

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Newberry County

Honorable R. Kirk Griffin, Circuit Court Judge

BENNIE D. MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000258

APPENDIX

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STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSION
COUNTY OF NEWBERRY) 2009-GS-36-37, 38, 39

STATE OF SOUTH CAROLINA)
) VS.) TRANSCRIPT OF RECORD
)
BENNIE MITCHELL)
) DEFENDANT

APRIL 19, 2010
NEWBERRY, SOUTH CAROLINA

B E F O R E:

HONORABLE D. GARRISON HILL, JUDGE.

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

AUSTIN MCDANIEL, ASSISTANT SOLICITOR
ATTORNEY FOR THE STATE

MATHIAS CHAPLIN, ESQ.
ATTORNEY FOR THE DEFENDANT

JOY E. HOLSTON
OFFICIAL COURT REPORTER

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

(DW) - DENOTES DEFENSE WITNESS

(SW) - DENOTES STATE'S WITNESS

(SW) STEPHEN POTTS

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1 THE COURT: YES SIR, MR. MCDANIEL.

2 MR. MCDANIEL: THANK YOU, YOUR HONOR. THIS IS THE
3 STATE OF SOUTH CAROLINA VERSUS BENNIE MITCHELL.
4 INDICTMENT 2009-GS-36-37, BURGLARY FIRST DEGREE; 38 IS A
5 LARCENY THIRD OFFENSE, 39 IS POSSESSION OF BURGLARY TOOLS.
6 THIS IS A DEFENSE MOTION, I BELIEVE THERE ARE A NUMBER OF
7 PRETRIAL MOTIONS. BEFORE WE GET STARTED THE STATE, WE
8 HAVE HIM REINDICTED. IT LOOKS LIKE THE FIRST INDICTMENT
9 THAT I MENTIONED, THE 2009-GS-36-038 IS AN INDICTMENT FOR
10 LARCENY. THE ACTUAL INDICTMENT IS FOR THE ENHANCEMENT OF
11 A THIRD PROPERTY OFFENSE. SO I REINDICTED HIM FOR JUST
12 PETTY LARCENY, JUDGE. HE NEEDS TO BE ARRAIGNED ON THAT
13 INDICTMENT. HIS DEFENSE COUNSEL HAS SEEN, HE DOES HAVE AN
14 OBJECTION TO, IT LOOKS LIKE THERE IS A SCRIBNER'S ERROR ON
15 THE BACK STATING THAT \$100.00 DOLLARS U.S. CURRENCY WAS
16 STOLEN AND IT WAS ACTUALLY \$70.00 DOLLARS. AND ALSO THERE
17 WAS A PACKAGE OF SOCKS THAT WAS TAKEN AND IT LOOKS LIKE
18 THAT WAS A SEPARATE INCIDENT AND IT WAS INCLUDED IN THE
19 INDICTMENT BY ERROR. WE ARE NOT GOING FORWARD ON THE
20 SECOND SEPARATE INCIDENT, JUDGE. IT LOOKS LIKE THE
21 \$100.00 DOLLARS SHOULD BE \$70.00 DOLLARS AND THE PACKAGE
22 OF SOCKS SHOULD BE OMITTED.

23 MR. CHAPLIN: YOUR HONOR, IF I MAY ADDRESS THE COURT.
24 ATTORNEY MATHIAS CHAPLIN FOR THE DEFENDANT, BENNIE
25 MITCHELL. THAT IS CORRECT, I WOULD LIKE TO HAVE THE

1 ENHANCEMENT OF LARCENY THIRD OR GREATER, I WOULD LIKE TO
2 HAVE THAT NOLLE PROS WITH A NEW INDICTMENT AND HAVE HIM
3 ARRAIGNED ON THAT. HOWEVER, I DO HAVE SOME CONCERNS WITH
4 THE LANGUAGE IN THE NEW INDICTMENT. AND THAT IS, LIKE MR.
5 MCDANIEL POINTED OUT, THE INCIDENT REPORT FROM THIS
6 INCIDENT STATED THAT THE ONLY THING THAT WAS STOLEN WAS
7 FOUR TO FIVE CANS OF BEER. AND THEN IT GOES DOWN AT THE
8 BOTTOM OF THE REPORT AND SAYS THAT MR. POTTS CALLED BACK
9 AND SAID THAT \$70.00 DOLLARS IN COINS HAD BEEN STOLEN ON
10 THE 28TH OF THAT YEAR. NOW, I DON'T KNOW IF THAT IS
11 ANOTHER INCIDENT OR IF THAT IS CONSIDERED TO BE THE TIME
12 THAT HE LOST THE FOUR TO FIVE CANS OF BEER. THAT IS NOT
13 CLEAR, THEREFORE I WOULD ASK THAT THE INDICTMENT ONLY SHOW
14 FOUR TO FIVE CANS OF BEER.

15 THE COURT: OKAY, SIR.

16 MR. MCDANIEL: THE STATE'S POSITION IS THAT IT SHOULD
17 SAY \$70.00 DOLLARS AND WE DO ADMIT THAT THE PACKAGE OF
18 SOCKS SHOULD BE OMITTED.

19 MR. CHAPLIN: AND, YOUR HONOR, I AM LOOKING AT THE
20 INCIDENT REPORT. AND THERE ARE SEVERAL INCIDENTS ON THIS
21 REPORT WHICH MAKES IT CONFUSING. BUT AT THE TIME OF THE
22 INCIDENT, AT THE TOP OF THE PAGE IT SAYS 10/27/08 AND AT
23 THE BOTTOM THERE IS AN ADDITION THAT SAYS ON 10/28/08
24 \$70.00 DOLLARS IN COINS WAS STOLEN. I ARGUE THAT THAT IS
25 NOT RELEVANT TO THIS MATTER.

1 MR. MCDANIEL: JUDGE, FACTUALLY SPEAKING THE INCIDENT
2 TAKES PLACE ON 10/27 AND 10/28. AND THIS CLEARLY HAPPENED
3 WITHIN THE 28TH OR THE 27TH. IT HAPPENED SOMETIME
4 BETWEEN, YOU KNOW, 11:00 O'CLOCK AT NIGHT THROUGH PAST
5 MIDNIGHT. AND THE INCIDENT REPORT REFLECTS THAT IT
6 HAPPENED DURING THAT PERIOD OF TIME. HIS CONCERN IS THAT
7 THE VICTIM IN THIS CASE CALLS LAW ENFORCEMENT BACK A
8 COUPLE OF DAYS LATER AND SAID, LOOK I REALIZE THAT SOME
9 CHANGE IN MY ROOM WAS ALSO TAKEN. WHILE WE HAVE IT AS A
10 \$100.00 DOLLARS THE INCIDENT REPORT SHOWS THAT IT WAS
11 \$70.00 DOLLARS.

12 THE COURT: MAY I SEE THE INDICTMENT.

13 MR. MCDANIEL: YES, SIR.

14 MR. CHAPLIN: YOUR HONOR, DO YOU HAVE A COPY OF THE
15 INCIDENT REPORT?

16 THE COURT: NO SIR, I DON'T HAVE ANYTHING. THIS IS
17 ON INDICTMENT NUMBER 10-GS-36-87. THE STATE WISHES TO
18 AMEND THE INDICTMENT TO ALLEGE THAT THE AMOUNT OF MONEY
19 WAS \$70.00 DOLLARS. AND WHAT OTHER DETAIL?

20 MR. MCDANIEL: THE PACKAGE OF SOCKS, JUDGE, SHOULD
21 NOT HAVE BEEN INCLUDED.

22 THE COURT: AND, MR. CHAPLIN, ON BEHALF OF MR.
23 MITCHELL DO YOU CONTEND THAT THE INCIDENT REPORT ALLEGES
24 CERTAIN ITEMS OF PERSONAL PROPERTY THAT WOULD MORE
25 CORRESPOND TO A FACTUAL SETTING THAN WHAT THE INDICTMENT

1 ALLEGES. IS THAT THE SITUATION?

2 MR. CHAPLIN: YOUR HONOR, YES, WHAT I AM SAYING IS
3 THAT THERE ARE SEVERAL DIFFERENT INCIDENCES ON THAT ONE
4 REPORT. AND I AM NOT QUITE SURE WHAT THE LOGIC BEHIND
5 THAT WAS. HOWEVER, THE ONLY THING THAT MY CLIENT IS
6 CHARGED WITH IS SOMETHING THAT OCCURRED ON 10/27. AND
7 THERE ARE THINGS THAT OCCURRED PRIOR TO THAT DATE AND
8 THERE ARE DATES THAT HE CALLED ON THE 30TH OF OCTOBER AND
9 SAID SOMETHING THAT HE IS ALSO MISSING \$70.00 DOLLARS. I
10 DON'T KNOW IF SOMEONE ELSE REENTERED HIS HOME, TOOK THE
11 MONEY, WHATEVER THE CASE MIGHT BE. WE ARE HERE SAYING
12 THAT THAT SHOULD BE FOUR TO FIVE CANS OF BEER.

13 THE COURT: I DON'T KNOW OF ANY AUTHORITY THAT I
14 WOULD HAVE TO AMEND THE INDICTMENT OVER OBJECTION ON THESE
15 FACTUAL MATTERS, MR. MCDANIEL. DO YOU HAVE ANY AUTHORITY
16 YOU ARE RELYING ON. I AM NOT CONCERNED ABOUT THE DATES,
17 THAT IS SOMETHING THAT THE JURY WOULD HAVE TO DETERMINE.
18 I DON'T THINK WHAT IT IS ON OR ABOUT THE 27TH DAY OF
19 OCTOBER OF 2008, THAT WOULD BE SOME KIND OF FAVORABLE
20 MATTER. BUT NEVERTHELESS, AS FAR AS THE PERSONAL PROPERTY
21 TAKEN IN THE ALLEGED LARCENY HOW CAN I AMEND THE ACTUAL
22 DESCRIPTION OF THE PROPERTY ON THE BASIS OF A SCRIBNER'S
23 ERROR ON SOME ITEMS THAT THE GRAND JURY FOUND AND THEN
24 AMENDING THE AMOUNTS OF MONEY THAT THE GRAND JURY ALSO
25 FOUND.

1 MR. MCDANIEL: JUDGE, I MEAN THE MONEY I THINK, I
2 BELIEVE THAT THE \$100.00 DOLLARS, I KNOW THEY WERE TRYING
3 TO GET THAT AMENDED TO \$70.00 AND I THINK THAT WAS MORE
4 THAN I AGREED, IT SHOULD OF BEEN \$70.00. I DON'T THINK
5 THAT WOULD AFFECT YOUR ABILITY TO CHANGE IT. I DON'T KNOW
6 THAT YOU HAVE TO BECAUSE ALL WE CAN PROVE IS \$70.00. AND
7 I THINK THE ARGUMENT IS THAT THE JURY IS NOT GOING TO, TO
8 GET THE INDICTMENT AND IT WAS JUST AN ERROR THAT WAS
9 \$70.00 AND IT SHOULD OF BEEN, IT IS \$100.00 AND IT SHOULD
10 OF BEEN \$70.00 DOLLARS. I BELIEVE YOUR HONOR, IF YOU
11 THOUGHT IT APPROPRIATE, CHANGE THAT \$70.00 DOLLARS. AT
12 LEAST INSTRUCT THE JURY THAT IT WAS \$70.00 DOLLARS. THE
13 SOCKS, I DON'T KNOW, I MEAN I AM NOT RELYING ON ANY
14 AUTHORITY THAT WAS JUST, IT IS IN THERE BASED ON AN
15 INCIDENT REPORT AND WE ARE NOT GOING FORWARD ON THE SOCKS
16 AND WE NEVER ALLEGED THAT THE SOCKS WERE TAKEN DURING THIS
17 INCIDENT DATE. IT IS A SCRIBNER'S ERROR, YOUR HONOR HAS
18 THE ABILITY TO AMEND THE INDICTMENT.

19 THE COURT: ALL RIGHT, WELL, I DON'T THINK THAT IT IS
20 A SCRIBNER'S ERROR BUT I WILL BE GLAD TO REVISIT THAT AT
21 THE DIRECTED VERDICT STAGE IF YOU HAVE OTHER AUTHORITY.
22 BUT I DON'T KNOW OF ANY DECISION THAT WOULD ALLOW ME TO
23 REWRITE THE INDICTMENT. I WILL RESPECTFULLY DENY THE
24 MOTION AT THIS STAGE. OKAY, MR. CHAPLIN, YOU HAD SOME
25 OTHER MOTIONS. I KNOW YOU WROTE ME SEVERAL WEEKS AGO AND

1 I THINK I RESPONDED THAT WE WOULD TAKE THEM UP. I WILL BE
2 GLAD TO HEAR YOU.

3 MR. MCDANIEL: YOUR HONOR, WE JUST NEED TO GET HIM
4 ARRAIGNED ON THAT INDICTMENT.

5 MR. CHAPLIN: YOUR HONOR.

6 THE COURT: YES.

7 MR. CHAPLIN: SO, MY CONCERN WITH THIS MATTER BEFORE
8 YOU RIGHT NOW IS WE ARE GOING TO NOLLE PROS THE INDICTMENT
9 THAT IT HAS THE ENHANCEMENT OF LARCENY THIRD OR GREATER.
10 AND ARRAIGNING HIM ON A NEW INDICTMENT, I HAVE SERIOUS
11 CONCERNS ABOUT THE WRITING IN THAT NEW INDICTMENT. AND I
12 AM STILL NOT CLEAR ON EXACTLY HOW WE SHOULD PROCEED WITH
13 THAT. I AM TROUBLED BY ARRAIGNING HIM ON SOMETHING THAT
14 IS INACCURATE.

15 THE COURT: I DON'T KNOW IF IT IS ACCURATE OR NOT,
16 HOW COULD I POSSIBLY KNOW IF IT IS ACCURATE OR NOT.

17 MR. CHAPLIN: YOUR HONOR, I AM BASING IT ON THE
18 INCIDENT REPORT.

19 THE COURT: I DON'T KNOW WHAT THE GRAND JURY HEARD.
20 I MEAN, WHAT ARE YOU ASKING ME TO DO.

21 MR. CHAPLIN: I GUESS WHAT I WOULD LIKE TO DO IS
22 REFLECT WHAT IS IN THE INCIDENT REPORT.

23 THE COURT: BUT I DON'T KNOW WHAT THE GRAND JURY
24 HEARD SO I DON'T KNOW, YOU KNOW, I GUESS YOU ARE ASKING ME
25 TO QUASH THE INDICTMENT. IS THAT WHAT YOU ARE ASKING ME

1 TO DO?

2 MR. CHAPLIN: WELL, YOUR HONOR, MY ORIGINAL ISSUE
3 INVOLVING THIS MATTER, I FELT THAT THE INDICTMENT STATING
4 THAT MR. MITCHELL HAS PRIOR CONVICTIONS WILL BE EXTREMELY
5 PREJUDICIAL. THAT IS WHY WE WOULD LIKE TO HAVE IT SAY
6 PETTY LARCENY. THE ONLY PROBLEM IS THAT THE PETTY LARCENY
7 INDICTMENT IS INCORRECT.

8 THE COURT: WELL, THE GRAND JURY RETURNED IT, IT IS
9 PRESUMABLY VALID. FOR THE COURT TO SAY THAT IT IS INVALID
10 AND INCORRECT WILL BE A STEP THAT I COULDN'T TAKE AT THIS
11 STAGE. I MEAN HE GOES TO TRIAL ON THE INDICTMENT AND HE
12 IS EITHER FOUND GUILTY OR NOT GUILTY OR IS DISMISSED AT
13 SOME STAGE. BUT I DON'T KNOW OF ANY BASIS ON WHICH I CAN,
14 ON THE BASIS OF AN INCIDENT REPORT, TURN AROUND AND
15 DISMISS AN INDICTMENT THAT CONFLICTS WITH THE INCIDENT
16 REPORT. BECAUSE THAT HAPPENS ALL THE TIME, DOESN'T IT?

17 MR. CHAPLIN: I AM NOT SURE IF IT HAPPENS ALL THE
18 TIME, YOUR HONOR, I AM JUST CONCERNED THAT THE LANGUAGE IN
19 THAT INDICTMENT, MY UNDERSTANDING IS THAT YOUR HONOR HAS
20 THE ABILITY TO CORRECT THE LANGUAGE.

21 THE COURT: I CAN CORRECT A SCRIBNER'S ERROR AND I
22 HAVE ALREADY DECLINED TO DO THAT. SO, AT THIS POINT, IF
23 THE STATE CALLS THE CASE FOR TRIAL I DON'T KNOW OF ANY WAY
24 THAT I CAN KEEP THEM FROM DOING THAT AT THIS STAGE. THERE
25 IS NO WAY I CAN KEEP HIM FROM DOING THAT IS FROM WHAT HE

1 TOLD ME. BUT I CERTAINLY WILL CONSIDER SOMETHING THAT I
2 MAY OF OVERLOOKED.

3 MR. CHAPLIN: YOUR HONOR, IF THAT IS THE CASE THEN I
4 WOULD BE BETTER WITH BRINGING TO THE COURT'S ATTENTION THE
5 PREJUDICIAL IMPACT OF THIS INDICTMENT, THE ORIGINAL
6 INDICTMENT AND HAVING THE COURT RULE ON THAT.

7 THE COURT: WHAT IS THE STATE'S RESPONSE TO THAT?

8 MR. MCDANIEL: JUDGE, I AM GOING FORWARD ON THE
9 INDICTMENT.

10 THE COURT: SO, THE STATE SAYS THEY ARE GOING FORWARD
11 ON THE INDICTMENT FOR PETTY LARCENY. THAT IS THE CASE?

12 MR. CHAPLIN: THAT IS CORRECT, YOUR HONOR.

13 THE COURT: WHAT OTHER INDICTMENT NUMBER?

14 MR. MCDANIEL: BURGLARY, THAT IS INDICTMENT
15 2009-GS-36-037. AND 2009-GS-36-039 IS POSSESSION OF
16 BURGLARY TOOLS.

17 MR. CHAPLIN: I BEG THE COURT'S INDULGENCE.

18 THE COURT: YES, SIR.

19 MR. MCDANIEL: YOUR HONOR, MAY WE APPROACH?

20 THE COURT: YES, SIR.

21 (WHEREUPON, A BENCH CONFERENCE WAS HELD.)

22 THE COURT: MADAM CLERK.

23 THE CLERK: BENNIE DARRON MITCHELL, IF YOU ANSWER TO
24 THAT NAME HOLD UP YOUR RIGHT HAND.

25 (WHEREUPON, MR. MITCHELL HOLDS UP HIS HAND.)

1 THE CLERK: YOU STAND INDICTED BY THE NAME OF BENNIE
2 DARRON MITCHELL. FOR THAT YOU AT A COURT OF GENERAL
3 SESSIONS, CONVENED ON THE 5TH DAY OF FEBRUARY OF 2010, THE
4 GRAND JURY OF NEWBERRY COUNTY PRESENT UPON THE OATH THAT
5 BENNIE DARRON MITCHELL DID IN NEWBERRY COUNTY, STATE
6 AFORESAID ON OR ABOUT THE 27TH DAY OF OCTOBER, 2008
7 FELONIOUSLY TAKE AND CARRY AWAY THE PERSONAL GOODS OF
8 STEPHEN LEE POTTS OF THE VALUE OF LESS THAN ONE-THOUSAND
9 DOLLARS DESCRIBED AS FOLLOWS: FOUR TO FIVE CANS OF BEER,
10 ONE-HUNDRED DOLLARS UNITED STATES CURRENCY, ONE PACKAGE OF
11 SOCKS WITH INTENT TO DEPRIVE THE OWNER PERMANENTLY OF SUCH
12 GOODS IN VIOLATION OF SECTION 16-13-38 OF THE SOUTH
13 CAROLINA CODE OF LAWS, 1976 AS AMENDED AGAINST THE PEACE
14 AND DIGNITY OF THE STATE AND CONTRARY TO THE STATUTE IN
15 SUCH CASES MADE AND PROVIDED. AND THAT IS SIGNED, JERRY
16 PEACE, SOLICITOR. ARE YOU GUILTY OF THE FELONY WHEREIN
17 YOU STAND INDICTED OR NOT GUILTY?

18 MR. MITCHELL: NOT GUILTY.

19 THE CLERK: ARE YOU READY TO COME TO TRIAL?

20 MR. MITCHELL: YES, MA'AM.

21 THE CLERK: HOW WILL YOU BE TRIED?

22 MR. MITCHELL: A JURY.

23 THE CLERK: GOD SEND YOU TRUE DELIVERANCE.

24 THE COURT: DOES THE STATE HAVE ANYTHING FURTHER AT
25 THIS POINT?

1 MR. MCDANIEL: NO, SIR.

2 THE COURT: YES SIR, MR. CHAPLIN, WHENEVER YOU ARE
3 READY.

4 MR. CHAPLIN: THANK YOU, YOUR HONOR. JUDGE HILL, WE
5 ARE HERE ON THE MATTER REFERRED TO BY ASSISTANT SOLICITOR
6 MCDANIEL, THE STATE VERSUS BENNIE MITCHELL. I FILED A
7 MOTION TO HAVE PRETRIAL MATTERS. PRIOR TO THIS HEARING,
8 YOUR HONOR, I HAVE HAD CONSULTATIONS WITH THE ASSISTANT
9 SOLICITOR AND FOR THE RECORD I WOULD LIKE TO NOTE THAT
10 SOME THINGS HAVE BEEN RESOLVED AND WE DO HAVE SOME ISSUES
11 THAT NEEDED TO BE BROUGHT TO THIS COURT'S ATTENTION FOR
12 GUIDANCE. THE FIRST ISSUE THAT I BROUGHT TO THE COURT'S
13 ATTENTION WAS EXCLUDING THE IN-COURT IDENTIFICATION OF
14 DEFENDANT MITCHELL BY MR. POTTS. AND I THINK THE STATE'S
15 RESPONSE IS--

16 MR. MCDANIEL: WE DO NOT INTEND TO HAVE THE VICTIM
17 IDENTIFY THE DEFENDANT, JUDGE.

18 THE COURT: MR. POTTS IS THE VICTIM?

19 MR. MCDANIEL: YES SIR, STEPHEN LEE POTTS.

20 THE COURT: OKAY.

21 MR. CHAPLIN: SECONDLY, YOUR HONOR, WE FILED A MOTION
22 FOR REDACTION FROM AN IRRELEVANT AND/OR PREJUDICIAL
23 INFORMATION CONTAINED IN THE INCIDENT REPORT RELATED TO
24 THIS MATTER. YOUR HONOR, THE BASIS OF THAT MOTION IS THE
25 FACT THAT THIS INCIDENT REPORT, IN ADDITION TO BE POORLY

1 WRITTEN, CONTAINS NUMEROUS DIFFERENT INCIDENTS THAT HAVE
2 NOTHING TO DO WITH MY CLIENT. AND THE CONCERN, YOUR
3 HONOR, IS THAT THIS INFORMATION MAY BE MISINTERPRETED BY
4 THE JURY AND THEY MAY ASSOCIATE MR. MITCHELL WITH THESE
5 OTHER EVENTS. THEREFORE I WANT TO MAKE SURE THAT THE ONLY
6 ISSUE THAT MR. MITCHELL IS ANSWERING TO IS THE ONE THAT HE
7 WAS INDICTED ON WHICH IS THE INCIDENT THAT OCCURRED ON
8 10/27/08, NOTHING THAT OCCURRED ON 10/18 OR ANYTHING THAT
9 OCCURRED PRIOR TO THAT OR ANYTHING THAT OCCURRED AFTER
10 10/27. AND THE INCIDENT REPORT, YOUR HONOR, AGAIN IT JUST
11 CONTAINS A WHOLE MISMATCH OF INFORMATION.

12 THE COURT: ALL RIGHT, SIR.

13 MR. MCDANIEL: THE STATE'S POSITION IS THAT WE DON'T
14 WANT TO INTRODUCE PREJUDICIAL EVIDENCE AGAINST THE
15 DEFENDANT THAT HE IS NOT AT TRIAL FOR. I BELIEVE THE
16 DEFENSE'S ISSUE IS, YOUR HONOR, CAN I GIVE YOU A BRIEF
17 FACTUAL OVERVIEW AND I THINK THAT WILL EXPLAIN IT.

18 THE COURT: OKAY.

19 MR. MCDANIEL: THE VICTIM IN THIS CASE COMES HOME TEN
20 DAYS PRIOR TO THIS INCIDENT DATE FROM A CLEMSON GAME ON
21 SATURDAY AND NOTICES THAT SOMEONE HAD BEEN IN HIS HOUSE.
22 AND BASED ON THAT HE BUYS, PURCHASES A DEER CAMERA AND
23 PLACES THAT DEER CAMERA ON THE REFRIGERATOR AND THEN ON
24 THE INCIDENT DATE CATCHES WHO WE BELIEVE IS THE DEFENDANT,
25 ENTERING HIS HOME WHILE HE IS NOT THERE, CATCHES A FEW

1 IMAGES OF THAT.

2 THE COURT: HOW DO YOU PUT IT ON A REFRIGERATOR.

3 MR. MCDANIEL: IT IS JUST ON TOP OF THE REFRIGERATOR,
4 IT IS NOT ACTUALLY CONNECTED TO IT. AND I THINK THE
5 DEFENSE'S CONCERN IS THAT IF WE, ON THAT FIRST INCIDENT
6 THAT HE IS NOT AT TRIAL FOR, NOR DO WE HAVE ANY EVIDENCE
7 THAT HE WAS THE ONE WHO ENTERED THAT HOUSE, HE IS
8 CONCERNED THAT WE WILL GET INTO, I GUESS ON THAT TIME.
9 THE STATE'S POSITION IS THAT I THINK WE CAN GET INTO WHY
10 HE PURCHASED THE CAMERA, YOU KNOW, HE NOTICED SOME ITEMS
11 MISSING FROM HIS HOME AND HE PURCHASED A DEER CAMERA. BUT
12 WE, IN NO WAY, IN OUR CASE-IN-CHIEF ARE GOING TO TRY TO
13 ASSOCIATE THAT THE DEFENDANT ENTERED THE HOME AT THAT
14 TIME. WE JUST WANTED THE JURY TO KNOW AND I THINK IT
15 WOULD BE DETRIMENTAL TO US IF WE JUST WENT IN AND I HAD A
16 DEER CAMERA ON MY REFRIGERATOR. I THINK THE JURY, THE
17 STATE CAN PRESENT SOME EVIDENCE AND IT WILL BE CAREFULLY
18 TAILORED TO WHAT WE ARE TRYING TO ACCOMPLISH, YOU KNOW,
19 SOME CRIMINAL BEHAVIOR OF THE DEFENDANT ON THAT PART. BUT
20 I GUESS WE ARE TRYING TO FIND SOME TYPE OF GUIDANCE FROM
21 YOUR HONOR.

22 THE COURT: YOU ARE NOT PLANNING TO INTRODUCE THE
23 INCIDENT REPORT, ARE YOU?

24 MR. MCDANIEL: NO, SIR.

25 THE COURT: SO, YOU ARE JUST ASKING HOW YOU CAN

1 ELICIT THE EXPLANATION AS TO WHY THE DEER CAMERA WAS
2 PURCHASED?

3 MR. MCDANIEL: YES, SIR.

4 THE COURT: WHAT ABOUT THAT, MR. CHAPLIN?

5 MR. CHAPLIN: YOUR HONOR, THAT IS EXACTLY WHY I AM
6 CONCERNED AND THAT IS THAT NONE OF THE PRIOR INCIDENTS BE
7 ASSOCIATED WITH MR. MITCHELL. AS FAR AS MR. POTTS
8 TESTIFYING AS TO HIS MOTIVE BEHIND DOING SOMETHING OR
9 WHATEVER, THAT WOULD BE, I GUESS THAT WOULD BE HIS OPTION.
10 HOWEVER IT NEEDS TO BE CLEARLY STATED THAT MR. MITCHELL
11 WAS NOT CHARGED WITH ANY ADDITIONAL OFFENSE AND HE IS NOT
12 HERE TO ANSWER TO ANY OF THOSE OFFENSES. AND, YOUR HONOR,
13 I AM CONCERNED, PURSUANT TO RULE 403, WITH REGARDS TO
14 PREJUDICIAL IMPACT OF THAT. I MEAN HE CAN SAY THAT HE HAD
15 SOME PRIOR BREAK-INS AND BOUGHT A DEER CAMERA BUT THE
16 SPECIFICITY OF THIS REPORT CONNECTED TO OUR INCIDENT
17 REPORT OR THE INCIDENT REPORT FROM THE 10/27 INCIDENT THAT
18 WE ARE HERE TO DEFEND, TO ME IT JUST MIGHT LEAD SOMEONE ON
19 THE JURY TO BELIEVE THAT MY CLIENT MIGHT OF BEEN
20 RESPONSIBLE FOR ALL OF THAT AND THAT IS NOT THE CASE.

21 THE COURT: OKAY. SO, IS THAT SUITABLE FOR THE
22 STATE?

23 MR. MCDANIEL: YES, SIR.

24 THE COURT: OKAY. LET'S MAKE SURE THE WITNESSES DO
25 KNOW THE LIMITS OF WHAT THEY NEED TO SAY AND NOT TO SAY.

1 MR. MCDANIEL: YES, YOUR HONOR.

2 MR. CHAPLIN: SO, YOUR HONOR, JUST FOR CLARIFICATION.
3 SO THEN, MY UNDERSTANDING IS THAT MR. POTTS MIGHT SAY THAT
4 HE HAD PRIOR BREAK-INS AND EVEN AT THAT OR IS HE ALLOWED
5 TO GO INTO SPECIFICITY.

6 THE COURT: HE CAN JUST SAY THAT, HE BOUGHT THE DEER
7 CAMERA BECAUSE HE HAD PRIOR BREAK-INS, HE IS NOT TO REFER
8 DIRECTLY OR INDIRECTLY AS TO ANY MATCHING, BETWEEN THOSE
9 AND MR. MITCHELL. AND IF THAT WERE TO HAPPEN THEN IT
10 WOULD RESULT IN A MISTRIAL. IT IS GOING TO BE CONFINED TO
11 A GENERIC EXPLANATION OF WHY HE PURCHASED THE DEER CAMERA.
12 SO, THE STATE CAN PUT IT INTO CONTEXT TO THE JURY.

13 MR. CHAPLIN: THANK YOU, YOUR HONOR. I THINK THAT
14 ACTUALLY WILL ADDRESS NUMBER TWO. YOUR HONOR, YOU DO HAVE
15 A COPY OF THIS MOTION, DO YOU NOT?

16 THE COURT: I DO NOT. THANK YOU.

17 MR. CHAPLIN: SO THAT WOULD ADDRESS ITEM NUMBER TWO
18 AND I THINK IT WOULD ALSO SPEAK TO ITEM NUMBER EIGHT.
19 YOUR HONOR, I KNOW WE ARE GOING TO HAVE A GREAT DEAL OF
20 DISCUSSION ON ITEM NUMBER THREE. IF I COULD COME BACK TO
21 THAT I WOULD APPRECIATE IT.

22 THE COURT: ALL RIGHT, SIR.

23 MR. CHAPLIN: NUMBER FOUR AS WELL. AND I WOULD LIKE
24 TO MOVE TO NUMBER FIVE.

25 THE COURT: OKAY.

1 MR. CHAPLIN: YOUR HONOR, THIS IS A MOTION TO EXCLUDE
2 TESTIMONY ABOUT ANY OF THE STATE'S WITNESSES, IN
3 PARTICULAR LAW ENFORCEMENT AS TO HOW THE DEFENDANT,
4 MITCHELL, IT HAS ALREADY BEEN ESTABLISHED THAT THE ALLEGED
5 VICTIM IN THIS MATTER, MR. POTTS DOES NOT KNOW MR.
6 MITCHELL BASED ON WHAT I AM HEARING. SO, WHAT I AM
7 CONCERNED ABOUT IS THAT, QUITE FRANKLY THAT THIS IS A CASE
8 OF MISTAKEN IDENTITY. THERE IS WITNESSES BY THE STATE
9 THAT, MY UNDERSTANDING IS THAT THEY PLAN TO SAY IN COURT,
10 THEY LOOKED AT A PICTURE AND IDENTIFIED THAT PERSON TO BE
11 MR. MITCHELL. AND I AM CONCERNED WITH REGARDS TO WHAT
12 MIGHT BE SAID AS WHAT WAS THE BASIS OF THAT. AND I WOULD
13 SAY ANY RECORD, ANY MENTION OF ANY TYPE OF PRIOR OFFENSES
14 OF MR. MITCHELL WOULD BE OFF LIMITS UNLESS HE TOOK THE
15 STAND. AND THAT THE STATE SHOULD NOT BE ABLE TO MENTION
16 ANY OF THAT. SO, I AM NOT QUITE SURE HOW THAT MATTER WILL
17 BE TESTIFIED TO AND I HAVE A GREAT DEAL OF CONCERN.

18 THE COURT: ALL RIGHT, YES SIR, MR. MCDANIEL.

19 MR. MCDANIEL: OUR INTENT IS TO, IS TO BASICALLY
20 OFFER EVIDENCE FROM LIEUTENANT MCCLURKIN, HE IS FROM
21 WHITMIRE, HE WORKED FOR LAW ENFORCEMENT. BUT THAT IS IT,
22 THEY BASICALLY GREW UP TOGETHER, HE HAS KNOWN HIM FOR 20
23 YEARS.

24 MR. CHAPLIN: YOUR HONOR, I THINK WE CAN CERTAINLY
25 APPRECIATE THE CONCERN I HAVE WITH A PERSON IN LAW

1 ENFORCEMENT MAKING A STATEMENT OF THAT NATURE, THAT I KNOW
2 THE, I AM STILL NOT CLEAR. I HAVE KNOWN MR. MITCHELL FOR
3 20 YEARS. I AM NOT SURE WHAT THEY ARE INTENDING TO
4 SUGGEST.

5 THE COURT: I DON'T KNOW HOW IT CAN VOICE THE
6 WITNESSES KNOWLEDGE IF IT IS BASED ON LIVING IN THE SAME
7 COMMUNITY, I MEAN, SOMEONE HE GREW UP WITH. I CAN PREVENT
8 THE STATE'S WITNESSES FROM COMMENTING ON OR IMPLYING ABOUT
9 ANY PRIOR RECORD OR SUSPICION THAT MR. MITCHELL COMMITTED
10 A CRIME. CERTAINLY WE CAN DO THAT BUT I AM NOT SURE I CAN
11 SAY, EVEN THOUGH YOU GREW UP WITH THE PERSON YOU CAN'T
12 TELL THE JURY THAT.

13 MR. CHAPLIN: WELL, YOUR HONOR, IF THAT IS WHAT THE
14 TESTIMONY IS GOING TO BE, I GREW UP WITH THIS INDIVIDUAL
15 OR I AM NOT QUITE SURE THAT IS ACCURATE.

16 THE COURT: IT MAY NOT BE, BUT I MEAN I UNDERSTOOD--

17 MR. MCDANIEL: JUDGE, MAY I JUST--

18 THE COURT: SURE.

19 MR. MCDANIEL: I DON'T HAVE A PROBLEM IF WE JUST GO
20 IN AND SAY, LIVED IN THE COMMUNITY TOGETHER FOR 20 YEARS.
21 YOUR HONOR, WE ARE NOT TRYING TO SLIP, THE LAST THING I
22 WANT TO DO IS A MISTRIAL. AND I THINK THAT WE CAN AT
23 LEAST ESTABLISH PERSONAL KNOWLEDGE.

