the order that's already been
10 marked as Plaintiff's Exhibit 1 recusing the
11 solicitor's office?

12 A. No, sir.

13 Q. Okay. Why not?

14 A. Because -- I remember when I had the trial in
15 2008, I remember that we did an order to recuse the
16 Second Circuit Solicitor's Office. And it just, it
17 slipped my mind at that time. So this evidence --
18 Ms. Aimee, she got in touch with the other attorney
19 that I had and he presented her with that order so
20 after I got that order that's where we amended it
21 to my application.

22 Q. What -- have you reviewed the order?

23 A. Yes, sir.

24 Q. What's your -- is your interpretation of it
25 that the solicitor's office was recused from

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1 prosecuting you for anything or tell us what your
2 opinion is.

3 A. The order says that they are recused from
4 prosecuting me for any charges or indictments that
5 are alleged to be related to that prior charge but
6 not only alleged to be related to that prior charge
7 but for any charges or indictments that was part of
8 a pattern of criminal activity which also included
9 that prior charge.

10 Q. Let me ask you this. Obviously there was
11 what's called an Alford plea in your case. Why was
12 it that you went in and entered this plea to this
13 charge?

14 A. I had no other choice, no other choice
15 because if I wouldn't have took that plea I was
16 going to get life in prison. And they made this
17 clear to me. They made this known to me. And I
18 couldn't go to trial because I couldn't prepare no
19 defense. I wouldn't know how to impeach the
20 witnesses the State was using against me. So I had
21 to take that plea.

22 Q. Do you recall at your plea -- and, Your
23 Honor, I'm referring to the plea transcript page
24 8. Do you recall the Court asking you, the Court
25 goes through a litany of things with you and asking

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1 you do you understand all of that. You indicate on
2 line eight page 8: No, sir. The Court asks you:
3 Well, what don't you understand. And you said: I
4 didn't understand the part about me agreeing that I
5 seen all the evidence because I haven't seen no
6 evidence. I'm taking this plea because I really
7 don't have no other alternative to escape receiving
8 a life sentence. And the Court says: All right.
9 Step down. We'll call your case.

10 A. Yes, sir.

11 Q. And then the plea resumes after that. What
12 were you -- why were you saying that?

13 A. At that time?

14 Q. Yes, sir.

15 A. Because I, I wanted the Court to know that I
16 didn't have -- that I was not taking this plea
17 voluntary, that I had no choice but to take this
18 plea because I couldn't properly defend myself.
19 And the Court just told them to call me to trial.
20 So, I mean.

21 Q. Now, you received a 25-year sentence
22 concurrent with the trial conviction?

23 A. Yes, sir.

24 Q. Okay. And we didn't do this earlier but I'm
25 going to ask you some questions about that. Do you

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1 understand that, what we're doing here today?

2 A. Yes, sir.

3 Q. Why are we here?

4 A. We're here to, hopefully to correct these
5 issues that was --

6 Q. Okay. And you filed, obviously you filed an
7 application for post-conviction relief?

8 A. Yes, sir.

9 Q. With regard to the plea which I'm
10 representing you on, do you understand that really
11 the only thing the Court can do is basically send
12 this case back if this Court grants your
13 application basically to day one as though you
14 first got arrested on this charge and you would go
15 back and face this burglary first all over again;
16 do you understand that?

17 A. Yes, sir.

18 Q. Okay.

19 A. Yes, sir.

20 Q. And you certainly may have some defenses or
21 motions that you would want to make at that time
22 but do you understand that by doing that you are
23 exposing yourself to the 15-to-life? That's the
24 potential range on the burglary first. Do you
25 understand that?

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1 A. Yes, sir.

2 Q. And knowing that, do you still want to go
3 forward with your application?

4 A. Yes, sir, because I want a trial like I
5 wanted from the start.

6 Q. Okay. Mr. Cave, we've been through your PCR
7 application, your allegations. Is there anything
8 that we have not covered with regard to your
9 application or anything that you feel like your
10 lawyer should have done for you or anything that
11 you feel like your lawyer did for you but did
12 improperly, is there anything else that you want to
13 tell this Court?

14 A. No, sir.

15 MR. BOOZER: Okay. Thank you, Mr. Cave.
16 That's all the questions I have.

17 THE APPLICANT: Yes, sir.

18 CROSS-EXAMINATION

19 BY MS. COLEMAN:

20 Q. Good morning, Mr. Cave. How are you?

21 A. All right. Fine.

22 Q. I've just got some questions for you. I'm
23 going to start with the trial.

24 A. Yes, ma'am.

25 Q. So this is Ms. Zmroczek's case with you and

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1 we're talking about Mr. David Hayes who was your
2 attorney at trial.

3 How many times did you meet with Mr. Hayes
4 before your trial?

5 A. I'm not for sure how many times but he came
6 to see me a few times.

7 Q. Okay. Let me step over here, actually.

8 Do you recall reviewing discovery with
9 Mr. Hayes before the trial?

10 A. You're talking about going over my motion to
11 discovery material?

12 Q. Yes.

13 A. Yes, ma'am.

14 Q. Do you recall discussing possible defenses
15 with Mr. Hayes?

16 A. Mr. Hayes really never came with no defense.
17 He was basically going off the State's
18 technicalities because he said my whole case was
19 blotched. I guess he felt there was no need to go
20 over the defense so he just relied on the
21 technicalities done by the State.

22 Q. And did you give him any possible defenses to
23 look into or to investigate?

24 A. Yes, ma'am.

25 Q. Did you give your attorney any potential

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1 witnesses to investigate?

2 A. No, ma'am.

3 Q. As far as the evidence that you wanted
4 suppressed, is it just the fingerprints that we've
5 been discussing today?

6 A. The fingerprints and the chain of custody
7 report.

8 Q. Okay.

9 THE COURT: You're talking about this, right;
10 Plaintiff's Number 2?

11 THE APPLICANT: Yes, sir.

12 THE COURT: When you say chain of custody
13 report, that's what you mean?

14 THE APPLICANT: Yes, sir.

15 THE COURT: I just want to make sure I follow
16 you.

17 THE APPLICANT: Because it was two now, but
18 the other one we didn't know nothing about, the
19 other chain of custody. Everything was based on
20 that chain of custody right there.

21 THE COURT: I apologize, Ms. Coleman.

22 THE APPLICANT: Yes, sir.

23 MS. COLEMAN: No, that's fine.

24 Q. You testified that your attorney stipulated
25 to your prior burglary charges. Did he ever

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1 discuss this stipulation with you?

2 A. No.

3 Q. No?

4 A. No, ma'am. I found out about the stipulation
5 during trial because I wanted him to bring up the
6 issue about my past burglary because this happened
7 in 1986. It was 20-some years ago. So I wanted
8 the jury to know that, you know. They was trying
9 to make it seem like this was an ongoing thing and
10 I just wanted to show the jury it was 20-some years
11 ago.

12 Q. Right.

13 A. Yes, ma'am.

14 Q. So those prior burglaries would have come in
15 at trial anyways; is that right?

16 A. Yes, ma'am. They would have came in; yes,
17 ma'am.

18 Q. Okay. Let's go back to the date you were
19 arrested in 2008, January of 2008. Were you
20 arrested for possession of marijuana second?

21 A. Yes, ma'am.

22 Q. And were you arrested for resisting arrest
23 stemming from this January 2008 arrest? Were you
24 charged with that as well?

25 A. I don't -- I don't think I was resisting no

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1 arrest.

2 Q. Did you plead guilty to possession of
3 marijuana second on March 18th of 2010?

4 A. Yes, ma'am.

5 Q. And did you plead guilty to resisting arrest?

6 A. I don't think I had a resisting arrest.

7 Q. Okay.

8 A. And the marijuana, they stopped -- I was
9 stopped and -- to be arrested for the burglary
10 charge. Once they stopped me for the burglary
11 charge, they found me in possession of marijuana.
12 So after they arrested and booked me for the
13 burglary charge, they used them same prints to, as
14 to arrest and book me for the marijuana charge.

15 Q. Okay. So they used those fingerprints for
16 the marijuana charge as well?

17 A. Yes, ma'am. Yes, ma'am.

18 Q. Okay. Let's see. All right. I'm going to
19 move onto your guilty plea now. So, Mr. Boozer's
20 case with you. This is with Mr. Katonak when he
21 was your attorney.

22 A. Okay.

23 Q. How many times did you meet with Mr. Katonak
24 before your guilty plea?

25 A. I think I met with Mr. Katonak. He came to

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1 see me, and then we had a few phone calls. I
2 didn't see him no more until the day that I came
3 for my hearing, my court hearing.

4 Q. And did you review discovery with
5 Mr. Katonak?

6 A. Yes, ma'am.

7 Q. Over the plea?

8 A. Yes, ma'am.

9 Q. And Mr. Boozer brought this up earlier. At
10 the guilty plea, Judge Early actually stopped the
11 plea because you said you had not seen all the
12 discovery, the evidence against you, right?

13 A. Yes, ma'am.

14 Q. And he did not continue and start your plea
15 again until after you had discussed this issue with
16 Mr. Katonak; is that right?

17 A. Yes, ma'am.

18 Q. Did you give Mr. Katonak any possible
19 defenses to investigate for this charge?

20 A. Just basically, just saying the same defenses
21 that I was using on my other case.

22 Q. Did you give him any leads or witnesses to
23 investigate for these charges?

24 A. No, ma'am. There was never no witnesses.

25 Q. Okay. Do you remember waiving your

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1 constitutional rights, like, your right to a jury
2 trial and your right to remain silent, at the
3 guilty plea?

4 A. You talking about when I took the plea?

5 Q. Yes.

6 A. Yes, ma'am.

7 Q. Okay. Do you recall telling Judge Early that
8 you were satisfied with your attorney's services?

9 A. Yes, ma'am. But these -- this is -- this is
10 the procedure I had to go through in order for them
11 to accept the plea.

12 Q. Uh-huh.

13 A. So I had to tell the Courts that.

14 Q. And you had no complaints against Mr. Katonak
15 at the guilty plea, right?

16 A. Not to the Court. I didn't present it to the
17 Court.

18 Q. Okay. Do you remember telling the judge that
19 no one was promising or threatening you to plead
20 guilty?

21 A. Yes, ma'am. Which is, once again, these are
22 procedures -- when they ask you questions -- like,
23 when he started asking me questions the first time
24 and I explained about not seeing the evidence, he
25 said -- well, once I went back and they explained

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1 to me that I would have to agree to them, agree to
2 them statements in orders for him to accept my
3 plea, other than that they wouldn't accept my plea.

4 Q. Okay. And you pled guilty under North
5 Carolina v. Alford, right?

6 A. Yes, ma'am.

7 Q. Do you remember telling Judge Early that you
8 understood that an Alford plea is treated just like
9 a guilty plea?

10 A. Yes, ma'am, because it's a guilty plea but
11 under up under Alford, I know that you're not
12 really pleading guilty to the charges, you're just
13 pleading guilty because you don't think you can
14 beat the evidence that the State has against you.
15 But an Alford charge is not admitting guilt to that
16 charge.

17 Q. Just one moment. And Mr. Boozer has already
18 asked you this but if you go to trial on this
19 charge that you pled guilty to you face a possible
20 sentence of life without parole. Do you want a
21 trial on these charges?

22 A. Yes, I do.

23 Q. And one last question. I'm sorry. I'm
24 backtracking.

25 Back to the trial with Mr. Hayes. Did you

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1 get along with Mr. Hayes by the end of the trial?

2 A. Me and Mr. Hayes did not get along before the
3 trial.

4 Q. Okay. So you didn't have a good relationship
5 with him?

6 A. No, ma'am.

7 MS. COLEMAN: Okay. Thank you. No further
8 questions.

9 THE APPLICANT: Yes, ma'am.

10 MS. ZMROCZEK: Just a follow-up question.
11 One, Your Honor.

12 REDIRECT EXAMINATION

13 BY MS. ZMROCZEK:

14 Q. As far as going back to our trial, what
15 you're asking the Court to do is to grant you a new
16 trial for the case for which I'm representing you
17 on, right?

18 A. I would like to have a new trial without this
19 illegally-obtained evidence and without the Second
20 Circuit Solicitor's Office.

21 Q. And understand that he can't make evidentiary
22 decisions, but you're asking the Court to grant a
23 new trial so that someone can look at, specifically
24 this, the prosecution aspect of it and then --

25 A. Make sure that I have --

1 Q. -- to properly identify the fingerprint
2 evidence?

3 A. Yes, ma'am.

4 Q. Okay. You're not asking the Judge to make an
5 evidence ruling?

6 A. Right.

7 Q. Okay. I wanted to be clear.

8 MR. BOOZER: No questions, Your Honor.

9 MS. COLEMAN: Nothing further from this
10 witness.

11 THE COURT: Do you understand that if I grant
12 you a new trial, I do not have the power in my
13 capacity as your post-conviction relief application
14 judge to excuse the Second Circuit Solicitor's
15 Office from your case?

16 THE APPLICANT: Yes, sir.

17 THE COURT: And do you understand that if I
18 grant your post-conviction relief application, I do
19 not have the power as your PCR judge to exclude the
20 fingerprints or the exhibit list? That's a
21 decision that your trial, your new trial judge, if
22 I granted your PCR, would have to make.

23 THE APPLICANT: Yes, sir. Yes, sir.

24 THE COURT: So you could -- do you understand
25 that on your trial, the case that Mr. Hayes

1 represented you on --

2 THE APPLICANT: Uh-huh.

3 THE COURT: -- if I grant that, you go back
4 to day number one and you're back to facing life.
5 Is it a burglary first?

6 THE APPLICANT: Yes, sir.

7 THE COURT: You're back to facing life and
8 that judge can look at you and say: The
9 fingerprint card's admissible and the Second
10 Circuit Solicitor's Office is handling the case,
11 and there's nothing I can do about it.

12 THE APPLICANT: Yes, sir. Can I respond to
13 something?

14 THE COURT: Sure. I want to make sure you
15 understand what you're doing.

16 THE APPLICANT: Yes, sir. Even if that
17 happened because if they used this evidence in
18 trial against me, then I have a right to show the
19 jury in my defense how the State's being allowed to
20 use evidence. But, yes, sir, I understand.

21 THE COURT: And I'm not saying you don't.
22 I'm just saying, I want to make sure that you
23 understand if I decide to grant your application
24 it's not going to say the Second Circuit
25 Solicitor's Office can't prosecute your case --

1 THE APPLICANT: Right, right.

2 THE COURT: -- and this evidence is
3 inadmissible. It's just going to say that I find
4 you've had a violation of your constitutional
5 rights and therefore I'm granting you a new trial.

6 THE APPLICANT: Yes, sir. I understand.

7 THE COURT: You understand and you're willing
8 to take that risk?

9 THE APPLICANT: Yes, sir, I am.

10 THE COURT: Okay. That's all the questions I
11 have. Do you want to ask him anything else,
12 Ms. Coleman?

13 MS. COLEMAN: No, Your Honor.

14 THE COURT: Ms. Zmroczek?

15 MS. ZMROCZEK: No, Your Honor. That's what I
16 was trying to clarify.

17 THE COURT: Mr. Boo -- Mr. Boozer. I'm
18 sorry. I almost called you Booker. Mr. Boozer,
19 anything you want to ask this young man?

20 MR. BOOZER: I've been called worse, Your
21 Honor. No further questions.

22 THE COURT: Thank you, Mr. Cave.

23 THE APPLICANT: Thank you, sir.

24 THE COURT: Who's next?

25 MS. ZMROCZEK: I don't have any additional

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1 witnesses. It's my understanding that Mr. Boozer
2 does not have any additional witnesses.

3 THE COURT: Is that right, Mr. Boozer?

4 MR. BOOZER: That's correct, Your Honor.

5 THE COURT: Ms. Coleman?

6 MS. COLEMAN: Yes, Your Honor. The State
7 calls David Miller.

8 THE COURT: All right. Come on forward,
9 Mr. Miller.

10 DAVID W. MILLER, having been duly sworn, was
11 examined and testified as follows:

12 THE CLERK: Have a seat in the witness box.
13 State your full name for the Court.

14 THE WITNESS: Deputy Solicitor David Miller,
15 M-I-L-L-E-R.

16 DIRECT EXAMINATION

17 BY MS. COLEMAN:

18 Q. Good morning, Mr. Miller. How are you?

19 A. Good morning.

20 Q. Where are you currently employed?

21 A. The Second Circuit Solicitor's Office.

22 Q. How long have you been employed there?

23 A. Since January of 2009.

24 Q. Were you the solicitor who prosecuted the
25 case of Albert James Cave, Jr.?

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1 A. Yes.

2 Q. And he -- there was a trial in this case and
3 a guilty plea that's at issue here. Did you
4 prosecute both of these cases?

5 A. I did.

6 Q. Starting with the trial, will you tell us
7 what the facts of this case were?

8 A. Essentially in May of 2011, Mr. Cave went
9 into the home of a family in North Augusta and he
10 stole some items from that home. Whenever it was
11 discovered that a burglary had occurred the
12 arrest -- or, the officer who responded to the
13 scene was a deputy, Deputy Costic. And he went
14 through the house with the victim and asked if
15 anything had been moved. And one of the things
16 that had been moved was a stack of papers that had
17 been taken off of a laptop so that the laptop could
18 be stolen.

19 Deputy Costic preserved those papers by
20 putting them into a bag and submitted them for
21 evidence or for fingerprint identification to the
22 Aiken County Sheriff's Office. And once there
23 Lieutenant Clay Adams developed some prints and
24 they were run through AFIS and they came back with
25 a match.

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1 Q. And as far as the guilty plea, the Alford
2 plea that he entered, can you tell us the facts of
3 these charges?

4 A. It's largely the same only this time it was a
5 home in the Warrenville area. An air-conditioning
6 unit had been removed and latent -- a window unit,
7 and latent prints from that window unit and the
8 window seal where that unit was removed from were
9 developed and somebody had gone into the home and
10 stolen a couple laptops and some other items.
11 Those prints were also -- latent prints were also
12 examined and there was a match made on those based
13 upon an AFIS hit as well. And the matches in both
14 cases were to the Defendant.

15 Q. Okay. From the trial. Did the Applicant's
16 attorney, Mr. Hayes, file Rule Five or Brady
17 motions in this case?

18 A. He did.

19 Q. Did you turn that material over to him?

20 A. We did.

21 Q. Was there any material that they requested
22 from you that you did not turn over?

23 A. There was none that we did not turn over.

24 Their Rule Five and Brady motions are generic.

25 There were some things that were not applicable,

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1 but there was nothing that was responsive to his
2 motion that we, or, in our knowledge, law
3 enforcement had that did not get turned over.

4 Q. Okay. The same question for the guilty plea
5 charges. Did Mr. Katonak file Rule Five or Brady
6 motions?

7 A. He did.

8 Q. And did you turn that material over to him?

9 A. We did.

10 Q. Was there anything that they requested that
11 you did not give to them?

12 A. No.

13 Q. Now you've already testified a bit about the
14 State's evidence in both the trial and the plea.
15 And there were fingerprints in both charges,
16 correct?

17 A. Both of the cases were prosecuted based
18 entirely upon the fingerprints.

19 Q. Okay. Now the Applicant has alleged that
20 the fingerprints were taken from a prior trial in
21 which he was found not guilty and was acquitted of
22 the charges. Can you tell us a little bit about
23 when you took the Applicant's fingerprints and what
24 charges they were used for?

25 A. On April 14th of 20 -- or, excuse me.

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1 January the 14th of 2008, Mr. Cave was arrested, as
2 he just testified, for a number of things. But
3 during his arrest for the burglary, a burglary that
4 had occurred on January the 7th of 2008, he was
5 found to be in possession of marijuana and he was
6 charged with resisting arrest. He was charged with
7 a litany of charges. I believe that there were 12
8 or 14 different charges that he was arrested for on
9 that day of January the 14th, 2008.

10 He remained incarcerated in the Aiken County
11 Detention Center until March the 18th of 2010, when
12 he pled guilty to the possession of marijuana
13 second offense and the resisting arrest charge from
14 that January 14th, 2008, arrest.

15 Q. Okay.

16 A. Before that guilty plea to those two charges,
17 he had a trial on January the 6th of 2010, on one
18 of his burglary charges. And after that trial the
19 jury found him not guilty.

20 And so as far back as I can recall in this
21 case, Mr. Hayes and then Mr. Katonak, both to me
22 and to the Court, has been saying the same argument
23 over and over and over again for Mr. Cave. But the
24 fact of the matter is, that fingerprint card from
25 his January 14th, 2008, arrest is the card that was

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1 used to compare his fingerprints to the latents
2 that were found in both of my cases. And as it
3 related to his burglary charge that he was found
4 not guilty on and any of the other charges that
5 were subsequently dismissed or nolle prossed or
6 whatever, he would have been entitled to have the
7 record of those charges taken out of the system,
8 expunged.

9 But the fact is he pled guilty to charges
10 from that arrest so there was never any
11 requirement, and even today he cannot go back and
12 apply for an expungement and get the record of his
13 arrest, to include his fingerprint card, that was
14 done on January 14th of 2008, removed from the
15 records because he pled guilty to charges from that
16 arrest.

17 He could certainly have his burglary charges
18 and any of the other charges that ended up being
19 dismissed or he was found not guilty on, any of
20 those charges he could have taken off of his rap
21 sheet, off of his record of arrest. But he can't
22 have that fingerprint card taken away.

23 And Mr. Hayes made the argument to me and I
24 made the argument back to Mr. Hayes and we went to
25 Judge Early pretrial and he made this argument

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1 before the Court and Judge Early said: No, I'm not
2 suppressing the fingerprints. For two reasons; the
3 first reason being, even if the fingerprints had
4 been -- even if the fingerprint card had been taken
5 out, Mr. Cave had 15 arrests in the State of South
6 Carolina.

7 Your fingerprints don't change over time.
8 Even if it hadn't been that card, that arrest card
9 that they happened to compare, it would have been
10 one of his other fingerprint cards that they
11 compared it to.

12 The second reason was, he wasn't entitled to
13 have that fingerprint card expunged, only the
14 charges he was found not guilty on.

15 And so, Judge Early ruled that the
16 fingerprint identification based on the card from
17 the 2008, January 14, 2008, arrest came in at the
18 trial. Subsequently Mr. Hayes was relieved as
19 counsel, Mr. Katonak was appointed. Mr. Katonak
20 came in and he filed a motion to suppress the
21 fingerprints. Again, the same argument that he's
22 made then, the same argument that he's making
23 today, the same argument that he was making before
24 the trial.

25 That motion was filed April 17th of 2012.

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1 The motion was heard May 14th of 2012. And Judge
2 Early filed his order denying the motion to
3 suppress on June the 20th. He signed it June the
4 20th, it, was filed June the 21st of 2012.

5 And, so that -- the first, I guess, issue
6 with the fingerprint is that fingerprint card does
7 not legally go anywhere. Even if he had moved for
8 it to be expunged following his acquittal, it would
9 not have been expunged. It would not have been
10 taken out of the system because he pled to those
11 charges subsequently.

12 Second of all, and this is what we argued at
13 the motion hearing, we alleged that the expungement
14 required some affirmative act by the defendant
15 because the statute -- we don't start the
16 expungement process until the defendant comes in
17 and requests that it be expunged. Now we don't
18 charge anything for an expungement if there's a
19 dismissal or there's an acquittal, but it still has
20 to be a process started by the defendant.

21 That's where Mr. Cave seems to get confused,
22 because Judge Early in his written order denying
23 the motion to suppress in the plea case said --
24 found that -- quoting from the statute it says --
25 he quoted from the statute and he says, the

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1 defendant based, argues that based on the language
2 above his fingerprint record from his 2008 burglary
3 arrest that he was found not guilty on should have
4 been destroyed. The State alleges that the
5 provisions of the statute are not automatic and
6 that there's no obligation on the State to destroy
7 the records until the defendant makes application
8 for expungement pursuant to 17-22-910 et sec.

9 Judge Early found Section 17-1-40 does not contain
10 any language to indicate that its mandates are in
11 any way contingent on any action by the defendant.

12 Accordingly he found and ruled that the
13 defendant is correct that the arrest record,
14 including the fingerprint card from his 2008
15 burglary arrest, should have been destroyed
16 pursuant to the statute when he was acquitted on
17 that charge. However, because of what was next in
18 the order he then went on to say, the defendant has
19 15 prior arrests that resulted in at least 12 prior
20 convictions. Accordingly even if the fingerprint
21 card from the 2008 burglary charge had been
22 destroyed, there would have been 10 or more other
23 fingerprint cards with the same fingerprint images
24 on them for comparison. Obviously the defendant's
25 fingerprints would be the same on any card obtained

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1 during any of his arrests dating back to his first
2 arrest in 1986. And then he said, based on that
3 I'm saying it's inevitable discovery and the
4 State -- the fingerprints would not be suppressed.

5 We actually considered and talked about going
6 back and asking Judge Early to reconsider the
7 statement that the 2008 burglary arrest should be
8 expunged because you can't separate the two of
9 them. The 2008 burglary arrest, it's the same
10 card, it's the same fingerprint card as the 2008
11 resisting arrest and possession of marijuana. You
12 can't separate the two of them. You can't separate
13 charges.

14 But at the end we decided it really doesn't
15 make any difference because of the fact that he did
16 not suppress the fingerprints, and we were moving
17 forward with the plea at that time.

18 Q. Okay. Thank you.

19 As far as chain of custody goes for the
20 fingerprints, did you think there were any issues
21 with the chain of custody in this case?

22 A. I didn't think that there were any issues
23 with the chain of custody but I can say when
24 discovery is sent out to a defendant, and that
25 defense attorney says this is a trial, we start

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1 preparing the case for trial, one of the things
2 that we do and we did in this case is we always
3 invite defense attorneys to come in, look at the
4 evidence, see everything that's there, see
5 everything we've got.