24 MR. CHAPLIN: SO, WHAT ARE YOU SUGGESTING TO BE SAID?

25 MR. MCDANIEL: THEY LIVED IN THE COMMUNITY TOGETHER

1 FOR X AMOUNT OF YEARS.

2 MR. CHAPLIN: I BEG THE COURT'S INDULGENCE.

3 THE COURT: SURE.

4 MR. CHAPLIN: YOUR HONOR, AS LONG AS THERE IS NO
5 CONNECTION BETWEEN WHAT HE SAYS AS A POLICE OFFICER. SO,
6 I GREW UP WITH HIM IN THE COMMUNITY OR I HAVE LIVED IN THE
7 COMMUNITY, WHATEVER THE CASE MIGHT BE. BUT THERE CAN'T BE
8 ANY STATEMENTS PROVIDED, YOU KNOW, I HAVE BEEN IN LAW
9 ENFORCEMENT FOR 20 YEARS AND BLA, BLA, BLA. ANYTHING LIKE
10 THAT WOULD BE OFF LIMITS.

11 MR. MCDANIEL: JUDGE, THEY WILL TESTIFY AS TO THEIR
12 EMPLOYMENT. ESPECIALLY LIEUTENANT MCCLURKIN IS THE
13 INVESTIGATING OFFICER IN THIS CASE. SO, WE ARE NOT GOING,
14 HE CAN TESTIFY TO WHAT HE DOES, HOW LONG HE HAS WORKED
15 THERE AND HE IDENTIFIES THE DEFENDANT ON HOW HE KNEW HIM
16 AND HE CAN SAY I KNEW HIM FOR 20 YEARS, WE HAVE LIVED IN
17 THE SAME COMMUNITY FOR 20 YEARS. BUT WE ARE NOT, I
18 UNDERSTAND THE DEFENSE'S CONCERN, THE STATE IS NOT TRYING
19 TO SNEAK SOMETHING IN.

20 THE COURT: I DON'T THINK--

21 MR. MCDANIEL: ANY IDENTIFICATION BY POLICE IS
22 PREJUDICIAL, I UNDERSTAND THAT BUT WE ARE, I KNOW THIS
23 COULD BE SENSITIVE.

24 THE COURT: I UNDERSTAND MR. CHAPLIN'S CONCERN AND OF
25 COURSE IF LAW ENFORCEMENT TESTIFIES THAT THEY KNOW MR.

1 MITCHELL BECAUSE HE IS ALWAYS A USUAL SUSPECT BUT I THINK
2 THAT IS WHAT HE IS TRYING TO MAKE SURE DOESN'T HAPPEN.
3 AND CERTAINLY NO ONE WANTS THAT TO HAPPEN. AND AS I
4 UNDERSTAND IT, THE TESTIMONY WILL ARISE IN THE FOLLOWING
5 SCENARIO, THAT THEY ALSO WILL TESTIFY THAT MR. MITCHELL
6 WAS IDENTIFIED IN WHAT CONTEXT?

7 MR. MCDANIEL: LIEUTENANT MCCLURKIN IDENTIFIES
8 PICTURES OF THE DEFENDANT. AND FACTUALLY, THE VICTIM
9 BRINGS THE CAMERA.

10 THE COURT: OKAY. WELL, THAT HE RECOGNIZED MR.
11 MITCHELL FOR 20 YEARS AND LIVED IN THE SAME COMMUNITY. I
12 DON'T SEE ANYTHING WRONG WITH THAT. HE IS NOT CONNECTING
13 HIS KNOWLEDGE TO MR. MITCHELL'S INVOLVEMENT OR ANY
14 SUSPICION OF CRIMINAL ACTIVITY.

15 MR. CHAPLIN: I THINK THAT WOULD COVER IT, LIVING IN
16 THE SAME COMMUNITY. I THINK THAT WOULD BE SUFFICIENT.

17 THE COURT: ALL RIGHT, SIR.

18 MR. CHAPLIN: YOUR HONOR, THE NEXT ITEM IS EXCLUDING
19 THE VIDEOTAPES AND PHOTOGRAPHS. I WOULD LIKE TO LUMP THAT
20 INTO THREE AND FOUR AND COME BACK TO THAT. I THINK THAT
21 IS GOING TO TAKE A LITTLE BIT OF TIME. SO, I KNOW WE HAVE
22 RESOLVED NUMBER ONE, NUMBER TWO AND NUMBER FIVE AND NUMBER
23 EIGHT. SO, NUMBER SEVEN, TO EXCLUDE ANY TESTIMONY OR
24 DOCUMENTATION INDICATING PRIOR CRIMES WITH POLICE
25 INTERACTION WITH DEFENDANT MITCHELL. AND I THINK YOU

1 ACTUALLY RESOLVED THAT MATTER. MY UNDERSTANDING IS THAT,
2 WELL THE STATE--

3 MR. MCDANIEL: UNLESS THE DEFENDANT TAKES THE STAND
4 WE WON'T GET INTO ANY PRIOR RECORD. THAT SEEMS SIMILAR TO
5 THE OTHER ONE, UNLESS THE DOOR IS OPEN.

6 THE COURT: OKAY.

7 MR. CHAPLIN: YOUR HONOR, NUMBER NINE, YOU MIGHT OF
8 ADDRESSED THAT ALREADY. EXCLUDING TESTIMONY AS TO ITEMS
9 SEIZED FROM THE RESIDENCE OF DEFENDANT, MITCHELL, NOT
10 APPEARING. A DESCRIPTION OF THE SEARCH WARRANT AND A
11 CONCERN THERE, YOUR HONOR, IS THAT WHEN THE POLICE
12 OFFICERS WENT TO MR. MITCHELL'S HOME AND SEARCHED IT THERE
13 WERE ITEMS THAT WERE NOT INDICATED ON THE SEARCH WARRANT
14 THAT LAW ENFORCEMENT TOOK. THEREFORE I THINK I SPOKE WITH
15 MR. MCDANIEL PRIOR TO THIS AND WE HAVE AGREED THAT THE
16 TESTIMONY WOULD BE THAT THEY WENT TO MR. MITCHELL'S HOME
17 BUT THEY FOUND NOTHING AS A RESULT OF THE SEARCH. IS THAT
18 CORRECT?

19 MR. MCDANIEL: THAT IS CORRECT, JUDGE.

20 THE COURT: SO THERE WILL BE NO DISCUSSIONS ABOUT THE
21 ITEMS SEIZED, IS THAT RIGHT?

22 MR. MCDANIEL: THAT IS CORRECT, JUDGE. JUST FOR YOUR
23 HONOR'S CLARIFICATION. THESE ITEMS OBTAIN A SUSPICION OF
24 ANOTHER CRIME, TURNED OUT THEY WEREN'T AND THAT THEY WERE
25 RETURNED.

1 THE COURT: AND THEN NUMBER TEN, YOUR HONOR, WOULD BE
2 ITEMS NOT PROVIDED IN A TIMELY MANNER PURSUANT TO RULE 5
3 AND BRADY WHICH WERE SERVED ON OCTOBER 8TH OF 2009 FROM
4 THE STATE, ASSISTANT SOLICITOR MCDANIEL.

5 MR. MCDANIEL: ALL BRADY MATERIAL HAS BEEN TURNED
6 OVER.

7 THE COURT: OKAY.

8 MR. CHAPLIN: SO, YOUR HONOR, I UNDERSTAND TEN TO BE
9 THAT, IF I DON'T HAVE IT AT THIS TIME IT DOESN'T EXIST AND
10 IT DOESN'T COME IN.

11 MR. MCDANIEL: BRADY RULE 5 MATERIAL, WE HAVE HAD
12 DISCUSSIONS ABOUT WHAT I PLAN TO INTRODUCE AT TRIAL BUT
13 BRADY AND RULE 5 MATERIAL HAVE BEEN TURNED OVER.

14 THE COURT: OKAY.

15 MR. CHAPLIN: SO, IS MY UNDERSTANDING CORRECT, YOUR
16 HONOR?

17 THE COURT: I DON'T KNOW, IT IS NOT REALLY SOMETHING
18 THAT I CAN SAY IT IS A BALL OR STRIKE AT THIS POINT. YOU
19 ARE ASKING ME FOR SOMETHING THAT I CAN'T SEE SO I AM NOT
20 GOING TO DO THAT.

21 MR. CHAPLIN: I AM JUST BASICALLY SAYING, WE ARE AT
22 THE PRETRIAL HEARING ON THIS MATTER AND IT IS MY
23 UNDERSTANDING THAT IF I DO NOT HAVE EVIDENCE, WHAT HAS
24 BEEN TURNED OVER THAT IT SHOULD NOT BE ADMITTED. AND IF
25 IT IS ADMITTED THAT WOULD BE A VIOLATION OF THE RULES OF

1 DISCOVERY AND NON-COMPLIANT WITH THESE MOTIONS.

2 THE COURT: LIKE I SAY, I CAN'T, THERE IS NO WAY FOR
3 ME TO KNOW WHAT TO RULE ON ON THAT. SO, I CAN'T REALLY, I
4 DON'T HAVE ANY CONTEXT FOR RULING, YOU ARE JUST ASKING ME
5 FOR SOME KIND OF ADVISORY OPINION.

6 MR. CHAPLIN: WELL, YOUR HONOR, IF SOMETHING SPECIFIC
7 SHOULD COME UP IN THE MATTER OF THIS HEARING I WILL THEN
8 MAKE THAT MOTION.

9 THE COURT: SURE.

10 MR. CHAPLIN: YOUR HONOR, AT THIS TIME I WOULD LIKE
11 TO GO BACK UP TO ACTUALLY NUMBER SIX. A MOTION TO EXCLUDE
12 VIDEOTAPE PHOTOGRAPHS IN THIS MATTER AND I MAKE THAT
13 MOTION BASED ON REQUIREMENT THAT THE STATE AUTHENTICATE
14 THESE ITEMS AND ALSO SHOW A PROPER CHAIN OF CUSTODY.

15 THE COURT: OKAY. YES SIR, MR. MCDANIEL.

16 MR. MCDANIEL: WELL, YOUR HONOR, WE WILL OFFER AT THE
17 CORRECT TIME THE PHOTOGRAPHS. YOU KNOW, IT IS NOT A
18 VIDEO, THESE ARE PICTURES, THERE IS NO VIDEOTAPE, THEY ARE
19 PICTURES THAT ARE TAKEN FROM A CAMERA THAT A CHAIN OF
20 CUSTODY IS NOT REQUIRED FOR A CAMERA. AS TO THE
21 PHOTOGRAPHS, REALLY ANYONE WHO CAN STATE THAT IT TRULY
22 REFLECTS WHAT I INTEND FOR THAT PICTURE TO REFLECT,
23 WHOEVER CAN AUTHENTICATE IT THAT WAY IS ENOUGH. AND AS
24 FAR AS GETTING PHOTOGRAPHS IN, THE ACTUAL PERSON WHO TOOK
25 THE PICTURES DO NOT, WILL NOT TESTIFY TO THAT. IT IS JUST

1 SOMEBODY WHO HAS SEEN THE SCENE OR WHO HAS SEEN WHAT I AM
2 TRYING TO REFLECT IN THE PICTURE. AND WE PLAN ON DOING
3 THAT, JUDGE.

4 MR. CHAPLIN: YOUR HONOR, LET ME JUST TRY TO BE MORE
5 SPECIFIC. THERE ARE SOME PICTURES OR VIDEO, WHATEVER THE
6 CASE MIGHT BE, THAT THE ALLEGED VICTIM, MR. POTTS, TOOK
7 WITH THE DEER CAMERA. AND I AM ASKING AT THIS PRETRIAL
8 HEARING THAT THAT, THAT THOSE PICTURES BE AUTHENTICATED
9 AND A PROPER CHAIN OF CUSTODY BE ESTABLISHED AT THIS TIME.

10 THE COURT: WELL, I DON'T THINK I CAN MAKE THE STATE,
11 BEFORE TRIAL AND I APPRECIATE WHAT YOU ARE DOING, I
12 UNDERSTAND THAT YOU ARE TRYING--

13 MR. CHAPLIN: AND I DON'T THINK THE STATE IS OPPOSED
14 TO THAT, I THINK THEY ARE PREPARED TO--

15 MR. MCDANIEL: I JUST DON'T THINK THAT, I THINK IT IS
16 A TRIAL ISSUE, I DON'T, I UNDERSTAND WHAT HE IS TRYING TO
17 SHOW BUT TO ME THAT IS SOMETHING THAT HE NEEDS TO PUT UP
18 IN RESPONSE TO THE STATE'S CASE. I WILL DO, I AM PREPARED
19 TO AUTHENTICATE THE PICTURES AND TO SHOW THE PICTURES.
20 BUT TO ME IT APPEARS LIKE THIS IS A TRIAL ISSUE OF WHAT
21 THE DEFENSE IS TRYING TO PUT UP AND NOT, IF I DON'T
22 AUTHENTICATE THE PHOTOS AT TRIAL THEY DON'T COME IN. I
23 DON'T HAVE TO HAVE A CHAIN AS FAR AS THE CAMERA BUT AT
24 LEAST IT DOESN'T SEEM LIKE IT IS AN ITEM THAT DOES REQUIRE
25 A CHAIN.

1 THE COURT: I DON'T THINK HE HAS TO HAVE A CHAIN OF
2 CUSTODY FOR THESE EXHIBITS. IN ORDER TO HAVE THEM
3 ADMITTED INTO EVIDENCE, HOWEVER, HE WOULD HAVE TO LAY THE
4 FOUNDATION WHICH WOULD BE FOR A WITNESS TO AUTHENTICATE
5 THAT THEY CONSTITUTE AN ACCURATE AND FAIR REPRESENTATION
6 OF WHAT IS DEPICTED ON THE PHOTOGRAPH. BEYOND THAT I AM
7 NOT SURE WHAT ELSE WOULD BE REQUIRED UNDER THE RULES OF
8 EVIDENCE TO MAKE IT ADMISSIBLE.

9 MR. CHAPLIN: YOUR HONOR, IT WAS MY UNDERSTANDING
10 THAT ONE OF THE REASONS THAT WE WERE COMING PRIOR TO THIS
11 TRIAL TOMORROW MORNING IS SO THAT WE CAN AUTHENTICATE AND
12 ENSURE, I MEAN THIS CASE TURNS ON SOME PICTURES THAT MR.
13 POTTS SAYS HE TOOK. NOW, IF THOSE PICTURES DON'T COME IN
14 FOR WHATEVER REASON THEN THERE IS A POSSIBILITY THAT WE
15 DON'T HAVE TO STRIKE A JURY OR DO ANYTHING ELSE. IT JUST
16 SEEMS THAT IT WOULD BE APPROPRIATE AT THIS TIME WE HAVE
17 EVERYBODY HERE, WE HAVE THE TECHNOLOGY, WE HAVE EVERYTHING
18 THAT WE NEED THAT WE CAN MOVE FORWARD AND AUTHENTICATE
19 THOSE PICTURES AT THIS TIME.

20 THE COURT: WELL, IS THE STATE INTENDING TO CALL MR.
21 POTTS AS A WITNESS TOMORROW?

22 MR. MCDANIEL: YES, SIR.

23 THE COURT: AND WILL HE BE A WITNESS THROUGH WHICH
24 CERTAIN PHOTOGRAPHS TAKEN FROM THE DEER CAMERA SUBMITTED
25 IN THE STATE'S CASE?

1 MR. MCDANIEL: YES, SIR.

2 THE COURT: I DON'T THINK THAT YOU ARE ENTITLED TO
3 HAVE A DRY RUN OF THAT, MR. CHAPLIN.

4 MR. CHAPLIN: SO, I TAKE IT THEN, YOUR HONOR, THAT
5 YOU ARE DENYING THAT MOTION?

6 THE COURT: WELL, I DON'T KNOW, YOU ARE ASKING FOR A
7 PRETRIAL REHEARSAL OF THE STATE'S CASE AND I DO DENY THAT.
8 AND IF YOU CAN PROVIDE ME AUTHORITY TO SUPPORT THAT I WILL
9 BE GLAD TO CONSIDER IT.

10 MR. CHAPLIN: YOUR HONOR, MAY WE APPROACH?

11 THE COURT: ABSOLUTELY.

12 (WHEREUPON, A BENCH CONFERENCE WAS HELD.)

13 THE COURT: YES SIR, MR. CHAPLIN.

14 MR. CHAPLIN: SO IT IS MY UNDERSTANDING THEN THAT AS
15 FAR AS ITEM SIX IS CONCERNED, THAT THE TRIAL IN THIS
16 MATTER THAT IS WHEN THE FOUNDATION WILL BE LAID AND
17 AUTHENTICATION AND THOSE ISSUES WILL BE ADDRESSED AND I
18 WILL HAVE AN OPPORTUNITY TO OBJECT AT THAT TIME.

19 THE COURT: SO, WHEN THEY ARE, IF THEY ARE PROPOSED
20 AS EVIDENCE IN THIS CASE YOU WILL CERTAINLY HAVE AN
21 OPPORTUNITY TO MAKE ANY OBJECTION YOU DEEM FURTHER, YES
22 SIR.

23 MR. CHAPLIN: YOUR HONOR, THEN WE WILL GO UP TO
24 NUMBER THREE. I GUESS WE CAN DO THREE AND FOUR, EXCLUDING
25 OPINION TESTIMONY BY LIEUTENANT MCCLURKIN AS TO THE

1 IDENTIFICATION OF THE IMAGES IN THE VIDEOTAPE.

2 THE COURT: OKAY.

3 MR. CHAPLIN: YOUR HONOR, THIS IS A SOMEWHAT UNIQUE
4 SITUATION IN THAT UNDER NEIL V. BIGGERS WE WOULD HAVE A
5 HEARING TO DETERMINE WHETHER OR NOT THE ID OF A WITNESS IS
6 RELIABLE. HOWEVER, IN THIS CASE WE HAVE SOMEONE WHO LOOKS
7 AT A PICTURE FROM A DEER CAMERA AND MAKES THE
8 IDENTIFICATION. IT IS MY UNDERSTANDING THAT THIS PERSON
9 WILL BE MAKING AN IN-COURT IDENTIFICATION OF, INTENDS TO
10 SAY THAT IS MY CLIENT IN THE PICTURE. THEREFORE I WANTED
11 TO ADDRESS THE MATTER UNDER NEIL V. BIGGERS AND ASK THE
12 COURT'S GUIDANCE WITH REGARDS TO SINCE THIS IS NOT BASED
13 ON THEIR PERSONAL KNOWLEDGE OF THE INCIDENT, THEY WEREN'T
14 THERE, THEY HAVE NO INFORMATION ON A PERSONAL LEVEL ON
15 WHAT OCCURRED. ALL THEY ARE SEEING IS THAT THEY SEE
16 SOMEBODY IN A PICTURE AND BASED ON LIVING IN THIS
17 COMMUNITY FOR AROUND 20 YEARS THAT THEY MAKE AN
18 IDENTIFICATION. BASICALLY THEY ARE GIVING AN OPINION AS A
19 LAY PERSON IN THIS PARTICULAR MATTER.

20 THE COURT: OKAY. WHAT IS THE STATE'S RESPONSE TO
21 THAT OBJECTION?

22 MR. MCDANIEL: I THINK WE COVERED THAT EARLIER, I
23 GUESS IT IS LAY OPINION BUT IT IS FIRST HAND PERSONAL
24 KNOWLEDGE THAT THAT IS, THE STATE'S POSITION IS THAT, WHAT
25 LAW ENFORCEMENT CAN SAY IS WE THINK THAT IS HIM. THE JURY

1 IS GOING TO DECIDE WHETHER OR NOT THAT IS HIM OR NOT. THE
2 STATE'S POSITION IS THAT THEY CAN TESTIFY TO WHO THEY
3 THOUGHT WAS HIM BASED ON THEIR PERSONAL KNOWLEDGE OF HIM.

4 THE COURT: WELL, AS TO THE OBJECTION OF IT BEING LAY
5 OPINION, WHETHER THEY THINK SOMEONE IN THE PHOTOGRAPH IS A
6 CERTAIN PERSON, IDENTIFY THE INDIVIDUAL WOULD REQUIRE
7 EXPERT OPINION TESTIMONY. I THINK YOUR OBJECTION MAY BE
8 TO THE CONSTITUTIONAL ISSUES, IS THAT RIGHT?

9 MR. CHAPLIN: I WILL TRY TO BE A LITTLE MORE
10 SPECIFIC. YOUR HONOR, THIS EXACT SAME ISSUE WAS BROUGHT
11 TO THE ATTENTION OF THE SUPREME COURT HERE IN SOUTH
12 CAROLINA IN A RECENT CASE OF 2009 WHICH I WILL PROVIDE AND
13 IT IS INVOLVING AN ATTORNEY THAT WAS CONVICTED OF
14 MURDERING SOMEONE IN A NIGHTCLUB. YOUR HONOR, I THINK WE
15 HAVE SOME GUIDANCE IN THIS PARTICULAR MATTER IN THAT THESE
16 CASES ARE VERY SIMILAR. AND IN THE HERRING MATTER, YOUR
17 HONOR, POLICE OFFICERS AND OTHER PERSONS LOOKED AT AN
18 IMAGE AND THEN TESTIFIED TO THE COURT AS TO WHAT THEIR
19 OPINION WAS AS TO WHAT IS IN THAT IMAGE OR THAT PICTURE.
20 THE ATTORNEY FOR MR. HERRING OBJECTED AT THAT TIME AND
21 ASKED FOR A MISTRIAL AS A RESULT OF THAT TESTIMONY. AND
22 IT IS EXACTLY WHAT YOUR HONOR MENTIONED EARLIER, LAY
23 OPINIONS REGARDING THIS MATTER. AND ON PAGE EIGHT OF THAT
24 DECISION, YOUR HONOR, IT CLEARLY STATES LAY OPINIONS
25 REGARDING VIDEOTAPES. PARAGRAPH THREE STATES, THREE

1 WITNESSES TESTIFIED AS TO THEIR INTERPRETATION OF A VIDEO.
2 I COMPARE THAT TO A WITNESS TESTIFYING AS TO HIS
3 INTERPRETATION OF A PICTURE. IN THIS CASE THEY WERE
4 DEPICTING THE OUTSIDE OF A CLUB AT THE NIGHT IN QUESTION.
5 IN MY CASE WE ARE TALKING ABOUT A PICTURE THAT WAS
6 ALLEGEDLY TAKEN AT THE HOME OF MR. POTTS AT THE NIGHT IN
7 QUESTION. SO, IT GOES ON TO SAY TWO WITNESSES AND A
8 POLICE OFFICER TESTIFIED AND THEY SAW A FLASH OF LIGHT
9 COMING FROM THE VEHICLE. THE THIRD WITNESS TESTIFIED THAT
10 HE SAW A SHOT FIRED FROM THE VEHICLE LATER CLARIFYING THAT
11 OBVIOUSLY WE SAW THE VIDEO WHERE THE SHOT WAS FIRED FROM
12 INSIDE THE VEHICLE. SO, THERE ARE LAY PEOPLE LOOKING AT
13 PICTURES OR VIDEOS AND GIVING OPINIONS. AND THE COURT
14 SAID IN RESPONSE TO HERRING'S OBJECTIONS, TO THE TESTIMONY
15 THE TRIAL JUDGE ISSUED A CURATIVE INSTRUCTION TO THE JURY
16 IN EACH INSTANCE. THAT IS WHAT IT TOOK TO RESOLVE THIS
17 MATTER, IT TOOK A CURATIVE INSTRUCTION. AND WHAT THE
18 JUDGE IN THAT SAID, IN THAT CASE SAID TO THE EFFECT THAT
19 THE WITNESS COULD NOT GIVE AN OPINION AS TO WHETHER OR NOT
20 THE FLASH WAS A GUNSHOT. IN MY CASE I AM SAYING THE
21 WITNESS CANNOT SAY WHETHER OR NOT IN THEIR OPINION THE
22 PERSON IN THAT PICTURE IS MR. MITCHELL. AND THEN THE
23 COURT GOES ON TO INSTRUCT, SAID THE JURY SHOULD STRIKE ANY
24 SUCH INFERENCE FROM ITS MEMORY. NOW, WE DON'T HAVE TO
25 WORRY ABOUT THAT IN A CURATIVE MATTER, YOUR HONOR, BECAUSE

1 WE ARE HERE TODAY TO ADDRESS IT UPFRONT. THE TRIAL COURT
2 INSTRUCTED THE JURY THAT YOU ARE, THE ONLY ONES WHO CAN
3 DRAW FROM CONCLUSIONS FOR WHAT YOU SAW ON THE TAPE AND
4 HERRING'S TESTIMONY IN THIS REGARD GOES ON FURTHER TO SAY
5 THAT NOBODY SAW A SHOT FIRED BASED ON THE TESTIMONY THAT
6 WE HAVE HEARD SO FAR, IT IS ALL FROM THE VIDEO. THAT IS
7 THE SAME IN THIS CASE, YOUR HONOR, NO ONE SAW ANYONE IN
8 THAT PARTICULAR HOUSE, IT IS ALL FROM THE PICTURES OR THE
9 VIDEO, WHATEVER WAS CONTAINED IN THAT DEER CAMERA. AND IT
10 GOES ON TO SAY, YOU ARE GOING TO HAVE THE VIDEO, YOU CAN
11 LOOK AT IT, YOU CAN DETERMINE WHATEVER YOU CHOOSE TO
12 DETERMINE FROM IT. I AM ASKING THAT THAT BE THE SAME
13 HERE, I DON'T SEE WHY WE SHOULD DEPART FROM AN ORDER OF
14 THE SUPREME COURT. NOW, THE COURT GAVE A CURATIVE
15 INSTRUCTION IN THAT CASE, YOUR HONOR, BECAUSE AND I STILL
16 DON'T KNOW IF THAT REALLY FIXED THE PROBLEM. I DO NOT
17 THINK THAT THAT WOULD ADDRESS THE ISSUE HERE. AND THE
18 OTHER DISSIMILARITY IS THAT THERE WAS A LOT OF OTHER
19 EVIDENCE THAT THIS JURY COULD PAY ATTENTION TO. IN THIS
20 CASE, YOUR HONOR, THIS IS THE ONLY PIECE OF EVIDENCE THAT
21 IS REALLY GOING OUT THERE TO THEM. THE QUESTION AT THIS
22 TRIAL IS WHO IS THE PERSON IN THIS PICTURE. AND IN THE
23 HERRING DECISION, YOUR HONOR, THE COURT CLEARLY STATES YOU
24 ARE GOING TO HAVE THE VIDEO, IN THIS CASE THEY ARE GOING
25 TO HAVE THE PICTURES, THEY CAN LOOK AT IT AND THEY CAN

1 DETERMINE WHATEVER THEY CHOOSE TO DETERMINE FROM IT. AND
2 I ASK THE COURT NOT DEPART FROM THIS DECISION AND APPLY
3 THE RULING IN HERRING TO THIS PARTICULAR MATTER.

4 THE COURT: WELL, WHAT RULE DID THE SUPREME COURT
5 STATE THAT FOR THE ADMISSION OF THE OPINION TESTIMONY
6 ABOUT WHAT THE GUN FLASH WAS, OR WHATEVER THE GUN FLASH AT
7 NIGHT. WHAT RULE DID THEY SAY THAT VIOLATED, I DON'T
8 UNDERSTAND.

9 MR. CHAPLIN: YOUR HONOR, I AM READING THE ORDER FROM
10 THE SUPREME COURT. I AM LOOKING AT THE FACTS IN THIS
11 CASE, I AM LOOKING AT THE FACTS IN MY CASE, I AM TELLING
12 YOU THAT THESE ARE VERY SIMILAR IN NATURE AND THAT WE
13 SHOULD COMPLY WITH THESE DIRECTIONS. THAT IS MY ARGUMENT.

14 THE COURT: WELL, THEY NEVER DID SAY WHAT WAS WRONG
15 WITH THAT.

16 MR. CHAPLIN: WHAT THEY SAID WAS THAT IT WAS IMPROPER
17 FOR THESE LAY PEOPLE TO TESTIFY AS TO WHAT THEY ARE
18 SEEING, AN ISSUE HERE, YOUR HONOR, IT IS JUST RIGHT IN OUR
19 FACE. THE JURY IS GOING TO SEE THE PICTURES, THEY HAVE AN
20 OPPORTUNITY TO REVIEW IT AND IF ANYTHING THE COURT WAS
21 CONCERNED ABOUT THE PREJUDICIAL IMPACT THAT IT WOULD HAVE
22 OR IT DID HAVE ON MR. HERRING'S CASE FOR THESE PEOPLE TO
23 INTERPRET SOMETHING THAT THE JURY CAN CLEARLY INTERPRET ON
24 THEIR OWN. THESE PEOPLE ARE NOT EXPERTS, THEY ARE GIVING
25 LAY OPINIONS AND IT IS NOT APPROPRIATE. AND THAT IS WHAT

1 THE COURT RULED. AND, YOUR HONOR, THIS CASE IS IDENTICAL
2 TO THE ONE THAT YOUR HONOR WOULD BE HEARING TOMORROW.

3 THE COURT: WELL, I UNDERSTAND YOUR ARGUMENT BASED ON
4 THE HERRING CASE AND MR. MCDANIEL, WHAT IS YOUR POSITION,
5 SIR.

6 MR. MCDANIEL: YOUR HONOR, I THINK WHAT IS IN DISPUTE
7 HERE IS WHAT A FLASH OF LIGHT WAS AND THERE IS NOT AN
8 IDENTIFICATION OF A PERSON. IT ALSO SAYS THAT A CURATIVE
9 INSTRUCTION IS WHAT I THINK YOU WOULD INSTRUCT ANY JURY
10 ABOUT, I MEAN, YOU GIVE IT AS MUCH WEIGHT AS YOU WANT TO
11 AND IT SEEMS LIKE THAT IS WHAT THE COURT DID HERE. AND
12 THEY FOUND THAT THE COURT'S CURATIVE INSTRUCTION WAS
13 SUFFICIENT IN CURING THE PREJUDICE. IT LOOKS LIKE THESE,
14 THEY HAD THREE WITNESSES TRYING TO DETERMINE WHAT A FLASH
15 OF LIGHT WAS. I MEAN IT IS A TOTAL DIFFERENT ISSUE OF TWO
16 LAW ENFORCEMENT OFFICERS THAT HAS KNOWN SOMEBODY FOR 20
17 YEARS AND 35 YEARS AND BEING TO IDENTIFY THE PICTURE OF
18 WHAT THEY THINK OR WHO THEY THINK IS THAT PERSON. I THINK
19 THERE IS CONCERNS THAT, I GUESS HERE WE DON'T KNOW HOW THE
20 FOUNDATION IS LAID, THAT THESE WITNESSES WERE ABLE TO SAY,
21 WELL, THAT IS GUNSHOT. HERE THE LAW ENFORCEMENT WOULD
22 SAY, I HAVE LIVED HERE 20 YEARS AND IDENTIFY BENNIE
23 MITCHELL. SO, THE DIFFERENCE IS WHAT WE ARE LOOKING AT IN
24 A CASE, I AM NOT SURE THAT ANY OF THESE LAY PERSONS WERE
25 QUALIFIED TO DECIDE WHAT A FLASH WAS OR NOT ON VIDEO. BUT

1 HERE THE STATE'S BURDEN, I GUESS LAY A FOUNDATION THAT
2 THEY CAN IDENTIFY AND ALSO IT IS GOING TO DETERMINE
3 WHETHER OR NOT THE JURY FEELS LIKE THEY BELIEVE OR NOT.
4 AND I DON'T KNOW WHETHER IT GOES INTO LAY OPINION
5 TESTIMONY. THE OFFICER WILL SAY I HAVE KNOWN HIM FOR 20
6 YEARS. WE ARE NOT TRYING TO INTERPRET SOMETHING ON VIDEO,
7 THEY ARE POSITIVELY IDENTIFYING SOMEBODY THEY HAVE KNOWN
8 FOR 20 YEARS AND I THINK THAT IS DIFFERENT THAN HAVING
9 THREE PEOPLE TESTIFY TO INTERPRET THIS VIDEO OF WHAT YOU
10 SEE.

11 THE COURT: WELL, I DON'T SEE ANY RULES THAT THE
12 SUPREME COURT EVER RECITED AGAINST DISCUSSION, LAY
13 OPINION. I AM ASSUMING THAT THEY ARE RELYING ON RULE 701
14 AND THE SUPPOSED ERROR WAS IN ADMITTING THE TESTIMONY OF
15 VIEWING THE VIDEOTAPE AND INTERPRETING THE IMAGE ON THE
16 TAPE. THE PEOPLE DID NOT PERSONALLY OBSERVE IS THE
17 QUESTION ON THE TAPE. IN ORDER FOR A LAY OPINION TO BE
18 ADMISSIBLE UNDER RULE 701 IT HAS TO BE BASED OF OPINIONS
19 OR INFERENCES THAT ARE, NUMBER ONE, ARE RATIONALLY BASED
20 ON THE PERCEPTION OF THE WITNESS; NUMBER TWO, IT MUST ALSO
21 BE A CLEAR UNDERSTANDING OF THE WITNESSES TESTIMONY OR THE
22 DETERMINATION OF THE FACT IN ISSUE. AND THIRD, DO NOT
23 REQUIRE SPECIAL KNOWLEDGE, SKILL. IT IS A PERSONAL
24 KNOWLEDGE REQUIREMENT REQUIRED IN THAT FIRST PRONG ON RULE
25 701. BUT I AM NOT SO SURE THAT PERSONAL KNOWLEDGE ELEMENT

1 WOULD NOT BE MET BY SOMEONE IN THE PHOTOGRAPH OF SOMEONE
2 RATHER THAN SEEING THE PERSON. SO, I DON'T HAVE A PROBLEM
3 FINDING THE FIRST PRONG OF THAT. I DO HAVE SOME CONCERN
4 ABOUT WHETHER THE OFFICER'S TESTIMONY ABOUT AND I ASSUME
5 THIS IS GOING TO ARISE IN THE CONTEXT SOME OF THE STATE'S
6 WITNESSES, THE POLICE OFFICERS THAT HAVE SEEN THE
7 PHOTOGRAPHS ON THE DEER CAMERA AND SAYING I LOOKED AT
8 THEM, I RECOGNIZE MR. MITCHELL. AND THE REASON I
9 RECOGNIZE HIM BECAUSE I HAVE KNOWN HIM 20 YEARS. IS THAT
10 CORRECT?

11 MR. MCDANIEL: THAT IS CORRECT.

12 THE COURT: HOW DOES THAT HELP THE JURY?

13 MR. MCDANIEL: WELL, IT GOES TO THE PERSONAL
14 KNOWLEDGE OF THE PICTURE, OF THE IDENTIFICATION. I MEAN
15 IT HELPS THE JURY KNOWING THAT SOMEONE HAS KNOWN THIS
16 PERSON THAT IS ON TRIAL, THAT HAS KNOWN THIS PERSON FOR 20
17 YEARS. SO, IT HELPS THEM, A CLEAR UNDERSTANDING OF THE
18 WITNESSES TESTIMONY OR DETERMINATION OF THE FACT AT ISSUE.
19 THE FACT AT ISSUE IS THAT HE, THE PICTURE, THE PERSON IN
20 THE PICTURE. SO, SOMEONE THAT HAS KNOWN HIM FOR 20 YEARS,
21 THAT WOULD HELP THE JURY TO GO TO THAT ULTIMATE FACT THAT
22 THAT WAS HIM AND THAT IS THE FACT THAT IS IN DISPUTE. AND
23 THAT WOULD AID THE JURY IN DECIDING ONE WAY OR THE OTHER.
24 IT AIDS THEM IN DETERMINING THE ULTIMATE FACT AT ISSUE
25 HERE. WHETHER OR NOT THAT WAS BENNIE MITCHELL IN THE

1 HOUSE AND ON THAT PICTURE.

2 THE COURT: WELL, HOW IS THAT DIFFERENT, YOU THINK
3 THE STATE WOULD BE ABLE TO CALL IN, FOR INSTANCE, MR.
4 MITCHELL'S HIGH SCHOOL CLASSMATES AND ASK THEM TO LOOK AT
5 THE PICTURE AND SAY, DO YOU RECOGNIZE THAT PERSON. DO YOU
6 THINK THAT WOULD BE PROPER?