6 In this case Mr. Hayes actually had a former
7 SLED agent who was an expert in fingerprint
8 identification go to Lieutenant Adams' office area
9 where these fingerprints were going to be looked at
10 by his expert and that he was allowed to see the
11 fingerprints and do all of that stuff.

12 But that's inside a secure, contained area.
13 And, I do not know whether they listed on the chain
14 of custody every time that they take it out or they
15 only list it on the chain of custody when they
16 actually remove it from that secure, contained area
17 where they do their examinations.

18 But it is -- in my experience, never happened
19 that when we send out the discovery to the defense,
20 in this case Mr. Hayes, that they have a complete
21 chain of custody because anything that happens with
22 that item, whether it gets sent to SLED or just
23 stays in play, eventually it's going to get removed
24 from evidence storage because it will be brought
25 for trial.

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1 And at that point in time the chain of
2 custody has to change. So we -- the last
3 opportunity for us to give them the completed chain
4 of custody is at the trial. Maybe it's a day
5 before the trial, but it's whenever that evidence
6 gets brought to us for the very last time.

7 So that is the normal course of business.
8 Certainly Mr. Hayes didn't indicate that he had any
9 problem with the chain. I didn't see any problem
10 with the chain. I understand why the chain that
11 was provided initially is incomplete because it
12 would have to be.

13 So, that's all I can tell you about the
14 chain. I had no idea that there was an issue with
15 that until just now.

16 Q. Okay. Thank you.

17 Moving onto the next issue. The Applicant
18 has submitted as their Exhibit 1, an order of
19 recusal from a prior case that he had which I
20 believe was the 2008 charge that you referred to
21 earlier. Was the order of recusal -- in your
22 opinion did it, did it apply to this case, to this
23 trial or to the guilty plea?

24 A. It is absolutely astounding to me how someone
25 can read that order that was issued in October of

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1 2008 and believe that Judge Williams or any Court
2 intended that completely unrelated charges with
3 completely unrelated victims that occur three years
4 after the issuance of the order would somehow
5 conflict the Second Circuit Solicitor's Office out
6 of the trial of the case.

7 You have to have such a tortured reading of
8 that order it is ridiculous. And, I had no idea
9 that the order existed. Lawrence Brown did not
10 work for this office when I came to work here in
11 2009. He was working somewhere else. He did not
12 work for the solicitor's office.

13 I was actually more familiar with the trial
14 of the 2008 charges because I'm good friends with
15 Aaron Walsh. I'm -- that was really the most I
16 knew about the case. It was an old case that
17 involved Lawrence Brown. And once there was an
18 acquittal in the case and the remaining charges in
19 March ended up getting dismissed or pled out, that
20 was the end of that as far as I knew.

21 And, frankly, whenever it came up that there
22 was this order that was even out there, I read the
23 order and I was, like, oh, well, I didn't know
24 about it but if you read it it doesn't make any
25 sense at all to say that that somehow conflicts our

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1 office out. If I knew about it, if I had known
2 about it beforehand I would have read that order
3 that said this doesn't conflict us out of the case
4 and we would have prosecuted it the same way.

5 Q. Was this order brought up at all at the trial
6 or at the guilty plea?

7 A. Never. The first time this order was brought
8 up was whenever I was informed by -- or testimony I
9 heard earlier that Ms. Zmroczek had filed a
10 misconduct allegation because we were prohibited
11 from trying her client.

12 Q. As far as the plea, the Alford plea, what do
13 you recall about plea negotiations with the
14 Applicant on those charges?

15 A. As far as the negotiations with Mr. Katonak?

16 Q. Yes.

17 A. When he first got appointed in the case he
18 came and talked to me about it after he had looked
19 at the discovery and he said: What can we do with
20 it. And I told him that my intention was to either
21 plead to burglary first for a concurrent time, or
22 in the alternative I retry the case as an LWOP
23 case. Mr. Cave certainly had a record to justify
24 it so that was what my intention was to do.

25 I did tell him in our first meeting, he's

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1 made this argument about the fingerprints so many
2 times you're going to have to make that argument to
3 Judge Early or whatever judge it happened to be.
4 You're going to have to make the motion, but I'll
5 leave the offer open until you make the motion and
6 you have a chance to get a ruling on the motion.
7 And then if he doesn't take it then I'm going to
8 pull the offer and we're going to go to trial.

9 And so Mr. Katonak made the motion. And I
10 would note, Judge Early -- when the motion was made
11 at the trial, Judge Early didn't issue a written
12 order but because it had come up so much, by the
13 time he heard it again for the plea he actually
14 issued a written order. And I don't know that
15 anybody's made that order a part of the record in
16 this case yet.

17 So he issued a written ruling on that -- at
18 that second time when Mr. Katonak made it.

19 Q. So there was a pretrial hearing before the
20 guilty plea regarding these prints?

21 A. Absolutely. It was a couple months before
22 the guilty plea.

23 Q. Okay. Let's see.

24 Mr. Miller, is there anything else about
25 either of these, the trial or the guilty plea,

DAVID W MILLER - CROSS BY ZMROCZEK

1 regarding the allegations today that you think
2 should be known, just in general?

3 A. No.

4 Q. Thank you very much. No further questions.

5 MS. ZMROCZEK: Your Honor, I'm having marked
6 that order we keep referring to, just so we can
7 have a clean record.

8 (Plaintiff's Exhibit No. 3, Judge Early's
9 order, marked for identification.)

10 MS. ZMROCZEK: Thank you. May I approach,
11 Your Honor?

12 THE COURT: Sure.

13 CROSS-EXAMINATION

14 BY MS. ZMROCZEK:

15 Q. I'm showing you Plaintiff's Exhibit 3. Is
16 this the order that you were referring to that
17 hasn't been made a part of the record yet?

18 A. It is.

19 MS. ZMROCZEK: Okay. Your Honor, at this
20 time we would move Plaintiff's or Applicant's 3
21 in.

22 MS. COLEMAN: No objection.

23 THE COURT: All right.

24 MS. ZMROCZEK: Thank you.

25 (Plaintiff's Exhibit No. 3, Judge Early's

DAVID W MILLER - CROSS BY ZMROCZEK

1 order, received into evidence.)

2 BY MS. ZMROCZEK:

3 Q. Would you agree with me that on page 2 of the
4 bottom of that order it says that the State does
5 not argue or contest that the fingerprints came
6 from the burglary print card. If you read -- do
7 you have a copy of the order or do I need to give
8 it back to you?

9 A. You're talking about the footnote?

10 Q. Correct.

11 A. That is correct.

12 Q. The State doesn't contest it.

13 A. There's -- and that's still the State's
14 position. There is not a separate fingerprint card
15 for the burglary charge. It did -- it is the
16 fingerprint card that came from his burglary
17 arrest. It is also the fingerprint card that came
18 from his arrest on other charges that he pled
19 guilty to.

20 Q. And I want to talk about those other charges
21 he pled guilty to. The AG actually handled those
22 pleas as well, right?

23 A. Yes.

24 Q. And those were after this?

25 A. No.

DAVID W MILLER - CROSS BY ZMROCZEK

1 Q. Those were after his trial?

2 A. They were after his trial.

3 Q. After his acquittal?

4 A. Right.

5 Q. So at that point the AG was still prosecuting
6 on behalf of the Second Circuit Solicitor's
7 Office?

8 A. The AG prosecuted him for everything that was
9 related to his arrest, January of 2008.

10 Q. Okay. And you would agree with me that the
11 fingerprint card slash second -- possession second
12 offense came out of that 2008 charge? That's
13 evidence that came out of that charge; you would
14 agree with me on that?

15 A. It wasn't evidence that came out of a charge.
16 That fingerprint card was -- that fingerprint card
17 came from an arrest.

18 Q. Okay.

19 A. That's it.

20 Q. But that came from an arrest --

21 A. Okay.

22 Q. -- in 2008?

23 A. Correct.

24 Q. So that -- the evidence that y'all relied on,
25 that the State relied on in this trial -- and I'm

DAVID W MILLER - CROSS BY ZMROCZEK

1 just focusing on the trial not the plea -- in the
2 trial, the evidence that y'all relied on came out
3 of the 2008 arrest?

4 A. No, that is not accurate.

5 Q. Okay. So where did the fingerprint match
6 come from?

7 A. The fingerprint match that was used at trial
8 came from a 10-print card that was taken by
9 Lieutenant Adams at the jail about a week before
10 the trial.

11 Q. All right. Let me rephrase the question.
12 But to arrest him for that charge that he went to
13 trial --

14 A. Correct.

15 Q. -- that came out of 2008 arrest card?

16 A. No, it came -- it came based on a comparison
17 of his fingerprints with that arrest card --

18 Q. Right.

19 A. -- that came --

20 Q. From 2008?

21 A. Yes.

22 Q. Thank you. That's what I'm talking about.

23 So there was evidence that linked the two
24 cases at least. The probable cause for making the
25 arrest in his trial came from the 2008 match, hit;

DAVID W MILLER - CROSS BY ZMROCZEK

1 correct?

2 A. It came from the 2008 hit, yes.

3 Q. Correct. Okay. Thank you.

4 So there is some link to the 2008 case slash

5 2010 case, whatever, 2008?

6 A. There's -- yes.

7 Q. Okay. So to say that it's a tortured,

8 twisted reading, it's -- at least it's a legitimate

9 argument that someone should have made had anybody

10 known about this order, right?

11 A. I don't think that it is a legitimate

12 argument.

13 Q. Okay. But it's an argument that could have

14 -- you would have taken a position that a tortured,

15 twisted reading would say that they're not related

16 and the defense counsel could have taken another

17 position?

18 A. Could have?

19 Q. Could have.

20 A. You are.

21 Q. Right. Right. But I'm doing it under PCR.

22 What I'm saying is it wasn't even brought to the

23 Court's attention?

24 A. It wasn't.

25 Q. Okay. Thank you.

DAVID W MILLER - CROSS BY ZMROCZEK

1 A. Because none of the three attorneys involved
2 being me, Mr. Katonak, or Mr. Hayes knew anything
3 about the order.

4 Q. And when did you talk to Mr. Walsh about it?
5 That was after I brought it to the Court's
6 attention?

7 A. No. I never talked to Mr. Walsh about the
8 order.

9 Q. Oh, okay.

10 A. I was talking to Mr. Walsh as the case, as it
11 was being tried back in 2011, I guess -- or, 2010.
12 I'm sorry.

13 Q. So back in 2011 -- when this case was tried,
14 I think it was August 2011, right?

15 A. Correct.

16 Q. And you had at least talked to Mr. Walsh at
17 that time?

18 A. About the 2011 case?

19 Q. About -- no -- you were talking with
20 Mr. Walsh in 2011 about the previous case at least,
21 so you --

22 A. No.

23 Q. -- had knowledge -- when did you first learn
24 that there was a previous case prior to 2011?

25 A. When I was working here and we had a term of

DAVID W MILLER - CROSS BY ZMROCZEK

1 court going on and Aaron Walsh was coming in as a
2 defense attorney every morning and the AG's office
3 was prosecuting the case.

4 Q. Okay.

5 A. That's when I learned. It was as it was
6 going on.

7 Q. So that was in 2010?

8 A. Correct.

9 Q. Okay. So prior to this trial?

10 A. Yes.

11 Q. So you had some knowledge that at least the
12 Second Circuit Solicitor's Office had been recused
13 because the AG's office was here every day and
14 Mr. Walsh was here every day?

15 A. Yes.

16 Q. Okay. So you just didn't know there was an
17 order but you had knowledge?

18 A. No. Everyone's understanding was the AG's
19 office was trying that case because the victim in
20 that case was Lawrence Brown.

21 Q. Okay. So you didn't know about the order?

22 A. No.

23 Q. Okay. All right. I want to talk about the
24 defense -- or, I keep saying defense. I do that
25 all the time. I'm sorry. -- plaintiff's,

DAVID W MILLER - CROSS BY ZMROCZEK

1 Applicant's Exhibit 2 which is the evidence
2 property list which --

3 A. Okay.

4 Q. -- I think mine has writing on it, but does
5 the Court have -- oh, it's over here. Sorry.

6 Now, I understand that you testified that
7 evidence gets collected at the sheriff's office and
8 brought over here and that's when the absolute
9 chain is complete, right?

10 A. Yes.

11 Q. Okay. So, you would agree with me that this
12 looks like what you turned over in evidence to
13 Mr. Hayes pursuant to his Rule Five requests?

14 A. Yes.

15 Q. Okay. You would agree with me that it says:
16 ID Albert James Cave, Jr., stored in '91,
17 written --

18 A. Yes.

19 Q. Okay. Do you know who wrote that?

20 A. I do not.

21 Q. Okay. Can you show me on that page anywhere
22 where Mr. Clay Adams' name appears on the chain of
23 custody?

24 A. It doesn't.

25 Q. So what we see is Investigator Causkey?

DAVID W MILLER - CROSS BY ZMROCZEK

1 A. Costic.

2 Q. That was -- he's the one who you said
3 collected the papers?

4 A. Correct.

5 Q. And then he properly secured them and then he
6 filled out the chain, right?

7 A. Right.

8 Q. And then J Roberts moved it from the evidence
9 locker?

10 A. Correct.

11 Q. And then it goes to CG Turner to log
12 evidence. Who's that? Do you know who that is?

13 A. Gerald Turner.

14 Q. And what relationship did he have to the
15 case?

16 A. He is the evidence technician.

17 Q. Okay.

18 A. He takes all of the evidence out of the
19 evidence locker for the sheriff's office in all of
20 their cases and he logs it into the system and
21 creates this little barcode and he sticks the
22 barcode on the item of evidence and he sticks it
23 onto the evidence custody receipt so that they can
24 keep them in line with each other.

25 Q. Certainly. And then the last one it says is

DAVID W MILLER - CROSS BY ZMROCZEK

1 processing. And who is that?

2 A. Chris Johnson.

3 Q. Okay. And Chris Johnson is not the same as
4 Clay Adams, right?

5 A. Chris Johnson is the fingerprint examiner and
6 evidence technician that -- and this is based on my
7 recollection. I know at least one of the cases,
8 Chris Johnson takes, took the piece of paper,
9 because this was two pieces of paper, and he took
10 them to the evidence processing section which is a
11 different place than the place where evidence is
12 just secured, and that Chris Johnson worked with
13 those items and then called Investigator Adams to
14 confirm his identification.

15 Q. Okay. So, when would Mr. Adams' name have
16 been added to the chain of custody?

17 A. Whenever Mr. Adams had custody of the item.

18 Q. Okay. And I guess that was submitted into
19 evidence at trial?

20 A. It would have been submitted -- the chain
21 wouldn't have been submitted. The chain would have
22 been something that was available for the defense
23 to look at and for, quite frankly for us to look at
24 because we decide who we need to call to establish
25 the chain based on that, but the actual pieces of

DAVID W MILLER - CROSS BY BOOZER

1 paper were -- would have been put into evidence
2 during the course of the trial.

3 Q. All right. And so the chain -- so, I guess,
4 my point is, Mr. Hayes never asked to see that
5 chain?

6 A. Mr. Hayes never had to ask to see the chain
7 because we show it to him before the trial when we
8 got the evidence here.

9 Q. Okay.

10 A. Mr. Hayes certainly would have seen it,
11 wanted to see it and he was given that opportunity
12 but he did not make a request to see it because we
13 gave it to him.

14 Q. Okay. And to your -- you have no knowledge
15 of whether that was given to Mr. Cave?

16 A. I have no idea that it was. In fact, I would
17 say that it probably wasn't because I don't know
18 that -- well, it may have been. We usually give
19 them photocopies of the final chain just so they'll
20 have them.

21 MS. ZMROCZEK: Thank you. I have no further
22 questions.

23 MR. BOOZER: No questions, Your Honor --
24 well, actually, I do have one question.

25 CROSS-EXAMINATION

DAVID W MILLER - CROSS BY BOOZER

1 BY MR. BOOZER:

2 Q. Mr. Miller, with regard to the Alford plea,
3 the fingerprints -- just for thoroughness. The
4 fingerprints that were used in that case, were they
5 matched with the fingerprint card from all the 2008
6 issues; do you know?

7 A. I don't know, because we didn't get that far
8 into that. I will say that -- because it came up
9 about a week before the trial. Sometime a week to
10 10 days before the trial, I actually requested that
11 Lieutenant Adams go over to the jail and roll new
12 fingerprints for the defendant and retain that
13 10-print card, keep it in his hands, secure it in
14 his office, do not let it out of his custody.

15 He did that. He went over -- and there was
16 testimony about it in the trial -- he rolled those
17 prints and then he went back and he compared the
18 prints that he rolled that day, that day, 10 days
19 before the trial or whenever it was, to the latents
20 from both, both of these cases because at that time
21 we didn't have any idea that the attorneys were
22 going to change. At that time we didn't have any
23 idea that one of them was going to end up being a
24 plea.

25 And the reason that I asked him to do that is

DAVID W MILLER - CROSS BY BOOZER

1 because fingerprints don't change. And so, if in
2 fact he was to roll Mr. Cave's prints today, they
3 should still match the latent prints. And I didn't
4 want there to be any issue about the chain of
5 custody.

6 So, as we went through these processes, and
7 as I was telling Mr. Hayes because obviously I got
8 somebody from law enforcement that's going over to
9 the jail where his client's incarcerated and he's
10 going to tell him he's got to let him roll his
11 fingerprints, I'm letting Mr. Hayes know this stuff
12 so that there's not some confusion if his client
13 calls him and says, hey, do I have to do this.

14 And so, it's a long answer to your question
15 but the thing is by the time we got to the plea, by
16 the time Mr. Katonak got appointed, Mr. Cave's
17 fingerprints had been compared to the newest
18 10-print card that we had for him which was the one
19 that was taken in preparation for trial.

20 I do not know whether the initial match to
21 the latent prints came off of that January 14th,
22 2008, arrest card or not. It could have been that
23 one or one of 14 other ones.

24 MR. BOOZER: Okay. Thank you. No further
25 questions.

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1 MS. COLEMAN: Nothing further.

2 THE COURT: Thank you.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: All right. It's 1:40. How long
5 are Katonak and Hayes going to be?

6 MS. COLEMAN: Maybe 20 minutes.

7 THE COURT: Total or each?

8 MS. COLEMAN: Total.

9 MS. ZMROCZEK: I probably have about 10
10 minutes questioning, Your Honor.

11 MR. BOOZER: And I don't anticipate being
12 more than five or 10 minutes with Mr. Katonak.

13 THE COURT: Where is Anita?

14 (Off-the-record discussion.)

15 MS. COLEMAN: The State calls David Hayes.

16 C. DAVID HAYES, having been duly sworn, was
17 examined and testified as follows:

18 THE CLERK: Please have a seat and state your
19 name for the Court.

20 THE WITNESS: Charles David Hayes, H-A-Y-E-S.

21 DIRECT EXAMINATION

22 BY MS. COLEMAN:

23 Q. Hey, Mr. Hayes, how are you?

24 A. Doing fine.

25 Q. How long have you been practicing law?

C DAVID HAYES - DIRECT BY COLEMAN

1 A. Since 2009. And prior to that I worked under
2 the practicing rule in Michigan for a term while I
3 was in law school.

4 Q. Okay. Do you recall whether you were
5 appointed or retained in this case?

6 A. I was appointed.

7 Q. How many times did you meet with the
8 Applicant prior to this trial?

9 A. It was five or six times from May to August.

10 Q. Did the Applicant cooperate during the course
11 of your representation?

12 A. No. This was absolutely the worst
13 relationship I've ever had with any client.

14 Q. Okay. And just to go into that a little.
15 The Applicant has alleged that there was some kind
16 of conflict of interest which is the reason why you
17 terminated your relationship with him. Is that the
18 case?

19 A. Not, it wasn't a conflict of interest. As he
20 said, we had an absolute horrific relationship to
21 where we argued and fought to the point it was
22 ridiculous. The last time I spoke with him was a
23 conference from the prison after he was convicted
24 on the trial as to the Jeffrey Nation robbery.

25 We went over everything, and I had been able

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1 to get Mr. Miller to agree to a concurrent 25. We
2 discussed that offer. He said he was willing to
3 accept it. We met over in the grand jury box. I
4 went over the sentencing sheet with him. We
5 discussed that. My understanding was that he was
6 accepting that offer. We got up to plead guilty
7 and it was not a guilty plea. It became a tirade
8 from Mr. Cave blasting me that he didn't know
9 anything, he didn't have discovery, he'd never seen
10 anything about it.

11 As a result of that, that plea was over.
12 Mr. Miller walked over, served me and Mr. Cave with
13 the LWOP notice. I knew that our relationship was
14 at a point that it didn't matter what I said, it
15 was going to be the opposite.

16 To protect my client afterwards, I grabbed
17 Mr. Miller at a break and went into chambers with
18 Judge Early and explained that our relationship had
19 broken down to a point that I think it was in the
20 best interests of my client to protect him from
21 himself that he needed another lawyer.

22 Q. And after that Mr. Katonak was appointed; is
23 that correct?

24 A. That's correct.

25 Q. As far as the charges for the trial, did you

C DAVID HAYES - DIRECT BY COLEMAN

1 file any Brady or Rule Five motions?

2 A. Yes.

3 Q. And did you review the discovery material
4 with the Applicant?

5 A. I did. I even hand-delivered his copies to
6 him.

7 Q. Okay. Did you ever discuss with the
8 Applicant stipulating to his prior burglaries?

9 A. I do not recall.

10 Q. Why did you choose to stipulate to this at
11 trial?

12 A. There's -- the theory I operate under is that
13 it was much better to stipulate and have a brief
14 rendition that we're stipulating than to have the
15 clerk of court come in and testify and maybe or may
16 not enter sentencing sheets from prior convictions.
17 I think it was less, it's less damaging to your
18 client.

19 Q. Okay.

20 A. And in this case, that stipulation was not
21 sent back to the jury. It was actually kept here
22 in the courtroom.

23 Q. Okay. Did you ever discuss the Applicant's
24 version of the facts?

25 A. All I remember is fighting a lot.

C DAVID HAYES - DIRECT BY COLEMAN

1 Q. Did he present you with any possible defenses
2 to investigate?

3 A. There was an alibi but that alibi was more in
4 relation to with Mr. Nation's burglary. And this
5 burglary, I do not recall any witnesses or alibis
6 or actual legal defenses.

7 Q. Can you briefly describe the State's evidence
8 against the Applicant?

9 A. Absolutely beautiful fingerprints. They were
10 Ninhydrins off of a piece of paper.

11 Q. And let's go into those fingerprints. Did
12 you see any -- was there a pretrial hearing, a
13 motion to suppress these prints?

14 A. I don't think I made a motion to suppress.
15 We -- that was part of the reason why our
16 relationship was so bad. There's two things that
17 he fixated on. And the two things he fixated on, I
18 believe that there was not grounds to make the
19 motion that he was asking for.

20 First was to the chain of custody. That is
21 not a suppression motion. My case law research
22 says that it goes to the weight, not admissibility.
23 So I don't believe there's a motion to suppress.

24 Also the chain that we had went all the way
25 through Chris Johnson. Chris Johnson developed the

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1 fingerprint and when the Ninhydrin print and my
2 understanding from the case law chain of custody is
3 once it's developed to the point it's never going
4 to change again, it's done.

5 So we had that part. Yes, at the trial
6 though we were given a more complete chain which I
7 believe is completely unnecessary because once you
8 have developed the item, the question of whether
9 it's been tampered with or changed is over.

10 In this case once Chris Johnson developed it,
11 I believe the true chain is over, the question that
12 we've argued about. Then it was given to
13 Mr. Adams. And as Mr. Miller stated, I did meet
14 with -- I had my investigator, Benny Williams at
15 the time, who was an ex-sheriff's investigator who
16 did fingerprints, and then after his opinion was
17 the prints were my client's, I had Mr. Don Kirk
18 come in and we went over to the sheriff's
19 department again, sat down and he reviewed the
20 fingerprints. And it was his opinion that it was
21 those prints. I then questioned him as to whether
22 they could be faked or changed and he told me that
23 it would be extremely hard to do something like
24 that with a Ninhydrin print.

25 Q. So you saw no legal basis to move to suppress

C DAVID HAYES - DIRECT BY COLEMAN

1 either the admissibility of the prints or the chain
2 of custody?

3 A. Well, no. And as to the print, that's a
4 separate issue. As to the actual fingerprint and
5 the card, Section 17-1-40 is what he was arguing.
6 I actually provided him with that statute.

7 As Mr. Miller indicated, I was familiar with
8 his two priors, trials. I then watched him enter
9 the guilty plea for the burg -- for the possession
10 second which I believe he pled to possession first
11 if I recall right. Either way it was time served.

12 So there was a conviction for the same arrest
13 with the burglaries and that fingerprint card would
14 never be expunged. Also he never filed for
15 expungement on it and I believe that that would
16 have been a frivolous motion.

17 Q. Okay. Did you have ample time to prepare for
18 this trial?

19 A. Yes.

20 Q. Sorry. Going back to the fingerprint issue.
21 If this issue had been raised on appeal, do you
22 think this would have been successful?

23 A. No.

24 Q. What was your general trial strategy in this
25 case?

C DAVID HAYES - DIRECT BY COLEMAN

1 A. I was doing everything I could to cast doubt
2 or question the prints. And I believe if I
3 remember right my closing was that his fingerprint
4 could have been placed on the paper that it was
5 found on at a job fair or something at Augusta
6 State University.

7 Q. Okay. Since the State had this fingerprint
8 to use as evidence against him, would you classify
9 the State's evidence as overwhelming?