7 MR. MCDANIEL: I JUST DON'T THINK THAT IT IS, I THINK
8 IT IS OUTSIDE, I DON'T KNOW WHETHER THAT IS PROBATIVE IN
9 THE CASE AT HAND.

10 THE COURT: HOW IS THAT DIFFERENT THAN HAVING AN
11 OFFICER?

12 MR. MCDANIEL: WELL, THIS IS THE INVESTIGATING
13 OFFICER AND HE, IF I JUST BROUGHT SOMEBODY IN THAT
14 WOULDN'T HELP THEM DETERMINE ON THE FACT THAT IT IS GOING
15 TO THIS INCIDENT. WHO WAS IN THAT HOUSE THAT NIGHT. BUT
16 ALSO HAS KNOWN FOR 20 YEARS TO SAY THAT IS BENNIE
17 MITCHELL, THAT GOES TO THE DETERMINING FACT THAT BENNIE
18 MITCHELL WAS IN THE HOUSE THAT NIGHT. I GUESS THAT IS
19 WHAT HE IS BEING TRIED FOR. THE ULTIMATE FACT IS THE
20 IDENTIFICATION AND AN OFFICER THAT HAS KNOWN HIM FOR 20
21 YEARS THAT IS INVOLVED IN THE CASE LENDS ITSELF MUCH MORE
22 TO THE IDENTIFICATION THAN BRINGING SOMEBODY WHO IS NOT
23 INVOLVED IN THE CASE JUST FOR AN IDENTIFIER. I MEAN, THEN
24 I WOULD THINK YOU WOULD HAVE A PROBLEM WITH BIGGERS ISSUE
25 THAT MR. CHAPLIN IS CONCERNED ABOUT. I GUESS SOMEBODY WHO

1 WENT TO HIGH SCHOOL WITH HIM WOULD OF ONLY REMEMBERED HIM
2 AS HE WAS IN HIGH SCHOOL. IT HAS BEEN SOME YEARS LATER
3 AND I THINK SOMEBODY THAT HAS KNOWN HIM OVER 20 YEARS
4 WOULD BE ABLE TO MORE IDENTIFY HIM.

5 THE COURT: WHAT ABOUT A FAMILY MEMBER, WHAT IS YOUR
6 OPINION. ISN'T THAT WHAT THE JURY, AS YOU JUST SAID,
7 ULTIMATELY CHARGED WITH THE RESPONSIBILITY OF DETERMINING
8 WHETHER THAT IS HIM IN THE PICTURE. THAT IS AN ULTIMATE
9 ISSUE WHICH UNDER RULE 704--

10 MR. MCDANIEL: 704?

11 THE COURT: 704. BUT IT STILL HAS TO BE HELPFUL TO
12 THE JURY AND NOT ESSENTIALLY TELL THEM WHAT RESULT TO
13 REACH. THERE IS A LOT OF WHAT OPINION TESTIMONY CASES ARE
14 DISCUSSED. AND AGAIN, ASSUMING THAT IS WHAT THEY WERE
15 CONCERNED ABOUT IN THE HERRING CASE.

16 MR. MCDANIEL: IN THE HERRING CASE, IT LOOKS LIKE YOU
17 HAVE AN EXPERT TO TRY TO DETERMINE WHAT IS ON THAT VIDEO.
18 I MEAN, IT HAS NOTHING TO DO WITH THE IDENTIFICATION OF
19 THE DEFENDANT IN THE HERRING CASE. IT IS THREE PEOPLE
20 THAT WERE ACTUALLY ON THE SCENE THAT NIGHT AND PLAY A
21 VIDEO AND SAY, WHAT DO YOU THINK YOU SEE THERE. I MEAN I
22 AM ASSUMING THAT IS HOW THEY KIND OF OFFERED THE
23 TESTIMONY.

24 THE COURT: WELL, YOU ARE RIGHT, WE DON'T KNOW. BUT
25 I CAN GLEAM FROM THE OPINION ITSELF THAT THEY WERE

1 CONCERNED ABOUT THE PERSONAL KNOWLEDGE REQUIREMENT. AND
2 AGAIN THEIR DISCUSSION ISSUE UNDER LAY OPINION, LAY
3 OPINION REGARDING THE VIDEO TAPE. SO, YOU MAY BE RIGHT,
4 IT MAY OF BEEN MORE THE EXPERT WITNESSES TESTIMONY ISSUE,
5 APPARENTLY WE WILL NEVER KNOW. BUT NEVERTHELESS, I AM
6 CONCERNED HOW IT IS HELPFUL TO THE JURY AND HOW IT
7 OVERCOMES RULE 403, HAVING THE OFFICER IDENTIFY HIM BASED
8 ON VIDEOTAPE. I MAY NOT BE CLEAR, I AM NOT CONCERNED
9 ABOUT PERSONAL KNOWLEDGE REQUIREMENT, I AM CONCERNED ABOUT
10 HELPING THE JURY. WHAT DOES IT REALLY BRING TO THE TABLE
11 FOR A LAW ENFORCEMENT OFFICER TO SAY, YEAH, I RECOGNIZE
12 HIM IN THAT. IF THE IDENTITY OF THE DEFENDANT, THE
13 PERPETRATOR IS IN FACT THE ULTIMATE ISSUE THE JURY HAS TO
14 DETERMINE, DOESN'T IT CAUSE UNDUE PREJUDICE TO THE
15 DEFENDANT TO HAVE A POLICE OFFICER SAY HE RECOGNIZES THAT
16 PERSON AND IN HIS OPINION THAT IS WHO IT IS.

17 MR. MCDANIEL: OF COURSE, THERE IS PREJUDICE, I WOULD
18 ADMIT THAT IT ALWAYS IS IN A COURT OF IDENTIFICATION BUT
19 IT IS NOT UNDUE BASED ON HOW WE HAVE DECIDED TO PRESENT IT
20 TO THE JURY, YOUR HONOR. I MEAN, I THINK YOUR HONOR, I
21 UNDERSTAND THAT IT LOOKS LIKE THE POLICE OFFICER IDENTIFY,
22 IT ADDS BUT THAT IS NO DIFFERENCE THAN BRINGING SOMEONE
23 OFF THE STREET AND JUST SAYING, I HAVE KNOWN HIM FOR 20
24 YEARS AND THAT IS HIM. WE ARE PRESENTING THE FACT THAT I
25 HAVE LIVED IN THIS COMMUNITY AND I KNOW BENNIE MITCHELL.

1 THAT IS HOW FOR THE JURY IT GOES TO THE ULTIMATE FACT.

2 THE COURT: WELL, MR. CHAPLIN, LET ME ASK YOU THIS.

3 LET'S SAY, CHANGE THE SCENARIO A LITTLE BIT. IF THE

4 OFFICER IS, JUST HAPPENS TO BE WALKING BY AND SOMEBODY

5 RUNS OUT OF THE BANK WITH A MASK ON AND A BAG AND DOLLAR

6 BILLS AND TWENTIES AND HUNDREDS ARE FLYING OUT OF THE BAG

7 THROUGH THE WIND AND THE PERPETRATOR HAS GOT A GUN AND HE

8 RUNS AWAY AND THE OFFICER COMES INTO COURT AND SAYS, WELL,

9 I WAS INVESTIGATING THIS CASE AND IN FACT I WAS THERE AND

10 I SAW THE PERSON RUNNING AND HE RUNS JUST LIKE JOE RUSSELL

11 WHO I WENT TO HIGH SCHOOL WITH. AND BASED ON THAT IN MY

12 OPINION THAT WAS MR. RUSSELL WHO RAN OUT OF THE BANK.

13 WHAT RULE OF EVIDENCE IS PART OF THAT TESTIMONY?

14 MR. CHAPLIN: WELL, YOUR HONOR, I THINK THAT THAT

15 SCENARIO IS MORE IN LINE WITH THE NEIL V. BIGGERS ISSUE,

16 THE RELIABILITY OF THE IDENTIFICATION. I THINK WHAT YOUR

17 HONOR JUST STATED IS THAT IF AN OFFICER WAS ON THE SCENE,

18 HE SAW A PERSON RUNNING OUT OF THE BANK WITH A MASK ON, HE

19 HAD PERSONAL KNOWLEDGE OF WHAT WAS GOING ON, THE WHOLE

20 NINE YARDS.

21 THE COURT: MAYBE THE MASK WASN'T A GOOD FACT. I

22 TAKE THE MASK OFF.

23 MR. CHAPLIN: HE IS THERE TESTIFYING AS TO WHAT HE

24 SAW. WHAT THIS CASE IS ABOUT, YOUR HONOR, DIRECTLY ON

25 POINT WITH WHAT WE ARE PRESENTING AND THAT IS SOMEBODY

1 LOOKING AT A VIDEO OR A PICTURE AND THEN GIVING THEIR
2 OPINION TO TWELVE PEOPLE WHO CLEARLY HAVE THE ABILITY TO
3 FORM THEIR OWN OPINION. THAT IS WHAT WE ARE ASKING THEM
4 TO COME HERE TOMORROW AND DO. THEY ARE TELLING THEM WHAT
5 TO PICK AND THAT IS NOT FAIR TO THE DEFENSE. AND I THINK
6 THAT IS WHAT THE SUPREME COURT WAS MORE CONCERNED THAN
7 ANYTHING, IS THAT LIKE IN THAT CASE IT WAS A VERY SERIOUS
8 MATTER. MY CLIENT IS ON TRIAL FOR A VERY SERIOUS MATTER.
9 AND THE OTHER ISSUE IS THAT, IN THE HERRING CASE, YOUR
10 HONOR, I WASN'T THERE BUT I UNDERSTAND THAT THERE WAS A
11 GREAT DEAL OF EVIDENCE FOR THE JURY TO LOOK AT. SO, I
12 THINK THE JURY INSTRUCTION MIGHT OF WORKED IN THAT CASE,
13 IT WON'T WORK HERE BECAUSE THERE IS ONLY ONE THING THAT
14 THE JURY IS GOING TO BE SEEING TOMORROW AND THAT IS A
15 PICTURE. AND THEY WILL HAVE IT, THEY WILL GET TO TAKE IT
16 BACK WITH THEM TO DELIBERATE, THEY WILL LOOK AT, THEY WILL
17 EXAMINE IT UP AND DOWN, THE STATE HAS ALREADY SAID THEY
18 ARE GOING TO HAVE TO AUTHENTICATE IT, TO GET ALL OF THAT
19 DONE. THEN WE ARE GOING TO TURN THAT OVER TO THEM AND
20 SAY, NOW YOU TELL US WHO YOU THINK THAT IS. NOW, FOR A
21 POLICE OFFICER'S TO GET ON THE STAND AND GIVE THEIR LAY
22 OPINION WHICH IS A TOTAL VIOLATION IN THE RULING OF
23 HERRING IS VERY PREJUDICIAL IN VIOLATION OF RULE 403 AND
24 THE OPEN ISSUE THAT WE ARE HERE TO DECIDE, WE ARE
25 BASICALLY DECIDING FOR THEM. AND IT WILL BE A REVERSAL

1 ERROR.

2 THE COURT: THE ISSUE OF THE OFFICER BEING PRESENT AT
3 THE SCENE WHEN THE CRIME OCCURRED, IN OTHER WORDS, THE
4 BASIS OF THE WITNESSES KNOWLEDGE WAS UNIQUE, UNLIKE HERE
5 WHERE THE BASIS OF THE WITNESSES KNOWLEDGE IS SOMETHING
6 THAT YOU SAY THE JURY WILL HAVE AS WELL. CERTAINLY
7 WOULDN'T HAVE THE EYEWITNESS SCENARIO. SO, I GUESS I AM
8 GOING BACK, MR. MCDANIEL, I AM ASKING YOU AGAIN WHAT IS IT
9 THAT WE CAN DO ADVANCE THE BALL OF THE STATE'S CASE TO
10 ALLOW THE OFFICER TO TESTIFY WHAT HIS OPINION IS TO THE
11 VIDEOTAPE.

12 MR. MCDANIEL: IT IS THE ONLY IDENTIFICATION THAT CAN
13 BE MADE IN THIS CASE. I MEAN, THERE IS NO EYEWITNESS,
14 NOBODY WAS PRESENT IN THE HOME AND THE VICTIM IN THIS CASE
15 WAS UNABLE TO IDENTIFY THE DEFENDANT. IT FURTHERS THE
16 CASE IN THAT THE IDENTITY OF THE DEFENDANT IS AT ISSUE AND
17 I HAVE A LAW ENFORCEMENT OFFICER WHO HAS KNOWN HIM FOR 20
18 YEARS WHO CAN POSITIVELY IDENTIFY HIM. NOW, IT IS HIS
19 OPINION BASED ON HIS PERSONAL KNOWLEDGE OF THE DEFENDANT.
20 AND I THINK THAT IS WHAT THE JURY ULTIMATELY DECIDES, HOW
21 MUCH WEIGHT THEY GIVE THAT BUT IT ADVANCES THE STATE'S
22 CASE IN THAT IT IS THE CRITICAL ELEMENT OF US PROVING THAT
23 THE DEFENDANT ACTUALLY WAS THE DEFENDANT IN THAT HOUSE
24 THAT NIGHT AND HE IS THE CORRECT INDIVIDUAL BEING TRIED
25 BEFORE A JURY.

1 THE COURT: WELL, THE JURY OF COURSE MAKES THE
2 ULTIMATE DETERMINATION. THEY CERTAINLY CAN DECIDE THE
3 FACT, THE CREDIBILITY OF THE EVIDENCE, WHETHER TO ACCEPT
4 IT OR REJECT IT WOULD BE THE WEIGHT THAT THEY THINK IT
5 DESERVES. I DO FIND THAT THE IDENTIFICATION IS RELEVANT.
6 I DO FIND THAT IN THIS CASE WHAT HAS BEEN PRESENTED TO ME
7 MEETS THE CRITERIA OF RULE 701. AND THAT IT IS LAY
8 EVIDENCE AND CAN FORM AN OPINION, IT IS RATIONAL BASED ON
9 EXCEPTION OF A WITNESS, IT IS HELPFUL IN DETERMINATION OF
10 THE FACT OF ISSUE AND A CLEAR UNDERSTANDING OF THE
11 WITNESSES TESTIMONY. IT DOES NOT REQUIRE SPECIAL
12 KNOWLEDGE, SKILL, EXPERIENCE OR TRAINING. I FIND THAT ITS
13 PROBATIVE VALUE IS NOT SUBSTANTIALLY OUTWEIGHED BY THE
14 UNFAIR PREJUDICE OF MISLEADING THE JURY OR ANY OTHER
15 CONSIDERATION. I WOULD RESPECTFULLY DENY THE DEFENSE
16 MOTION EXCLUDING OPINION TESTIMONY OF THE OFFICER AS AN
17 IDENTITY AS A PERSON IN THE DEER CAMERA PHOTOGRAPH.

18 MR. CHAPLIN: YOUR HONOR.

19 THE COURT: YES, SIR.

20 MR. CHAPLIN: I WOULD JUST LIKE TO SAY AT THIS POINT
21 THAT THE COURT IN HERRING WAS SO SPECIFIC AS TO SAY THAT
22 AN OFFICER COULD IDENTIFY OR GIVE THEIR OPINION AS TO
23 WHETHER OR NOT A GUNSHOT WAS A GUNSHOT. BECAUSE THEY
24 WEREN'T THERE, THEY ARE LOOKING AT A VIDEO.

25 THE COURT: RIGHT.

1 MR. CHAPLIN: AND I STRUGGLE TO SEE THE DISTINCTION
2 FROM THAT CASE TO THIS CASE.

3 THE COURT: WELL, FIRST OF ALL I HAVE ALREADY RULED.
4 AND I UNDERSTAND THAT YOU DON'T AGREE WITH MY RULING AND I
5 NOTE YOUR OBJECTION TO IT. I WILL MAKE THIS THE FINAL
6 WORD ON THE SUBJECT. THE RATHER BRIEF DISCUSSION IN
7 HERRING BEGINS AFTER A SESSION CALLED LAY OPINIONS
8 REGARDING THE VIDEOTAPE. IT CONCERNED A GUNSHOT
9 IDENTIFICATION TESTIMONY. THEY NEVER SAID WHETHER IT WAS
10 IN ERROR FOR THE STATE TO ADMIT THAT EVIDENCE, FOR THE
11 TRIAL JUDGE TO ALLOW ITS ADMISSION. THEY NEVER DID SAY
12 THAT, THEY NEVER CITED A RULE, THEY NEVER CITED A CASE
13 THAT DEALT WITH WHETHER IT WAS ERROR. ALL THEY DID, MR.
14 CHAPLIN, IS FIND THAT THE TRIAL COURT'S CURATIVE
15 INSTRUCTION WAS SUFFICIENT TO CURE ANY PREJUDICE SUCH THAT
16 THERE WAS NO ERROR IN DENYING THE DEFENDANT'S MOTION FOR A
17 MISTRIAL. SO IT CAME UP IN THE CONTEXT OF A MOTION FOR A
18 MISTRIAL. THEY NEVER ELABORATED ON IF, NEVER MADE ANY
19 FINDING ABOUT WHETHER THE IDENTIFICATION TESTIMONY WAS
20 REVERSIBLE ERROR. SO IT IS HARD FOR ME TO TAKE FROM THAT
21 TO THE CONCLUSION THAT YOU WISH ME TO REACH. AND RELYING
22 ON THE LAW OF THE RULES OF EVIDENCE, SPECIFIC RULES AND
23 HOW THEY ARE INTERPRETED IN CASE LAW I HAVE MADE MY
24 RULING. WHAT IS THE NEXT MOTION.

25 MR. CHAPLIN: I BEG THE COURT'S INDULGENCE.

1 THE COURT: OKAY. LET'S TAKE A BREAK.

2 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

3 THE COURT: YES SIR, MR. CHAPLIN.

4 MR. CHAPLIN: YOUR HONOR, I WILL AGAIN ASK, I GUESS
5 THE ONLY THING LEFT WOULD BE NUMBER FOUR. AND I WOULD
6 ARGUE THAT ADDITIONAL OFFICERS WOULD BE CUMULATIVE AND I
7 WOULD AGAIN BE CONCERNED OF THE PREJUDICIAL EFFECT THAT
8 THAT WOULD HAVE.

9 THE COURT: NUMBER FIVE?

10 MR. CHAPLIN: NUMBER FOUR.

11 THE COURT: OKAY. ALL RIGHT. MR. MCDANIEL, WHAT IS
12 YOUR RESPONSE TO THAT.

13 MR. MCDANIEL: I DON'T THINK IT WOULD BE CUMULATIVE,
14 JUDGE, IT IS JUST A SECOND INDICATION, FACTUALLY AFTER
15 LIEUTENANT MCCLURKIN MAKES AN IDENTIFICATION THEN CHIEF
16 SWINDLER WILL ALSO MAKE AN IDENTIFICATION.

17 THE COURT: I NEED TO KNOW EXACTLY WHAT THE TESTIMONY
18 IS GOING TO BE.

19 MR. MCDANIEL: I MEAN BASICALLY THE SAME AS MR.
20 MCCLURKIN THAT I VIEWED THE PICTURE, THAT IS BENNIE
21 MITCHELL.

22 THE COURT: I THINK I AM GOING TO GRANT THE DEFENSE
23 MOTION ON THAT. I THINK WHAT IT WOULD BE IS ALMOST
24 BOLSTERING THE CREDIBILITY WITH LIEUTENANT MCCLURKIN BY
25 OTHER OFFICERS. I THINK ALLOWING LIEUTENANT MCCLURKIN TO

1 IDENTIFY WOULD BE SUFFICIENT TO EXPLAIN TO THE JURY
2 ESSENTIALLY WHY MR. MITCHELL WAS ON TRIAL, WHY HE WAS
3 DEVELOPED AS A SUSPECT. I THINK BEYOND THAT IT BECOMES
4 CUMULATIVE AND RULE 403 CONCERNS WOULD BE INDICATED TO THE
5 POINT THAT THAT SHOULD NOT BE ALLOWED.

6 MR. MCDANIEL: YES, SIR.

7 MR. CHAPLIN: YOUR HONOR, JUST TO BE THOROUGH, IF I
8 COULD, GO BACK TO NUMBER ONE. THAT MOTION WAS GRANTED.
9 NUMBER TWO, WE AGREED THAT THE ONLY TESTIMONY WOULD BE
10 PERTAINING TO MATTERS DIRECTLY RELATED TO THE INCIDENT ON
11 10/27/08. ALTHOUGH I HAVE OBJECTED AND DISAGREE FOR YOU
12 TO ALLOW LIEUTENANT MCCLURKIN TO PROVIDE ANY TESTIMONY AS
13 TO THE IDENTIFICATION IN THE PICTURE THAT WAS DENIED.
14 FOUR, GRANTED IT ON THE GROUNDS THAT IT WOULD BE
15 CUMULATIVE AND PURSUANT TO RULE 403, PREJUDICIAL,
16 BOLSTERING. NUMBER FIVE, STATE'S WITNESSES CAN ONLY SAY
17 THAT THEY KNOW MR. MITCHELL BECAUSE THEY LIVED IN THE
18 COMMUNITY OVER THE PAST 20 YEARS AND KNOW MR. MITCHELL AS
19 A MEMBER OF THE COMMUNITY. AS FAR AS THE VIDEOTAPE OR
20 PICTURES OF THE INCIDENT ALLEGEDLY TAKEN BY MR. POTTS ON
21 THE NIGHT OF 10/27, WE WILL ADDRESS THOSE ISSUES AT THE
22 TIME THE STATE INTENDS TO INTRODUCE THAT. SO THAT IS
23 DEFERRED. NUMBER SEVEN, UNDERSTAND AS LONG AS MR.
24 MITCHELL DOES NOT TAKE THE STAND THAT THERE WILL BE NO
25 TESTIMONY REGARDING ANY PRIOR CRIMES. AS FAR AS EIGHT,

1 MR. POTTS IS LIMITED TO SAYING THAT HE HAS HAD PRIOR
2 BREAK-INS AND THAT IS THE EXTENT. JUST SO THE JURY WILL
3 UNDERSTAND THE BASIS OF PROVIDING THE DEER CAMERA. NUMBER
4 NINE, WE SETTLED THAT, THE TESTIMONY WILL BE THEY SEARCHED
5 THE HOME OF MR. MITCHELL AND DIDN'T FIND ANYTHING PURSUANT
6 TO THAT SEARCH WARRANT. AND THEN WE ALSO ADDRESSED THE
7 MATTER OF NOLLE PROSING THE ENHANCEMENT INDICTMENT AND
8 REPLACING IT WITH A PETTY LARCENY INDICTMENT WHICH I NOTED
9 MY CONCERNS REGARDING THE DESCRIPTION OF THAT INDICTMENT
10 PRIOR TO MR MITCHELL'S ARRAIGNMENT. THANK YOU, YOUR
11 HONOR.

12 THE COURT: LET ME JUST SAY THAT SOME CASES COULD OF
13 ALLOWED LAY OPINIONS ON SIMILAR ISSUES WOULD INCLUDE
14 UNITED STATES VERSUS YAZZIE, 976, F2D, 1252, 9TH CIRCUIT,
15 1992 TO ALLOW LAY OPINION EVIDENCE ON A STATUTORY RAPE
16 TRIAL. UNITED STATES VERSUS LOPEZ, 478, F.3D, 1213, IT IS
17 A TENTH CIRCUIT CASE FROM 2007 WHICH UPHELD THE
18 ADMISSIBILITY OF THE LAY OPINION THAT WAS AN
19 IDENTIFICATION BY AN FBI AGENT VOICE ON AN AUDIOTAPE AND
20 AN IMAGE ON A VIDEOTAPE. SO, WITH THAT IS THERE ANYTHING
21 FURTHER FOR CONSIDERATION TODAY?

22 MR. CHAPLIN: THOSE TWO CASES, CAN YOU GIVE THEM
23 AGAIN?

24 THE COURT: SURE. 478, F.3D, 1213 IS UNITED STATES
25 VERSUS LOPEZ. AND UNTIED STATES VERSUS YAZZIE, 976, F2D,

1 1252. THANK YOU. WHAT TIME IS THE JURY COMING IN?

2 MR. MCDANIEL: 9:30, JUDGE.

3 THE COURT: WE WILL SEE YOU IN THE MORNING AT 9:30.

4 THANK YOU.

5 (WHEREUPON, THE TRIAL WILL RESUME THE NEXT MORNING AT
6 9:30 A.M.)

7 APRIL 20, 2010.

8 THE COURT: MR. MCDANIEL, CALL YOUR CASE, PLEASE.

9 MR. MCDANIEL: YOUR HONOR, THE CASE IS THE STATE
10 VERSUS BENNIE DARRON MITCHELL CHARGED ON INDICTMENT
11 2009-GS-36-037, FIRST DEGREE BURGLARY. 2009-GS-36-039,
12 POSSESSION OF BURGLARY TOOLS. INDICTMENT 2010-GS-36-087,
13 PETTY LARCENY.

14 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, WE ARE
15 NOW GOING TO SELECT THE JURY IN THE CASE OF THE STATE
16 VERSUS BENNIE DARRON MITCHELL. AND OUR PURPOSE IS TO
17 INSURE THAT EVERYONE SELECTED CAN BE FAIR AND IMPARTIAL
18 AND DECIDE THIS CASE WITHOUT ANY KIND OF BIASED OR
19 PREJUDICE OR ANY KIND OF PRECONCEIVED NOTIONS.

20 MR. MCDANIEL: YOUR HONOR, I DO HAVE A WITNESS LIST.

21 THE COURT: OKAY, THANK YOU. FIRST OFF I AM GOING TO
22 ASK MR. MITCHELL TO STAND SO THE JURY CAN SEE YOU, SIR.

23 (WHEREUPON, MR. MITCHELL STANDS.)

24 THE COURT: THANK YOU. LADIES AND GENTLEMEN, THIS IS
25 A CRIMINAL CASE AND THERE ARE CERTAIN PRINCIPLES THAT

1 APPLY TO ALL CRIMINAL CASES. AND I AM GOING TO READ TO
2 YOU THE INDICTMENTS. THERE ARE THREE INDICTMENTS BUT
3 BEFORE I DO THAT I WANT TO ADVISE YOU AND INSTRUCT YOU
4 THAT THESE INDICTMENTS ARE NOT EVIDENCE. AN INDICTMENT IS
5 SIMPLY A WAY A CASE GETS STARTED, IT IS A FORMAL WAY A
6 CASE CAN BEGIN AND THE STATE CAN START A PROSECUTION
7 AGAINST A CITIZEN AND LETS A CITIZEN KNOW WHAT HE IS BEING
8 CHARGED WITH. THE ALLEGATIONS IN THE INDICTMENT ARE NOT
9 PROOF OF ANYTHING, THEY ARE NOT EVIDENCE, THEY DON'T EVEN
10 CREATE A SUSPICION OF GUILT. THEY ARE SIMPLY ALLEGATIONS
11 AT THIS STAGE. MR. MITCHELL HAS PLEAD NOT GUILTY TO THE
12 INDICTMENT AND THAT PUTS THE BURDEN OF PROOF ON THE STATE.
13 AND MR. MITCHELL MAY ONLY BE CONVICTED IF THE JURY FINDS
14 UNANIMOUSLY THAT THE STATE HAS PROVEN EACH ELEMENT OF EACH
15 CRIME BEYOND A REASONABLE DOUBT. THERE ARE THREE CHARGES
16 IN THIS CASE SO THE JURY WILL HAVE TO INDEPENDENTLY WEIGH
17 THE EVIDENCE AS TO EACH CHARGE AND DETERMINE WHETHER THE
18 STATE HAS MET ITS BURDEN OF PROOF ON EACH CHARGE AND NOT
19 THEIR DECISION ON ONE CHARGE INFLUENCE THEIR DECISION ON
20 ANOTHER CHARGE. MR. MITCHELL IS PRESUMED INNOCENT, HE
21 DOESN'T HAVE TO OFFER ANY KIND OF EXPLANATION OR EVIDENCE
22 WHATSOEVER. THE BURDEN OF PROOF, AS I HAVE SAID IS
23 ENTIRELY ON THE STATE. THE PRESUMPTION OF INNOCENCE WILL
24 STAY WITH MR. MITCHELL NOT ONLY RIGHT DURING THE JURY
25 SELECTION BUT ONCE THE CASE STARTS HE WILL STILL BE

1 PRESUMED INNOCENT. ONCE THE CASE ENDS AND YOU GO BACK
2 INTO THE JURY ROOM HE WILL STILL BE PRESUMED INNOCENT.
3 AND THAT PRESUMPTION OF INNOCENCE CAN ONLY BE REMOVED IF
4 YOU, THE JURY, FIND UNANIMOUSLY THE STATE HAS PROVEN GUILT
5 BEYOND A REASONABLE DOUBT AS TO EACH ELEMENT OF THE CRIME.
6 SO THOSE ARE CERTAIN PRINCIPLES THAT APPLY TO THIS CASE
7 AND ARE FUNDAMENTAL TO OUR CRIMINAL JUSTICE SYSTEM. NOW,
8 THE INDICTMENTS ALLEGE AS FOLLOWS. INDICTMENT
9 09-GS-36-37, IT ALLEGES THAT BENNIE DARRON MITCHELL DID IN
10 NEWBERRY COUNTY BETWEEN THE DATES OF 27TH DAY OF OCTOBER
11 OF 2008 AND THE 28TH DAY OF OCTOBER OF 2008 WILLFULLY AND
12 UNLAWFULLY ENTER A DWELLING WITHOUT CONSENT AND WITH THE
13 INTENT TO COMMIT A CRIME THEREIN WHEN SUCH ENTERING OR
14 REMAINING OCCURRED IN THE NIGHTTIME. THE SAID DWELLING
15 BEING OWNED AND OR OPERATED BY STEPHEN LEE POTTS IN
16 VIOLATION OF SECTION 16-11-311 OF THE SOUTH CAROLINA CODE
17 OF LAWS.

18 THE SECOND INDICTMENT ALLEGES THAT MR. MITCHELL DID
19 IN THIS COUNTY ON OR ABOUT THE 27TH DAY OF OCTOBER OF 2008
20 KNOWINGLY, WILLFULLY AND UNLAWFULLY MAKE OR CAUSE TO BE
21 MADE OR AMENDED OR POSSESS ANY IMPLEMENT OR THING ADAPTED,
22 DESIGNED OR COMMONLY USED FOR THE COMMISSION OF BURGLARY,
23 LARCENY, SAFECRACKING OR OTHER CRIME IN VIOLATION OF
24 SECTION 16-11-20 OF THE SOUTH CAROLINA CODE.

25 AND THE THIRD AND FINIAL INDICTMENT ALLEGES THAT MR.

1 MITCHELL DID IN THIS COUNTY ON OR ABOUT THE 27TH DAY OF
2 OCTOBER OF 2008 FELONIOUSLY TAKE AND CARRY AWAY THE
3 PERSONAL GOODS OF STEPHEN LEE POTTS OF THE VALUE OF LESS
4 THAN ONE-THOUSAND DOLLARS DESCRIBED AS FOLLOWS: FOUR TO
5 FIVE CANS OF BEER, ONE-HUNDRED DOLLARS OF UNITED STATES
6 CURRENCY, ONE PACKAGE OF SOCKS WITH INTENT TO DEPRIVE THE
7 OWNER PERMANENTLY OF SUCH GOODS IN VIOLATION OF SECTION
8 16-13-30 (A) OF THE SOUTH CAROLINA CODES. THOSE ARE THE
9 ALLEGATIONS IN THE INDICTMENTS AND AGAIN THEY ARE JUST
10 THAT, ALLEGATIONS. MR. MITCHELL HAS PLEAD NOT GUILTY. HE
11 DOESN'T HAVE THE BURDEN OF PROOF. THE STATE CARRIES THE
12 SOLE BURDEN OF PROOF AND HE IS PRESUMED INNOCENT. NOW,
13 THE FIRST THING THAT I NEED TO ASK IF THERE IS ANYONE WHO
14 IS RELATED BY BLOOD OR MARRIAGE OR KIN TO IN ANY WAY TO
15 MR. BENNIE DARRON MITCHELL OR MR. STEPHEN LEE POTTS. IF
16 SO, PLEASE STAND. YES, MA'AM.

17 JUROR: SHIRLEAN BROWN.

18 THE COURT: AND YOUR RELATIONSHIP?

19 JUROR: I AM KIN TO MR. MITCHELL.

20 THE COURT: WE WILL EXCUSE YOU FROM THIS CASE. THANK
21 YOU. IS THERE ANYONE WHO KNOWS ANYTHING ABOUT THIS CASE
22 OTHER THAN WHAT YOU HAVE HEARD HERE FROM ME THIS MORNING.
23 IF SO, PLEASE STAND.

24 (NO RESPONSE.)

25 THE COURT: IS THERE ANYONE WHO HAS ANY PERSONAL,

1 SOCIAL OR BUSINESS RELATIONSHIP WITH EITHER MR. MITCHELL
2 OR MR. POTTS. OKAY.

3 JUROR: RENEE FOULIS. I HAVE A BUSINESS RELATIONSHIP
4 IN NEWBERRY WITH MR. POTTS.

5 THE COURT: CAN YOU BE FAIR AND DECIDE THIS CASE
6 SOLELY ON THE EVIDENCE PRESENTED?

7 JUROR: YES, SIR.

8 THE COURT: THANK YOU.

9 JUROR: I AM DEBBIE ST. MARK AND I DO FREQUENT THE
10 ESTABLISHMENT OF MR. POTTS.

11 THE COURT: AND WOULD THAT AFFECT YOUR ABILITY TO BE
12 FAIR AND IMPARTIAL IN THIS CASE?

13 JUROR: NO, SIR.

14 THE COURT: YOU CAN PUT THAT ASIDE AND DECIDE THIS
15 CASE SOLELY ACCORDING TO THE EVIDENCE AND THE LAW?

16 JUROR: YES, SIR.

17 THE COURT: OKAY.

18 JUROR: JUSTIN DERRICK, I ALSO GO TO THEIR
19 ESTABLISHMENT SOMETIMES.

20 THE COURT: AND COULD YOU PUT THAT RELATIONSHIP ASIDE
21 AND DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE LAW?

22 JUROR: YES, SIR.

23 THE COURT: YOU COULD BE FAIR AND IMPARTIAL TO BOTH
24 MR. POTTS AND MR. MITCHELL?

25 JUROR: YES, SIR.

1 THE COURT: IS THERE ANYONE ELSE WHO IS A CUSTOMER OF
2 OR WHO HAS BEEN EMPLOYED BY OR HAD A MEMBER OF THEIR
3 IMMEDIATE FAMILY BE EMPLOYED OR HAVE ANY OTHER BUSINESS
4 RELATIONSHIP WITH AN ENTITY KNOWN AS THE BLUE MOON. IF
5 SO, PLEASE STAND. OKAY.