10 A. I mean, it was convincing enough for 12
11 jurors.

12 Q. Okay.

13 A. I had two experts that I definitely wasn't
14 going to put on the stand.

15 Q. Did you ever feel that there was any reason
16 for the solicitor's office to recuse them self
17 based on an order of recusal in this case?

18 A. No, as to that I was present and watched the
19 prior two trials. One was an acquittal, one was a
20 mistrial. And my understanding at that time was
21 that the AG's office was trying it, as Mr. Miller
22 said, because Lawrence Brown was the victim in one
23 of the cases.

24 I never knew of this order until I received
25 the PCR packet. However I do not believe that it

C DAVID HAYES - CROSS BY ZMROCZEK

1 applies because those two burglaries and all of
2 those charges were several years prior to this, and
3 these victims had no connection to the solicitor's
4 office.

5 And as to Jeffrey Nation, he was charged with
6 a crime and tried here and was an ex-sheriff's
7 deputy. So I don't see any conflict with the
8 solicitor's office being able to try these cases.

9 Q. Okay. Was there any reason to request a
10 continuance based on new evidence given before the
11 trial?

12 A. Not that I'm aware of.

13 Q. And was there any reason to object to
14 improper judicial remarks throughout the trial?

15 A. Not that I'm aware of. I glanced through the
16 transcript and I made objections. If I thought it
17 was objectionable I objected.

18 MS. COLEMAN: Thank you. No further
19 questions.

20 THE COURT: Yes, ma'am?

21 MS. ZMROCZEK: Thank you. Briefly, Your
22 Honor. Very briefly, I hope.

23 CROSS-EXAMINATION

24 BY MS. ZMROCZEK:

25 Q. Do you have a copy of the transcript with

C DAVID HAYES - CROSS BY ZMROCZEK

1 you?

2 A. Yes. Point me where you want me to go.

3 Q. Can you turn to page 6? I think it's 6, or

4 41. It might be 41 if you have the appellate

5 transcript.

6 A. Okay. What line?

7 Q. And it says that -- you told the Court on

8 line 15 -- or, excuse me, beginning on line 13 you

9 had a small motion for suppression based on the

10 chain of custody?

11 A. Okay.

12 Q. So you agree that you at least told the Court

13 that you had that motion, you just never made it?

14 A. Well, the State proved it. Once they went

15 through all the witnesses and then went to enter

16 the evidence that I would object to and they have

17 actually gone through the full chain, I then don't

18 have an objection.

19 Q. Okay. And would you agree with me that the

20 Court would frequent -- well, at least three times

21 the Court just interrupted from the bench and said

22 things, like, for example, on page 25 --

23 A. Wait a minute. 25?

24 Q. Yes.

25 A. Okay. What line?

C DAVID HAYES - CROSS BY ZMROCZEK

1 Q. On line one, the Court interrupted your
2 questioning and said: Mr. Hayes, if you want to
3 let -- if you want to know what was, specifically
4 was in his bedroom I could sit here all day long
5 and tell you what's in my bedroom. That was in
6 front of the jury, correct?

7 A. I don't know. I would assume so.

8 Q. Okay. Additionally the Court on page 73 --
9 or, excuse me, 38. I don't know which pages you
10 have. I think --

11 A. I've got the trial transcript.

12 Q. Okay. Page 38.

13 A. Okay.

14 Q. During the direct examination of Delane
15 Smiley the Court on line 14, when you make an
16 objection the Court says, stop, and he starts
17 asking questions. He asks at least one question
18 from the bench saying: What did he do with them.
19 So apparently there was maybe some confusion about
20 some papers, I guess. This was the one who
21 collected the papers or at least was talking about
22 papers from which the fingerprints came, correct?

23 A. I think when the judge is telling him stop,
24 he's telling the witness to quit answering
25 because -- that would be the way it's reading to me

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1 is that the victim, the witness did not stop
2 talking and as I made my objection the judge told
3 him to quit talking.

4 Q. Okay. And then on page 101 when you were
5 making your objection about the latent print
6 examiner --

7 A. 101. Okay.

8 Q. -- did you have the policies and procedures
9 of Aiken County Sheriff's Office regarding --

10 A. Yep.

11 Q. -- latent fingerprints? And did you hand
12 those up as part of your argument that he either
13 didn't follow the policies and procedures or wasn't
14 qualified?

15 A. I don't remember.

16 Q. Okay.

17 A. You said page 101?

18 Q. Oh, yeah. So 101 when he was overruling your
19 objection talking about how he lets all kinds of --
20 I let doctors testify in here all the time who
21 weren't board certified but they're doctors
22 nonetheless. There weren't any doctors that had
23 anything to do with this case, right?

24 A. No.

25 Q. Okay. So he was just making a comment about

C DAVID HAYES - CROSS BY ZMROCZEK

1 experts in general?

2 A. Yes.

3 Q. Okay. When -- I want to ask you about
4 when -- your relationship with Mr. Cave. You said
5 it was the worst relationship you ever had with a
6 client. When did that break down?

7 A. It never was one. It was bad from the
8 get-go.

9 Q. Do you feel like -- do you feel like that
10 that hindered your ability to defend him?

11 A. No.

12 Q. Okay. But you're saying there never was a
13 relationship so you were never able to talk to him?

14 A. No, we talked and then we'd fight because we
15 would always go back to the same two things; chain
16 of custody and fingerprints.

17 And we never -- we could never get around
18 that. And then I'd leave, we'd cool down, I'd come
19 back, we'd go through more of the discovery. I
20 went through even Jeffrey Nation discovery and
21 there was another charge he was charged with and we
22 went through that discovery. We did go through the
23 stuff, but by the end in a full discussion there
24 would be a fight. And it was always because we
25 were going back to stuff we had already discussed.

C DAVID HAYES - CROSS BY BOOZER

1 Q. Right. The fingerprints?

2 A. The fingerprints and the chain of custody.

3 Q. And you would agree with me that even though
4 you weren't aware of this order in 2008, that the
5 evidence that they used to connect him to this
6 crime came from that case in 2008?

7 A. The evidence they used to connect him, no.

8 Q. The fingerprint card that they used.

9 A. The fingerprint card they used to compare to
10 the evidence --

11 Q. Yes. Sorry. That's what I mean.

12 A. -- was the cards that they had from when they
13 arrested him in 2008.

14 Q. Okay. So, so that was -- their probable case
15 was that fingerprint card from 2008 based on -- and
16 the fingerprints that they had gathered from the
17 new break-in?

18 A. Yes.

19 Q. Okay. Thank you.

20 MS. ZMROCZEK: No further questions, Your
21 Honor.

22 MR. BOOZER: Just one.

23 CROSS-EXAMINATION

24 BY MR. BOOZER:

25 Q. Did you handle a preliminary hearing for the

BRIAN A KATONAK - DIRECT BY COLEMAN

1 charge in the plea?

2 A. Yes.

3 Q. Okay.

4 A. I actually -- we actually stood here to enter
5 a plea before I moved, before I asked the Court to
6 relieve me because of the situation.

7 MR. BOOZER: Thank you.

8 MS. COLEMAN: Nothing further from this
9 witness.

10 THE COURT: Have a good week.

11 THE WITNESS: You too, sir. Thank you.

12 THE COURT: Next?

13 MS. COLEMAN: State calls Brian Katonak.

14 BRIAN A. KATONAK, having been duly sworn, was
15 examined and testified as follows:

16 THE CLERK: Will you please have a seat in
17 the witness box? State your full name for the
18 Court.

19 THE WITNESS: Brian Austin Katonak.

20 DIRECT EXAMINATION

21 BY MS. COLEMAN:

22 Q. Hi, Mr. Katonak. Thank you for being here
23 today.

24 A. It's great to be here.

25 Q. How long have you been practicing law?

BRIAN A KATONAK - DIRECT BY COLEMAN

1 A. Since 1992.

2 Q. Were you appointed in this case?

3 A. Yes, I was.

4 Q. How many times did you meet with the
5 Applicant prior to his guilty plea?

6 A. Oh, I'm not really sure. I know I had a
7 lengthy meeting with him up at, in prison in
8 McCormick in April of the year he pled. But I
9 can't recall how many other times. You know,
10 sometimes we'd talk on the phone since he was an
11 hour-plus away. I know we did some of our
12 conversations on the phone.

13 Q. Did you file any Rule Five or Brady motions?

14 A. I'm not sure if I had to. Since I got in the
15 case somewhat late, I'm not sure if Mr. Hayes just
16 gave me what he had or Mr. Miller just gave it to
17 me. So I'm not sure if I even had to file
18 anything.

19 Q. Okay. So you received the discovery?

20 A. I received it, yes.

21 Q. Did you review this with the Applicant, the
22 discovery material?

23 A. I did. And it was actually kind of unusual
24 on a case, usually I'm sitting down with my client
25 reviewing the documents. Since this case had been

BRIAN A KATONAK - DIRECT BY COLEMAN

1 going on for sometime and Mr. Hayes already had the
2 discovery items and already given them to Mr. Cave,
3 he actually already was very familiar with all the
4 items in there. And actually when I met with him
5 he was more versed with them than I was at that
6 time.

7 Q. Did you discuss the Applicant's version of
8 the facts?

9 A. Well, I'm not sure what the question is. His
10 primary issue was on the fingerprint card, what's
11 been discussed as far as the case that he was found
12 not guilty on that, that they should not have been
13 able to use that card to compare his fingerprints
14 to the Nation case.

15 Q. And did you have -- did you make a motion to
16 suppress these fingerprints?

17 A. Yes.

18 Q. And what was the result of this motion?

19 A. Well, I think the -- Judge Early's order was
20 made part of the record but, as Mr. Miller stated,
21 Judge Early denied our motion.

22 Q. Okay. Did the Applicant present you with any
23 possible defenses?

24 A. Not that I can recall. It was all basically
25 that they should not be able to use his

BRIAN A KATONAK - DIRECT BY COLEMAN

1 fingerprints on the Nation case since he had gotten
2 found not guilty on his previous case.

3 Q. Did you discuss the elements of the charge
4 with the Applicant?

5 A. Yes.

6 Q. How would you describe the State's evidence
7 including his fingerprints against the Applicant?

8 A. Well, I've been involved in a lot of these
9 cases. I mean, it's a pure fingerprint case, you
10 know, we don't have other eyewitnesses or other
11 evidence. In my opinion, those are difficult cases
12 because the State certainly could have their
13 experts testify to it. You know, my defense I
14 think would have been the same as Mr. Hayes' case,
15 but I was well aware of how that case came.

16 My concern in talking to Mr. Cave and I told
17 him countless times, hey, listen, if you don't take
18 this plea and you're convicted, you're going to
19 have a life sentence. Additionally he had, I know,
20 another burglary and, I believe, a grand larceny
21 that were still out there pending.

22 Now Mr. Hayes, I think, was still technically
23 counsel on those cases but they're still pending,
24 too, and so he would be looking at those as well,
25 too. I was checking as I was sitting in here

BRIAN A KATONAK - DIRECT BY COLEMAN

1 today. Those were actually dismissed on the same
2 day that he did his plea.

3 Q. Did you review the Applicant's constitutional
4 rights before he pled guilty?

5 A. Yes.

6 Q. Did he tell you that he did not understand
7 something at the guilty plea?

8 A. No. Mr. Cave is a smart individual. In
9 fact, I'll say he's actually more versed in the law
10 than a lot of people I represent and he's certainly
11 very competent and understood what was going on.

12 Q. And he pled guilty under North Carolina
13 versus Alford?

14 A. That's right.

15 Q. And did you explain what an Alford plea was
16 to him?

17 A. I had explained it. He had some
18 understanding of it, I'm not sure if from Mr. Hayes
19 or just his research, but he had some understanding
20 that he would not be admitting that he committed a
21 crime but essentially he understood that the
22 charging facts against him were such that the
23 chance of conviction was highly likely and
24 therefore was taking the Alford.

25 Q. Ultimately whose decision was it to plead

BRIAN A KATONAK - DIRECT BY COLEMAN

1 guilty?

2 A. I always tell my client you're the one that
3 has to do the time. It's not me. I'm not -- I've
4 never forced any client of mine to take a plea.
5 It's always up to them and Mr. Cave seemed to
6 understand that and he took the plea.

7 Q. Did the Applicant ever indicate that he
8 wanted to go to trial instead of plead guilty?

9 A. Well, that's a hard one to answer. His big,
10 big fight in this case was always on that
11 fingerprint card. It's one of the situations he
12 didn't want to plead but he didn't want to go to
13 trial.

14 Q. Right.

15 A. And then once we got here, he saw that the
16 ball was going to roll down the hill, you know; if
17 he did not enter an Alford plea that a trial was
18 going to be starting. And so at that point I
19 explained to him, listen, we're either going to go
20 out and you're going to enter the plea or, you
21 know, a jury's going to be picked. And I'm not
22 sure if the jury was going to be picked that day or
23 sometime that week.

24 But a jury is going to be picked on this case
25 and it's going to go forward. If you don't take a

BRIAN A KATONAK - DIRECT BY COLEMAN

1 plea, I know Mr. Miller very well and I've had a
2 lot of cases with him. And when he says the deal's
3 off the table, the deal's off the table. You go
4 pick the first person on the jury and you say, I
5 want the deal, that deal is gone. And, you know,
6 I'm very well aware of that fact and told Mr. Cave
7 that as well.

8 Q. So, knowing that the State was going to use
9 the fingerprint evidence against him and that he
10 was facing life without parole, do you believe it
11 was in your client's best interests to plead guilty
12 to this?

13 A. I think it would have been ridiculous for him
14 not to take it.

15 Q. But, again, it was his decision to plead
16 guilty?

17 A. It's always my client's decision.

18 Q. Did he ever ask you for an appeal?

19 A. He spoke about an appeal. I can't recall
20 whether I filed the notice or he filed the notice
21 on the appeal.

22 Q. Okay. All right. Thank you. No further
23 questions.

24 THE WITNESS: Thank you.

25 THE COURT: Cross?

BRIAN A KATONAK - CROSS BY BOOZER

1 MR. BOOZER: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. BOOZER:

4 Q. Mr. Katonak, how are you?

5 A. Great. Thank you.

6 Q. Good. Do you recall what specific evidence
7 you would have reviewed with Mr. Cave prior to the
8 plea?

9 A. What specific evidence. No, I can't recall.

10 Q. Was there a lot of evidence against Mr. Cave;
11 do you recall?

12 A. I mean, it's primarily a fingerprint case.
13 That's -- so for many cases, I would not say that's
14 a lot of evidence.

15 Q. And you actually -- you made a motion to
16 suppress evidence. What was your motion that you
17 made prior to trial?

18 A. You know, Mr. Cave, as I stated, his big
19 issue was on the fingerprints. I think my motion
20 was actually in suppressing the fingerprint card
21 from his arrest on the Nation case. At the hearing
22 itself we discussed the overall issue of all the
23 fingerprint cards. And I want to say it was a
24 pretty lengthy motion that was made. I think it
25 took over an hour between my argument and

BRIAN A KATONAK - CROSS BY BOOZER

1 Mr. Miller's argument.

2 Q. We'll come back to that in just a moment.

3 A. Okay.

4 Q. Did you have any discussion with Mr. Cave
5 prior to the plea about any situation involving a
6 prior recusal of the Second Circuit Solicitor's
7 Office prosecuting him?

8 A. Sitting here today, I was thinking I can't
9 recall that ever coming up and when I heard the
10 discussion about this order, today was the first I
11 knew about any order.

12 Q. Have you reviewed that order?

13 A. I've never seen it.

14 MR. BOOZER: Your Honor, may I approach the
15 witness?

16 THE COURT: Absolutely.

17 MR. BOOZER: Thank you.

18 Q. Mr. Katonak, I'm going to hand you what's
19 been marked as Applicant's Exhibit 1. And I
20 represent to you that that is a copy of the order
21 that we're referencing. If you would just take a
22 moment and review it to yourself.

23 A. (Complying.) Okay.

24 Q. Have you had an opportunity to review that
25 exhibit?

BRIAN A KATONAK - CROSS BY BOOZER

1 A. Yes, I have.

2 Q. All right. And in looking at it, what's your
3 interpretation or opinion of this order?

4 A. That the Second Circuit Solicitor's Office is
5 recused from charges stemming from that indictment.

6 Q. Okay. Do you recall in your case who the
7 victim was alleged to have been?

8 A. Jeffrey Nation.

9 Q. And what was that?

10 A. He was a former, I'm not sure if he's a
11 county deputy or a City of Aiken Deputy.

12 Q. Okay. Were you aware that the -- that he
13 had been tried before and found not guilty or
14 acquitted on a couple of charges of burglary first?

15 A. That's one of the first things he told me,
16 yes.

17 Q. Okay. Were you aware of who the alleged
18 victims were in those cases?

19 A. I mean, I learned during the case it was
20 Lawrence Brown.

21 Q. Who was -- do you know who that was?

22 A. He worked either for the solicitor's office
23 or for the PD's office at that time.

24 Q. Okay. And do you know who the other case
25 involved?

BRIAN A KATONAK - CROSS BY BOOZER

1 A. The one he went to trial on?

2 Q. Correct.

3 A. No, not that I recall today.

4 Q. If he represented that it was someone who may
5 have been the son or a relative of the Mayor of
6 Aiken, would you have any reason to dispute that?

7 A. Like I say, I don't recall who the victim in
8 that case was.

9 Q. Since this case, the one you represented him
10 on involved someone who, I guess, was it -- was an
11 employee of Aiken County, you said?

12 A. He was a past employee.

13 Q. Past employee. Do you think that you could
14 kind of make the argument and try to wedge it in
15 there that this was part of a pattern of criminal
16 activity that he was, you know, allegedly breaking
17 into folks who work for Aiken County or a member of
18 law enforcement, do you think that you could make
19 that argument?

20 A. I tend to agree with Mr. Miller's assessment
21 of that so, no.

22 Q. Let me ask you this. Had you known about
23 this order, would you have attempted to make any
24 sort of motion or attempt to make any sort of
25 argument to have the solicitor's office recused

BRIAN A KATONAK - CROSS BY BOOZER

1 from prosecuting the case?

2 A. You know, in representing criminal defendants
3 you try to do whatever you can to protect them.
4 Though, you know, if I would have known about it
5 and he would have asked me to make that motion I
6 would have said, well, what that's going to mean is
7 instead of Mr. Miller prosecuting it someone else
8 is going to prosecute it as opposed to a motion
9 where, or a motion on the evidence, trying to
10 suppress evidence that could really change or alter
11 the outcome of the case. It was just going to be
12 changing who was at the State's bench, so whether
13 that would have been advantageous for him or not I
14 don't know.

15 MR. BOOZER: Your Honor, may I approach the
16 witness one more time?

17 THE COURT: Sure.

18 BY MR. BOOZER:

19 Q. Mr. Katonak, I'm going to hand you another
20 document. If you would, it's going to be marked as
21 Plaintiff's Exhibit Number 4, take a moment to
22 review that to yourself.

23 A. (Complying.) Okay.

24 Q. Could you identify that, please?

25 A. Yes, that's a motion to suppress that I filed

BRIAN A KATONAK - CROSS BY BOOZER

1 on April 12th, 2012.

2 Q. All right. And is that a true and accurate
3 copy of that motion that you filed?

4 A. Yes, it is.

5 MR. BOOZER: Your Honor, at this time we
6 would move to make this Plaintiff's Exhibit Number
7 4.

8 THE COURT: Any objection, Ms. Coleman?

9 MS. COLEMAN: No objection.

10 THE COURT: All right. Admitted without
11 objection.

12 (Plaintiff's Exhibit No. 4, motion to
13 suppress, received into evidence.)

14 BY MR. BOOZER:

15 Q. And, Mr. Katonak, if you would, just take a
16 look at that. And what was the basis of your
17 motion or your request, I guess? Then there on the
18 second page, kind of near the end there, what were
19 you asking the Court to do?

20 A. Well, essentially almost a fruit of the
21 poisonous tree-type theory. Well, In fact, I used
22 that exact line in there. We were trying to argue
23 that the fingerprint record on the Nation arrest
24 should not be admissible based on the fact that it
25 was compared or allegedly compared to the

BRIAN A KATONAK - CROSS BY BOOZER

1 fingerprint evidence on the case he got dismissed.

2 Q. Okay. Did you make any sort of argument that
3 the entire case should have been dismissed because
4 of the fingerprint card that was used from 2008?

5 A. I can't recall if I did or not though if the
6 fingerprints didn't come in, I don't think the
7 State had a case.

8 Q. Okay. And also do you agree that the -- was
9 the 2008 fingerprint card used in the case that you
10 were handling? Were those fingerprints used to
11 match him to the fingerprints lifted from the case
12 that you were handling?

13 A. I spoke with Mr. Miller on that issue. And
14 when I did he informed me of the fact that he
15 testified to that -- after his arrest in the trial
16 case that he went and had an officer take
17 additional fingerprints from him. So, I can't
18 state today that the fingerprints came from the
19 case he was found not guilty on or on the card that
20 was later rolled from his prints.

21 Q. But would you agree with me that in the order
22 that Judge Early entered that in the footnote that
23 the State doesn't contest the initial comparison
24 was made between the latents lifted in the 2008
25 burglary fingerprint card?

BRIAN A KATONAK - CROSS BY BOOZER

1 A. It may be in that order but for me
2 personally, I don't know one way or another. And I
3 don't know how one could show that it was taken
4 from one or the other.

5 Q. Do you recall Mr. Cave sort of contesting at
6 the plea that you had reviewed evidence with him?

7 A. Well, when we got -- when we got him to
8 initially plead, he did state that he hadn't
9 reviewed everything. And that's why Judge Early
10 said step off, and we had to go back and talk some
11 more.

12 Q. What did you go and talk about?

13 A. I didn't really know. We went back there and
14 I asked him: What, what additional things do you
15 need to see. And I will say this. I got along
16 with Mr. Cave fine. I mean, I understood he and
17 Mr. Hayes had great conflicts and that's why I got
18 on the case.

19 But, he had all the evidence already when I
20 initially met him. The items I had were the same
21 items he had. I didn't have anything new and I
22 basically said, what else do you want to see,
23 there's nothing else to show.

24 And, again, I stressed to him, hey, if you
25 don't want to do this plea, that's your right to do

1 so, but just know when we walk back out there and
2 tell the judge we don't have a plea, then you're
3 looking at a life charge if you're convicted.

4 MR. BOOZER: Thank you, Mr. Katonak. No
5 further questions.

6 MS. COLEMAN: Nothing further from the State.

7 THE COURT: Have a good one.

8 THE WITNESS: Thank you.

9 MS. COLEMAN: And no further witnesses.

10 THE COURT: Any further witnesses,
11 Ms. Zmroczek?

12 MS. ZMROCZEK: I don't have any, Your Honor.
13 I just wanted to clarify that I need to move
14 Plaintiff's Exhibit 4 in. For the purposes of just
15 clarification, can we make, like, since there are
16 two separate records, can we have -- I would like
17 for it to be part of ours just --

18 THE COURT: It is.

19 MS. ZMROCZEK: -- so it's, like, part of both
20 of ours.

21 THE COURT: The four exhibits are introduced
22 as to both cases.

23 MS. ZMROCZEK: Right.

24 THE COURT: Anything further?

25 MS. ZMROCZEK: Nothing further.

1 THE COURT: Mr. Boozer?

2 MR. BOOZER: Nothing further, Your Honor.

3 THE COURT: All right. I'll let you know by
4 the end of next week.

5 MR. BOOZER: Thank you, Your Honor.

6 MS. COLEMAN: Thank you, Your Honor. Sorry
7 that took longer than I thought.

8 END OF PROCEEDINGS: 2:28 P.M.

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CERTIFICATE OF REPORTER

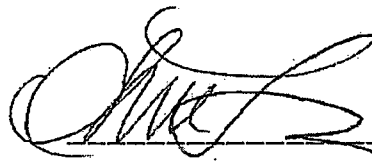
STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, Cheri L. Young, Registered Professional Reporter and Official Court Reporter for the State of South Carolina, Second Circuit-At Large, do hereby certify that the foregoing proceedings were written stenographically by me using computer-aided translation; further, that the foregoing is a true, accurate and complete record, to the best of my skill and ability, of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Aiken County, on the 23rd day of September, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

I have hereunder set my hand this 4th day of January, 2017.



Cheri L. Young, RPR
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Albert James Cave Jr., #189002,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2013-CP-02-01498

ORDER OF DISMISSAL

FILED

11-16 2016 12:50
CP

Shirley England
CLERK, J.C.S.
Walter Parks
Deputy Clerk

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 8, 2013. Respondent submitted its return on October 16, 2013. An evidentiary hearing into the matter was convened on September 23, 2016, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Aimée Zmroczek, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted during the July 2011 term of the Aiken County Grand Jury for Grand Larceny more than \$2,000 but less than \$10,000 (2011-GS-02-01032) and Burglary in the First Degree (2011-GS-02-01031). C. David Hayes, Esquire, represented Applicant. On May 9-12, 2011, a jury trial was held before the Honorable Doyet A. Early, III. The jury convicted Applicant as indicted. On May 12, 2011, Judge Early sentenced Applicant to twenty-five years imprisonment for Burglary First, and thirty days with credit for time served for larceny.

A Notice of Appeal was filed with the South Carolina Court of Appeals and an Anders brief was submitted. The Court of Appeals affirmed Applicant's sentences and convictions on December 28, 2012. State v. Albert Cave, Jr., No. 2013-UP-245 (Ct. App. June 12, 2013). The Remittitur was issued on July 1, 2013.