6 JUROR: CAYCI BANKS. I HAVE BEEN TO THE BLUE MOON
7 AND MY HUSBAND IS FRIENDS OF HIS.

8 THE COURT: WOULD THAT AFFECT YOUR ABILITY TO BE FAIR
9 AND IMPARTIAL?

10 JUROR: NO, SIR.

11 THE COURT: YOU CAN DECIDE THE CASE SOLELY ON THE
12 EVIDENCE ACCORDING TO THE LAW?

13 JUROR: YES, SIR.

14 THE COURT: OKAY.

15 JUROR: ROBERT REYNOLDS. I HAVE BEEN TO THE BLUE
16 MOON.

17 THE COURT: WOULD THAT AFFECT YOUR ABILITY TO BE FAIR
18 AND IMPARTIAL?

19 JUROR: NO, SIR.

20 THE COURT: YOU COULD DECIDE THE CASE ACCORDING TO
21 THE EVIDENCE IN THE LAW?

22 JUROR: YES, SIR.

23 THE COURT: THANK YOU. I AM GOING TO ASK THE LAWYERS
24 WHO ARE GOING TO BE INVOLVED IN THE TRIAL TO INTRODUCE
25 THEMSELVES AND THE PEOPLE AT THEIR TABLE. MR. MCDANIEL.

1 MR. MCDANIEL: MY NAME IS AUSTIN MCDANIEL, ASSISTANT
2 SOLICITOR FOR THE EIGHTH CIRCUIT, NEWBERRY COUNTY. TO MY
3 RIGHT IS KENN WILTSHIRE. YOU HAVE MET MR. POTTS. ALLISON
4 MOORE IS ALSO EMPLOYED WITH THE NEWBERRY POLICE
5 DEPARTMENT.

6 THE COURT: MR. CHAPLIN.

7 MR. CHAPLIN: GOOD MORNING, MY NAME IS MATHIAS
8 CHAPLIN AND I AM AN ATTORNEY HERE IN SOUTH CAROLINA. I
9 PRACTICE IN COLUMBIA, SOUTH CAROLINA AND ALSO IN
10 WALTERBORO, SOUTH CAROLINA. HERE WITH ME IS BENNIE DARRON
11 MITCHELL. THANK YOU. AND I ALSO SEATED WITH ME IS
12 ELIZABETH COOK WHO HAS ALSO REPRESENTED SOME PEOPLE IN THE
13 STATE OF SOUTH CAROLINA. AND SHE IS NOW WORKING AS AN
14 INVESTIGATOR IN THIS CASE.

15 THE COURT: IS THERE ANYONE WHO IS RELATED BY BLOOD
16 OR MARRIAGE OR KIN TO IN ANY WAY EITHER TO MR. CHAPLIN OR
17 MR. MCDANIEL OR ANY OF THE PEOPLE THAT THEY INTRODUCED.
18 IF SO, PLEASE STAND.

19 (NO RESPONSE.)

20 THE COURT: DOES ANYONE HAVE ANY BUSINESS, SOCIAL OR
21 PERSONAL RELATIONSHIP WITH MR. CHAPLIN OR MR. MCDANIEL OR
22 ANYONE THEY INTRODUCED. IF SO, PLEASE STAND.

23 (NO RESPONSE.)

24 THE COURT: HAS ANYONE EVER BEEN EMPLOYED BY OR HAD A
25 MEMBER OF THEIR IMMEDIATE FAMILY BE EMPLOYED BY MR. CHAPIN

1 OR MR. MCDANIEL OR THE SOLICITORS OFFICE OF THE EIGHTH
2 CIRCUIT. IF SO, PLEASE STAND.

3 (NO RESPONSE.)

4 THE COURT: HAS ANYONE EVER BEEN REPRESENTED BY OR
5 HAD THE OTHER SIDE REPRESENTED BY MR. CHAPLIN OR MR.
6 MCDANIEL. IF SO, PLEASE STAND.

7 (NO RESPONSE.)

8 THE COURT: ALL RIGHT, THE PEOPLE WHO MAY TESTIFY IN
9 THIS CASE INCLUDE JACKIE SWINDLER, ROY MCCLURKIN, KEVIN
10 ATKINS, DON KNEECE, ALLISON MOORE, TOM ALLEY, EDMUND
11 PEREIRA, P-E-R-E-I-R-A AND ELIZABETH COOK. IS THERE
12 ANYONE RELATED BY BLOOD OR MARRIAGE TO ANY OF THESE
13 POTENTIAL WITNESSES OR KIN TO ANY OF THEM. IF SO, PLEASE
14 STAND.

15 (NO RESPONSE.)

16 THE COURT: DOES ANYONE HAVE ANY PERSONAL, SOCIAL OR
17 BUSINESS RELATIONSHIP WITH ANY OF THESE POTENTIAL
18 WITNESSES. IF SO, PLEASE STAND. YES, SIR.

19 JUROR: LELAND JACKSON, I KNOW THE OFFICER.

20 THE COURT: PART OF YOUR JOB AS A JUROR WOULD BE TO
21 EVALUATE WHETHER THE WITNESSES ARE CREDIBLE OR BELIEVABLE.
22 DO YOU THINK THAT YOU CAN DO THAT FAIRLY AND IMPARTIALLY
23 BASED ON THE FACT THAT YOU KNOW THEM?

24 JUROR: YES, SIR.

25 THE COURT: AND YOU CAN DECIDE THE CASE ACCORDING TO

1 THE EVIDENCE AND THE LAW?

2 JUROR: YES, SIR.

3 THE COURT: THANK YOU.

4 JUROR: MARY DAWKINS, I KNOW THE OFFICERS.

5 THE COURT: DO YOU THINK THAT YOU CAN BE FAIR AND
6 IMPARTIAL?

7 JUROR: YES, SIR.

8 THE COURT: YOU CAN DECIDE THE CASE ON THE EVIDENCE
9 AND THE LAW?

10 JUROR: YES, SIR.

11 THE COURT: DOES ANYONE KNOW OF ANY REASON WHY THEY
12 COULD NOT BE FAIR AND IMPARTIAL IN THIS CASE OR DOES
13 ANYONE HAVE ANY BIASED OR PREJUDICE THAT THEY HAVE
14 CONCERNING ANY ISSUE OR ANYONE INVOLVED IN THIS MATTER.
15 IF SO, PLEASE STAND.

16 (NO RESPONSE.)

17 THE COURT: ANY FURTHER VOIR DIRE FROM THE STATE?

18 MR. MCDANIEL: NOT FROM THE STATE, JUDGE.

19 THE COURT: FROM THE DEFENSE?

20 MR. CHAPLIN: NOTHING FURTHER, YOUR HONOR.

21 THE COURT: THANK YOU. WE WILL NOW PROCEED WITH THE
22 SELECTION OF THE JURY AND WHEN YOUR NAME IS CALLED YOU MAY
23 SIMPLY STAND UP WHERE YOU ARE AND EACH SIDE HAS A CERTAIN
24 NUMBER OF STRIKES. THE STRIKES ARE FIVE AND TEN AND WE
25 WILL HAVE ONE ALTERNATE. AND THE STRIKES WILL BE ONE AND

1 TWO ON THAT. SO, IF YOU ARE SELECTED THEY WILL ASK YOU TO
2 BRING YOUR BELONGINGS WITH YOU AND COME UP AND HAVE A SEAT
3 IN THE JURY BOX AND WITH THAT YOU MAY PROCEED.

4 THE CLERK: NUMBER 97, CAROL MAZZA. WHAT SAYS THE
5 STATE?

6 MR. MCDANIEL: PLEASE SEAT THE JUROR.

7 THE CLERK: WHAT SAYS THE DEFENSE?

8 MR. CHAPLIN: PLEASE SEAT THE JUROR.

9 THE CLERK: NUMBER 38, DEXTER DOUGLAS. WHAT SAYS THE
10 STATE?

11 MR. MCDANIEL: PLEASE EXCUSE MR. DOUGLAS.

12 THE CLERK: NUMBER 114, ALLEN O'SHIELDS. WHAT SAYS
13 THE STATE?

14 MR. MCDANIEL: PLEASE PRESENT MR. O'SHIELDS.

15 THE CLERK: WHAT SAYS THE DEFENSE?

16 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

17 THE CLERK: NUMBER 123, ROBERT REYNOLDS. WHAT SAYS
18 THE STATE?

19 MR. MCDANIEL: PLEASE PRESENT MR. REYNOLDS.

20 THE CLERK: WHAT SAYS THE DEFENSE?

21 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

22 THE CLERK: NUMBER 24, ANN COTNEY. WHAT SAYS THE
23 STATE?

24 MR. MCDANIEL: PLEASE SEAT MS. COTNEY.

25 THE CLERK: WHAT SAYS THE DEFENSE?

1 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

2 THE CLERK: NUMBER 77, LELAND JACKSON. WHAT SAYS THE
3 STATE?

4 MR. MCDANIEL: PLEASE SEAT MR. JACKSON.

5 THE CLERK: WHAT SAYS THE DEFENSE?

6 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

7 THE CLERK: NUMBER 141 JACQUELINE SMITH. WHAT SAYS
8 THE STATE?

9 MR. MCDANIEL: PLEASE SEAT MS. SMITH.

10 THE CLERK: WHAT SAYS THE DEFENSE?

11 MR. CHAPLIN: PLEASE SEAT THE JUROR.

12 THE CLERK: NUMBER 113, DANIEL NOBLES. WHAT SAYS THE
13 STATE?

14 MR. MCDANIEL: PLEASE EXCUSE MR. NOBLES.

15 THE CLERK: NUMBER 36, JUSTIN DICKERT. WHAT SAYS THE
16 STATE?

17 MR. MCDANIEL: PLEASE SEAT MR. DICKERT.

18 THE CLERK: WHAT SAYS THE DEFENSE?

19 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

20 THE CLERK: NUMBER 74, DONALD HURST. WHAT SAYS THE
21 STATE?

22 MR. MCDANIEL: PLEASE SEAT MR. HURST.

23 THE CLERK: WHAT SAYS THE DEFENSE?

24 MR. CHAPLIN: PLEASE SEAT THE JUROR.

25 THE CLERK: NUMBER 154, KIMBERLY WEST. WHAT SAYS THE

1 STATE?

2 MR. MCDANIEL: PLEASE SEAT MS. WEST.

3 THE CLERK: WHAT SAYS THE DEFENSE?

4 MR. CHAPLIN: PLEASE SEAT THE JUROR.

5 THE CLERK: NUMBER 20, JOSHUA CHEATHAM. WHAT SAYS
6 THE STATE?

7 MR. MCDANIEL: PLEASE EXCUSE MR. CHEATHAM.

8 THE CLERK: NUMBER 100, ELIZABETH MONTGOMERY. WHAT
9 SAYS THE STATE?

10 MR. MCDANIEL: PLEASE SEAT MS. MONTGOMERY.

11 THE CLERK: WHAT SAYS THE DEFENSE?

12 MR. CHAPLIN: PLEASE SEAT THE JUROR.

13 THE CLERK: NUMBER 153, TRACY WERTS. WHAT SAYS THE
14 STATE?

15 MR. MCDANIEL: PLEASE SEAT MS. WERTS.

16 THE CLERK: WHAT SAYS THE DEFENSE?

17 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

18 THE CLERK: NUMBER 13, JANA BOICE. WHAT SAYS THE
19 STATE?

20 MR. MCDANIEL: PLEASE EXCUSE MS. BOICE.

21 THE CLERK: NUMBER 32, MARY DAWKINS. WHAT SAYS THE
22 STATE?

23 MR. MCDANIEL: PLEASE PRESENT MS. DAWKINS.

24 THE CLERK: WHAT SAYS THE DEFENSE?

25 MR. CHAPLIN: PLEASE EXCUSE MS. DAWKINS.

1 THE CLERK: NUMBER 106, WILLIE NANCE. WHAT SAYS THE
2 STATE?

3 MR. MCDANIEL: PLEASE EXCUSE MR. NANCE.

4 THE CLERK: NUMBER 155, BENJAMIN WESTWOOD. ANY
5 CHALLENGE FOR CAUSE BY THE STATE?

6 MR. MCDANIEL: NOT FROM THE STATE.

7 THE CLERK: WHAT SAYS THE DEFENSE?

8 MR. CHAPLIN: PLEASE SEAT THE JUROR.

9 THE CLERK: NUMBER 58, PAMELA GRIFFIN. ANY CHALLENGE
10 FOR CAUSE BY THE STATE?

11 MR. MCDANIEL: NOT BY THE STATE.

12 THE CLERK: WHAT SAYS THE DEFENSE?

13 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

14 THE CLERK: NUMBER 99, DEBRA METTS. ANY CHALLENGE
15 FOR CAUSE BY THE STATE?

16 MR. MCDANIEL: NOT BY THE STATE.

17 THE CLERK: WHAT SAYS THE DEFENSE?

18 MR. CHAPLIN: PLEASE SEAT THE JUROR.

19 THE CLERK: NUMBER 112, HENRY NICHOLSON, JR. ANY
20 CHALLENGE FOR CAUSE BY THE STATE?

21 MR. MCDANIEL: NO, MA'AM.

22 THE CLERK: WHAT SAYS THE DEFENSE?

23 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

24 THE CLERK: NUMBER 135, SHANI SHELLS. ANY CHALLENGE
25 FOR CAUSE BY THE STATE?

1 MR. MCDANIEL: NO, MA'AM.

2 THE CLERK: WHAT SAYS THE DEFENSE?

3 MR. CHAPLIN: PLEASE SEAT THE JUROR.

4 THE CLERK: NUMBER 145, DEBORAH STEVENS. ANY

5 CHALLENGE FOR CAUSE BY THE STATE?

6 MR. MCDANIEL: NO, MA'AM.

7 THE CLERK: WHAT SAYS THE DEFENSE?

8 MR. CHAPLIN: PLEASE SEAT THE JUROR.

9 THE CLERK: NUMBER 98, TERRY MELLINGER. ANY

10 CHALLENGE FOR CAUSE BY THE STATE?

11 MR. MCDANIEL: NO, MA'AM.

12 THE CLERK: WHAT SAYS THE DEFENSE?

13 MR. CHAPLIN: PLEASE SEAT THE JUROR.

14 THE CLERK: NUMBER 6, ANGELA BAGGOTT. ANY CHALLENGE

15 FOR CAUSE BY THE STATE?

16 MR. MCDANIEL: NO, MA'AM.

17 THE CLERK: WHAT SAYS THE DEFENSE?

18 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

19 THE CLERK: NUMBER 150, MARGARET TERRANA. ANY

20 CHALLENGE FOR CAUSE BY THE STATE?

21 MR. MCDANIEL: NO, MA'AM.

22 THE CLERK: CHALLENGE FOR CAUSE BY THE DEFENSE?

23 MR. CHAPLIN: NO, MA'AM.

24 THE CLERK: NUMBER 120, RUSSELL PITTS. CHALLENGE FOR

25 CAUSE BY THE STATE?

1 MR. MCDANIEL: NO, MA'AM.

2 THE CLERK: CHALLENGE FOR CAUSE BY THE DEFENSE?

3 MR. CHAPLIN: NO, MA'AM.

4 THE CLERK: FOR THE ALTERNATE. NUMBER 95, TERESA

5 MAYBIN. WHAT SAYS THE STATE?

6 MR. MCDANIEL: PLEASE SEAT MS. MAYBIN.

7 THE CLERK: WHAT SAYS THE DEFENSE?

8 MR. CHAPLIN: PLEASE SEAT THE JUROR.

9 THE COURT: ALL RIGHT, ANY OBJECTIONS OR EXCEPTIONS
10 TO THE COMPOSITION OF THE JURY, THE SELECTION PROCESS FROM
11 THE STATE?

12 MR. MCDANIEL: NOT FROM THE STATE.

13 THE COURT: FROM THE DEFENSE?

14 MR. CHAPLIN: NOT FROM THE DEFENSE, YOUR HONOR.

15 THE COURT: LADIES AND GENTLEMEN OF THE JURY, YOU
16 HAVE BEEN SELECTED TO BE THE JURY FOR THE STATE VERSUS
17 BENNIE MITCHELL. AND I AM GOING TO ASK YOU TO GO BACK TO
18 THE JURY ROOM RIGHT NOW. THE BAILIFF WILL SHOW YOU WHERE
19 THAT IS AND WE ARE GOING TO TRY TO HAVE SOME OF THE
20 OPENING ARGUMENTS THIS MORNING. YOU ARE EXCUSED.

21 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

22 (WHEREUPON, THE REMAINING JURY PANEL WAS EXCUSED FROM
23 OPEN COURT.)

24 THE COURT: ANYTHING BEFORE WE BRING THE JURY IN?

25 MR. MCDANIEL: NOT FROM THE STATE, YOUR HONOR.

1 MR. CHAPLIN: NO, SIR.

2 THE COURT: BRING THE JURY IN, PLEASE.

3 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
4 APPROXIMATELY 11:55 P.M.)

5 THE COURT: GOOD AFTERNOON. WE ARE GOING TO DO THE
6 OPENING STATEMENTS AND THEN WE ARE GOING TO BREAK FOR
7 LUNCH AND I AM GOING TO GIVE YOU A FEW PRELIMINARY
8 INSTRUCTIONS RIGHT NOW. AND BEFORE I DO THAT I WANT TO
9 AGAIN THANK YOU FOR YOUR SERVICE THIS WEEK. I KNOW IT IS
10 INCONVENIENT FOR YOU TO BE HERE AND I AM TAKING YOU AWAY
11 FROM YOUR JOBS AND YOUR FAMILY AND OTHER IMPORTANT ASPECTS
12 OF YOUR LIFE ASKING YOU TO COME DOWN HERE AND RESOLVE
13 SOMETIMES DIFFICULT ISSUES. BUT AS I SAID BEFORE, THE
14 JURY TRIAL RIGHT IS A RIGHT FOR THE FOUNDERS OF OUR
15 COUNTRY THAT IT WAS FUNDAMENTALLY IMPORTANT, SO IMPORTANT
16 THAT NOT ONLY DID THEY FORM THE CONSTITUTION ITSELF, THE
17 TEN AMENDMENTS AND THE BILL OF RIGHTS AND THAT IS HOW
18 STRONGLY THEY FELT ABOUT IT. AND YOU ARE MAKING IT
19 POSSIBLE FOR THAT RIGHT TO HAVE LIGHT HERE TODAY IN
20 NEWBERRY COUNTY. I AM GARY HILL, A CIRCUIT JUDGE IN
21 GREENVILLE. MS. JOY HOLSTON IS THE COURT REPORTER AND SHE
22 TAKES DOWN EVERY WORD THAT IS SAID AND KEEPS TRACK OF THE
23 EXHIBITS DURING THE COURSE OF THE TRIAL. NEXT TO HER IS
24 YOUR CLERK OF COURT, JACKIE BOWERS AND BETH FOLK IS HER
25 ASSISTANT. THE BAILIFFS ARE HERE FOR YOUR ASSISTANCE

1 WHILE YOU ARE SERVING ON THE JURY. EVERYONE THAT I HAVE
2 INTRODUCED TO YOU AND CERTAINLY I DID THIS AND CERTAINLY
3 THE LAWYERS ARE HERE TO DO THIS, WE HAVE TAKEN AN OATH TO
4 DO OUR JOB AND YOU ARE GOING TO TAKE AN OATH AS WELL. AT
5 THIS TIME I WILL ASK THE CLERK TO ADMINISTER THAT OATH TO
6 YOU. AND LISTEN TO IT VERY CAREFULLY BECAUSE IT HAS BEEN
7 AROUND A LONG TIME AND IT TELLS YOU IN A NUTSHELL WHAT
8 YOUR DUTIES ARE.

9 (WHEREUPON, THE JURY WAS SWORN AT APPROXIMATELY 12:00
10 P.M.)

11 THE COURT: EVEN THOUGH I INTRODUCED MYSELF TO YOU I
12 REALLY DIDN'T TELL YOU WHAT MY JOB IS SO I AM GOING TO
13 TELL YOU WHAT MY ROLE IS IN THE PROCESS. MY ROLE IS
14 PRETTY SIMPLE WHEN YOU COMPARE IT TO YOURS. I AM THE
15 JUDGE OF THE LAW SO THAT MEANS DURING THE COURSE OF THIS
16 TRIAL IF SOMEONE OBJECTS TO EVIDENCE I WILL HAVE TO RULE
17 ON WHETHER IT IS ADMISSIBLE UNDER THE LAW. DON'T HOLD IT
18 AGAINST THE LAWYERS FOR OBJECTING, THEY ARE SIMPLY DOING
19 THEIR JOBS AND THEY HAVE AN ETHICAL DUTY TO OBJECT IF THEY
20 THINK THE EVIDENCE IS IMPROPER. BUT IF SOMEONE DOES
21 OBJECT DURING THE TRIALS EVIDENCE I WILL RULE ON IT AND I
22 CAN USUALLY RULE ON IT RIGHT HERE IN THE COURTROOM,
23 SOMETIMES THINGS GET A LITTLE TRICKY AND WE HAVE GOT TO
24 TAKE A BREAK SO WE CAN DO IT MORE EFFICIENTLY OUTSIDE OF
25 YOUR PRESENCE. BUT GENERALLY I CAN DO IT ON THE SPOT.

1 AND IF I SUSTAIN THE OBJECTION THAT SIMPLY MEANS THE
2 EVIDENCE IS IMPROPER AND YOU CAN'T CONSIDER IT. IF I
3 OVERRULE THE OBJECTION THAT MEANS THE EVIDENCE IS PROPER
4 AND YOU CAN CONSIDER IT. THE SECOND ROLE IS I HAVE TO BE
5 THE JUDGE OF THE LAW AND I WILL GIVE YOU THE LAW THAT YOU
6 HAVE TO APPLY TO THE FACTS OF THIS CASE AT THE END OF THE
7 TRIAL. I WILL INSTRUCT YOU ON WHAT THE LAW IS. YOUR JOB
8 IS MORE DIFFICULT BECAUSE YOU ARE THE JUDGE OF THE FACTS.
9 AS I SAID THIS MORNING, OUR SYSTEM OF JUSTICE REQUIRES
10 THAT THERE ALWAYS BE TWO JUDGES IN THE CASE AND I AM THE
11 JUDGE OF THE LAW, YOU ARE THE JUDGE OF THE FACTS. AND YOU
12 ARE THE SOLE AND EXCLUSIVE JUDGE OF THE FACTS. AND BY THAT
13 I MEAN THAT I CAN'T COMMENT ON THE FACTS OF THIS CASE AND
14 I CAN'T SUGGEST TO YOU WHAT I THINK YOUR VERDICT SHOULD BE
15 BECAUSE THAT IS ENTIRELY YOUR PREROGATIVE UNDER OUR SYSTEM
16 OF JUSTICE. NOW, HOW DO YOU DECIDE WHAT THE FACTS ARE.
17 YOU DO THAT BY EVALUATING THE WEIGHT AND THE EVIDENCE YOU
18 ARE GOING TO HEAR DURING THE COURSE OF THIS TRIAL. THE
19 EVIDENCE CONSISTS OF TWO SOURCES. THE FIRST IS THE ONE
20 THAT YOU ARE MOST FAMILIAR WITH AND THAT IS SWORN WITNESS
21 TESTIMONY. I KNOW VERY LITTLE ABOUT THIS CASE BUT I
22 ANTICIPATE THAT WE WILL HAVE WITNESSES TO COME IN WHO ARE
23 SWORN AND WHO WILL GIVE YOU THEIR KNOWLEDGE ABOUT THE CASE
24 AND OTHER INFORMATION THAT IS RELEVANT TO THE CASE. THAT
25 IS ONE SOURCE YOU CAN DETERMINE WHAT THE FACTS ARE IN THE

1 CASE. THE SECOND SOURCE IS AN EXHIBIT. WE HAVE IN THIS
2 CASE EXHIBITS, AN EXHIBIT IS A PHYSICAL, TANGIBLE OBJECT.
3 IT MIGHT BE SOMETHING LIKE A PHOTOGRAPH OR MAP OR SOME
4 OTHER CONCRETE ITEM. BUT IT WILL BE AN EXHIBIT, IT WILL
5 BE EVIDENCE IN THE CASE THAT YOU CAN USE TO DETERMINE THE
6 FACTS OF THE CASE. AND YOU WILL KNOW THAT BECAUSE IT WILL
7 BE BACK IN THE JURY ROOM WITH YOU AT THE END OF THE TRIAL
8 AND HAVE A STICKER ON IT THAT SAYS EXHIBIT NUMBER SO AND
9 SO. THOSE ARE THE ONLY TWO THINGS THAT YOU CAN USE IN
10 DETERMINING WHAT THE FACTS ARE IN THIS CASE, WITNESS
11 TESTIMONY AND EXHIBITS. EVERYTHING ELSE IS NOT EVIDENCE.
12 AS I MENTIONED TO YOU, THE INDICTMENT IN THIS CASE IS NOT
13 EVIDENCE. IT CERTAINLY IS NOT A WITNESS AND IT CERTAINLY
14 IS NOT AN EXHIBIT SO IT IS NOT SOMETHING THAT YOU CAN USE
15 TO DETERMINE WHAT THE FACTS ARE. LIKEWISE WHAT THE
16 LAWYERS SAY, THEY ARE VERY IMPORTANT, YOU SHOULD BE PAYING
17 ATTENTION TO WHAT THEY SAY BECAUSE THEY ARE TRYING TO HELP
18 YOU UNDERSTAND THE EVIDENCE. WHAT THE LAWYERS SAY IS NOT
19 IN AND OF ITSELF EVIDENCE, AGAIN THEY ARE NOT WITNESSES.
20 SO BEAR IN MIND WHAT YOU CAN AND CANNOT USE IN DETERMINING
21 WHAT THE FACTS ARE. THE ONLY THING THAT YOU CAN USE IS
22 WITNESS TESTIMONY AND THE EXHIBITS. NOW, A CRIMINAL CASE
23 HAS CERTAIN PRINCIPLES THAT APPLY. I TOLD YOU THAT THE
24 INDICTMENT IS NOT EVIDENCE, IT IS SIMPLY AN ALLEGATION.
25 IT IS SIMPLY THE WAY THE CASE STARTS, IT IS A PIECE OF

1 PAPER. THAT IS ALL IT IS, IT IS SIMPLY THE TICKET THAT
2 ALLOWS THE PROSECUTION TO COME INTO THIS COURTROOM AND
3 START A CASE AGAINST A CITIZEN AND LET A CITIZEN KNOW WHAT
4 HE IS CHARGED WITH. LIKEWISE MR. MITCHELL HAS PLEAD NOT
5 GUILTY TO THE INDICTMENT AND THAT PUTS THE BURDEN OF PROOF
6 ON THE STATE AND YOU MUST DETERMINE WHETHER THE STATE HAS
7 MET ITS BURDEN OF PROOF. MR. MITCHELL IS PRESUMED
8 INNOCENT AND THAT PRESUMPTION OF INNOCENCE CAN ONLY BE
9 REMOVED IF YOU FIND UNANIMOUSLY THE STATE HAS MET ITS
10 BURDEN OF PROVING EACH ELEMENT OF EACH CRIME BEYOND A
11 REASONABLE DOUBT. I ALSO TOLD YOU AND I WILL REMIND YOU
12 NOW AND AGAIN AT THE END OF THE TRIAL THAT THERE ARE THREE
13 CHARGES IN THIS CASE AND YOU WILL HAVE TO WEIGH THE
14 EVIDENCE AS TO EACH CHARGE INDEPENDENTLY AND NOT LET YOUR
15 DECISION ON ONE AFFECT YOUR DECISION ON THE OTHER. NOW,
16 IN DETERMINING THE FACTS OF THE CASE YOU WILL HAVE TO BY
17 NECESSITY DETERMINE THE CREDIBILITY OR BELIEVABILITY OF
18 THE EVIDENCE. SO THAT MEANS FOR EVERY WITNESS WHO WAS
19 CALLED AND EVERY EXHIBIT THAT MAY BE ADMITTED YOU WILL
20 HAVE TO DETERMINE WHETHER IT IS WORTHY OF BELIEF. YOU
21 WILL HAVE TO GAUGE THE CREDIBILITY OF EACH WITNESS AND
22 DOING THAT YOU CAN USE CERTAIN TOOLS INCLUDING WHETHER THE
23 WITNESS IS HESITANT OR FORTHRIGHT IN THEIR TESTIMONY, IN
24 OTHER WORDS, THEIR DEMEANOR ON THE STAND. YOU MAY
25 CONSIDER WHETHER THE WITNESS HAS AN INTEREST IN THE

1 OUTCOME OF THE CASE, WHETHER THEY HAD ANY BIASED OR
2 PREJUDICE ABOUT SOME ISSUE IN THE CASE. WHETHER OR NOT
3 THEIR TESTIMONY STACKS UP OR HOW IT STACKS UP AGAINST THE
4 OTHER EVIDENCE IN THE CASE. AND YOU MAY CERTAINLY USE
5 ANYTHING IN YOUR DAY TO DAY LIFE IN DETERMINING WHETHER
6 SOMEONE IS TELLING YOU THE TRUTH OR NOT BECAUSE YOUR
7 COMMON SENSE DID NOT SUDDENLY EVAPORATE WHEN YOU STEPPED
8 INTO NEWBERRY COUNTY COURT HOUSE. SO, YOU WILL BE THE
9 JUDGE OF THE FACTS AND BY DOING THAT YOU WILL HAVE TO BY
10 NECESSITY DETERMINE THE CREDIBILITY OR BELIEVABILITY OF
11 ALL OF THE EVIDENCE. YOU ARE CERTAINLY NOT GOING TO DO
12 THAT ARBITRARILY, IT IS A VERY HEAVY RESPONSIBILITY YOU
13 HAVE BEFORE YOU AND I KNOW YOU WILL DO IT FAIRLY AND
14 IMPARTIALLY AND WITH SOUND REASON. HOW MANY OF YOU HAVE
15 SET ON A JURY CASE IN CRIMINAL COURT BEFORE. YOU MAY KNOW
16 FROM YOUR EXPERIENCE THAT A CRIMINAL TRIAL HAS A CERTAIN
17 STRUCTURE TO IT AND I AM GOING TO TELL YOU A LITTLE BIT
18 ABOUT HOW THAT STRUCTURE IS SO YOU WILL KNOW WHAT TO
19 EXPECT. FIRST OF ALL, I DON'T KNOW HOW LONG THIS CASE
20 WILL TAKE, IT MAY WELL GO INTO TOMORROW OR THE NEXT DAY.
21 BUT REGARDLESS OF HOW LONG OR SHORT THIS TRIAL IS BEEN IN
22 MIND THAT IT IS AN IMPORTANT TRIAL. IT IS A DAY IN COURT
23 FOR MR. MITCHELL AND FOR THE STATE. SO, IT IS IMPORTANT
24 THAT YOU FAIRLY AND IMPARTIALLY TRY THE CASE. BUT A
25 CRIMINAL TRIAL HAS A DEFINITE STRUCTURE TO IT AND IN JUST

1 A MOMENT YOU ARE GOING TO HEAR WHAT IS CALLED THE OPENING
2 STATEMENTS OF THE SOLICITOR. THE STATE BEARS THE BURDEN
3 OF PROOF, THE SOLICITOR WILL GO FIRST. IN THEIR OPENING
4 STATEMENT A LAWYER WILL SIMPLY TELL YOU WHAT THEY THINK
5 THE EVIDENCE IS GOING TO SHOW AND GIVE YOU A ROADMAP SO TO
6 SPEAK ABOUT WHAT THE CASE IS GOING TO BE ABOUT. MR.
7 MITCHELL, HIS ATTORNEY, MR. CHAPLIN WILL HAVE THE
8 OPPORTUNITY BUT NOT THE OBLIGATION TO PRESENT AN OPENING
9 STATEMENT AS WELL. THE DEFENSE DOESN'T HAVE THE BURDEN OF
10 PROOF, THE DON'T HAVE TO OFFER ANY EVIDENCE OR EXPLANATION
11 OR DO ANYTHING DURING THIS TRIAL. ONCE YOU HAVE HEARD THE
12 OPENING STATEMENT OR STATEMENTS WE WILL THEN GO INTO THE
13 EVIDENCE PORTION OF THE TRIAL. AND THE STATE WILL BEGIN,
14 BECAUSE THEY HAVE THE BURDEN OF PROOF, PRESENT THEIR
15 WITNESSES. MR. MITCHELL WILL HAVE THE OPPORTUNITY TO
16 CONFRONT THAT EVIDENCE. ONCE THE STATE COMPLETES IT
17 PRESENTATION OF THE EVIDENCE THE DEFENSE WILL HAVE THE
18 OPPORTUNITY BUT NOT THE OBLIGATION TO PRESENT ANY
19 EVIDENCE. AND ONCE YOU HEARD ALL THE EVIDENCE WE WILL
20 THEN HAVE THE CLOSING ARGUMENTS OF THE LAWYERS AND THEN I
21 WILL INSTRUCT YOU ON THE LAW AND THEN THE CASE WILL BE IN
22 YOUR HANDS FOR A DECISION AND FOR A VERDICT. NOW, IT IS
23 VERY IMPORTANT UNTIL WE REACH THAT POINT THAT YOU NOT
24 DISCUSS THIS CASE WITH ANYONE, AND YOU NOT MAKE UP YOUR
25 MIND PREMATURELY. WE WENT TO A GREAT DEAL OF TROUBLE AND

1 SO DID YOU TRYING TO FIND A JURY THAT COULD BE FAIR AND
2 IMPARTIAL AND HAVE AN OPEN MIND AND CERTAINLY WANT TO KEEP
3 YOU THAT WAY SO DON'T START TALKING ABOUT THE CASE UNTIL
4 YOU HAVE HEARD ALL THE EVIDENCE, UNTIL YOU HAVE HEARD THE
5 CLOSING ARGUMENTS AND UNTIL I HAVE GIVEN YOU THE LAW.

6 THEN YOU CAN HAVE THE TOOLS THAT YOU WILL NEED TO DO YOUR
7 JOB IN THIS MATTER. SO, DON'T TALK ABOUT THE CASE, KEEP
8 AN OPEN MIND AND REMEMBER THE PROCESS THAT YOU AND I ARE
9 SUPPOSE TO BE NEUTRAL AND FAIR AND IMPARTIAL. WE DON'T
10 HAVE ANY FRIENDS TO REWARD OR ENEMIES TO PUNISH AND YOUR
11 SOLE JOB IS TO DETERMINE THE TRUE FACTS OF THE CASE AND
12 WHETHER THE STATE HAS MET ITS BURDEN OF PROOF. SO, WITH
13 THAT WE WILL HAVE THE OPENING STATEMENT OF MR. MCDANIEL.

14 MR. MCDANIEL: THANK YOU, YOUR HONOR, MAY IT PLEASE
15 THE COURT. LADIES AND GENTLEMEN, THIS IS MY CHANCE TO
16 KIND OF GIVE YOU A ROADMAP OF HOW THE STATE IS GOING TO
17 PRESENT THE EVIDENCE. AND THIS IS A VERY SOUTHERN CASE I
18 WOULD SAY, OR MAYBE SPECIFICALLY NEWBERRY COUNTY BECAUSE
19 WHAT WE HAVE HERE IS A BURGLARY FIRST DEGREE. AND THE WAY
20 THAT WE FIGURED OUT SOMEBODY CAME IN THE HOUSE WAS, THE
21 VICTIM, MR. POTTS BOUGHT A DEER CAMERA AND PUT IT ON TOP
22 OF THE REFRIGERATOR TO CATCH SOMEBODY COMING IN. HE COMES
23 HOME OCTOBER 27TH, 28TH, HE WORKS AT THE BLUE MOON AND HE
24 GOES TO WORK AND COMES HOME IN THE EARLY MORNING HOURS ON
25 THE 28TH AND REALIZES SOMEONE HAS BEEN IN HIS HOME, CHECKS

1 THE CAMERA AND THERE IS AN IMAGE OF SOMEBODY ON THE
2 CAMERA. THE NEXT MORNING HE CALLS THE POLICE, THEY SHOW
3 UP, THEY ARE NOT SURE WHO IT IS. THEY FINALLY GET IT DOWN
4 TO THE POLICE DEPARTMENT AND THEY ARE ABLE TO IDENTIFY MR.
5 MITCHELL, THE PERSON INSIDE AND HE WAS ARRESTED FOR THAT
6 CHARGE. NOW, I HAVE A NUMBER OF WITNESSES I AM GOING TO
7 CALL THAT THE JUDGE TOLD YOU WOULD BE EVIDENCE IN THIS
8 CASE. I WANT YOU TO PAY CLOSE ATTENTION TO THE WITNESSES
9 AND HOW THEY ARE INVOLVED IN THIS CASE, WHAT THEY SAW,
10 WHAT THEY DID, THEIR EXPERIENCE. THAT IS THE STATE'S
11 EVIDENCE. WHAT I HAVE TO PROVE TO YOU BEYOND A REASONABLE
12 DOUBT IS THAT BENNIE MITCHELL IS GUILTY OF BURGLARY FIRST
13 DEGREE. HE ENTERED MR. POTTS HOME WITHOUT CONSENT,
14 WITHOUT PERMISSION AT NIGHT WITH THE INTENT TO COMMIT A
15 CRIME THEREIN BEYOND A REASONABLE DOUBT. I HAVE TO PROVE
16 THAT TO YOU, I PLAN ON DOING THAT THROUGH MY WITNESSES,
17 PETTY LARCENY, THAT HE STOLE SOME ITEMS UNDER THE VALUE OF
18 \$1,000.00 DOLLARS, THE SAME WAY, BEYOND A REASONABLE
19 DOUBT. AND FINALLY POSSESSION OF BURGLARY TOOLS. THAT HE
20 HAD SOME TYPE OF TOOLS, THE SAME WAY, THE WITNESSES WILL
21 TESTIFY. AND I WANT YOU TO, THE STATE NEEDS YOU TO PAY
22 CLOSE ATTENTION TO THE WITNESSES. AND YOU WILL WEIGH THAT
23 AND I WILL STAND UP BEFORE YOU AGAIN AND ASK YOU TO FIND
24 MR. MITCHELL GUILTY BEYOND A REASONABLE DOUBT OF THOSE
25 THREE CHARGES. THANK YOU.

1 THE COURT: MR. CHAPLIN.

2 MR. CHAPLIN: GOOD AFTERNOON, LADIES AND GENTLEMEN.

3 AS I STATED EARLIER, MY NAME IS MATHIAS CHAPLIN AND I AM

4 THE DEFENSE ATTORNEY IN THIS MATTER AND I REPRESENT MR.

5 BENNIE MITCHELL. THIS IS A MISTAKEN IDENTITY CASE. ONE,

6 TWO, THREE, FOUR, FIVE, SIX, SEVEN, EIGHT, NINE, TEN,

7 ELEVEN, TWELVE AND AN ALTERNATE. WE HAVE SELECTED TWELVE

8 BRIGHT, INTELLIGENT PEOPLE TO ASSIST US IN THIS MATTER AND

9 AN ALTERNATE. THAT IS NOT BY CHANCE. WE DID THAT BECAUSE

10 THE ODDS OF ONE PERSON BEING WRONG ON AN IDENTIFICATION IS

11 WAY TO HIGH TO BASE SOMETHING AS SERIOUS AS GUILT OR

12 INNOCENCE. SO, WE HAVE CHOSEN TWELVE JURORS AND LIKE I

13 SAID, AN ALTERNATE. AND IN ADVANCE WE THANK YOU FOR YOUR

14 SERVICE BECAUSE THE DECISION YOU ARE ABOUT TO MAKE IS VERY

15 IMPORTANT. HAVE YOU EVER THOUGHT THAT YOU SAW SOMETHING

16 AND THEN LATER ON YOU FIGURED OUT THAT THAT IS NOT REALLY

17 WHAT YOU SAW. MAYBE YOU THOUGHT YOU SAW A FRIEND AND THEN

18 WHEN YOU GOT CLOSE THAT WASN'T REALLY YOUR FRIEND.

19 SEVERAL MONTHS AGO I THOUGHT I SAW A FRIEND OF MINE NAMED

20 JOHN. NOW, WE WERE AT A FUNCTION AND THE ROOM WAS FAIRLY

21 DARK AND HIS FACE WAS A LITTLE BLURRY BECAUSE HE WAS FAR

22 OFF SO I DECIDED I WOULD WAIT UNTIL WE GOT INTO THE LOBBY

23 DURING INTERMISSION AND SAY HI TO JOHN. WELL, YOU KNOW

24 WHAT HAPPENED, I GOT TO THE LOBBY AND IT TURNED OUT THE

25 PERSON I THOUGHT WAS JOHN WAS NOT JOHN. THE LIGHTS CAME

1 ON, THE IMAGE WAS CLEAR AND I REALIZED THAT I HAD MADE A
2 MISTAKE, WE ALL DO IT. AND I BET YOU HAVE SEEN THINGS
3 UNDER POOR LIGHT AND UNDER STRAINED CONDITIONS AND WHEN
4 THE LIGHTS GOT TURNED ON YOU REALIZED IT WAS SOMETHING
5 ELSE. LOOK AT ME, I AM BALDHEADED, FAIRLY LARGE EYES AND
6 THEY SAY I WEAR SOME FUNKY GLASSES. WELL, PEOPLE ALWAYS
7 TELL ME I LOOK LIKE SOMEONE ELSE, I HAVE EVEN HEARD I LOOK
8 LIKE SOME THINGS. WELL, AND THEN WHAT ABOUT THE LADY ON
9 SATURDAY NIGHT LIVE, I THINK TINA FEY, SHE LOOKS LIKE
10 SARAH PALIN. I PERSONALLY CAN'T TELL THE DIFFERENCE. AND
11 THEN YOU HAVE THESE PEOPLE THAT PERSONATE ELVIS, THEY LOOK
12 A GREAT DEAL LIKE THE LATE ELVIS PRESSLEY AS WELL. THE
13 TRUTH IS OUR EYES OFTEN PLAY TRICKS ON US. AND WE ARE NOT
14 LYING WHEN YOU SAY YOU SAW SOMETHING YOU DID NOT. THE
15 FACT IS WE ARE HUMAN AND WE MAKE MISTAKES. NORMALLY OUR
16 MISTAKES ARE PRETTY HARMLESS, WE CAN SAY I AM SORRY AND GO
17 ON ABOUT OUR BUSINESS. BUT NOT IN THIS CASE. IN THE CASE
18 BEFORE YOU TODAY SOMEONE HAS MISTAKENLY IDENTIFIED MY
19 CLIENT AND MY CLIENT WAS ARRESTED. WE NEED YOU TO HELP US
20 GET TO THE BOTTOM OF THIS ISSUE. THE STATE IS SAYING THAT
21 THEY ARRESTED THE RIGHT PERSON AND THE DEFENSE, WE ARE
22 SAYING THEY HAVE ARRESTED THE WRONG PERSON. NOW LEGAL
23 CASES INVOLVING MISTAKEN IDENTITY ARE FAR TOO COMMON, YOU
24 PROBABLY HEARD ABOUT THEM. AND THAT IS WHY THERE ARE
25 SAFEGUARDS IN THE SYSTEM TO PREVENT THIS. WE CALL THIS

1 CORROBORATING EVIDENCE. THINGS SUCH AS FINGERPRINTS,
2 WITNESS STATEMENTS THAT WERE AT THE SCENE WHEN IT ACTUALLY
3 OCCURRED, SOMETIMES A CONFESSION AND ITEMS FROM THE SCENE
4 THAT WERE ACTUALLY FOUND ON THE PERSON THAT IS ARRESTED.
5 ALL OF THOSE THINGS TEND TO LEND CREDIBILITY TO SOMEONE
6 SAYING I THINK THAT IS THE PERSON. SO I CHALLENGE YOU IN
7 THIS CASE FOR THAT TYPE OF EVIDENCE. I SUGGEST THAT YOU
8 WON'T FIND ANY. NOW, THE JUDGE STATED AND THE SOLICITOR
9 STATED, THE BURDEN OF PROOF IN THIS MATTER IS ON THE
10 STATE. IT IS NOT UP TO MR. MITCHELL. REMEMBER YOU LIVE
11 IN AMERICA AND WE ARE INNOCENT UNTIL PROVEN GUILTY BY A
12 PANEL OF OUR PEERS. NOW TO ASSIST YOU IN THIS PARTICULAR
13 MATTER I TOO WILL BE BRINGING FORTH SOME WITNESSES. AND
14 MY WITNESSES ARE GOING TO BE EXPERTS IN SEVERAL AREAS AND
15 THEY ARE GOING TO ANSWER SOME QUESTIONS AND HOPEFULLY
16 THEIR RESPONSES WILL ASSIST YOU IN YOUR DELIBERATIONS. I
17 WILL TELL YOU MORE ABOUT THAT LATER. NOW, YOU WILL BE
18 ASKED AT THE CONCLUSION TO DECIDE WHETHER OR NOT YOU
19 BELIEVE MY CLIENT IS GUILTY OR NOT, WHETHER YOU SUSPECT OR
20 WHETHER YOU HAVE A HUNCH OR WHATEVER THE CASE MIGHT BE, IT
21 IS BEYOND A REASONABLE DOUBT. WHAT IS A REASONABLE DOUBT,
22 THAT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF MY
23 CLIENT'S GUILT. THAT IS NOT A SUSPICION OR A HUNCH,
24 SOMEONE FROM THE STATE MAY GIVE YOU THEIR OPINION
25 REGARDING MY CLIENT AND SAY THAT MR. MITCHELL IS GUILTY.

1 YOU KNOW WHAT, THAT IS THEIR RIGHT BUT THAT IS ALL IT IS,
2 IT IS AN OPINION. WE ALL HAVE THEM. YOU ARE THE FINAL
3 DECISION MAKER IN THIS MATTER AND AT THE CONCLUSION OF THE
4 MATTER WE WILL GIVE YOU THE EVIDENCE AND ASK YOU TO
5 DECIDE. NOW JUST BECAUSE A WITNESS IS CONVINCED BEYOND A
6 REASONABLE DOUBT DOESN'T MEAN THAT YOU ARE GOING TO BE
7 CONVINCED BEYOND A REASONABLE DOUBT. I WANT YOU TO APPLY
8 YOUR GOOD SENSE, TAKE A LOOK AT THE EVIDENCE AND YOU
9 DECIDE WHAT YOU THINK. NOW, EVIDENCE IN A LEGAL TRIAL
10 DEFINITELY NEEDS TO BE RELIED ON. NOW, JUST BECAUSE SOME
11 EVIDENCE IS BEFORE YOU IT DOES NOT MEAN THAT IT IS
12 RELIABLE. YOU HAVE TO MAKE THAT DECISION. RELIABLE
13 EVIDENCE IS CLEAR, IT IS CONCISE AND IT IS CONVINCING.
14 WHEN EACH OF YOU ARE SELECTED THE MAIN THING THAT MY
15 CLIENT AND I CONSIDER IS YOUR ABILITY TO GET, TO NOT GET
16 LOST IN ALL OF THE OTHER ISSUES REGARDING THIS TRIAL AND
17 KEEP YOUR EYES ON THE BALL. THE BALL HERE IS WHETHER OR
18 NOT THE STATE IS MISTAKEN IN THEIR ID OF BENNIE. THAT IS
19 THE ULTIMATE ISSUE THAT YOU ARE GOING TO BE DECIDING. I
20 WANT YOU TO USE YOUR COMMON SENSE AND I KNOW ALL OF YOU
21 WILL BE ABLE TO MAKE A GOOD DECISION. ASK YOURSELF, HAS
22 THE STATE PROVEN BEYOND A REASONABLE DOUBT THAT BENNIE IS
23 GUILTY. LOOK AT THE MATTER IN WHICH THE POLICE IN THIS
24 MATTER HANDLED THE CASE. NOW, IF THEIR WORK LOOKS SLOPPY
25 CHANCES ARE THE RESULTS ARE GOING TO BE SLOPPY AND THE

1 DECISION THEY MADE ARE GOING TO BE BASED ON THAT SLOPPY
2 WORK AND THOSE SLOPPY RESULTS. I SUGGEST THAT YOU ARE
3 GOING TO SEE SOME OF THAT TODAY. DID THEY REALLY
4 INVESTIGATE THIS MATTER IN A PROFESSIONAL MATTER IN THE
5 WAY YOU WOULD EXPECT LAW ENFORCEMENT TO DO SO. DID THEY
6 DO EVERYTHING IN THEIR POWER TO MAKE SURE THAT THE RIGHT
7 PERSON WAS ARRESTED, SOMETHING THAT WE ALL AS CITIZENS
8 EXPECT LAW ENFORCEMENT TO DO. AT THE END OF THE DAY IF
9 YOU ARE IN DOUBT YOU HAVE TO RULE IT OUT. IF YOU BELIEVE
10 THAT THE STATE COULD BE WRONG THAT IS WHAT WE CALL
11 REASONABLE DOUBT. IN THIS COUNTRY ONE PERSON ACCUSING YOU
12 OF SOMETHING IS ONLY AN OPINION. THAT OPINION HAS TO BE
13 SUPPORTED BY SOLID EVIDENCE TO SUPPORT THIS OPINION. NOW,
14 I WILL DO MY BEST TO STAY FOCUSED AND GIVE YOU AS MUCH
15 INFORMATION AS POSSIBLE TO HELP YOU DECIDE THE ULTIMATE
16 ISSUE IN THIS MATTER. I WANT YOU TO SIT BACK AND RELAX
17 AND LISTEN TO THE TESTIMONY. REMEMBER THE ISSUE TODAY IS
18 WHO DID IT, IF THE PERSON IN THAT PICTURE IS BENNIE. IT
19 IS THE STATE'S JOB TO CONVINCE YOU BEYOND A REASONABLE
20 DOUBT THAT THEY HAVE ARRESTED THE RIGHT PERSON. BENNIE
21 AND I ARE CERTAIN THAT YOU WILL DECIDE HE DID NOT DO THAT
22 AND THAT THE STATE'S CASE AGAINST HIM IS SERIOUSLY FLAWED.
23 WE HAVE SELECTED YOU TO HELP US TO MAKE THIS DECISION. WE
24 DID NOT SELECT ONE PERSON TO MAKE THIS DECISION BECAUSE
25 THE ODDS THAT ONE PERSON IS WRONG IS FAR TOO GREAT TO RELY

1 UPON IN A SITUATION OF THIS MAGNITUDE. WE ARE TALKING
2 ABOUT BENNIE'S FREEDOM. AND LIKE I SAID, IF YOU ARE IN
3 DOUBT YOU NEED TO RULE IT OUT. I THANK YOU AND MOST OF
4 ALL BENNIE MITCHELL THANKS YOU.

5 THE COURT: THANK YOU, MR. CHAPLIN. LADIES AND
6 GENTLEMEN, WE ARE GOING TO BREAK FOR LUNCH AND BE BACK IN
7 THE JURY ROOM AT 1:30 AND WE WILL RESUME THE CASE AT THAT
8 TIME. DON'T TALK ABOUT THE CASE AND CONTINUE TO KEEP AN
9 OPEN MIND, WE WILL SEE YOU BACK AT 1:30.

10 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
11 A LUNCH BREAK.)

12 THE COURT: ANYTHING BEFORE WE BREAK FOR LUNCH.

13 MR. MCDANIEL: BRIEFLY JUDGE, I WOULD LIKE A MOTION
14 ON THIRD PARTY GUILT. I WILL HAND YOU A CASE. AND I
15 UNDERSTAND THE DEFENSE, I JUST WANT TO MAKE, THIS CASE
16 BASICALLY STATES THAT THE OFFENSE IS BARRED FROM OFFERING
17 THIRD PARTY GUILT, EVIDENCE OFFERED BY THE ACCUSED AS TO
18 ANOTHER COMMISSION OF A CRIME CHARGED MUST BE LEANING TO
19 THE FACTS INCONSISTENT WITH THE ACCUSED GUILT AND RAISING
20 REASONABLE INFERENCE, PRESUMPTION OF HIS INNOCENCE AND
21 EVIDENCE MERELY CASTING MERE SUSPICION ON ANOTHER OR
22 RAISING CONJECTURAL INFERENCE AS TO THE COMMISSION OF THE
23 CRIME IS INADMISSIBLE. I DON'T THINK RIGHT NOW, I MEAN I
24 UNDERSTAND HIS DEFENSE NOW AND I GUESS AS LONG AS IT IS A
25 GENERAL, YOU CAN MISIDENTIFY PEOPLE, I THINK THAT WOULD BE

1 OKAY. BUT I WOULD THINK THAT IF HE SPECIFICALLY BRINGS UP
2 SOMEBODY, ANYBODY ELSE WITHIN THE COMMUNITY THAT HAS BEEN
3 CHARGED WITH A CRIME THAT LOOKS LIKE HIM I THINK HE WOULD
4 BE BARRED UNLESS HE PROVIDED MORE EVIDENCE THAT HIS
5 CLIENT, INTEND TO SHOW THAT HIS CLIENT IS NOT GUILTY OF
6 THE CHARGES.

7 THE COURT: MR. CHAPLIN.

8 MR. CHAPLIN: THANK YOU, YOUR HONOR. ASSISTANT
9 SOLICITOR MCDANIEL AND I HAVE DISCUSSED THIS MATTER. AND
10 I THINK WHAT HE IS REFERRING TO IS THE FACT THAT I AM
11 PREPARED TO ASK QUESTIONS ABOUT CRIMES IN THIS PARTICULAR
12 AREA OF ONE OF HIS WITNESSES. AND I DON'T THINK THAT I AM
13 TRYING TO SUGGEST THAT SOMEONE ELSE IS THE PARTY IN THIS
14 CASE. I SIMPLY INTEND TO SHOW THAT THIS OFFICER HAS
15 INVESTIGATED SIMILAR CRIMES IN THIS PARTICULAR AREA BEFORE
16 AND AFTER THE ARREST OF MR. MITCHELL.

17 THE COURT: ARE YOU GOING TO ASK ABOUT SPECIFIC
18 SUSPECTS?

19 MR. CHAPLIN: NO, I AM NOT, YOUR HONOR. HOWEVER,
20 YOUR HONOR, IF THE RESPONSE I RECEIVE IS NOT ACCURATE I DO
21 HAVE INFORMATION ON SPECIFIC PEOPLE TO IMPEACH THAT
22 TESTIMONY.

23 THE COURT: WELL, BASED ON WHAT YOU ARE TELLING ME,
24 HOW DOES IT RISE TO THE LEVEL OF EVIDENCE THAT CLEARLY
25 POINTS OUT ANOTHER PERSON IS THE GUILTY PARTY THAT IS

1 INCONSISTENT WITH MR. MITCHELL'S GUILT. I MEAN, JUST
2 BECAUSE OTHER CRIMES OCCURRED SIMILAR IN THE AREA, I AM
3 HAVING DIFFICULTY UNDERSTANDING HOW IS THAT ANYTHING BUT
4 CASTING SUSPICION ON SOMEONE, ANOTHER PERSON. IN ANY
5 CASE, ALWAYS TRYING A SIMILAR CRIME, GENERIC CRIME, I MEAN
6 IN THE VICINITY. HOW IS THIS EVIDENCE SUFFICIENT TO MEET,
7 HOW DOES IT DO ANYTHING THAN CAST A MERE SUSPICION ON
8 ANOTHER PERSON?

9 MR. CHAPLIN: WELL, I THINK, YOUR HONOR, THE
10 INFORMATION THAT I PRESENT CAST SUSPICION ON A SPECIFIC
11 INDIVIDUAL, STATED THAT THEY ARE THE PERSON THAT DID THIS
12 AND NOT MY CLIENT THEN I WILL BE IN VIOLATION OF THIS
13 RULING. AND I DON'T INTEND TO DO THAT. I SIMPLY INTEND
14 TO SHOW THAT THIS IS A CRIME IN THE AREA AND THAT IT IS
15 VERY POSSIBLE THAT ONE OF THE WITNESSES IS VERY WELL AWARE
16 OF THAT AND I WILL TRY TO EXAMINE HIM BASED ON HIS
17 KNOWLEDGE OF THE CRIME LEVELS IN THIS AREA.

18 THE COURT: WELL, I MEAN, IF YOU ARE ASKING WHAT MY
19 QUESTION IS, HOW ARE THOSE FACTS INCONSISTENT WITH MR.
20 MITCHELL'S GUILT. JUST BECAUSE OTHER CRIMES OCCURRED
21 DOESN'T MEAN THAT THE DEFENDANT IS INNOCENT OF THE CRIME
22 HE IS CHARGED WITH.

23 MR. CHAPLIN: AND I AM NOT SUGGESTING THAT, YOUR
24 HONOR, I AM SIMPLY, I THINK WE HAVE A RIGHT TO, IN OUR
25 DEFENSE, TO POINT OUT THE CONDITIONS OF THAT PARTICULAR

1 AREA.

2 THE COURT: THIRD PARTY GUILT REALLY COMES DOWN TO
3 THE RULE OF RELEVANCE. HOW IS THAT RELEVANT.

4 MR. CHAPLIN: I THINK THIS IS RELEVANT. IF SOMEONE
5 IS AT YOUR HOUSE, THEY DON'T KNOW WHO IT IS. AND I THINK
6 THAT OTHER HOUSES ARE BEING BROKEN INTO AND THAT THIS AREA
7 IS IN A HIGH CRIME AREA IN THE CITY OF NEWBERRY I THINK IS
8 VERY RELEVANT. THEIR ARE SAYING THAT ONLY ONE PERSON AND
9 ONE PERSON COULD POSSIBLY BE THE PERSON IN THAT PICTURE.
10 BASED ON THE CONDITIONS IN THAT AREA, ONE OF THE WITNESSES
11 WILL HAVE KNOWLEDGE OF, THAT IS NOT THE CASE.

12 THE COURT: IF YOU HAD A SO CALLED SIGNATURE CRIME
13 THAT WAS OCCURRING, THE NOTICE OPERANDI OF THE PERPETRATOR
14 WAS SUCH THAT THEY WERE LEAVING THEIR SIGNATURE AT THE
15 SCENE, SO TO SPEAK. AND THE DEFENDANT HAD BEEN ARRESTED
16 FOR ONE OF THOSE CRIMES AND YET AFTER HE IS INCARCERATED
17 THE CRIMES STILL OCCUR I CAN SEE YOUR POINT. AND I
18 UNDERSTAND THE RELEVANCE OF THAT. BUT JUST GENERALLY BY
19 SAYING OTHER BURGLARIES OCCURRED IN THIS NEIGHBORHOOD, I
20 MEAN, I HAVE TO HAVE MORE DETAIL, MORE SPECIFIC FACTS TO
21 REALLY MAKE A JUDGMENT ON WHETHER OR NOT THIS WOULD MEET
22 THE THIRD PARTY GUILT. YOU ARE GOING TO HAVE TO ISOLATE A
23 LITTLE MORE FOR ME. CAN YOU DO THAT.

24 MR. CHAPLIN: I CAN, YOUR HONOR.

25 THE COURT: OKAY.

1 MR. CHAPLIN: YOUR HONOR, I DO NOT INTEND, LET ME
2 JUST GO FROM THE, IT SAYS AT ANY RATE THE EVIDENCE OFFERED
3 BY ACCUSED AS TO THE COMMISSION OF THE CRIME BY ANOTHER
4 PERSON IT MUST BE LIMITED TO SUCH FACTS AS ARE
5 INCONSISTENT WITH HIS OWN GUILT. AND TO SUCH FACTS HAS
6 RAISED A REASONABLE INFERENCE OR PRESUMPTION AS TO HIS OWN
7 INNOCENCE. AND THAT IS NOT WHAT I AM TRYING TO DO, YOUR
8 HONOR. I AM SIMPLY SUGGESTING THAT THIS IS A VERY HIGH
9 CRIME AREA AND WE WOULD LIKE TO HAVE THAT INFORMATION
10 SHARED WITH THE JURY AND I PLAN TO DO THAT THROUGH ONE OF
11 THE WITNESSES THAT THE STATE PLANS TO CALL.

12 THE COURT: WHAT IS IT ABOUT THE OTHER CRIMES THAT
13 WOULD BE RELEVANT TO THESE, JUST BECAUSE THEY OCCURRED, I
14 AM NOT SURE IF THAT IS ENOUGH. THAT IS WHAT I AM TRYING
15 TO GET AT. LET'S PUT IT ANOTHER WAY. IF MR. MITCHELL WAS
16 ON TRIAL FOR STEALING A CAR, THE FACT THAT OTHER CARS WERE
17 STOLEN AFTER HE WAS ARRESTED NEXT DOOR OR ACROSS THE
18 STREET FROM THE SCENE OF THE ALLEGED CAR BREAKING, HOW
19 WOULD THAT BE RELEVANT TO SHOW THAT HE IS NOT THE PERSON
20 THAT STOLE THE CAR.

21 MR. CHAPLIN: SIR, I THINK ONE OF THE THINGS THERE
22 THAT SUGGEST IS THAT THERE IS A GREAT DEAL OF CRIME GOING
23 ON IN THAT AREA AND WHAT THE STATE IS CONTENDING IS IS
24 THAT ONLY ONE PERSON AND ONE PERSON ONLY COULD OF DONE
25 THIS PARTICULAR INCIDENT. AND WHAT I AM SAYING IS THAT

1 THERE IS A POSSIBILITY THAT IT COULD OF BEEN SOMEONE ELSE.

2 THE COURT: SEE, THAT IS THE KEY, YOU HAVE TO HAVE
3 MORE THAN A POSSIBILITY. I MEAN THAT IS WHAT THE CASE IS,
4 IT HAS TO BE MORE THAN JUST SPECULATION, IT HAS TO BE
5 SOMETHING THAT RISES TO THE LEVEL OF BEING INCONSISTENT
6 WITH THE DEFENDANT'S GUILT. AND I UNDERSTAND THAT IS A
7 LITTLE DIFFICULT TO BEAT YOUR BRAIN AROUND, MY BRAIN
8 AROUND, ANYBODIES BRAIN AROUND BECAUSE IT IS A LITTLE BIT
9 OF A CIRCULAR STATEMENT. BUT I THINK WHAT THEY MEAN THERE
10 IS THAT THE EVIDENCE JUST CAST A MERE SUSPICION ON ANOTHER
11 PERSON IS NOT ENOUGH. SO, IF THERE IS SOMETHING SPECIFIC
12 ABOUT WHAT YOU ARE TRYING TO ELICIT THAT WOULD BRING IT
13 ABOVE JUST MERE SUSPICION I DON'T SEE HOW IT IS RELEVANT
14 AND ADMISSIBLE UNDER THE THIRD PARTY GUILT.

15 MR. CHAPLIN: I UNDERSTAND, YOUR HONOR, AND I WILL
16 RESPECT WHATEVER RULING YOU HAVE.

17 THE COURT: I WILL BE GLAD TO PROFFER, LET YOU
18 PROFFER THE TESTIMONY OUTSIDE THE PRESENCE OF THE JURY SO
19 WE CAN GET A BETTER IDEA OF THE CONTEXT OF IT IF YOU WISH.

20 MR. CHAPLIN: WE ARE FINE.

21 THE COURT: THANK YOU, WE WILL SEE YOU BACK AT 1:30.

22 (WHEREUPON, A LUNCH BREAK WAS TAKEN.)

23 THE COURT: ANYTHING BEFORE WE BRING THE JURY IN?

24 MR. MCDANIEL: NO, SIR.

25 MR. CHAPLIN: NO, YOUR HONOR.

1 THE COURT: BRING THE JURY IN, PLEASE.

2 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
3 APPROXIMATELY 1:45 P.M.)

4 THE COURT: MR. MCDANIEL, YOU MAY CALL YOUR FIRST
5 WITNESS.

6 MR. MCDANIEL: THE STATE CALLS STEPHEN LEE POTTS.

7 STEPHEN LEE POTTS, AFTER BEING DULY SWORN,
8 TESTIFIED AS FOLLOWS:

9 DIRECT EXAMINATION

10 BY MR. MCDANIEL:

11 Q MR. POTTS, WHERE DO YOU WORK?

12 A A THE BLUE MOON.

13 Q HOW LONG HAVE YOU WORKED THERE?

14 A I AM WORKING ON SEVEN YEARS NOW.

15 Q HOW OLD ARE YOU?

16 A I AM 39.

17 Q HOW LONG HAVE YOU LIVED IN NEWBERRY?

18 A 16 YEARS, 14 YEARS, EXCUSE ME.

19 Q AND WHERE DO YOU LIVE?

20 A ON PAULINE STREET.

21 Q IS THAT LOCATED IN NEWBERRY COUNTY?

22 A YES, IT IS.

23 Q AND HOW LONG HAVE YOU LIVED THERE?

24 A ALMOST 10 YEARS.

25 Q YOU SAID YOU WORK AT THE BLUE MOON, WHAT KIND OF

1 HOURS DO YOU WORK THERE?

2 A THEY VARY, BUT USUALLY I GO IN LATE MORNING AND LEAVE
3 SOMETIME EARLY THE FOLLOWING MORNING, SAY ABOUT LUNCH TIME
4 TO MAY 12:00 TO MAYBE 2:00 O'CLOCK IN THE MORNING.

5 Q NOW, I WANT TO GO BACK TO THE NIGHT OF OCTOBER 27TH,
6 MAYBE JUST THE DAY OF OCTOBER 27TH. DID YOU WORK THAT
7 DAY?

8 A I DID.

9 Q WHAT TIME DID YOU GO TO WORK?

10 A I HAD GONE IN EARLY AND THEN I HAD GONE BACK HOME AND
11 THEN I LEFT AGAIN AFTER 7:00 O'CLOCK OR SOMETHING LIKE
12 THAT TO GO BACK IN FOR THE NIGHT.

13 Q WHAT DO YOU DO THERE?

14 A ALL DIFFERENT THINGS. WE DO STOCKING, INVENTORY, I
15 ALSO DO SOME BARTENDING, WORK THE DOOR SOMETIMES, JUST
16 GENERAL MANAGER DUTIES.

17 Q WHAT IS YOUR TITLE THERE?

18 A I AM ONE OF THE OWNERS.

19 Q SO, YOU HAD GONE BACK AROUND 7:00 O'CLOCK AT NIGHT?

20 A YES.

21 Q WHAT TIME DID YOU GET OFF?

22 A I BELIEVE IT WAS IN THE BALLPARK OF 1:00 OR 1:30,
23 SOMEWHERE IN THAT BALLPARK.

24 Q THAT WOULD BE OCTOBER 28TH?

25 A YES, EARLY IN THE MORNING.

1 Q AND DO YOU REMEMBER ABOUT WHAT TIME YOU GOT HOME?

2 A I ONLY LIVE ABOUT A MILE AWAY, IT WAS SOON AFTER
3 THAT.

4 Q SO, 1:00 IN THE MORNING?

5 A YES, SOMETHING LIKE THAT.

6 Q AND WERE YOU ALONE?

7 A MY GIRLFRIEND WAS WITH ME THAT NIGHT.

8 Q SO, WHAT DID YOU DO WHEN YOU GOT HOME?

9 A WHEN I WALKED UP TO THE BACKDOOR I NOTICED THAT THE
10 WINDOW BESIDE THE BACKDOOR HAD BEEN DUG AT WITH A TOOL OF
11 SOME SORT, IT WAS A WINDOW THAT HAD BEEN MESSED WITH
12 BEFORE SO I LOOK AT THAT WINDOW FREQUENTLY NOW.

13 Q SO, DID YOU ENTER THE HOUSE, DID YOU CALL THE POLICE
14 THERE?

15 A I TOLD MY GIRLFRIEND TO WAIT OUTSIDE AND THEN I
16 WALKED THROUGH THE HOUSE TO MAKE SURE NOBODY WAS STILL
17 THERE.

18 Q WAS THERE ANYBODY THERE?

19 A NO.

20 Q WERE YOU ABLE TO FIGURE OUT WHAT HAPPENED?

21 A SOMEBODY HAD BEEN IN THE HOUSE, I COULD SEE THAT. I
22 HAD SET UP A CAMERA IN THE KITCHEN.

23 Q WHERE WAS IT?

24 A IT WAS ON TOP OF THE REFRIGERATOR IN THE KITCHEN. SO
25 I IMMEDIATELY WENT AND CHECKED THAT AND SAW SOME

1 PHOTOGRAPHS OF SOMEONE IN MY KITCHEN.

2 Q DID YOU KNOW WHO THEY WERE?

3 A I HAD NEVER SEEN THEM BEFORE, NO.

4 Q WHY DID YOU HAVE A DEER CAMERA ON THE REFRIGERATOR?

5 A ABOUT TEN DAYS PRIOR TO THAT I HAD HAD A, THERE HAD
6 BEEN SOME ACTIVITY IN MY HOUSE BEFORE. AND I HAD WENT AND
7 PURCHASED A CAMERA.

8 Q DID YOU PURCHASE IT BEFORE THAT SPECIFIC--

9 A PRETTY MUCH.

10 Q NOW, DID YOU CALL THE POLICE THAT NIGHT OR EARLY IN
11 THE MORNING?

12 A I DID NOT, WE WENT AHEAD AND WENT TO BED AND I CALLED
13 THEM THE NEXT MORNING.

14 Q WHAT TIME DID YOU GET UP?

15 A IT WAS 10:00 OR 10:30 WHEN I GOT UP.

16 Q AND WHAT DID YOU DO WHEN YOU GOT UP THAT MORNING?

17 A I TOOK A SHOWER AND THEN I CALLED THE POLICE PRETTY
18 MUCH AND JUST TOLD THEM WHAT I HAD FOUND.

19 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED STATE'S
20 IDENTIFICATION, STATE'S EXHIBIT 1 FOR IDENTIFICATION.

21 MR. CHAPLIN: YOUR HONOR.

22 THE COURT: YES, SIR.

23 MR. CHAPLIN: THE DEFENSE HAS AN OBJECTION TO THIS
24 EVIDENCE AND WE WOULD LIKE TO HAVE THAT MATTER HEARD
25 OUTSIDE THE PRESENCE OF THE JURY.

1 THE COURT: OKAY. LADIES AND GENTLEMEN, I ASK YOU TO
2 GO BACK TO THE JURY ROOM AND DON'T TALK ABOUT THE CASE AND
3 WE WILL RESUME MOMENTARILY. THANK YOU.