Applicant filed a timely application for post-conviction relief on July 8, 2013.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Failure to recuse solicitor
 - b. Failure to request a continuance pursuant to late provided evidence
 - c. Failure to object to improper judicial remarks
 - d. Failure to obtain a pretrial ruling and file motions to suppress fingerprint evidence
2. Prosecutorial Misconduct
 - a. Violating due process in forcing a plea and/or trial with the threat of LWOP when case was new to the docket
 - b. Failing to recuse office
3. Ineffective Assistance of Appellate Counsel
 - a. Failure to identify proper issues for appeal

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

The evidentiary hearing was held before this Court on September 23, 2016. Due to unusual circumstances, the hearing was combined with the hearing for another PCR application that Applicant filed on a different conviction stemming from similar events. The following is a summary of testimony from the hearing that is relevant to the convictions in this application.

At the hearing, Applicant testified on his own behalf. Respondent presented testimony from Deputy Solicitor David Miller (hereinafter "Solicitor") and Trial Counsel C. David Hayes (hereinafter "Trial Counsel").

Applicant

Applicant testified that he had been arrested several times for burglary and forgery. He stated that in 2008 he was charged with burglary first degree and grand larceny. He stated that he went to trial on these charges and was acquitted, and the South Carolina Attorney General's Office prosecuted the case because the victim was a member of the Second Circuit Solicitor's Office and they were recused from the action. Applicant entered into evidence Applicant's Exhibit #1, "Order Recusing the Second Circuit Solicitor's Office from Prosecuting Defendant."

Applicant testified that this Order read that the Second Circuit Solicitor's Office was recused from prosecuting his 2008 offense, "or any charges or indictments stemming from the same incidents or incidents alleges to *be related or part of a pattern of criminal activity including*" the 2008 charge. App. Ex. #1 (emphasis added). He opined that the 2011 charges listed in this PCR application for which he was currently serving time were part of a pattern of criminal activity related to his 2008 charges, and therefore under this Order the Second Circuit Solicitor's Office should have been recused from this case, as well.

Applicant testified that he did not discuss this Order with Trial Counsel, but Trial Counsel knew about his 2008 case because they had discussed it. He stated that he did not ask Trial Counsel to move to have Solicitor recused based on this order.

Applicant testified that he did ask Trial Counsel to file a motion to suppress the fingerprint evidence from his 2008 case. He stated that law enforcement had no probable cause to arrest him for these crimes because the warrant was based on a match from the fingerprints from his previous charges, on which he was acquitted, and that fingerprint card should have been destroyed. However, he was told that because he had not applied to have his previous charges expunged, the card had not been destroyed. He testified that Trial Counsel had a motion to

suppress the fingerprints based on the chain of custody, but he never made the motion. Applicant stated that he met with Trial Counsel multiple times but they always argued about the motion to suppress his fingerprints, so he tried to have Trial Counsel relieved. He stated that the fingerprint issue was discussed in his Anders brief on appeal but the brief did not address the admissibility of the prints.

Additionally, Applicant testified that he pled guilty to possession of marijuana second degree on March 18, 2010. He stated that this was one of the charges he was arrested for in January, 2008, along with the charges on which he was later acquitted at trial.

Applicant testified that Trial Counsel agreed to stipulate that Applicant had prior burglary charges, but Trial Counsel never consulted with him before the stipulation was made.

Solicitor

Deputy Solicitor David Miller testified that he has been employed at the Second Circuit Solicitor's Office since January of 2009, and he was the solicitor who prosecuted this case against Applicant. Solicitor stated that he turned all of the discovery material over after Trial Counsel filed Rule 5 and Brady motions. He stated that there was no material that they requested that he did not provide them.

Solicitor testified that law enforcement was able to match Applicant to the crime because of latent fingerprints found at the scene of the burglary that matched up to his prints in their database. He stated that Applicant's fingerprints were in their possession because he was arrested on January 14, 2008 for several different charges, including possession of marijuana, resisting arrest, and about twelve other charges. Solicitor stated that Applicant had a trial on some of the charges from the January 2008 arrest and was acquitted, but remained in custody until March 18, 2010, when he pled guilty to possession of marijuana and resisting arrest.

Solicitor testified that, because Applicant pled guilty to possession of marijuana and resisting arrest, the fingerprint card from his January 2008 arrest, which was used to match the prints from the crimes address in this PCR application, could not be destroyed. Solicitor testified that Applicant was entitled to have the charges he was acquitted of expunged from his record, but he was not entitled to have his fingerprint card destroyed because of the charges he pled guilty to.

Solicitor further testified that, after the trial on the convictions in question, Applicant was facing different charges, and a hearing was held over the suppression of the fingerprints. He testified that Judge Early ruled that he would allow the prints into evidence because Applicant was not entitled to have the card destroyed and because he had fifteen prior arrests and twelve prior convictions in South Carolina and several other fingerprint cards. He stated that Judge Early allowed these prints because of their inevitable discovery. The Order denying this motion was entered into evidence at the evidentiary hearing.

Solicitor testified that he later had an officer go over to the jail to roll new fingerprints from Applicant to compare to the latent prints found at the scene of the crime. He noted that fingerprints do not change, and Applicant's prints matched both the 2008 fingerprint card and the crime scene prints.

Solicitor testified that there was never any issue with the chain of custody on the fingerprints. He stated that he invited Trial Counsel to come see the discovery, and Trial Counsel sent an expert to examine the fingerprints in a secured, contained area.

Solicitor testified that he did not know that the Order of Recusal existed until it came up in the allegation in this PCR action. He stated that it was completely unrelated to the charges and

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victims in this case, and it did not make sense to recuse the Second Circuit Solicitor's Office from this case. He stated that he saw no reason to recuse himself from this case.

Trial Counsel

Trial Counsel testified that he was appointed in this case and he met with Applicant five or six times prior to trial. He stated that he and Applicant did not get along, and Applicant did not cooperate during the course of his representation. He testified that he and Applicant fought all the time, mostly about the issue of the admissibility of the fingerprints. He stated that their bad relationship did not affect his ability to represent Applicant. Trial Counsel stated that he saw no grounds on which to move to suppress the fingerprints based on their admissibility or on the chain of custody. He stated that he did not think the fingerprint card could have been destroyed or expunged, so he did not move to suppress it. He further opined that this issue would not have been successful on appeal if it had been fully argued.

Trial Counsel testified that his trial strategy in this case was to cast doubt on the accuracy of the fingerprints. He opined that the state's evidence against Applicant was overwhelming because they had his fingerprints at the crime scene.

Trial Counsel stated that he happened to be present at the trials that the Attorney General's Office prosecuted, but he did not know about the existence of the Order of Recusal until this PCR action. Trial Counsel stated that this Order did not apply to this case.

Trial Counsel testified that he did not feel there was any reason for Solicitor to be recused from the case. He stated that there was no reason to request a continuance based on new evidence. He stated that he saw no reason to object to any judicial remarks during the trial.

Trial Counsel testified that he stipulated to the fact that Applicant had prior burglary convictions because he did not want to draw it to the jury's attention. He stated that it was better to quietly stipulate the fact than to have the Clerk of Court testify against Applicant at trial.

Trial Counsel stated that he was eventually relieved from his representation of Applicant because of their poor relationship.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Trial Counsel's testimony to be credible and persuasive. This Court further finds Solicitor's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they are denied and dismissed with prejudice.

Failure to recuse Solicitor

Applicant alleges that Trial Counsel was ineffective for failing to move to have Solicitor recused from the case. This allegation is meritless and must be denied.

The Order of Recusal introduced by Applicant is clearly meant to apply only to the charges from the trial in which it was ordered. The charges in the case at issue are completely

separate and unrelated from Applicant's prior trial and cannot be viewed as a "pattern of criminal activity" stemming from his prior charges. The Order was clearly written only for the purpose of recusing an office that might be swayed because of the victim in the prior case. The victims in the case at hand have no relation to the previous case, and there is no reason why this Order would apply to different charges. This Court finds that this allegation is meritless and that there was no reason for the Second Circuit Solicitor's Office to be recused from this case. Therefore, Trial Counsel cannot be ineffective for failing to move to have Solicitor recused. Thus, this allegation is denied and dismissed.

Failure to request a continuance pursuant to late provided evidence

Trial Counsel credibly testified that there was no reason to request a continuance based on any late provided evidence. Applicant has failed to meet his burden in proving that there was any evidence that was not provided in a timely manner, that a continuance request based on this evidence would have been successful, or that a continuance would have changed the outcome of the trial. Therefore, this allegation is meritless and must be denied and dismissed.

Failure to object to improper judicial remarks

Applicant has failed to meet his burden in proving which judicial remarks were improper, why they were improper, that Trial Counsel was ineffective for failing to object to them, or that the result of the trial would have been different had Trial Counsel objected. Because Applicant has not met his burden of proof, this allegation is denied and dismissed with prejudice.

Failure to move to suppress fingerprint evidence

Applicant's allegation that Trial Counsel improperly failed to move to suppress the fingerprint evidence is meritless. This Court finds that there was no legal reason to move to

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suppress these fingerprints, as a motion to suppress would not have been successful, thus Trial Counsel cannot be found ineffective for choosing not to do so.

Solicitor credibly testified that Applicant's fingerprint card is not eligible to be destroyed after his 2008 acquittal because it was taken after the same arrest as two charges to which Applicant pled guilty. Furthermore, even if the card had been destroyed, law enforcement could have collected more fingerprints from Applicant to compare to the crime scene based on his other charges and arrests; as Solicitor noted, fingerprints do not change. Finally, as noted by Solicitor, Applicant later had a hearing over a motion to suppress these fingerprints, and the motion was denied based on inevitable discovery. Applicant had 15 prior arrests and 12 convictions, and there were multiple other sets of his fingerprints throughout the state of South Carolina with which to compare to the prints at the crime scene. Any motion to suppress the fingerprints would not have been successful, and Trial Counsel's choice not to pursue this motion was reasonable.

Furthermore, Trial Counsel credibly testified that he saw no legal reason to move to suppress these fingerprints. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State,

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309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland at 689, 104 S. Ct. at 2065.

Applicant has further failed to meet his burden in proving any prejudice. Even if Trial Counsel had managed to successfully suppress the fingerprint card from 2008, law enforcement could have pulled any other fingerprint card from Applicant's prior arrests and convictions throughout the state. Applicant's fingerprints would have been matched to the crime scene even without this specific fingerprint card from 2008. Thus, any failure to move to suppress this card would not have changed the outcome of the trial.

This Court finds that Applicant has failed to meet his burden of proving that Trial Counsel was ineffective in this regard, this allegation is denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

This Court finds that Applicants claims of prosecutorial misconduct are meritless and must be denied and dismissed with prejudice.

Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evans, 312 S.C. 4, 8, 430 S.E.2d 517, 520

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(1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief.

Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The Respondent submits the Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed. As addressed above, the Order of Recusal introduced by Applicant clearly does not apply to the convictions at hand, and there was no reason for the Second Circuit Solicitor's Office to be recused from this case. Furthermore, Applicant has failed to meet his burden in proving that Solicitor used the "threat" of a sentence of Life Without Parole to force Applicant to go to trial. Applicant has not shown a manner in which Solicitor acted improperly or outside the bounds of what is allowed under South Carolina law. Therefore, these allegations are denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Applicant's allegation that appellate counsel was ineffective for failing to argue the inadmissibility of Applicant's fingerprints at trial is meritless.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record." Id. (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)) (emphasis supplied). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the

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very goal of vigorous and effective advocacy...." Id. (citing Jones, 463 U.S. at 754, 103 S.Ct. 3308).

"Neither Anders nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones, 463 U.S. at 751, 103 S. Ct. at 3312. "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Solicitor credibly testified that Applicant's fingerprint card is not eligible to be destroyed after his 2008 acquittal because it was taken after the same arrest as two charges to which Applicant pled guilty. Any argument over the admissibility of these fingerprints likely would not have prevailed on appeal, and thus Applicant can show no prejudice. This Court finds that Applicant's appellate counsel was not ineffective for failing to thoroughly brief the issue of admissibility of Applicant's fingerprints, and this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his

application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10 day of NOV, 2016.

Robert E. Hood

ROBERT E. HOOD
Presiding Judge
Second Judicial Circuit

Columbia South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP0201498

Albert James Cave Jr

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment In Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge.

Judge Code

11/16/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on 11-16-16, and a copy mailed first class or placed in the appropriate attorney's box on 11-16-16, to attorneys of record or to parties (when appearing pro se) as follows:

Almee Jendrzewski Zmroczek A.J.Z. Law Firm, LLC PO
Box 11961 Columbia, SC 29211

Julie Amanda Coleman PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard by Plaintiff

Court Reporter

Liz Godard - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL DISTRICT

2013-CP-02-01498

Albert James Cave, Jr., #189002,
Applicant,)

RECEIVED

v.)

MOTION TO RECONSIDER JUL 14 2017

State of South Carolina,
Respondent.)

S.C. SUPREME COURT

NOW COMES, Applicant, Albert James Cave, Jr., by and through his undersigned counsel, and moves pursuant to Rule 59(e) SCRPC for an order altering or amending the court's prior order filed on November 16, 2016 and received by counsel on December 20, 2016, denying Applicant's claim and dismissing with prejudice. While the court has ruled in the State's favor, the Applicant submits this motion to ensure that he has "enable[d] the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 546, 546 (2000).