4 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

5 THE COURT: MR. CHAPLIN.

6 MR. CHAPLIN: YOUR HONOR, THIS MOTION IS BEING MADE
7 PURSUANT TO THE VIDEO OR CD THAT THE STATE HAS SHOWN ME
8 AND I AM MAKING THIS OBJECTION TO THE ADMISSION OF THAT CD
9 BASED ON RULES 1002 OF THE SOUTH CAROLINA RULES OF
10 EVIDENCE OR 1003, SOUTH CAROLINA RULES OF EVIDENCE AND
11 RULE 1004. FIRST AND FOREMOST, YOUR HONOR, RULE 1002 SAYS
12 THAT THERE IS A REQUIREMENT OF AN ORIGINAL. I THINK THE
13 TESTIMONY WE ARE ABOUT TO HEAR IS THAT THAT IS NOT AN
14 ORIGINAL. RULE 1002, EXCUSE ME, 1002, THAT SAYS THAT
15 EXCEPT AS OTHERWISE PROVIDED IN THE RULES BY STATUTE.
16 THEN I MOVE OVER TO 1003, YOUR HONOR, THAT THESE ARE
17 DUPLICATES. AND IT SAYS A DUPLICATE IS ADMISSIBLE
18 PROVIDED THERE IS NOT A GENUINE QUESTION AS TO THE
19 AUTHENTICITY OF THE ORIGINAL. GOES ON TO SAY THAT DUE TO
20 CIRCUMSTANCES THAT IT WOULD BE UNFAIR TO ADMIT THE
21 DUPLICATE OF THE ORIGINAL. YOUR HONOR, THESE IS A GENUINE
22 ISSUE AS TO THE AUTHENTICITY OF THE ORIGINAL OF THIS
23 DOCUMENT. THEN I MOVE ON TO RULE 1004, YOUR HONOR. AND
24 IT SAYS, IF THE ORIGINALS ARE LOST OR DESTROYED DUPLICATES
25 CAN BE ADMITTED UNLESS THE PROPONENT LOST OR DESTROYED IN

1 BAD FAITH. AND WE ARE SUGGESTING THAT THAT IS THE CASE IN
2 THIS SITUATION. THEREFORE WE ARE ASKING THAT THE VIDEO
3 NOT BE ADMITTED INTO EVIDENCE, IT CAN'T BE PROPERLY
4 AUTHENTICATED AND I THINK IT VIOLATES SEVERAL RULES OF
5 SOUTH CAROLINA RULES OF EVIDENCE.

6 THE COURT: MR. MCDANIEL.

7 MR. MCDANIEL: YOUR HONOR, I JUST WANT TO MAKE SURE,
8 HE IS ALLEGING BAD FAITH THAT THE ORIGINALS WERE, IS THAT
9 WHAT YOU ARE AND I AM SORRY. YOU ARE SAYING THAT THESE
10 CAN'T COME IN BECAUSE THEY HAVE BEEN LOST OR DESTROYED IN
11 BAD FAITH. I JUST WANT A CLARIFICATION.

12 MR. CHAPLIN: WELL, I AM SAYING THAT WHAT YOU HAVE IS
13 NOT AN ORIGINAL, I AM SAYING THAT IT IS ACCEPTABLE, A
14 DUPLICATE IS ACCEPTABLE PROVIDED THERE IS NOT A GENUINE
15 QUESTION RAISED AS TO THE AUTHENTICITY OF THE ORIGINAL
16 WHICH I AM RAISING THAT QUESTION. AND THE CIRCUMSTANCES,
17 UNDER THESE CIRCUMSTANCES TO BE UNFAIR TO ADMIT THE
18 DUPLICATE IN LIEU OF THE ORIGINAL. I AM FURTHER ALLEGING
19 AND ARGUING THAT THE ADMISSIBILITY OF OTHER EVIDENCE OR
20 CONTENTS OR EVEN SECOND, THIRD OR FORTH DOWNLOAD OF WHAT
21 YOU HAVE, IF IT FALLS UNDER THE FACT THAT THE ORIGINAL HAS
22 BEEN LOST OR DESTROYED I THEN SAY THE ORIGINAL WAS
23 DESTROYED IN BAD FAITH.

24 MR. MCDANIEL: YOUR HONOR, THERE HAS BEEN NO EVIDENCE
25 OF BAD FAITH. I MEAN, I HAVEN'T EVEN, HE HASN'T, THE

1 AUTHENTICITY HASN'T BEEN ESTABLISHED HERE. TO CALL THIS A
2 COPY OF THE ORIGINAL IS A STRETCH, BECAUSE THESE CAMERAS
3 WERE MEANT TO DOWNLOAD, PRINT THEM OUT. THAT IS THE SAME
4 AS SAYING THAT YOUR OLD REGULAR FILM CAMERAS, WHEN YOU
5 TAKE THAT PICTURE, THAT THE ORIGINALS IS ACTUALLY WHAT IS
6 ON THE FILM. AND THEN WHEN YOU GET THEM DEVELOPED THAT IS
7 A COPY OF WHAT CAME FROM THE ORIGINAL. THAT IS THE WAY I
8 SEE THAT. NOW, I ALSO THINK THAT UNDER, IF YOUR HONOR WAS
9 TO FIND THAT THE ORIGINAL HAS BEEN LOST OR DESTROYED WE
10 WOULD ASK THAT AND WE ARE NOT CONTENDING THAT THESE ARE
11 COPIES. AND I WOULD SAY THAT THESE ARE THE ORIGINALS THAT
12 CAME FROM THAT VIDEO, THAT THOSE ORIGINALS CAN'T BE
13 OBTAINED. AND THAT A COPY, ASSUMING THAT THE PROPER
14 FOUNDATION AND AUTHENTICITY HAS BEEN ESTABLISHED WILL
15 SERVE THE SAME PURPOSE AS THE ORIGINAL. NOW, MY POSITION
16 IS THAT THESE ARE THE ORIGINALS AND I THINK WE ESTABLISHED
17 IN PRETRIAL MOTIONS YESTERDAY THAT ALTHOUGH THIS CAMERA
18 DID NOT NEED A CHAIN OF CUSTODY THAT THE CAMERA WAS NEVER
19 OUT OF HIS POSSESSION, THAT HE DOWNLOADED THOSE IMAGES AND
20 BURNED THEM ONTO A CD WHICH HE PRESENTED TO THE POLICE. I
21 DO NOT SEE HOW THAT IS ANY DIFFERENT THAN THE POLICE
22 TAKING, EVERY LAW ENFORCEMENT OFFICER HAS A DIGITAL CAMERA
23 IN THEIR CAR AND HOW THEY SNAP PICTURES OF CRIME SCENES OR
24 WHATEVER, THEY DOWNLOAD THOSE AND THOSE ARE THE ORIGINALS.
25 ONE OF THESE ARE ORIGINALS. TWO, IF YOUR HONOR DOES NOT

1 FEEL THAT THEY ARE ORIGINALS THAT THE ORIGINALS HAVE BEEN
2 DESTROYED, I GUESS, THE MEMORY IN THE CAMERA WOULD HOLD SO
3 MANY PICTURES. SO, I KNOW THEY ARE NOT ACTUALLY ON A HARD
4 DRIVE. BUT THEY WERE DOWNLOADED AND THOSE COPIES WITH
5 BARRING MR. MATHIAS' ACCUSATION THAT THIS WAS DONE IN BAD
6 FAITH, WE WOULD ASK THAT THEY COME IN UNDER RULE 1004(2).
7 STATING THAT THE ORIGINAL IS NOT REQUIRED AND OTHER
8 EVIDENCE OF THE CONTENTS OF A WRITING OR RECORDING OR
9 PHOTOGRAPH IS ADMISSIBLE. AND NO ORIGINAL CAN BE OBTAINED
10 BY ANY JUDICIAL PROCESS. AND I AM SORRY, I THINK IT
11 REQUIRES THERE BE AN ISSUE OF AUTHENTICITY AND I THINK HE
12 JUST, I THINK THE DEFENSE IS SAYING WE DON'T AGREE THAT
13 THEY ARE AUTHENTIC WITH THE FOUNDATION LAID.

14 THE COURT: OKAY. ANY FURTHER ARGUMENT, MR. CHAPLIN.

15 MR. CHAPLIN: YOUR HONOR, OUTSIDE THE PRESENCE OF THE
16 JURY I WOULD LIKE TO ASK THE COURT TO INSTRUCT THAT WE
17 HAVE A PROFFER, HOW THIS WAS AUTHENTICATED. I MAY HAVE
18 CONCERNS WITH THAT PROCESS.

19 THE COURT: WHY DON'T YOU GO AHEAD AND PROFFER THE
20 TESTIMONY.

21 PROFFER DIRECT EXAMINATION

22 BY MR. MCDANIEL:

23 Q MR. POTTS, I AM GOING TO HAND YOU WHAT HAS BEEN
24 MARKED AS STATE'S EXHIBIT 1 FOR PURPOSES OF
25 IDENTIFICATION. HAVE YOU EVER SEEN THAT?

1 A YES.

2 Q WHAT IS THAT?

3 A THIS IS THE DVD THAT I PROVIDED TO THE POLICE.

4 Q CAN YOU DESCRIBE TO US HOW THAT DVD WAS MADE?

5 A I TOOK THAT CAMERA ON TOP OF THE REFRIGERATOR THAT
6 HAD TAKEN THE PHOTOS OF THE PERSON IN MY KITCHEN.

7 Q HOW MANY PHOTOS WERE THERE?

8 A THERE WAS NINE PHOTOS THAT WAS IN THAT LITTLE BLOCK.
9 WE TOOK IT TO THE LAPTOP, DOWNLOADED THEM ON THE LAPTOP
10 AND BURNED THEM STRAIGHT ONTO THE CD.

11 Q AND WHERE WAS THAT LAPTOP?

12 A INSIDE THE BLUE MOON.

13 Q AT ANY TIME WAS THE CAMERA OUT OF YOUR POSSESSION?

14 A NO.

15 Q DID YOU TRY TO LET ANYBODY ELSE TRY TO DOWNLOAD IT?

16 A NO.

17 Q AND YOU DOWNLOADED THE IMAGES?

18 A YES, I PUT THEM ON THE COMPUTER.

19 Q AND YOU BURNED THEM TO THAT DISK?

20 A MY GIRLFRIEND BURNED THEM WITH ME PRESENT.

21 Q AND YOU HAVE SEEN THE IMAGES THAT IS ON HERE?

22 A YES, SIR.

23 Q AND HOW MANY IMAGES ARE THERE?

24 A THERE IS NINE.

25 Q AND DO THOSE IMAGES FAIRLY AND ACCURATELY REPRESENT

1 THE EVENTS THAT TOOK PLACE THAT NIGHT?

2 A YES.

3 Q NO ALTERATIONS OR DELETIONS HAVE BEEN MADE?

4 A NO.

5 Q BY YOU?

6 A NO.

7 Q BY ANYBODY?

8 A NO.

9 Q AND YOU PROVIDED THIS TO THE POLICE, CORRECT?

10 A CORRECT.

11 Q WHO TOOK IT TO THE POLICE?

12 A I DID.

13 Q AND WHO DID YOU GIVE IT TO?

14 A OFFICER MCCLURKIN.

15 Q SO, UNTIL THEN WAS THIS DISK EVER OUT OF YOUR
16 POSSESSION?

17 A NO.

18 Q THANK YOU.

19 PROFFER CROSS-EXAMINATION

20 BY MR. CHAPLIN:

21 Q GOOD AFTERNOON, MR. POTTS. MR. POTTS, SO IT IS YOUR
22 TESTIMONY THAT YOU CAME HOME, I AM SORRY, THAT YOU WENT TO
23 WORK EARLIER THAT DAY?

24 A YES.

25 Q CAME HOME AND YOU WENT BACK TO WORK AT 7:00 O'CLOCK.

1 THE COURT: NOW, YOU ARE GOING TO HAVE TO CONFINE
2 YOUR QUESTIONS TO THE AUTHENTICITY, THIS ISN'T A DISCOVERY
3 FORM.

4 Q MR. POTTS, SO WHEN YOU CAME HOME YOU NOTICED THAT
5 THERE WAS A PICTURE IN THE CAMERA?

6 A YES.

7 Q HOW DID YOU NOTICE THAT?

8 A BECAUSE I WENT, THERE IS A VIEWER ON THE CAMERA.

9 Q SO, YOU WENT TO THE CAMERA?

10 A AND I COULD SEE A SMALL PICTURE ON IT, YES.

11 Q IS THE CAMERA MOTION ACTIVATED?

12 A YES.

13 Q WHEN YOU CHECKED THE CAMERA DID IT TAKE A PICTURE OF
14 YOU?

15 A YES, I AM SURE IT DID.

16 Q YOU PROVIDED THE POLICE DEPARTMENT WITH NINE
17 PICTURES?

18 A YES.

19 Q AND YOUR CAMERA HOLDS HOW MANY PICTURES?

20 A I DON'T KNOW THAT.

21 Q DOES IT HOLD MORE THAN NINE?

22 A YES.

23 Q SO, YOU DOWNLOADED THE PICTURES TO A COMPUTER AT THE
24 BLUE MOON, IS THAT WHAT YOU SAY?

25 A RIGHT.

1 Q WHO SELECTED WHICH PICTURES WERE DOWNLOADED?

2 A THE CAMERA PUT ALL OF THEM ON THERE ONTO THE
3 COMPUTER.

4 Q YOU SAID THE CAMERA HOLDS MORE THAN NINE?

5 A YES.

6 Q AND THAT IS ALSO TOOK A PICTURE OF YOU?

7 A THERE WERE SEVERAL PICTURES OF ME DURING SEVERAL
8 DIFFERENT DAYS, I CAN GO BACK AND CHECK IT.

9 Q BUT YOU DIDN'T PROVIDE THOSE PICTURES TO THE DOWNLOAD
10 THAT YOU MADE AT THE BLUE MOON?

11 A NO.

12 Q WHY NOT?

13 A BECAUSE THEY DIDN'T HAVE ANY BEARING FOR THIS. ME
14 WALKING THROUGH THE HOUSE TWO DAYS EARLIER DOESN'T HAVE
15 ANY BEARING ON THIS.

16 Q WHAT ABOUT THE PICTURE OF YOU CHECKING THE CAMERA ON
17 THE NIGHT OF THE 27TH?

18 A IT IS NOT ON THAT DISK.

19 Q WHY NOT?

20 A BECAUSE I DON'T NEED A PICTURE OF ME.

21 Q SO, YOU DETERMINE WHAT PICTURES YOU ARE GOING TO
22 PROVIDE THE POLICE?

23 A YES.

24 Q FROM THE ORIGINALS?

25 A YES.

1 Q NOW, WHEN YOU LOOKED AT THE PICTURES DID YOU, YOU SAY
2 YOU CAME HOME AT--

3 A 1:00 OR 1:30, AROUND THAT BALLPARK.

4 Q BUT THE PICTURES YOU PROVIDED THE POLICE HAVE A DATE
5 TIMESTAMP OF 3:00 O'CLOCK IN THE MORNING?

6 A YES.

7 Q SO, WERE YOU HOME WHEN THOSE PICTURES WERE TAKEN?

8 A NO, THE CLOCK WAS WRONG ON THE CAMERA. THAT IS
9 SOMETHING THAT I HAD JUST SET UP AND I HADN'T SET THAT UP
10 YET. THAT DOESN'T HAVE TO BE SET UP TO TAKE PICTURES.

11 Q NOW, THE PICTURES THAT YOU PROVIDED LAW ENFORCEMENT,
12 A NUMBER 187 THROUGH 195.

13 A OKAY.

14 Q WHERE ARE PICTURES 1 THROUGH 186?

15 A THEY WERE ON THE COMPUTER.

16 Q I BEG YOUR PARDON?

17 A THEY WERE ON THE COMPUTER.

18 Q AND WHERE ARE THEY NOW?

19 A THEY MAY STILL BE ON THERE, I HAVEN'T LOOKED IN A
20 WHILE. THEY WERE NOT OF THIS DAY.

21 Q SO, WHEN THE OFFICER CAME TO YOUR HOME ON THE MORNING
22 OF THE 28TH--

23 MR. MCDANIEL: JUDGE, THIS HAS NOTHING TO DO WITH THE
24 AUTHENTICITY OF THE PICTURES. HE IS GOING--

25 MR. CHAPLIN: YOUR HONOR, MY ISSUE HERE IS GOING BACK

1 TO THE QUESTION IN RULE 103, WITH REGARDS TO UNLESS IT IS
2 A GENUINE QUESTION OF AUTHENTICITY. AND I CAN STOP NOW
3 BUT, YOUR HONOR, I OFFER THAT AS THERE IS A GENUINE
4 QUESTION AS TO AUTHENTICITY OF WHAT, THAT THESE ARE
5 DUPLICATES BASED ON HIS TESTIMONY, THESE ARE DUPLICATES,
6 NOT ORIGINALS. HE SAID HE MAY HAVE THE ORIGINALS
7 SOMEWHERE AT HIS HOUSE OR SOMETHING LIKE THAT BUT WE DON'T
8 HAVE ORIGINALS. SO, NOW WE ARE OVER TO THE ADMISSIBILITY
9 OF DUPLICATES AND IF WE ARE IN THE ADMISSIBILITY OF
10 DUPLICATES WE DON'T EVEN HAVE ALL THE DUPLICATES.

11 THE COURT: WELL, HELP ME OUT. MY RECOLLECTION IS
12 THAT MR. POTTS SAID HE DOWNLOADED THE DEER CAMERA DATA TO
13 HIS COMPUTER, FROM THAT HE BURNED THIS DISK THAT IS NOW
14 SEEKING TO BE INTRODUCED, IS THAT RIGHT?

15 MR. MCDANIEL: THAT IS CORRECT, JUDGE.

16 THE COURT: IS THAT RIGHT?

17 MR. CHAPLIN: THAT IS WHAT I UNDERSTAND AS WELL, YOUR
18 HONOR.

19 THE COURT: YOUR OBJECTION IS UNDER THE BEST EVIDENCE
20 RULE CODIFIED BY RULES 1001 THROUGH 1004 WHICH REQUIRES IN
21 ORDER TO PROVE THE CONTENTS OF THE PHOTOGRAPHS THE
22 ORIGINAL IS REQUIRED. THE DEFINITION OF ORIGINAL UNDER
23 RULE 1001 SAYS, AN ORIGINAL OF A PHOTOGRAPH INCLUDES THE
24 NEGATIVE OR ANY PRINT THEREFROM. IF DATA ARE STORED IN A
25 COMPUTER OR SIMILAR DEVICE, ANY PRINTOUT OR OTHER OUTPUT

1 READABLE BY SIGHT SHOWN TO REFLECT THE DATA ACCURATELY IS
2 AN ORIGINAL. SO, HOW COULD THAT NOT BE AN ORIGINAL BASED
3 ON THE TESTIMONY WE HAVE BEFORE US BECAUSE IT IS DATA
4 STORED IN A COMPUTER THAT WILL BE OUTPUT READABLE BY
5 SIGHT. IT IS THE SAME PICTURE THAT WAS ON THE DEER CAMERA
6 BASED ON THE FOUNDATION MADE BY THE STATE. I THINK THE
7 BEST EVIDENCE RULE WAS DESIGNED TO KEEP TESTIMONY AND
8 EVIDENCE COMING IN ABOUT A LETTER, FOR INSTANCE, WITHOUT
9 PUTTING IN THE ORIGINAL LETTER ITSELF BECAUSE THE LETTER
10 WOULD BE, "THE BEST EVIDENCE OF THE CONTENTS." THAT IS
11 WHAT THE RULE IS DESIGNED TO DO. AND HERE THOSE PURPOSES
12 AREN'T SERVED BY SOME RULE THAT WOULD REQUIRE THE ORIGINAL
13 IMAGE OF WHATEVER REALITY THAT WAS CAPTURED BY THE
14 PHOTOGRAPH WHEN IT WAS TAKEN. IT COULD GET INTO CERATIN
15 SITUATIONS WHERE THE ORIGINAL WOULD BE FOUND THAT WAS AN
16 IMAGE THAT WAS SEEN THROUGH THE VIEWFINDER AT THE TIME THE
17 SHUTTER CLOSED OR SOMETHING OF THAT NATURE. BUT THAT IS
18 NOT WHAT THE RULE SAYS. THE RULE SAYS, IT DEFINES THE
19 ORIGINAL THE WAY I QUOTED IT AND I THINK BASED ON THE
20 TESTIMONY THAT THE CONTENTS ON THAT CD WOULD QUALIFY AS AN
21 ORIGINAL UNDER THAT DEFINITION. SO, I RESPECTFULLY
22 OVERRULE YOUR OBJECTION.

23 MR. CHAPLIN: THANK YOU, YOUR HONOR.

24 THE COURT: ANYTHING BEFORE WE BRING THE JURY BACK
25 IN?

1 MR. CHAPLIN: NO, SIR.

2 MR. MCDANIEL: NO, SIR.

3 THE COURT: BRING THE JURY IN.

4 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
5 APPROXIMATELY 2:10 P.M.)

6 DIRECT EXAMINATION

7 BY MR. MCDANIEL:

8 Q YOU HAD TALKED ABOUT PUTTING THE CAMERA ON THE
9 REFRIGERATOR?

10 A RIGHT.

11 Q TO CAPTURE AN IMAGE OF SOMEBODY?

12 A RIGHT.

13 Q I AM GOING TO HAND YOU, WHAT IS THAT?

14 A THIS IS THE CAMERA THAT I USED TO PUT ON THE
15 REFRIGERATOR.

16 Q AND THAT IS YOUR CAMERA, RIGHT?

17 A YES.

18 Q CAN YOU EXPLAIN TO US HOW THAT WORKS?

19 A OKAY. BASICALLY YOU SET IT UP AND CUT IT ON TO TAKE
20 PHOTOGRAPHS AND IT IS--

21 Q CAN YOU TAKE PICTURES DURING THE DAY?

22 A YES, I CAN. I HAD TO SET IT UP FOR A BURST OF THREE
23 DIFFERENT PICTURES. AND DURING THE DAY IT CAN TAKE MORE
24 PICTURES WITHOUT A FLASH AND AT NIGHT IT HAS A RED SENSOR
25 AND IT DOES AN INFRARED FLASH AND IT TAKES PICTURES THEN.

1 BUT THAT ONLY HAPPENS AT NIGHT.

2 Q WHEN YOU SAY FLASH?

3 A IT IS A LITTLE RED PULSE ACROSS THIS BAR RIGHT HERE,
4 THAT IS RED.

5 Q BUT IT IS NOT LIKE WHEN WE--

6 A IT IS NOT A CAMERA FLASH, IT IS KIND OF A LITTLE GLOW
7 ON IT.

8 Q AND WHAT ACTIVATES THAT CAMERA?

9 A IT HAS A MOTION SENSOR ON THE FRONT HERE AND THEN
10 WHATEVER GOES IN FRONT OF IT WHETHER IT IS ME OR THE CAT
11 OR SOMEONE ELSE IN THE HOUSE, IT ACTIVATES AND THEN IT
12 STARTS TAKING PICTURES.

13 Q AND YOU SAID SOMETHING ABOUT LIKE THREE PICTURE
14 BURST. HOW DID YOU HAVE THAT SET UP?

15 A I HAD IT SET FOR THREE AND AS SOON AS IT IS ACTIVATED
16 IT WILL TAKE ONE PICTURE AND THERE IS A DELAY OF TEN TO
17 TWELVE OR THIRTEEN SECONDS, SOMETHING LIKE THAT. AND THEN
18 IT TAKES ANOTHER PICTURE AND ANOTHER DELAY AND THEN IT
19 TAKES ANOTHER PICTURE.

20 Q AND THAT IS A SETTING, RIGHT?

21 A I CAN SET IT UP TO DO ONE PICTURE AND THEN RESET SO I
22 CAN SET IT TO DO TWO OR THREE AND IT CAN DO VIDEO ALSO BUT
23 I DIDN'T HAVE IT ON THAT.

24 Q SO, IT IS UP TO THREE AND YOU HAD IT SET ON THE
25 THREE?

1 A THE THREE PICTURE BURST, YES.

2 Q AND JUST WANT TO MAKE SURE I AM CLEAR. SO, WHEN IT
3 DETECTS MOTION IT TAKES A PICTURE?

4 A CORRECT.

5 Q AND THEN THERE IS A DELAY AND IT TAKES ANOTHER
6 PICTURE AND THEN THE DELAY AND THEN IT TAKES ANOTHER
7 PICTURE AND THEN THAT IS THE END OF THAT CYCLE?

8 A RIGHT.

9 Q AND THAT IS HOW YOU HAD IT SET UP THAT NIGHT?

10 A RIGHT.

11 Q THANK YOU.

12 MR. CHAPLIN: I RENEW THE OBJECTION I MADE EARLIER,
13 YOUR HONOR.

14 THE COURT: OKAY.

15 MR. CHAPLIN: ABOUT THE ADMISSIBILITY OF THE CD.

16 THE COURT: THANK YOU, MR. CHAPLIN.

17 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED STATE'S
18 EXHIBIT 1 FOR IDENTIFICATION PURPOSES.

19 A OKAY.

20 Q DO YOU KNOW WHAT THAT IS?

21 A THIS IS THE DVD THAT I PROVIDED TO THE POLICE OF THE
22 PICTURES ON THAT CAMERA.

23 Q DID YOU DOWNLOAD?

24 A YES.

25 Q HOW DID YOU OBTAIN THESE PICTURES?

1 A WE TOOK IT BACK TO A LAPTOP AND DOWNLOADED ON THE
2 LAPTOP AND THEN PRINTED IT ON A DVD.

3 Q HAVE YOU SEEN THE PICTURES ON THERE?

4 A YES.

5 Q HOW MANY PICTURES ARE ON THERE?

6 A THERE ARE NINE PICTURES ON THERE.

7 Q AND DO THEY FAIRLY AND ACCURATELY REPRESENT THE
8 OFFENSE THAT TOOK PLACE THAT NIGHT?

9 A YES.

10 Q ANY ALTERATIONS OR DELETIONS MADE?

11 A NO.

12 Q THANK YOU.

13 MR. MCDANIEL: YOUR HONOR, I WOULD ASK THAT STATE'S
14 EXHIBIT 1 BE MOVED INTO EVIDENCE IN THIS CASE.

15 THE COURT: IT IS IN EVIDENCE SUBJECT TO THE DEFENSE
16 OBJECTION.

17 (WHEREUPON, STATE'S EXHIBIT NO. 1 WAS ADMITTED INTO
18 EVIDENCE.)

19 MR. MCDANIEL: YOUR HONOR, PERMISSION TO PUBLISH
20 STATE'S 1 TO THE JURY.

21 THE COURT: YES, SIR.

22 MR. MCDANIEL: THANK YOU.

23 (WHEREUPON, THE DVD WAS PLAYED FOR THE JURY.)

24 Q MR. POTTS, I WILL ASK YOU TO GET DOWN FROM THE STAND
25 AND SHOW ME THESE PICTURES AND SPEAK UP SO EVERYBODY CAN

1 HEAR YOU. WHAT IS THAT PICTURE OF?

2 A THAT IS A PICTURE OF THE DOORWAY COMING INTO MY
3 KITCHEN, THE REFRIGERATOR WOULD BE ABOUT THERE.

4 Q BEFORE WE GET STARTED, ON THE BOTTOM THERE, WHAT ARE
5 THOSE?

6 A HERE?

7 Q YES.

8 A THAT IS LITTLE -- DATE AND TIME IS OFF.

9 Q HAD YOU SET THAT TIME?

10 A I DON'T THINK THAT I SET THE TIME, I SET THE DATE ON
11 IT.

12 Q SO THE TIME IS OFF A COUPLE OF HOURS?

13 A RIGHT.

14 Q I AM GOING TO GO TO THE NEXT PICTURE. THAT IS
15 PICTURE NUMBER TWO, THE SAME?

16 A YES.

17 Q AND I WILL GO TO THE NEXT ONE.

18 A ANY MOTION WILL SET THAT CAMERA OFF, THE DOOR, IF YOU
19 WALK PAST THE DOORWAY IT WILL SET IT OFF.

20 Q OKAY. THAT WOULD BE THE THIRD?

21 A THE THIRD IN THE SERIES.

22 Q AND WHAT IS THE DELAY BETWEEN THOSE AGAIN?

23 A APPROXIMATELY THIRTEEN SECONDS, SOMEWHERE IN THAT.

24 Q IS THAT THE IMAGE THAT YOU SAW THAT NIGHT?

25 A YES.

1 Q SO, THAT IS IMAGE FOUR, CORRECT?

2 A YES.

3 Q SO, THAT IS THE FIFTH IMAGE?

4 A RIGHT.

5 Q THERE IS A DELAY, RIGHT?

6 A RIGHT.

7 Q SO, WHAT IS THE CAMERA DOING IN THOSE THIRTEEN
8 SECONDS?

9 A IT IS JUST TAKING A PICTURE OF THE SAME SPOT.

10 Q WHY DOES IT WAIT, WHAT IS THE PURPOSE OF THE THIRTEEN
11 SECONDS?

12 A SO IT WON'T TAKE THE SAME PICTURE THREE TIMES. IT IS
13 SET UP FOR DEER, SO YOU DON'T TAKE A PICTURE OF THE SAME
14 DEER MOVING AROUND, MULTIPLE PICTURES.

15 Q SO, THAT WOULD BE, THAT IS THE SIXTH PICTURE?

16 A THAT IS THE THIRD ONE IN THE SECOND SERIES. AND THEN
17 THERE IS ANOTHER DELAY.

18 Q AND THIS WOULD START?

19 A IT WOULD SET UP AGAIN AND START ANOTHER SERIES.

20 Q THIS IS NUMBER TWO?

21 A THERE IS A LIGHT, THIS IS THE DOOR BEING OPENED RIGHT
22 THERE.

23 Q AND THIS IS THE LAST PICTURE AND THOSE ARE THE NINE
24 PICTURES?

25 A THOSE ARE THE NINE PICTURE.

1 Q THANK YOU, YOU CAN HAVE A SEAT. YOU DIDN'T KNOW WHO
2 WAS ON THAT CAMERA, RIGHT?

3 A NO, I HAD NEVER SEEN THAT PERSON BEFORE.

4 Q ANYBODY HAVE PERMISSION TO GO INTO YOUR HOUSE?

5 A ONLY MY GIRLFRIEND.

6 Q WHOEVER IS ON THERE DID NOT HAVE PERMISSION?

7 A NO.

8 Q DO YOU KEEP YOUR HOUSE LOCKED?

9 A YES.

10 Q ARE YOU ABLE TO TELL HOW THE PERSON GOT IN THE HOUSE
11 THAT NIGHT?

12 A IT APPEARED THEY CAME THROUGH THE BEDROOM WINDOW
13 WHERE I HAD A WINDOW UNIT.

14 Q WHAT IS A WINDOW UNIT?

15 A AIR-CONDITIONING UNIT, STUCK IN THE WINDOW THERE.
16 THAT WINDOW WASN'T LOCKED BECAUSE IT WAS SITTING IN THERE.

17 Q WAS THE AIR-CONDITIONING UNIT THERE THAT MORNING?

18 A IT WAS BACK IN PLACE, YES, THERE WAS, OUTSIDE OF THE
19 WINDOW YOU CAN SEE WHERE SOMEBODY HAD BEEN WALKING AROUND
20 AND A CHAIR HAD BEEN MOVED OVER NEAR THE WINDOW. AND
21 THERE WAS SOME OLD WINDOW FRAMES AND HAD BEEN STEPPED ON
22 AND BROKEN TO GET INTO THE WINDOW.

23 Q BUT THE WINDOW UNIT WAS PUT BACK?

24 A THE WINDOW WAS PUT BACK THE WAY IT WAS.

25 Q WHO PUT THE WINDOW UNIT IN?

1 A I DID. IT IS A SMALL UNIT THAT YOU CAN BUY JUST FOR
2 ONE ROOM.

3 Q SO, YOU CAN MOVE THESE?

4 A YES.

5 Q DO YOU REMEMBER ABOUT WHAT TIME YOU CALLED THE
6 POLICE?

7 A IT WAS LATE IN THE MORNING, 10:00 TO 11:00, SOMEWHERE
8 IN THAT BALLPARK.

9 Q AND ABOUT HOW LONG YOU THINK IT TOOK THE POLICE TO
10 SHOW UP?

11 A NOT TOO LONG, TWENTY MINUTES MAYBE.

12 Q WHO WAS THERE AT THE HOUSE WHEN THEY CAME?

13 A JUST MYSELF.

14 Q WERE YOU ABLE TO DOWNLOAD THE PICTURES THERE?

15 A I VIEWED THEM, MY COMPUTER WASN'T CAPABLE TO DO THAT.
16 THAT IS WHY I TOOK IT TO ONE THAT COULD DO THAT ON.

17 Q AND I KNOW YOU ALREADY TOLD THE, WHERE DID YOU
18 DOWNLOAD THE PICTURES?

19 A ONTO A LAPTOP AT WORK WE HAD AT THE BLUE MOON.

20 Q NOW, DO YOU KNOW THE DEFENDANT?

21 A NO.

22 Q MR. POTTS, WHAT WAS TAKEN FROM YOUR HOME?

23 A IT WAS ABOUT \$100.00 DOLLARS WORTH OF QUARTERS I HAD
24 IN A BOX.

25 Q WHERE WAS THAT?

1 A IT WAS ON MY CHESTER DRAWERS IN THE BEDROOM. AND A
2 FEW ARTICLES OF CLOTHING INCLUDING SOME SOCKS AND A HAT,
3 STUFF LIKE THAT.

4 MR. CHAPLIN: OBJECTION, YOUR HONOR. YOUR HONOR,
5 PURSUANT TO THE MOTION THAT WAS HEARD YESTERDAY I THINK WE
6 DISCUSSED THIS ISSUE. AND I AM CONCERNED WITH YOUR RULING
7 IN THAT SITUATION.

8 THE COURT: I OVERRULE THE OBJECTION, GO AHEAD.

9 Q ANYTHING ELSE TAKEN?

10 A AND THEN THERE WAS SOME BEER TAKEN OUT OF THE
11 REFRIGERATOR.

12 Q HOW MANY?

13 A FOUR OR FIVE CANS OF BEER.

14 Q HOW MUCH WAS THE BEER WORTH?

15 A SIX DOLLARS, IT WAS CHEAP BEER.

16 Q UNDER \$1,000.00 DOLLARS?

17 A YES, UNDER \$1,000.00 DOLLARS.

18 Q AND NOBODY HAD PERMISSION TO COME TO YOUR HOUSE?

19 A NO.

20 Q TO TAKE ANYTHING?

21 A NO.

22 Q ANYBODY HAVE A KEY?

23 A ONLY MY GIRLFRIEND HAS A KEY.

24 Q NO FURTHER QUESTIONS.

25 THE COURT: MR. CHAPLIN.

1 CROSS-EXAMINATION

2 BY MR. CHAPLIN:

3 Q GOOD AFTERNOON AGAIN, MR. POTTS. I THINK THAT YOU
4 STATED THAT YOU LIVE AT [REDACTED] PAULINE STREET?

5 A THAT IS CORRECT.

6 Q AND YOU LIVE THERE ALONE?

7 A I DO.

8 Q AND ON OCTOBER 27TH OR THE MORNING OF OCTOBER 28TH
9 YOU REPORTED TO NEWBERRY POLICE THAT THERE WAS A BURGLARY
10 AT YOUR HOME?

11 A ON THAT NEXT MORNING, YES.

12 Q MR. POTTS, LET'S JUST TALK ABOUT YOUR HOME FOR A
13 SECOND. DO YOU HAVE TELEVISIONS IN THE HOUSE?

14 A YES.

15 Q DO YOU HAVE STEREOS?

16 A NO.

17 Q DO YOU HAVE COMPUTERS?

18 A YES.

19 Q DO YOU HAVE CD'S?

20 A A FEW.

21 Q WHAT ABOUT VIDEO GAMES?

22 A NO.

23 Q YOU HAVE CAMERAS?

24 A OTHER THAN THIS ONE I DIDN'T AT THE TIME, NO.

25 Q BUT YOU DID HAVE A CAMERA?

1 A THE ONE THAT I USED TO TAKE THESE PICTURES, YES.

2 Q YOU HAVE FURNITURE?

3 A YES.

4 Q WHAT ABOUT LAWNMOWERS AND LAWN EQUIPMENT, SOMEWHERE
5 NEAR THE HOUSE ON YOUR PROPERTY?

6 A THAT HAS ALREADY BEEN TAKEN TO BE HONEST WITH YOU.

7 Q YOU HAVE A BAR IN THE HOUSE?

8 A I HAVE ALCOHOL IN THE HOUSE, YES. I DON'T HAVE A
9 BAR, NO.

10 Q ARE ANY OF THOSE THINGS TAKEN TO YOUR KNOWLEDGE ON
11 THE MORNING OF 10/28?

12 A THE BEER WAS TAKEN.

13 Q BEER?

14 A YES.

15 Q AND I THINK YOU INDICATED THAT AROUND \$100.00 DOLLARS
16 IN COINS?

17 A YES.

18 Q TAKEN?

19 A YES.

20 Q MR. POTTS, DO YOU REMEMBER CALLING THE POLICE THE
21 FOLLOWING MORNING REGARDING, TO REPORT THIS BREAK-IN?

22 A YES.

23 Q AND DO YOU REMEMBER SPEAKING WITH AN OFFICER BY THE
24 NAME OF OFFICER MOORE?

25 A I DON'T REMEMBER THE NAME.

1 Q DO YOU REMEMBER SPEAKING WITH AN OFFICER?

2 A YES. AT LEAST DISPATCH.

3 Q AND DID YOU PROVIDE THE OFFICER WITH INFORMATION AT
4 THAT TIME?

5 A I BELIEVE I JUST SAID THAT SOMEONE HAD BROKEN INTO MY
6 HOUSE AND I NEEDED SOMEONE TO COME AND INVESTIGATE.

7 Q AND DID SOMEBODY INVESTIGATE?

8 A YES.

9 Q AT THAT TIME WHEN THEY INVESTIGATED DID YOU TELL THEM
10 THAT YOU WERE MISSING \$100.00 DOLLARS OR \$70.00 DOLLARS?

11 A \$100.00.

12 Q MR. POTTS, ISN'T IT TRUE THAT IT WASN'T UNTIL THE
13 30TH, MAYBE TWO OR THREE DAYS LATER THAT YOU CALLED BACK
14 AND SAID YOU WERE MISSING \$70.00 DOLLARS.

15 A I ADDED TO THE LIST, ONCE I HAD DONE A FULL INVENTORY
16 OF EVERYTHING IN THE HOUSE.

17 Q SO, YOU DIDN'T TELL THEM THAT ON THE, THE MORNING OF
18 THE 28TH?

19 A I AM NOT SURE WHICH ITEM I TOLD THEM THAT MORNING AND
20 WHICH ITEMS I TOLD LATER.

21 Q BUT YOU ARE CERTAIN THAT YOU SAID \$100.00 DOLLARS AND
22 NOT \$70.00?

23 A IT WAS APPROXIMATELY \$100.00 DOLLARS BECAUSE I WAS
24 COLLECTING THE STATE COINS AND I WAS TRYING TO KEEP A
25 DOLLAR OF EACH STATE AND THEY WERE ALL GONE.

1 Q MY QUESTION IS, WHAT DID YOU TELL THE OFFICER WHEN
2 YOU REPORTED THE BURGLARY, \$70.00 OR \$100.00?

3 A I BELIEVE I TOLD THEM \$100.00.

4 Q NOW, YOU SAID YOU CAME IN AND YOU NOTICED THERE WAS A
5 PICTURE ON YOUR DEER CAMERA?

6 A YES.

7 Q LET ME JUST BACK UP FOR A SECOND. YOU SAID YOU HAD
8 SOME OTHER PROBLEMS AT THAT LOCATION SO YOU BOUGHT A DEER
9 CAMERA?

10 A YES.

11 Q DID YOU EVER USE THE DEER CAMERA BEFORE?

12 A I HADN'T USED THAT ONE BECAUSE I HADN'T GOTTEN ONE
13 BUT I HAD USED ONE BEFORE, YES.

14 Q YOU HAVE?

15 A YES.

16 Q SO YOU HAVE SET THEM UP?

17 A YES. AND I HAD USED THAT ONE THAT FULL WEEK TESTING
18 SO I HAD PICTURES OF MYSELF JUST TO SEE IT WORK.

19 Q SO, YOU TOOK PICTURES OF YOURSELF THE WHOLE WEEK?

20 A EVERYTHING THAT MADE A MOTION IN THAT KITCHEN GOT A
21 PICTURE TAKEN OF IT THAT WAS IN THE VIEW OF THE CAMERA.
22 SO, IF IT WAS MY CAT JUMPING ON THE COUNTER OR ME WALKING
23 THROUGH THE HALLWAY, THAT IS WHAT IT GOT A PICTURE OF.

24 Q SO, WHEN YOU CAME HOME YOU CHECKED THE CAMERA BECAUSE
25 YOU THOUGHT SOMEBODY HAD BEEN IN THE HOUSE?

1 A CORRECT.

2 Q AND THEN YOU, I THINK YOU SAID YOU HAD YOUR
3 GIRLFRIEND WITH YOU?

4 A YES.

5 Q SO, YOU THEN WALKED THROUGH THE HOUSE TO MAKE SURE IT
6 WAS CLEAR?

7 A I WALKED THROUGH THE HOUSE FIRST.

8 Q WHAT DO YOU MEAN BY FIRST?

9 A WHEN WE FIRST GOT THERE I COULD TELL SOMEBODY TRIED
10 TO BREAK INTO THE HOUSE SO I TOLD HER TO WAIT OUTSIDE AND
11 I WALKED THROUGH.

12 Q RIGHT.

13 A AND THEN I CHECKED THE CAMERA WHILE I WAS IN THERE.

14 Q AND THEN AFTER YOU CHECKED THE CAMERA WHAT DID YOU
15 DO?

16 A WE WENT TO BED.

17 Q YOU SAW THERE WAS A PICTURE OF A PERSON ON THE
18 CAMERA?

19 A YES.

20 Q YOU WEREN'T CONCERNED THAT MAYBE YOU MIGHT OF MISSED
21 IT AND THE PERSON WAS STILL THERE?

22 A I CAN'T SAY IT WAS A CONCERN BUT I DIDN'T SEE
23 ANYBODY.

24 Q AT THAT TIME YOU CALLED YOUR GIRLFRIEND AND THEN
25 Y'ALL WENT TO BED?

1 A YES, SHE WAS RIGHT OUTSIDE.

2 Q AND THEN THE NEXT MORNING YOU CALLED THE POLICE?

3 A CORRECT.

4 Q WHEN WAS THAT?

5 A SOMEWHERE BETWEEN 10:00 AND 11:00 I THINK IT WAS, I
6 AM NOT EXACTLY SURE WHAT TIME IT WAS.

7 Q AND YOU SAID THAT YOU THOUGHT SOMEONE HAD ENTERED
8 YOUR HOME BECAUSE IT LOOKED LIKE A WINDOW HAD BEEN
9 TAMPERED WITH?

10 A THERE WAS A WINDOW BESIDE THE BACKDOOR WHERE I ALWAYS
11 ENTER AND IT HAD BEEN BROKEN INTO BEFORE, SOMEBODY JUST
12 SLID IT OPEN BECAUSE IT WASN'T LOCKED. AND I HAD PUT A
13 BOARD ON THE WINDOW SO IT COULDN'T BE SLID UP ANYMORE BUT
14 OBVIOUSLY YOU COULD SEE WHERE SOMEONE HAD DUG INTO THE
15 WINDOW WITH A TOOL OF SOME SORT TO TRY TO GET IN.

16 Q SO HOW DO YOU THINK THE PERSON GOT IN IF THEY DIDN'T
17 GET IN THERE?

18 A THEY MOVED OVER TO THE NEXT WINDOW AND CRAWLED IN, I
19 AM ASSUMING TO THAT WINDOW.

20 Q THROUGH THE NEXT WINDOW?

21 A RIGHT.

22 Q AND THAT WINDOW CONTAINS AN AIR-CONDITIONING UNIT?

23 A YES.

24 Q SO, WHEN YOU GOT HOME WAS THE AIR-CONDITIONING UNIT
25 SITTING ON THE GROUND?

1 A NO.

2 Q IT WAS IN THE WINDOW?

3 A CORRECT.

4 Q SO, YOU ARE SAYING THAT THE PERSON TOOK THE UNIT OUT
5 AND WENT IN AND TOOK FOUR OR FIVE CANS OF BEER AND SOME
6 COINS. LEFT THE HOUSE, PUT THE UNIT BACK?

7 A I DIDN'T SAY IT LIKE THAT. I SAID IT WAS EVIDENCE
8 THAT SOMEBODY HAD TRIED TO GO IN THROUGH THAT WINDOW, THEY
9 HAD BROKEN A WINDOW PANE, MOVED A CHAIR AROUND, THAT IS
10 WHERE IT APPEARS THE WAY THEY WENT IN. I KNEW THEY HAD
11 BEEN IN WHEN I FOUND THE PICTURE. THEY MAY OF TRIED TO GO
12 IN THAT WINDOW BUT WENT IN A DIFFERENT WINDOW BUT I
13 COULDN'T TELL. I JUST NOTICED THAT THERE WAS EVIDENCE
14 THAT SOMEONE HAD TRIED TO GO THROUGH THAT WINDOW.

15 Q SO, DID YOU EVER DETERMINE HOW THE PERSON IN THE
16 PICTURE ENTERED YOUR HOME?

17 A I CAN'T FOR SURE DETERMINE HOW HE GOT IN THERE, I
18 JUST KNOW THAT HE WAS IN THERE ACCORDING TO THE PICTURE.

19 Q WERE YOUR DOORS LOCKED WHEN YOU CAME HOME?

20 A YES.

21 Q WERE ANY WINDOWS BROKEN?

22 A THERE WAS DAMAGE TO ONE, IT WASN'T BROKEN.

23 Q WAS ANY GLASS BROKEN IN THE WINDOWS?

24 A NO.

25 Q WHEN YOU CAME IN THE HOME WAS IT IN SHAMBLES,

1 DISTURBED?

2 A NOT REALLY, NO.

3 Q SO, LET'S TALK ABOUT THE CAMERA THAT YOU SAY YOU PUT
4 IN THE HOUSE. YOU INDICATED THAT YOU HAD SOME PROBLEMS AT
5 THAT LOCATION IN THE PAST?

6 A YES.

7 Q SO, YOUR RESPONSE TO THAT WAS TO BUY A DEER CAMERA?

8 A YES.

9 Q AND INSTALL IT IN YOUR KITCHEN?

10 A CORRECT.

11 Q WAS IT FACING ANY ENTRY DOORS TO THE HOUSE?

12 A NO.

13 Q DO YOU HAVE A LOT OF VALUABLES IN YOUR KITCHEN?

14 A NOT REALLY, NO.

15 Q IS THERE A REASON WHY YOU PUT IT IN THE KITCHEN?

16 A BECAUSE THERE WAS ALMOST AN IDENTICAL BURGLARY ABOUT
17 A WEEK BEFORE, ABOUT TEN DAYS BEFORE. SOMEBODY HAD GONE
18 THROUGH MY HOUSE THROUGH THAT SAME WINDOW THAT HAD BEEN
19 DAMAGED.

20 Q WAS THE CAMERA FACING THAT WINDOW?

21 A NO. AND THEY HAD GONE INTO THE REFRIGERATOR AND
22 STOLE SOME OTHER BEER AND SOME LIQUOR AND STUFF IN THE
23 HOUSE. SO, I HAD JUST NATURALLY ASSUMED THEY MAY COME
24 BACK BECAUSE THEY GOT AWAY WITH IT THE FIRST TIME.

25 Q SO, WHEN SOMEBODY MOVES AROUND IN YOUR KITCHEN IT

1 TAKES A PICTURE OF THAT PERSON, RIGHT?

2 A AS LONG AS THEY ARE IN FRONT OF THE CAMERA, YES.

3 Q WHEN SOMEONE ENTERS THE KITCHEN IT TAKES A PICTURE?

4 A THROUGH THAT PARTICULAR DOOR, THERE IS ANOTHER DOOR.

5 Q IF SOMEONE LEAVES THE KITCHEN IT WOULD TAKE A
6 PICTURE?

7 A AS LONG AS IT WASN'T IN THE MIDDLE OF A CYCLE OR
8 SOMETHING LIKE THAT, YES.

9 Q AND SOMEBODY MOVES AROUND IN THE KITCHEN IT WOULD
10 TAKE A PICTURE ALSO?

11 A IT WILL TAKE PICTURES AS LONG AS SOMEBODY IS MOVING
12 WITH THOSE DELAYS IN BETWEEN, AS LONG AS IT IS IN FRONT OF
13 THAT MOTION SENSOR.

14 Q I THINK YOU TESTIFIED THAT YOU HAD BEEN IN AND OUT OF
15 THE KITCHEN THAT ENTIRE DAY TESTING THE CAMERA?

16 A I DIDN'T SAY THAT, NO.

17 Q HAD YOU BEEN IN THE KITCHEN THAT DAY?

18 A PROBABLY, YES.

19 Q WAS THE CAMERA INSTALLED?

20 A YES.

21 Q NOW, THE PICTURES THAT WE SAW A SECOND AGO WAS A
22 TOTAL OF NINE?

23 A YES.

24 Q DOES THE CAMERA HOLD MORE THAN NINE PICTURES?

25 A YES.

1 Q BUT WE ONLY SAW NINE?

2 A CORRECT.

3 Q AND WHO DECIDED WHICH NINE YOU COULD SEE?

4 A I DID.

5 Q SO, YOU ARE SAYING THAT ALL THE PICTURES, WE HAVEN'T
6 SEEN ALL THE PICTURES?

7 A YOU HAVE SEEN ALL THE PICTURES THAT WERE IN THIS
8 TIMEFRAME. THERE IS NO REASON TO SHOW A PICTURE OF ME
9 WALKING AROUND IN A TOWEL.

10 Q WE ARE NOT SURE WHAT TIMEFRAME THERE IS BECAUSE YOU
11 SAY IT HAPPENED AT ONE TIME AND THE CAMERA SAYS IT IS A
12 DIFFERENT TIME. SO, YOU MADE THAT DECISION AS WELL?

13 A WHAT DO YOU MEAN?

14 Q JUST TO SHOW US A CERTAIN NUMBER OF PICTURES?

15 A THAT WAS THE ONLY ONES WHILE I WAS GONE THAT NIGHT,
16 YES.

17 Q BUT YOU CAME HOME AND YOU CHECKED THE CAMERA THAT
18 NIGHT AS WELL, RIGHT?

19 A YES.

20 Q AND IT TOOK A PICTURE OF YOU AT THAT TIME?

21 A I ASSUME IT DID, I DON'T REMEMBER EXACTLY.

22 Q AND YOU SAID THE CAMERA HAD BEEN INSTALLED DURING THE
23 DAY IN YOUR KITCHEN?

24 A YES.

25 Q AND IT TOOK PICTURES OF YOU, IT IS MOTION ACTIVATED

1 SO IT TOOK PICTURES OF YOU DURING THE DAY?

2 A CORRECT.

3 Q SO, IT IS POSSIBLE THERE ARE PICTURES TAKEN BY THAT
4 CAMERA THAT WE MIGHT THINK IS HELPFUL THAT WE HAVEN'T
5 SEEN. IS THAT POSSIBLE?

6 A I DON'T THINK SO.

7 Q WHY NOT?

8 A BECAUSE THERE IS NOTHING ELSE ON THOSE PICTURES OTHER
9 THAN MYSELF WALKING DURING THE DAY.

10 Q WELL, THE CAMERA, I THINK YOU STATED THAT THE CAMERA
11 HOLDS MORE THAN NINE PICTURES?

12 A YES.

13 Q BUT THE ONLY ONES THAT YOU PROVIDED US ARE THE ONES
14 YOU THOUGHT WERE THE IMPORTANT ONES?

15 A THEY WERE THE ONLY ONES THAT SHOWED THE OCCURRENCE
16 THAT NIGHT.

17 Q BASED ON YOUR OPINION?

18 A THAT IS WHAT IS ON THE CAMERA.

19 Q WHERE ARE THE OTHER PICTURES?

20 A THEY ARE PROBABLY STILL ON THE COMPUTER.

21 Q NOW, WHEN THE POLICE OFFICER CAME TO YOUR HOME THAT
22 MORNING DID YOU SHOW THAT PERSON THE PICTURES?

23 A I SHOWED HIM THESE NINE PICTURES, YES.

24 Q YOU SHOWED HIM ONLY NINE. SO, SOMETIME BETWEEN, SO
25 WHEN DID YOU SELECT THE NINE, BEFORE YOU CALLED THE

1 POLICE?

2 A I LOOKED AT THEM BEFORE I CALLED THE POLICE. THAT IS
3 HOW I KNEW SOMEBODY WAS IN MY HOUSE.

4 Q SO, YOU PICKED OUT NINE AND THAT IS WHAT YOU SHOWED
5 THE POLICE?

6 A THERE WERE SOME DIFFERENT DAYS ON THERE SO THERE WAS
7 NO REASON, THEY WERE NOT IMPORTANT TO THIS CASE.

8 Q DID THE OFFICER SAY THAT OR DID YOU SAY THAT?

9 A I SAID THAT.

10 Q I THINK A LITTLE EARLIER YOU AND THE SOLICITOR WERE
11 KIND OF CHUCKLING OVER THE BEER IN THERE. YOU SAID FOUR
12 CANS OF BEER WERE TAKEN?

13 A I JUST KNOW THAT THE BEERS IN THERE WERE GONE, THERE
14 WERE FOUR OR FIVE CANS. I DON'T KNOW THE EXACT COUNT.

15 Q WHEN DID YOU BUY THE BEER?

16 A I DON'T RECALL THAT. I WOULD PROBABLY SAY THE WEEK
17 BEFORE.

18 Q BUT YOU ARE NOT CERTAIN?

19 A NOT CERTAIN.

20 Q DO YOU EVER HAVE ANY GUESTS IN YOUR HOME?

21 A OTHER THAN MY GIRLFRIEND IT IS VERY RARE.

22 Q DOES IT EVER OCCUR?

23 A IT HAS, YES.

24 Q NOW, YOU SAID YOU LOOKED AT THE PHOTO ON THE CAMERA?

25 A YES.

1 Q AND I THINK IT IS YOUR TESTIMONY THAT YOU HAVE NO
2 CLUE WHO THAT INDIVIDUAL MIGHT BE?

3 A I HAVE NEVER SEEN HIM BEFORE, NO.

4 Q AND THEN YOU, YOU SAID YOU DOWNLOADED THE PICTURES
5 ONTO A LAPTOP AT THE BLUE MOON THE NEXT MORNING?

6 A CORRECT.

7 Q IS THAT BEFORE YOU CALLED THE POLICE?

8 A THAT WAS AFTER.

9 Q AFTER. SO, DID THE POLICE LOOK AT ANY PICTURES THAT
10 WERE MADE OUT THERE?

11 A THEY COULD VIEW IT ON MY LAPTOP BUT I COULDN'T PRINT
12 THEM OFF.

13 Q SO, YOU ACTUALLY DOWNLOADED IT ONTO YOUR LAPTOP?

14 A IT IS NOT DOWNLOADED ON THERE, YOU CAN VIEW THEM ON
15 THERE.

16 Q YOU JUST VIEWED IT FROM YOUR LAPTOP?

17 A RIGHT.

18 Q WHEN THE POLICE WERE THERE?

19 A I SHOWED THEM THAT PICTURE THAT YOU SAW THERE.

20 Q THE NINE?

21 A YES.

22 Q DID THE POLICE ASK TO SEE ANY OTHER PICTURES?

23 A I DON'T RECALL.

24 Q DID YOU TELL THEM THERE WERE OTHERS?

25 A I DON'T RECALL.

1 Q SO, THEN AFTER YOU TOOK THE CAMERA YOU, THE POLICE
2 VIEWED THE PICTURES ON YOUR LAPTOP. YOU THEN, THE POLICE
3 LEFT, IS THAT CORRECT?

4 A YES.

5 Q AND DID THEY GIVE YOU INSTRUCTIONS AS TO WHAT TO DO?

6 A THEY TOLD ME TO BRING IT DOWN THERE OR TO, SO THEY
7 COULD MAKE A COPY OF IT.

8 Q BRING WHAT DOWN?

9 A THE CAMERA.

10 Q AND DID YOU TAKE THE CAMERA TO THE POLICE?

11 A I TOOK IT UP THERE EARLIER AND WE COULDN'T MAKE A
12 COPY OF IT SO I TOOK IT TO MY COMPUTER.

13 Q SO, YOU TOOK THE CAMERA TO THE POLICE STATION?

14 A SURE.

15 Q YOU KNOW WHAT TIME THAT WAS?

16 A I DON'T RECALL EXACTLY, IT WAS EARLY.

17 Q BEFORE DARK THAT DAY?

18 A YES.

19 Q OKAY. AND WHO DID YOU TALK TO AT THE POLICE STATION?

20 A I DON'T REMEMBER THAT PART. I REMEMBER WHO I TALKED
21 TO WHEN I BROUGHT THE COPY DOWN THERE.

22 Q WHEN YOU TOOK THE CAMERA TO THE POLICE DEPARTMENT YOU
23 DON'T KNOW WHO YOU SPOKE TO?

24 A I DON'T RECALL.

25 Q BUT THAT PERSON TOLD YOU TO LEAVE WITH THE CAMERA AND

1 DO WHAT?

2 A I TOLD THEM WE COULD MAKE A COPY OF IT ON OUR LAPTOP
3 AND BRING IT TO THEM.

4 Q WHO IS WE?

5 A ME AND MY GIRLFRIEND.

6 Q SHE OBVIOUSLY CAME BACK TO YOUR HOUSE?

7 A NO, SHE WAS AT WORK AND THAT WAS THE COMPUTER WE USED
8 AT WORK.

9 Q I SEE. SO, THEN YOU LEFT THE POLICE STATION AND THEN
10 YOU WENT TO THE BLUE MOON TO DOWNLOAD?

11 A CORRECT.

12 Q NOW, WAS YOUR GIRLFRIEND WITH YOU THE FIRST TIME YOU
13 WENT TO POLICE STATION?

14 A NO.

15 Q BUT WHEN YOU WENT TO THE BLUE MOON AND YOU MADE THE
16 DISK THEN YOU AND YOUR GIRLFRIEND CAME BACK AND BROUGHT
17 THE CD TO THE POLICE?

18 A NO, I CAME ALONE AGAIN.

19 Q NOW, I THOUGHT YOU SAID WE A SECOND AGO. YOU CAME
20 BACK ALONE AND YOU GAVE THE CAMERA TO, THE DISK TO WHOM?

21 A I GAVE THE DISK TO OFFICER MCCLURKIN.

22 Q AND THEN YOU LEFT?

23 A THEY MADE AN IDENTIFICATION AS TO WHO WAS ON THAT.

24 Q THEN YOU LEFT?

25 A THEN I LEFT, YES.

1 Q MR. POTTS, YOU CALLED THE POLICE PROBABLY AROUND
2 11:00 O'CLOCK OR SO THE MORNING OF THE 28TH?

3 A IN THAT BALLPARK, I DON'T REMEMBER EXACTLY WHAT TIME.

4 Q NOW, MR. POTTS, THE INCIDENT REPORT WAS WRITTEN UP AS
5 A RESULT OF A CALL BEING MADE FROM YOUR HOUSE. DID YOU
6 EVER SEE THAT REPORT?

7 A I DON'T THINK SO.

8 Q NO. WAS IT OFFERED TO YOU FOR REVIEW?

9 A I DON'T THINK SO.

10 Q NO. NOW, WHEN THE POLICE GOT THERE THAT MORNING WERE
11 YOU WITH THE POLICE THE ENTIRE TIME?

12 A I THINK SO, YES.

13 Q WERE ANY FINGERPRINTS OBTAINED?

14 A I AM NOT SURE ABOUT THAT.

15 Q DID YOU SEE ANYBODY DUST FOR FINGERPRINTS?

16 A THEY DID ATTEMPT TO, YES.

17 Q WERE ANY PICTURES TAKEN AT THAT TIME?

18 A I DON'T KNOW.

19 Q YOU INDICATED THAT THERE WERE FOOTPRINTS OUTSIDE NEAR
20 CHAIRS. WERE ANY PICTURES TAKEN OF THAT?

21 A I DON'T KNOW.

22 Q DID YOU EVER SEE ANY PICTURES OF THAT?

23 A I DON'T THINK SO, NO.

24 Q NOW, THE INCIDENT REPORT SAID THAT YOU SAID THAT THE
25 PERSON ENTERED THROUGH A WINDOW THAT HOLDS AN

1 AIR-CONDITIONER. DID YOU SAY THAT?

2 MR. MCDANIEL: YOUR HONOR, THAT IS HEARSAY, I OBJECT.

3 THE COURT: SUSTAINED.

4 Q HOW DID YOU SAY THE PERSON ENTERED?

5 A I ACTUALLY DON'T RECALL EXACTLY WHAT I SAID THAT DAY,
6 SIR.

7 Q DO YOU RECALL CALLING THE POLICE?

8 A YES.

9 Q DO YOU RECALL CALLING BACK AND TELLING THEM ABOUT
10 SOME COINS MISSING?

11 A YES.

12 Q BUT YOU DON'T RECALL WHAT YOU SAID WHEN THEY CAME TO
13 YOUR HOUSE ON THE 28TH?

14 A I DON'T REMEMBER EXACTLY WHAT I SAID, NO.

15 Q I DON'T HAVE ANY FURTHER QUESTION AT THIS TIME.

16 THE COURT: REDIRECT?

17 MR. MCDANIEL: YES, SIR.

18 REDIRECT EXAMINATION

19 BY MR. MCDANIEL:

20 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED FOR--

21 MR. CHAPLIN: YOUR HONOR, I HAVE AN OBJECTION, THE
22 PHOTOS THAT THE STATE IS TRYING TO PRESENT AT THIS TIME.

23 MR. MCDANIEL: JUDGE, CAN WE DO THIS OUTSIDE THE
24 PRESENCE OF THE JURY, PLEASE.

25 THE COURT: LADIES AND GENTLEMEN, LET'S TAKE A BREAK

1 AND DON'T TALK ABOUT THE CASE AND LET'S KEEP AN OPEN MIND.

2 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
3 A BREAK.)

4 THE COURT: YES, SIR.

5 MR. CHAPLIN: YOUR HONOR, THERE ARE PHOTOGRAPHS THAT
6 THE STATE HAS THAT WERE TAKEN ALMOST A YEAR AFTER THIS
7 INCIDENT OCCURRED. I THINK THAT THE LOCATION HAS CHANGED
8 GREATLY OVER THAT ONE YEAR PERIOD. AND I AM ASSUMING THAT
9 THESE PHOTOGRAPHS ARE NOT RELEVANT EVIDENCE AND I AM
10 SAYING IF YOU FIND THAT THEY ARE RELEVANT THAT THEY ARE
11 PREJUDICIAL IN THAT I BELIEVE THEY SHOW CONDITIONS THAT
12 ARE NOT APPLICABLE TO THE TIME AND DATE THAT WE ARE
13 TALKING ABOUT.

14 THE COURT: MR. MCDANIEL.

15 MR. MCDANIEL: YOUR HONOR, THEY ARE RELEVANT AND I
16 WILL HAND THEM UP IF YOU WOULD LIKE SEE THEM. THEY ARE
17 WHERE HE PLACED THE DEER CAMERA ON THE REFRIGERATOR. I
18 THINK THEY WERE TAKEN ON JANUARY OF THIS YEAR BY THE
19 OFFICERS PURELY USING THEM AS DEMONSTRATIVE EVIDENCE OF
20 HOW, JUST SO THE JURY CAN SEE HOW IT WAS SET UP. I THINK
21 THEY HAVE A RIGHT TO SEE THAT, I DON'T KNOW IF IT WOULD BE
22 PREJUDICIAL OR CONFUSING BECAUSE IT WAS ALREADY
23 ESTABLISHED WHEN THOSE PICTURES WERE TAKEN ON THE DATE IN
24 QUESTION, THE INCIDENT DATE. THESE WERE PICTURES LATER
25 THAT I ASKED TO BE TAKEN SO THE JURY COULD SEE HOW IT WAS

1 SET UP. I BELIEVE THE DEFENSE WENT IN ON SOME LENGTH OF
2 HOW THE CAMERA WAS IN THE KITCHEN, I THINK THE JURY WOULD
3 HAVE A RIGHT TO SEE THAT SHOULD I LAY THE PROPER
4 FOUNDATION FOR IT. THE OTHER IS THE FACT IT WAS IN THE
5 HOME TAKEN JANUARY OF 2008. THERE WAS ON CROSS, AGAIN, A
6 LONG LINE OF QUESTIONING ABOUT WHAT WINDOWS THE ALLEGED
7 DEFENDANT WENT IN AND THE BACKDOOR. I DON'T KNOW THAT
8 CONDITIONS HAVE CHANGED ENOUGH OR AT ALL OTHER THAN THE
9 WINDOW THAT ONCE HELD THE AIR-CONDITIONING UNIT HAS BEEN
10 MOVED TO ANOTHER WINDOW. I WASN'T GETTING INTO ANY
11 TESTIMONY LIKE THAT AND I THINK THE JURY WOULD KNOW THAT
12 THIS PICTURE WAS TAKEN A FEW MONTHS AGO. THE STATE WOULD
13 LIKE TO INTRODUCE JUST SO THEY CAN SEE THE BACK OF THE
14 HOUSE, THIS IS THE WINDOW, THIS IS THIS WINDOW AND THIS IS
15 THE BACKDOOR.

16 THE COURT: I OVERRULE THE OBJECTION. LET'S TAKE
17 ABOUT A TEN MINUTE BREAK.

18 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

19 THE COURT: ARE YOU READY FOR THE JURY?

20 MR. MCDANIEL: JUDGE, WE HAVE ONE SCHEDULING ISSUE.
21 WE WOULD ASK THAT THE STATE GO THROUGH ITS SECOND WITNESS.
22 I HAVE MS. MOORE WITH THE NEWBERRY POLICE DEPARTMENT. WE
23 WOULD ASK THAT WHEN HER TESTIMONY IS COMPLETE THAT WE
24 START AGAIN IN THE MORNING AS EARLY AS POSSIBLE. THE
25 CONCERN THAT HE WILL BE THE MOST LENGTHY.

1 THE COURT: OKAY.

2 MR. CHAPLIN: HOW EARLY CAN WE START IN THE MORNING.
3 I DO HAVE A WITNESS TO BE BACK AT CLEMSON FOR A 1:00
4 O'CLOCK CLASS TOMORROW.

5 THE COURT: I CAN'T MAKE EVERYBODY HAPPY, WE CAN
6 START AT 9:30 BUT AND I KNOW YOU CAN'T GUARANTEE THEM, I
7 KNOW YOU HAVE GOT TO TRY TO ACCOMMODATE TOO. WHOEVER THE
8 WITNESS IS, JUST REMIND THAT THIS ISN'T A TEA PARTY WE ARE
9 HAVING HERE. OKAY. LET'S BRING THE JURY IN.

10 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
11 APPROXIMATELY 3:25 P.M.)

12 THE COURT: MR. MCDANIEL, YOU CAN CONTINUE WITH
13 REDIRECT.

14 REDIRECT EXAMINATION

15 BY MR. MCDANIEL:

16 Q MR. POTTS, IN CROSS YOU SAID YOU LIVED AT [REDACTED] PAULINE
17 STREET?

18 A CORRECT.

19 Q AND TO THE BEST OF YOUR KNOWLEDGE NO PICTURES WERE
20 TAKEN THAT DAY, CORRECT?

21 A I DON'T RECALL THAT.

22 Q I AM GOING TO HAND YOU STATE'S EXHIBITS 4, 5 AND 6
23 FOR IDENTIFICATION. TAKE A MOMENT TO LOOK AT THEM,
24 PLEASE.

25 A OKAY.

1 Q DO YOU KNOW WHAT THOSE PICTURES ARE?

2 A YES.

3 Q HAVE YOU SEEN THOSE BEFORE?

4 A I HAVEN'T SEEN THE ACTUAL PICTURES BEFORE, NO.

5 Q WHAT IS IN THE PICTURE?

6 A NUMBER 4 IS THE BACK OF MY HOUSE. LET'S SEE, NUMBER

7 5 IS THAT CAMERA ON TOP OF MY REFRIGERATOR. THEN A

8 CLOSEUP VIEW AND THEN A MORE DISTANCE VIEW IN NUMBER 6.

9 Q AND DO THOSE FAIRLY AND ACCURATELY REPRESENT THE
10 IMAGES THAT WERE TAKEN THAT DAY?

11 A YES.

12 Q AND, AGAIN, WERE THOSE TAKEN AT SOME OTHER DATE?

13 A YES.

14 Q DO YOU ROUGHLY REMEMBER WHEN THOSE PICTURES WERE
15 TAKEN?

16 A A COUPLE OF MONTHS AGO.

17 Q THEY WERE NOT TAKEN ON THE INCIDENT DATE?

18 A NO.

19 MR. MCDANIEL: YOUR HONOR, I WOULD ASK THAT STATE'S
20 EXHIBITS 4, 5 AND 6 BE MOVED INTO EVIDENCE.

21 MR. CHAPLIN: YOUR HONOR, I RENEW MY PREVIOUS
22 OBJECTION.

23 THE COURT: OKAY. SUBJECT TO PREVIOUS OBJECTION.

24 (WHEREUPON, STATE'S EXHIBIT NOS 4, 5 AND 6 WERE
25 ADMITTED INTO EVIDENCE.)

1 (WHEREUPON, STATE'S EXHIBIT NOS. 2 AND 3 WERE
2 ADMITTED INTO EVIDENCE.)

3 MR. MCDANIEL: PERMISSION TO PUBLISH TO THE JURY,
4 YOUR HONOR.

5 THE COURT: OKAY.

6 Q NOW, ON CROSS THERE WAS I GUESS A LOT OF TESTIMONY
7 WHICH WINDOWS AND DOOR, CAN YOU EXPLAIN THIS TO US?

8 A THIS IS THE BACK OF WHAT I USUALLY USE. AND THIS IS
9 THE WINDOW, THIS IS THE BOARD I ACTUALLY USE THROUGH THE
10 WINDOW TO BLOCK SOMEONE FROM COMING IN. THAT IS WHEN I
11 SAW IT HAD BEEN TAMPERED WITH AGAIN. AND THE FOOTPRINTS
12 AND THE CHAIR AND ALL--

13 Q YOU HAD MOVED THE WINDOW UNIT?

14 A YES.

15 Q OKAY. BUT THAT IS WHERE IT WAS DURING THE INCIDENT
16 DATE?

17 A THAT IS CORRECT.

18 Q WHAT HAS CHANGED JUST SO THE JURY KNOWS.

19 A THERE IS PROBABLY SOME TRASH THERE, THIS IS THE
20 WINDOW UNIT HERE AND THERE WAS SOME WINDOW PANES HERE
21 WHICH WERE STEPPED ON AND BROKEN. SO THEY HAD BEEN
22 REMOVED.