Specifically all allegations submitted in the memoranda by Applicant regarding:

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AIKEN COUNTY
CLERK OF COURT

1. Ineffective assistance of counsel

- a. Failure to recuse solicitor;
- b. Failure to request a continuance pursuant to late provided evidence;
- c. Failure to object to improper judicial remarks;
- d. Failure to obtain a pretrial ruling and file motions to suppress fingerprint

evidence;

2. Prosecutorial Misconduct

- a. Violating due process in forcing a plea and/or trial with the threat of LWOP when the case was new to the docket;

- b. Failing to recuse office
- 3. Ineffective Assistance of Appellate Counsel
 - a. Failure to identify proper issues for appeal.
- 4. Failure to Overcome the Burden of Proof by Appellate Counsel
 - a. There was no testimony from the appellate division to offer any explanation as to failure to raise the issues that were ripe in this case. Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991).

THEREFORE, counsel requests that Order be reconsidered for the above listed specific reasons and issues not specifically listed above but raised during the trial of this matter.

Respectfully Submitted,



Aimee J. Zmroczek, Esq. #77936
A. J. Z. Law Firm, LLC
2003 Lincoln Street
P.O. Box 11961
Columbia, SC 29211
(803) 400-1918 telephone
(803) 403-8005 fax
ajzlawfirm@gmail.com
Counsel for Applicant

Columbia, South Carolina
Dated: December 29, 2016

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Albert James Cave, Jr.,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
CA. NO.: 2013-CP-02-01498

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JUL 14 2017

ORDER

S.C. SUPREME COURT

After careful consideration of the submitted briefs, the applicable law and all other arguments, this Court denies Applicant's Motion to Reconsider.

Under SCRCF Rule 59(f), a Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties without oral argument." Hence, the grant or denial of a Motion to Reconsider is within the discretion of the circuit court. Motions to Reconsider are limited in scope and are not to be used to repeat the same arguments previously presented. *Dockins v. Benchmark Commc'n*, 180 F.R.D. 294, 295 (D.S.C. 1998). A Motion to Reconsider cannot be granted where the moving party simply seeks to have the Court rethink its decision. *Id.*

Accordingly, Applicant's Motion to Reconsider is DENIED.

Robert E. Hood

The Honorable Robert E. Hood
5th Judicial Circuit Judge

Columbia, South Carolina

This 13 day of June 2017

ELECTRONICALLY FILED - 2017 Jun 16 12:31 PM - AIKEN - COMMON PLEAS - CASE#2013CP0201498

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
STATE OF SOUTH CAROLINA)
VS.)
ALBERT CAVE)
DEFENDANT)

IN THE COURT OF GENERAL SESSIONS
SECOND JUDICIAL CIRCUIT

ORDER RECUSING THE SECOND
CIRCUIT SOLICITOR'S OFFICE
FROM PROSECUTING DEFENDANT

Warrant #s: I 090325, I 090482, I 090483

This matter came before the court upon motion of the Defendant. The grounds for the motion were that one alleged victim is a former Deputy Solicitor in the Aiken office of the Second Circuit, and the other alleged victim is the son or a close blood relative of the Mayor of the City of Aiken.

A hearing was held on September 10, 2008 on this matter. The Defendant was represented by his attorney Aaron G. Walsh, the State by the Honorable Barbara R. Morgan, Solicitor for the Second Judicial Circuit. At that hearing, Defense Counsel presented argument in favor of recusal, which was opposed by the State.

During the September 10, 2008 hearing, Solicitor Morgan put the Court and the Defense on notice that additional indictments would be sought for several separate and distinct incidents, and that the State might seek Life Without Parole (LWOP) for the Defendant.

This Court believes the Second Circuit could effectively and fairly prosecute this case, however to avoid even the appearance of impropriety or favoritism, especially considering the possibility of a future life sentence, the Court agrees with the Defense that prudence is the best course of action. Mr. Cave shall be prosecuted by either another circuit or the Attorney General's Office. The Court believes the Attorney General's Office may best and properly make that determination.

THEREFORE IT IS ORDERED:

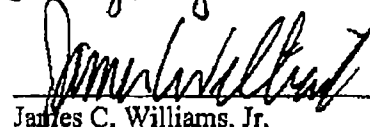
1. The Second Circuit Solicitor's Office shall be recused from prosecuting the above-captioned offenses, or any charges or indictments stemming from the same incidents or incidents alleged to be related or part of a pattern of criminal activity including the above captioned charges, including but not specifically limited to, the possible indictments mentioned by Solicitor Morgan at the hearing.
2. The Attorney General shall have the discretion to designate his office or the Solicitor of a

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TRUE & CORRECT

FILED November 14, 2008
L. J. Hodard
S.C.C.P. & G.S.
Deputy Clerk

different Circuit to prosecute Mr. Cave.

It is so ordered this 29 day of October, 2008 in Orangeburg County.


James C. Williams, Jr.
Circuit Court Judge

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[Handwritten signature]

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STOREROOM ID1
IDENT: ALDEN ~~James~~ CRUMP JR.

1. The first step is to identify the problem or question that needs to be addressed. This involves understanding the context and the specific requirements of the task.

2. The second step is to gather relevant information and resources. This may involve researching existing solutions, consulting with experts, or collecting data.

3. The third step is to develop a plan or strategy. This involves breaking down the problem into smaller, manageable tasks and determining the sequence of steps to be taken.

4. The fourth step is to implement the plan. This involves carrying out the tasks and monitoring progress to ensure that the plan is being followed.

5. The fifth step is to evaluate the results. This involves comparing the actual outcomes with the expected results and identifying any areas for improvement.

6. The sixth step is to communicate the findings. This involves sharing the results with the relevant stakeholders and providing a clear summary of the findings.

7. The seventh step is to reflect on the process. This involves thinking about what worked well and what could be done better next time.

8. The eighth step is to document the process. This involves creating a record of the steps taken and the results achieved, which can be used for future reference.

9. The ninth step is to review the process. This involves looking back at the entire process and identifying any lessons learned.

10. The tenth step is to improve the process. This involves making changes to the process based on the lessons learned and the feedback received.

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Chain of Custody

Item #	Date	Print Name	Signature	Purpose for Change
1	5-2-11	D. Kastyk	[Signature]	Evidence / Crime Scene
1	5-2-11	J. Roberts	[Signature]	Evidence Locker
1	05-03-11	C.G. Turner	[Signature]	LUG EVIDENCE
1	5-4-11	G. Johnson	[Signature] SDW	PROCESSING.

FILED 9/23 2012
Dei Hadard
William E. Ego
 2012



STATE OF SOUTH CAROLINA)

IN THE GENERAL SESSIONS COURT

COUNTY OF AIKEN)

SECOND JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA,)

ORDER DENYING MOTION
TO SUPPRESS EVIDENCE

vs.)

2011-GS-02-01388

ALBERT JAMES CAVE, JR.,)

Defendant)

FILED June 21 2012
MO 26164
Dei Hadard
William E. Ego

This matter comes before the Court as a motion to suppress fingerprint identification evidence in the above-captioned case. A hearing on the motion was conducted at the Aiken County Courthouse on May 14, 2012. The Defendant was present for the hearing and was represented by his attorney, Brian A. Katonak. The State was represented at the hearing by Assistant Solicitor David W. Miller. It appears from the arguments before the Court that a fingerprint was obtained from the scene of a residential burglary. Later, crime scene investigators with the Aiken County Sheriff's Office determined that the print from the crime scene matched a known fingerprint image of the Defendant herein, Albert James Cave, Jr. Based on the identification of the fingerprint, the Defendant was arrested and charged with Burglary.

The Defendant bases his motion to suppress on his belief that the known fingerprint image that was compared to the latent print to make the identification was obtained in a prior case where the Defendant was ultimately found not guilty at trial. The Defendant argues that following his acquittal on the prior charge, his fingerprint record should have been destroyed pursuant to South Carolina Code §17-1-40, but that was not done. Continuing that line of reasoning, the Defendant claims that if his fingerprint card had been destroyed, investigators would not have been able to identify the latent fingerprint as a match to his own because they would have had no fingerprint card to compare it to. Accordingly, the Defendant claims that the identification of the fingerprint and his subsequent arrest are the "fruit of the poisonous tree" and

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should be suppressed. The State argues several grounds for the preservation of the fingerprint identification that are discussed more fully below. After considering the arguments of counsel and the evidence offered to the Court, I find that the Defendant's motion should be DENIED and that the fingerprint evidence should not be suppressed based upon the allegations stated in the motion.

DISCUSSION

Section 17-1-40 of the South Carolina Code of Laws provides, in relevant part, "A person who after being charged with a criminal offense and ... the person is found not guilty of the charge, the arrest and booking record, files, mug shots, *and fingerprints* of the person *must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency....*" (emphasis added). The Defendant argues that based on the language above his fingerprint record from his 2008 burglary arrest that he was found not guilty on should have been destroyed¹. The State alleges that the provisions of the statute are not automatic, and that there is no obligation on the State to destroy the records until the Defendant makes application for an expungement pursuant to §17-22-910, *et seq.* Section 17-1-40 does not contain any language to indicate that its mandates are in any way contingent on any action by the Defendant. Accordingly, I find and rule that the Defendant is correct that the arrest record, including the fingerprint card, from his 2008 burglary arrest should have been destroyed pursuant to the statute when he was acquitted on that charge.

The State alleges, however, that the identification of the Defendant's fingerprint was inevitable because the Defendant has at least fifteen (15) prior arrests that resulted in at least twelve (12) prior convictions. Accordingly, even if the fingerprint card from the 2008 burglary charge had been destroyed, there would have been ten or more other fingerprint cards with the same fingerprint images on them for comparison. Obviously, the Defendant's fingerprints would be the same on any card obtained during any of his arrests dating back to his first arrest in 1986.

¹ For the purpose of this motion, the State does not contest the fact that the initial comparison was made between the latent fingerprint lifted at the crime scene and the Defendant's fingerprint card from the Defendant's 2008 burglary arrest.

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Because the comparison of the latent print to any of the properly retained cards would have resulted in the identification of the Defendant's fingerprint, I find that the State would have inevitably discovered the fingerprint match. Accordingly the fingerprint evidence should not be suppressed.

Additionally, the Court notes that when the Defendant was arrested on May 19, 2011 he was once again fingerprinted. On May 20, 2011, Investigator Clay Adams of the Aiken County Sheriff's Office again confirmed the match of the latent fingerprint from the crime scene to the Defendant's fingerprints.

Based on the foregoing, I find that the Defendant's motion to suppress should be, and hereby is DENIED.

IT IS SO ORDERED.

Aiken, South Carolina
June 20, 2012


Doyet A. Early, III
Resident Judge
Second Judicial Circuit

FILED

9/23

2016

PLAINTIFF'S
EXHIBIT

4 9/23/16

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

STATE OF SOUTH CAROLINA

VS.

ALBERT CAVE, JR.
DEFENDANT.COURT OF GENERAL SESSIONS
SECOND JUDICIAL CIRCUITNOTICE OF MOTION AND MOTION
TO SUPPRESS FINGERPRINT
EVIDENCE

2011-GS-02-1388

TO: Hon. J. Strom Thurmond, Jr.
Aiken County Solicitor's Office

PLEASE TAKE NOTICE that the above named Defendant by and through his undersigned attorney, will move, whenever the Court shall direct, for an Order to suppress fingerprint evidence. The basis of this motion is as follows:

1. The Defendant is charged with Burglary 1st in the above captioned case.
2. The primary evidence that the State involves fingerprints found at the scene.

The evidence that the State is relying on is as follows:

- a) In its investigation, law enforcement lifted fingerprints on a storm window and window frame.
- b) The fingerprints were then allegedly matched against fingerprints of the Defendant from a previous case.
- c) Based on this fingerprint match, a warrant was issued against the Defendant and he was arrested.

3. The Defendant believes that the fingerprint evidence should be suppressed for the following reason:

FILED April 12 2012

D.C.C.P. & G.S.

Submitted By Brian Katonak

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3 CERTIFIED
TRUE & CORRECT

- a) The Defendant was previously charged with burglary, and from the crime, his fingerprints were taken.
- b) The Defendant went to trial for that charge, and he was found not guilty.
- c) Upon being found not guilty, the Defendant believes that his fingerprint record from that charge should have been destroyed.
- d) The Defendant is informed and believes that the fingerprint record that the State used in arresting him in this current case is his fingerprint record from his previous case that should have been destroyed. Therefore, the Defendant believes that the use of this evidence constitutes 'fruits from the poisonous tree' and should not be admissible.
- e) As the Defendant was wrongfully arrested by the use of these fingerprints, he does not believe any subsequent fingerprint evidence taken after his arrest should be admissible.

I SO MOVE:

LAW OFFICES OF BRIAN A. KATONAK



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April 9, 2012