23 Q OKAY. AND THAT IS THE BACKDOOR IN THE EARLY MORNING
24 OF OCTOBER 28TH?

25 A CORRECT.

1 Q THANK YOU. STATE'S EXHIBIT 6, WHAT IS THAT?

2 A THAT IS MY REFRIGERATOR INSIDE THE KITCHEN, THIS IS
3 THE CAMERA AND IN A VERY SIMILAR POSITION AS THE NIGHT OF
4 THE INCIDENT.

5 Q AND STATE'S EXHIBIT 5?

6 A A CLOSER VIEW.

7 Q AND SIMILAR TO THE WAY IT WAS THAT NIGHT?

8 A YES.

9 Q AND YOU HAD SET THAT UP SINCE YOU PURCHASED IT, I
10 MEAN BEFORE THE INCIDENT DATE?

11 A YES, THE DAY AFTER, I PURCHASED IT PROBABLY A WEEK
12 BEFORE THE INCIDENT HAPPENED AND IT WAS SET UP PROBABLY
13 FOUR OR FIVE DAYS BEFORE THE INCIDENT HAPPENED.

14 Q NOW, YOU SAID THAT YOU WEREN'T SURE HOW SOMEBODY GOT
15 IN YOUR HOUSE THAT NIGHT?

16 A NO.

17 Q BUT YOU DO KNOW SOMEBODY WAS IN YOUR HOUSE?

18 A YES.

19 Q AND DID ANYBODY HAVE PERMISSION TO BE IN YOUR HOME?

20 A NO.

21 Q HAVE YOU AT ALL TAMPERED WITH THE IMAGES?

22 A NO.

23 Q THIS NINE PICTURES THAT YOU SELECTED TO GIVE THE
24 POLICE, CAN YOU TELL US WHAT THE OTHER IMAGES WERE?

25 A AS I SAID EARLIER, JUST EITHER THE CAT WENT INTO THE

1 ROOM OR ME WONDERING INTO THE KITCHEN TO GET SOMETHING TO
2 DRINK MYSELF, THINGS OF THAT NATURE.

3 Q AND THESE NINE THAT WERE GIVEN TO THE POLICE WERE THE
4 NINE THAT YOU THOUGHT WERE RELEVANT IN THIS CASE?

5 A YES, THEY WERE ALL IN A BLOCK OF TIME RIGHT THERE.

6 Q WAS THERE ANY OTHER PICTURES OF UNIDENTIFIED PEOPLE
7 IN YOUR HOUSE?

8 A NO.

9 Q THE CAMERA, WAS THAT EVER OUT OF YOUR POSSESSION?

10 A NO.

11 Q DIDN'T LEAVE IT WITH ANYBODY FOR ANY PERIOD?

12 A NO.

13 Q WHEN YOU DOWNLOADED IT AT THE BLUE MOON THE CAMERA
14 WAS WITH YOU?

15 A YES, I WAS THERE.

16 Q THE CAMERA WAS ALWAYS IN YOUR POSSESSION?

17 A YES.

18 Q ALWAYS HAD THE DISK ONCE IT WAS BURNED?

19 A IT WAS BRIEF, I GUESS. IT WENT STRAIGHT FROM THE
20 BLUE MOON TO THE POLICE STATION.

21 Q AND AGAIN WHO DID YOU TURN THAT OVER TO?

22 A TO OFFICER MCCLURKIN.

23 Q NO FURTHER QUESTIONS.

24 THE COURT: RE CROSS?

25 MR. CHAPLIN: VERY BRIEF, YOUR HONOR.

RECROSS-EXAMINATION

BY MR. CHAPLIN:

Q MR. POTTS, THIS WINDOW YOU SAID THE NIGHT THAT YOU
CAME HOME HAD AN AIR-CONDITIONER IN IT, IS THAT CORRECT?

A CORRECT.

Q AND LATER YOU REMOVED THAT AIR-CONDITIONER YOURSELF?

A CORRECT.

Q SO, NOW IT LOOKS DIFFERENT, IT IS WITHOUT AN
AIR-CONDITIONER?

A THAT IS THE WAY IT LOOKS NOW.

Q THAT IS THE WAY IT LOOKS NOW. AND YOU ALSO SAID THAT
THESE PICTURES, YOU AGREE THAT THESE PICTURES WERE NOT
TAKEN THE DAY THAT YOU REPORTED THE INCIDENT BUT ALMOST A
YEAR LATER?

A THAT IS CORRECT.

Q HERE IS THE DEER CAMERA ON TOP OF YOUR REFRIGERATOR,
DO YOU KNOW IF IT WAS WORKING AT THIS TIME?

A YES, WE DID TEST IT, YES.

Q THAT IS ALL I HAVE.

THE COURT: THANK YOU, MR. POTTS. CALL YOUR NEXT
WITNESS.

MR. MCDANIEL: THE STATE CALLS ALLISON MOORE.

ALLISON MOORE, AFTER BEING DULY SWORN,
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

1 BY MR. MCDANIEL:

2 Q WHERE DO YOU WORK?

3 A NEWBERRY POLICE DEPARTMENT.

4 Q HOW LONG HAVE YOU WORKED THERE?

5 A FOUR YEARS.

6 Q ANY OTHER LAW ENFORCEMENT EXPERIENCE?

7 A YES SIR, I HAVE HAD TEN YEARS PRIOR.

8 Q WHERE WAS THAT AT?

9 A AT CLINTON POLICE DEPARTMENT.

10 Q WHAT IS YOUR RANK NOW?

11 A I AM JUST A CORPORAL.

12 Q WHAT IS YOUR DUTIES AS A CORPORAL?

13 A I AM ON ROAD PATROL.

14 Q WHAT DO YOU DO ON ROAD PATROL?

15 A ANSWER CALLS THAT ARE GIVEN, RIDE AROUND AND CHECK
16 PROPERTY.

17 Q NOW, WERE YOU WORKING ON OCTOBER 28TH OF 2008?

18 A YES, SIR.

19 Q WHAT TIME DID YOU START?

20 A 6:00 A.M.

21 Q WHAT WAS YOUR RANK THAT DAY?

22 A JUST PATROLMAN.

23 Q AND SAME DUTIES OR HAD YOUR DUTIES CHANGED?

24 A NO SIR, SAME DUTIES.

25 Q RESPOND TO CALLS?

1 A YES, SIR.

2 Q NOW, DID YOU COME INTO CONTACT WITH LEE POTTS THAT
3 DAY?

4 A YES, SIR.

5 Q ABOUT WHAT TIME?

6 A A LITTLE AFTER 11:00 A.M.

7 Q DID YOU GO TO HIS HOME?

8 A YES, SIR.

9 Q DO YOU KNOW WHERE THAT IS LOCATED?

10 A ON PAULINE STREET.

11 Q WHO WAS THERE WHEN YOU GOT THERE?

12 A MR. POTTS.

13 Q DID HE SHOW YOU A DEER CAMERA?

14 A YES, HE DID.

15 Q AND DID HE SHOW YOU THIS DEER CAMERA?

16 A YES, SIR.

17 Q WHAT WAS ON IT?

18 A AN IMAGE OF SOMEONE COMING INTO HIS KITCHEN.

19 Q WERE YOU ABLE TO IDENTIFY THAT IMAGE?

20 A NO, SIR.

21 Q I WANT TO SHOW YOU WHAT HAS BEEN MARKED AS STATE'S
22 EXHIBIT 1. AND CAN YOU TELL ME, IS THAT THE IMAGE YOU SAW
23 THAT DAY?

24 A YES, SIR.

25 Q AND YOU COULD NOT IDENTIFY THAT IMAGE?

1 A NO, SIR.

2 Q THANK YOU. SO, AFTER YOU SAW THAT IMAGE TELL ME WHAT
3 YOU DID IN THE HOUSE?

4 A AFTER I SAW THE IMAGE WE BEGAN TO CHECK THE EXTERIOR
5 OF THE HOME TO FIND OUT WHERE THE INDIVIDUAL ENTERED THE
6 HOME.

7 Q WERE YOU ABLE TO DETERMINE WHERE SOMEONE ENTERED?

8 A NO, SIR. I DUSTED FOR FINGERPRINTS ON THE
9 AIR-CONDITIONER WHERE WE ASSUMED THE SUBJECT ENTERED THE
10 HOME.

11 Q WERE YOU ABLE TO RECOVER ANY PRINTS?

12 A NO, SIR.

13 Q DID YOU CHECK THE INTERIOR OF THE HOME?

14 A THE INTERIOR, NO SIR.

15 Q DID YOU TAKE PICTURES?

16 A NO, SIR.

17 Q WHY DIDN'T YOU TAKE PICTURES?

18 A JUST AFTER SEEING THE IMAGE I THOUGHT IT WAS A PRETTY
19 GOOD IMAGE OF THE SUSPECT, THAT I KNEW THAT THE PERSON
20 COULD BE IDENTIFIED SO I JUST, I DIDN'T, I FAILED TO TAKE
21 PICTURES.

22 Q HOW LONG WERE YOU AT THE HOUSE?

23 A APPROXIMATELY FORTY-FIVE MINUTES.

24 Q AND YOU BASICALLY STAYED ON THE EXTERIOR OF THE HOME?

25 A WELL, I WAS INSIDE LOOKING AT THE IMAGE FOR ABOUT TEN

1 OR FIFTEEN MINUTES AND PRETTY MUCH STAYED ON THE EXTERIOR,
2 YES.

3 Q DID YOU DO ANYTHING IN THE HOUSE, DUST FOR PRINTS?

4 A NO, SIR.

5 Q SO, WHAT DID YOU TELL HIM TO DO WITH THE IMAGE?

6 A HE WAS UNABLE TO DOWNLOAD IT ON A DISK THAT DAY FOR
7 US SO I ADVISED HIM IF HE COULD GET IT DOWNLOADED BECAUSE
8 HE SAID HE COULD AT THE BLUE MOON. AND THEN I TOLD HIM TO
9 BRING IT TO THE POLICE DEPARTMENT AND HE DID.

10 Q WERE YOU THERE WHEN HE CAME TO THE POLICE DEPARTMENT?

11 A YES, SIR.

12 Q WERE YOU THERE WHEN MR. MCCLURKIN PUT THE DISK IN?

13 A YES, SIR.

14 Q DO YOU KNOW WHAT ITEMS MR. POTTS BROUGHT TO THE
15 POLICE DEPARTMENT?

16 A THE DISK AND THE VIDEO CAMERA.

17 Q AT ANY TIME DID YOU HAVE THE DEER CAMERA IN YOUR
18 POSSESSION?

19 A NO, SIR.

20 Q THE DISK IN YOUR POSSESSION?

21 A NO, SIR.

22 Q I AM GOING TO GO BACK WHEN YOU DUSTED FOR PRINTS,
23 WHERE DID YOU DUST FOR PRINTS?

24 A I DUSTED ON THE OUTSIDE OF THE HOME ON THE DOOR
25 HANDLE AND ON THE AIR-CONDITIONER UNIT AND THE CHAIR.

1 Q YOU REMEMBER WHAT THE CHAIR LOOKED LIKE?

2 A IT WAS GREEN IN COLOR, PLASTIC CHAIR.

3 Q THAT IS THE CHAIR, STATE'S EXHIBIT 4?

4 A YES SIR, IT DOES RESEMBLE.

5 Q SHOW ME, IF YOU CAN, WHERE YOU DUSTED?

6 A THE AIR-CONDITIONING WINDOW WAS IN THIS WINDOW,
7 DUSTED FOR PRINTS ON THIS AIR-CONDITIONER. DUSTED FOR
8 PRINTS ON THIS CHAIR AND THEN ON THE DOOR HANDLE TO THE
9 DOOR.

10 Q NO PRINTS WERE LIFTED?

11 A NO PRINTS WERE LIFTED.

12 Q CAN YOU DESCRIBE THE AIR-CONDITIONER THAT WAS IN
13 THERE?

14 A IT WAS A SMALL UNIT THAT COULD BE JUST PLACED INTO
15 THE WINDOW WITH THE WINDOW CLOSING DOWN ON THE UNIT
16 ITSELF.

17 Q THANK YOU. WERE YOU SHOWN ANY SCRAPINGS ON THE
18 WINDOW?

19 A YES, SIR.

20 Q WHERE WAS THAT?

21 A IT WAS ON THE LEFT WINDOW TO THE LEFT OF THE DOOR,
22 THE WINDOW THAT I WAS TOLD THAT HAD BEEN PREVIOUSLY
23 ENTERED.

24 Q AND WHAT DID THAT LOOK LIKE?

25 A IT LOOKED LIKE SOME TYPE OF A TOOL, LIKE A

1 SCREWDRIVER, KNIFE, HAD, YOU KNOW, JUST TRIED TO LIFT IT.

2 Q YOU HAD SAID A SECOND AGO THAT YOU ASSUMED THE ENTRY
3 WAS AT, WHERE THE AIR-CONDITIONER WAS?

4 A YES, SIR.

5 Q WHY DID YOU ASSUME THAT?

6 A BECAUSE MR. POTTS ADVISED ME THAT THE CHAIR THAT WAS
7 NEAR THE AIR-CONDITIONER HAD NOT BEEN LIKE THAT
8 PREVIOUSLY.

9 Q AND THAT IS THE GREEN CHAIR THAT YOU DUSTED?

10 A YES, SIR.

11 Q ANYTHING ELSE THAT YOU SAW?

12 A NO, SIR.

13 Q SO, AFTER YOU PROCESSED, WHERE DID YOU GO WHEN YOU
14 PROCESSED THIS?

15 A I BELIEVE THAT WAS, WE ENDED THE CALL AT THAT POINT.

16 Q AND WHEN YOU END A CALL WHAT HAPPENS TO THE CASE
17 AFTER YOU RESPOND?

18 A IT IS FORWARDED TO AN INVESTIGATOR.

19 Q AND IN THIS CASE IT WAS FORWARDED TO WHO?

20 A LIEUTENANT MCCLURKIN.

21 Q AS I GUESS THE INITIAL RESPONDER, HOW DO YOU INFORM
22 MR. MCCLURKIN OF THE CASE THAT YOU HAVE?

23 A WELL, THAT VARIES. USUALLY SOMETIME THE NEXT MORNING
24 THEY ARE ASSIGNED DIFFERENT CASES BUT THIS INCIDENT, I
25 BROUGHT IT TO HIS ATTENTION BECAUSE I KNEW THAT MR. POTTS

1 WAS COMING DOWN WITH THE IMAGE.

2 Q DO YOU REMEMBER WHAT TIME MR. POTTS CAME DOWN?

3 A IT WAS LATER ON IN THE AFTERNOON.

4 Q THANK YOU.

5 THE COURT: MR. CHAPLIN.

6 CROSS-EXAMINATION

7 BY MR. CHAPLIN:

8 Q GOOD AFTERNOON, CORPORAL MOORE.

9 A GOOD AFTERNOON, SIR.

10 Q NOW, YOU TESTIFIED THAT YOU HAD BEEN A POLICE OFFICER
11 FOR 14 YEARS?

12 A YES, SIR.

13 Q AND WHERE DID YOU DO YOUR TRAINING?

14 A AT THE SOUTH CAROLINA STATE POLICE ACADEMY.

15 Q AND DURING THAT TRAINING PROCESS WERE YOU TRAINED HOW
16 TO PROCESS CRIME SCENES?

17 A NO SIR, NOT AT THE BASIC TRAINING.

18 Q WERE YOU EVER TRAINED TO PROCESS CRIME SCENES?

19 A YES, SIR.

20 Q AT WHAT TIME?

21 A IT WAS APPROXIMATELY MAYBE IN THE YEAR OF 2000.

22 Q 2000?

23 A YES.

24 Q DID YOU TAKE A PARTICULAR CLASS IN THAT AREA?

25 A YES SIR, IT WAS CALLED BASIC DETECTIVE CLASS.

1 Q BASIC DETECTIVE CLASS?

2 A YES.

3 Q AND I BET YOU DID WELL?

4 A YES, SIR.

5 Q GOOD. NOW, YOU RESPONDED TO THE SCENE IN THIS
6 MATTER. THAT IS CORRECT, RIGHT?

7 A YES, SIR.

8 Q AND I THINK IT IS YOUR TESTIMONY THAT YOU DIDN'T GET
9 ANY FINGERPRINTS FROM THIS CRIME SCENE THAT WOULD MATCH MY
10 CLIENT, MR. MITCHELL?

11 A I DID NOT GET ANY PRINTS, NO SIR.

12 Q SO, YOU DID NOT GET ANY MATCHES?

13 A I DID NOT GET ANY FINGERPRINTS.

14 Q AND AS FAR AS PICTURES OF THE CRIME SCENE YOU DIDN'T
15 GET, YOU DIDN'T TAKE ANY PICTURES?

16 A NO, SIR.

17 Q IS THAT WHAT THEY TRAINED YOU AT THE POLICE ACADEMY?

18 A I DO NOT RECALL TAKING PHOTOGRAPH CLASS DURING BASIC
19 DETECTIVE.

20 Q WHEN YOU WERE TRAINED BY THE PROCESS OF CRIME SCENE,
21 TAKING PHOTOGRAPHS WASN'T IN THAT TRAINING?

22 A I DON'T RECALL.

23 Q DID YOU ATTEMPT TO GET ANY DNA SAMPLES FROM THE CRIME
24 SCENE?

25 A NO, SIR.

1 Q I THINK EARLIER MR. POTTS TESTIFIED THAT THERE HAS
2 BEEN SOME FOOTPRINTS OUTSIDE. DID YOU SEE THOSE
3 FOOTPRINTS?

4 A I BELIEVE THERE WAS SOME MARRING OF THE GROUND BUT
5 THERE WAS NO IMPRESSION OF A FOOTPRINT.

6 Q DID YOU TAKE A PHOTOGRAPH OF THE MARRING?

7 A NO, SIR.

8 Q NOW, DID YOU CANVAS THE NEIGHBORHOOD TO SEE IF
9 ANYBODY SAW ANYBODY ENTERING MR. POTTS HOME?

10 A NO, SIR.

11 Q WHY NOT?

12 A I JUST DIDN'T SIR, I DIDN'T.

13 Q I THINK YOU SAID THAT MR. POTTS SHOWED YOU AN IMAGE?

14 A YES, SIR.

15 Q SO, HE DIDN'T SHOW YOU NINE PICTURES?

16 A I DON'T RECALL HOW MANY PICTURES HE SHOWED ME BUT I
17 DO REMEMBER THE IMAGE, THE PHOTOGRAPH IMAGE OF THE PERSON
18 IN THE KITCHEN.

19 Q DID YOU TAKE NOTES WHEN YOU WERE DOING THIS?

20 A A LITTLE BIT FROM MY REPORT.

21 Q DID YOU BRING THOSE NOTES WITH YOU TODAY?

22 A NO, SIR.

23 Q WHY NOT?

24 A WELL, THEY ARE JUST NOTES ON A PAD, LIKE HIS NAME,
25 ADDRESS, DATE OF BIRTH AND THINGS LIKE THAT FOR THE

1 INCIDENT REPORT.

2 Q BUT YOU KNEW I WAS GOING TO BE QUESTIONING YOU TODAY,
3 CORRECT?

4 A YES, SIR.

5 Q SO, YOU DIDN'T THINK THOSE NOTES WOULD HELP?

6 A WELL, THEY ARE NOT OFFICIAL CRIME SCENE NOTES, THEY
7 ARE JUST NOTES FOR THE INCIDENT REPORT.

8 Q SO, YOU ARE NOT SURE HOW MANY PICTURES YOU SAW ON
9 THIS CAMERA?

10 A I DO NOT RECALL HOW MANY, NO SIR.

11 Q BUT YOU TESTIFIED THAT YOU SAW AN IMAGE?

12 A AN IMAGE OF A PERSON, YES SIR.

13 Q DID YOU EVER ESTABLISH THAT THERE WAS ENTRY INTO THE
14 HOME, SOME ENTRY?

15 A I DIDN'T SEE AN ENTRY INTO THE HOME.

16 Q I THINK YOU SAID THAT ONCE YOU SAW THE PICTURE, DID
17 YOU SAY, ONCE I SAW THE PICTURE I STOPPED THERE?

18 A I DON'T RECALL, I DON'T UNDERSTAND YOUR QUESTION.

19 Q WHEN YOU, YOU DIDN'T ESTABLISH THERE WAS AN ENTRY
20 INTO THE HOME. AND I THINK MR. POTTS TESTIFIED THAT HE
21 HAD PRIOR BREAK-INS AT THIS LOCATION, CORRECT, DID HE TELL
22 YOU THAT?

23 A YES, SIR.

24 Q SO, YOU ARE NOT ONE-HUNDRED PERCENT SURE AS TO WHAT
25 EXACTLY WAS TAKEN AT THIS TIME, ON THIS OCCASION, ARE YOU?

1 A ONLY WHAT MR. POTTS TOLD ME.

2 Q I THINK YOU SAID THAT YOU DIDN'T WALK THROUGH THE
3 HOME?

4 A NO SIR, I DID NOT.

5 Q SO, YOU GOT TO THE HOUSE AND WHO ANSWERED THE DOOR?

6 A MR. POTTS.

7 Q AND THEN YOU WALKED IN AND YOU STARTED TALKING TO MR.
8 POTTS, CORRECT?

9 A YES, SIR.

10 Q AND MR. POTTS TOLD YOU THAT SOMEBODY HAD BROKEN IN?

11 A YES, SIR.

12 Q AT THAT TIME DID HE SHOW YOU THE IMAGE?

13 A YES SIR, HE WAS IN THE PROCESS OF BRINGING IT UP ON
14 HIS COMPUTER.

15 Q SO, THEN YOU LOOKED AT THE COMPUTER?

16 A YES, SIR.

17 Q BUT YOU ARE NOT SURE WHAT YOU SAW ON THE COMPUTER?

18 A I SAW AN IMAGE OF A SUBJECT.

19 Q YOU SAW AN IMAGE?

20 A YES SIR, ENTERING THE KITCHEN IN MR. POTTS HOME.

21 Q AT THAT TIME DID YOU SUSPECT THAT THAT IMAGE MIGHT BE
22 EVIDENCE?

23 A YES, SIR.

24 Q SO, AT THE POLICE ACADEMY WHAT DID THEY TELL YOU TO
25 DO WHEN YOU THINK YOU HAVE EVIDENCE?

- 1 A WE NEED TO COLLECT IT.
- 2 Q DID YOU COLLECT THIS?
- 3 A NO SIR, BECAUSE IT WAS HIS PERSONAL COMPUTER.
- 4 Q SO, IF EVIDENCE IS PERSONAL YOU DON'T COLLECT IT?
- 5 A I DID NOT, SIR, IN THIS CASE.
- 6 Q SO, YOU DID NOTHING TO PRESERVE THAT IMAGE THAT YOU
- 7 LOOKED AT?
- 8 A NO SIR, I LOOKED AT IT AND I REMEMBERED IT.
- 9 Q BUT AS FAR AS PRESERVING IT TO MAKE SURE IT IS
- 10 PRESERVED FOR THIS TRIAL, YOU DID NOT?
- 11 A NO, SIR.
- 12 Q NOW MR. POTTS, DID HE TELL YOU THAT, I THINK YOU SAID
- 13 WHEN YOU GOT THERE MR. POTTS WAS ALONE?
- 14 A YES, SIR.
- 15 Q I THINK EARLIER MR. POTTS TESTIFIED THAT HE CAME HOME
- 16 WITH HIS GIRLFRIEND, DID HE TELL YOU THAT?
- 17 A I DO NOT RECALL.
- 18 Q DID YOU ASK HIM HOW MANY PEOPLE WERE IN THE HOUSE
- 19 WHEN HE NOTICED THIS IMAGE?
- 20 A NO, SIR.
- 21 Q SO, YOU DIDN'T GET A WITNESS STATEMENT FROM HIS
- 22 GIRLFRIEND, DID YOU?
- 23 A NO, SIR.
- 24 Q YOU THINK IF HE HAD TOLD YOU THAT THERE WAS A
- 25 GIRLFRIEND YOU WOULD OF TRIED?

1 A NO, SIR.

2 Q WHY NOT?

3 A I DON'T SEE HOW THAT IS RELEVANT.

4 Q IT IS ANOTHER PERSON THAT MIGHT HAVE INFORMATION
5 REGARDING WHAT WAS SEEN WHEN THEY CAME HOME AND YOU DON'T
6 SEE THAT AS RELEVANT?

7 A NO SIR, BECAUSE MR. POTTS IS THE OWNER OF THE HOME
8 AND THE PERSON WHO RESIDES THERE. HE WOULD KNOW WHAT IS
9 MISSING AND WHAT IS NOT.

10 Q SO, IN YOUR REPORT YOU DIDN'T EVEN MENTION THERE WAS
11 ANOTHER POTENTIAL WITNESS?

12 A I WAS UNAWARE THAT THERE WAS ANOTHER PERSON THERE.

13 Q YOU WERE NOT AWARE?

14 A I WAS NOT AWARE.

15 Q SO, MR. POTTS NEVER TOLD YOU THAT?

16 A NO SIR, I DID NOT KNOW THERE WAS ANOTHER INDIVIDUAL
17 THERE.

18 Q WHEN YOU LOOKED AT THE IMAGE FROM THE COMPUTER DID
19 YOU NOTICE THAT THE TIMESTAMP WAS OFF?

20 A I DON'T RECALL.

21 Q DID YOU ASK MR. POTTS WHY IT SAID 3:00 O'CLOCK IF IT
22 OCCURRED AT MIDNIGHT?

23 A I DON'T RECALL US QUESTIONING ABOUT THE TIME.

24 Q DO YOU RECALL WHAT TIME, SO YOU DON'T EVEN KNOW WHAT
25 TIME IT SAID ON THE PICTURE, YOU CAN'T TESTIFY TO THAT?

1 A NO SIR, I DO NOT RECALL THAT.

2 Q SO, YOU ARE NOT EVEN CERTAIN IT SAID 3:00 O'CLOCK
3 WHEN YOU LOOKED AT THAT PICTURE OF THAT IMAGE?

4 A I DO NOT RECALL.

5 Q YOU DO NOT RECALL. SO, WHEN YOU ESTABLISHED THE TIME
6 OF THE BREAK-IN THAT WAS BASED ON THE INFORMATION YOU GOT
7 FROM MR. POTTS SOLELY, RIGHT?

8 A YES, SIR.

9 Q AND AS FAR AS WHAT WAS STOLEN, THAT IS INFORMATION
10 YOU GOT FROM MR. POTTS?

11 A YES, SIR.

12 Q SO, YOU TESTIFIED THAT YOU TRIED TO GET FINGERPRINTS
13 AND YOU COULDN'T GET ANY. AND YOU SAID YOU COULDN'T GET
14 ANY FINGERPRINTS FROM THE AIR-CONDITIONING UNIT, ISN'T
15 THAT METAL. THE AIR-CONDITIONING, WASN'T IT METAL?

16 A YES SIR, I AM ASSUMING SO.

17 Q SO WHY COULDN'T YOU GET A PRINT OFF OF THAT?

18 A IT DEPENDS, GETTING A PRINT COULD DEPEND ON MANY
19 THINGS.

20 Q YOU WERE TRAINED TO DO FINGERPRINTS?

21 A YES, SIR.

22 Q AND THAT WAS AT THE POLICE ACADEMY?

23 A DURING THAT BASIC DETECTIVE CLASS.

24 Q SO ROUGHLY 14 YEARS AGO?

25 A 10 YEARS AGO, YES.

1 Q OKAY. AND THE PRINTS ON THE DOOR, DID YOU TRY TO GET
2 A PRINT OFF THE DOORKNOB?

3 A YES, SIR.

4 Q AND YOU, IS THAT METAL ALSO?

5 A I AM ASSUMING THAT IS WHAT A DOORKNOB IS MADE OUT OF.

6 Q AND YOU COULDN'T GET A PRINT OFF OF THAT?

7 A NO, SIR.

8 Q AND YOU SAID YOU WERE SHOWN SCRAPINGS FROM SOMETHING
9 THAT HAPPENED EARLIER?

10 A THE SCRAPINGS MR. POTTS ADVISED THAT HAD OCCURRED
11 THIS TIME, ON THIS INCIDENT WHERE THE INDIVIDUAL ATTEMPTED
12 TO GAIN ENTRY INTO THE HOME.

13 Q WERE YOU ABLE TO DETERMINE, BASED ON YOUR TRAINING,
14 WHETHER THOSE SCRAPINGS HAD OCCURRED THROUGH JUST NATURAL
15 WEAR AND TEAR OR ACTUALLY THAT DAY YOU TOOK MR. POTTS WORD
16 FOR IT?

17 A NO SIR, I EXAMINED IT AND IT DID LOOK FRESH.

18 Q WHAT DO YOU MEAN THEY LOOKED FRESH?

19 A THEY APPEARED FRESH, THEY DID NOT APPEAR TO BE OLD
20 PIECES OF WOOD, IT WAS FRESHLY PIECES OF WOOD AND IT WAS
21 NOT FROM WEAR AND TEAR. IT APPEARED FROM A TOOL.

22 Q BUT YOU ALSO SAID IT APPEARED THAT NO ONE ENTERED
23 THROUGH THAT WINDOW AT THAT TIME?

24 A NO, SIR.

25 Q NOW, YOU SAID YOU SAW FRESH SCRAPINGS?

1 A YES.

2 Q DID YOU TAKE A PICTURE OF IT?

3 A NO, SIR.

4 Q WHY NOT?

5 A I DIDN'T, I JUST DIDN'T TAKE PICTURES.

6 Q DID YOU HAVE A CAMERA?

7 A NO, SIR.

8 Q NOW, YOU SAID THAT YOU ARE ON THE ROAD PATROL?

9 A YES, SIR.

10 Q AND YOU ANSWER CALLS FROM PEOPLE?

11 A YES, SIR.

12 Q AND BUT THAT DOESN'T INCLUDE, AND YOU INVESTIGATE

13 CRIME SCENES?

14 A NEWBERRY CITY IS A SMALL DEPARTMENT AND WE DO ASSIST

15 THE INVESTIGATORS WHEN WE RESPOND TO CALLS.

16 Q DID YOU CALL IN AN INVESTIGATOR TO THIS SCENE?

17 A NO, SIR.

18 Q WHY NOT?

19 A BECAUSE WE ASSIST THEM AND I FELT THIS WAS A CRIME

20 SCENE THAT I COULD HANDLE.

21 Q WELL, WHEN YOU REALIZED YOU COULDN'T GET ANY PRINTS

22 AND YOU DIDN'T HAVE A CAMERA YOU STILL FELT LIKE YOU COULD

23 HANDLE IT?

24 A YES, SIR.

25 Q SO, BASICALLY WHEN YOU LEFT THIS LOCATION THERE WAS

1 ONE PIECE OF EVIDENCE THAT YOU WERE AWARE OF THAT, WHICH
2 IS AN IMAGE ON A CAMERA?

3 A YES, SIR.

4 Q BECAUSE YOU HADN'T TAKEN ANY PICTURES OR ANYTHING
5 ELSE?

6 A NO, SIR.

7 Q THAT IS THE ONLY EVIDENCE TO SUPPORT THAT THERE HAD
8 BEEN AN ALLEGED BREAK-IN?

9 A YES, SIR.

10 Q SO, LET'S TALK ABOUT HOW YOU HANDLED THAT EVIDENCE.
11 HERE IS A CAMERA, IT IS SITTING IN THE COURTROOM TODAY.
12 DID YOU TRY TO TAKE IT THAT DAY?

13 A NO, SIR.

14 Q WHY NOT?

15 A MR. POTTS KNEW HOW TO OPERATE THAT CAMERA AND HE SAID
16 THAT HE COULD DOWNLOAD IT, SINCE HE KNEW HOW TO OPERATE IT
17 I WAS GOING TO ALLOW HIM TO DO SO.

18 Q COULD YOU HAVE CALLED SOMEONE FROM THE INVESTIGATION
19 DEPARTMENT TO COME OVER AND HANDLE THAT FOR YOU AND
20 DOWNLOAD AND PRESERVE IT. IS THAT POSSIBLE, COULD YOU
21 HAVE DONE IT?

22 A YES.

23 Q BUT YOU DIDN'T THINK THAT WAS NECESSARY?

24 A NO, SIR.

25 Q WHY NOT?

1 A I FELT LIKE I COULD HANDLE THE SCENE.

2 Q BUT YOU COULDN'T GET THE PICTURES BECAUSE YOU SAID
3 YOU DIDN'T UNDERSTAND THE CAMERA. SO, WHY DIDN'T YOU CALL
4 SOMEONE FOR BACKUP?

5 A I DIDN'T SAY I COULDN'T UNDERSTAND THE CAMERA. HE
6 OWNED AND OPERATED THAT CAMERA.

7 Q OH, YES. IT IS PERSONAL, IT IS A PERSONAL BELONGING?

8 A YES SIR, HE OWNS IT, YES SIR.

9 Q BUT IT CONTAINED THE ONLY PIECE OF EVIDENCE REGARDING
10 THIS ALLEGED CRIME?

11 A YES, SIR.

12 Q AND YOU LEFT IT WITH HIM?

13 A YES, SIR.

14 Q SO, WHAT IF MR. POTTS HAD MISHANDLED THE EVIDENCE
15 WHEN YOU LEFT.

16 MR. MCDANIEL: YOUR HONOR, THAT IS SPECULATION.

17 THE COURT: SUSTAINED.

18 Q I WILL REWORD OR WITHDRAW. SO, YOU TOLD MR. POTTS TO
19 BRING THE CAMERA TO THE POLICE DEPARTMENT?

20 A ONCE HE GOT THE IMAGE DOWNLOADED, YES SIR.

21 Q NOW, WHEN YOU SAW THE IMAGES ON THE CAMERA, AGAIN, I
22 DON'T MEAN TO BE REDUNDANT AND I AM PROBABLY GOING TO GET
23 OBJECTED TO. BUT YOU ONLY SAW ONE PICTURE?

24 A I JUST RECALL SEEING ONE PICTURE.

25 Q ONE PICTURE?

1 A YES, SIR.

2 Q MR. POTTS SAID HE THOUGHT THAT NINE PICTURE WERE
3 RELEVANT BUT YOU ONLY SAW ONE?

4 A YES, SIR.

5 Q YOU GO TO A CRIME SCENE AND YOU FIND A GUN, THIS
6 PERSONAL PROPERTY OF SOMEONE AND YOU THINK THAT IT MIGHT
7 BE EVIDENCE, YOU TELL THE PERSON, THE OWNER TO BRING IT TO
8 THE POLICE DEPARTMENT OR DO YOU COLLECT IT RIGHT THEN?

9 A I WOULD COLLECT THAT.

10 Q OFFICER MOORE, CORPORAL MOORE, DID YOU DISCUSS YOUR
11 INCIDENT REPORT THAT YOU CREATED ON THIS INCIDENT WITH MR.
12 POTTS?

13 A NO, SIR.

14 Q IS THAT STANDARD THAT YOU JUST NOT CONFER WITH THE
15 ALLEGED VICTIM?

16 A YES, SIR.

17 Q YOU NEVER GO BACK AND MAKE SURE IT IS ACCURATE?

18 A NO, SIR.

19 Q IS THAT HOW YOU WERE TRAINED AT THE POLICE ACADEMY OR
20 IS THAT HOW THEY DO IT IN NEWBERRY?

21 A I DON'T RECALL THAT TRAINING AT THE POLICE ACADEMY
22 BUT THAT IS JUST HOW IT IS DONE.

23 Q IN NEWBERRY YOU DON'T GO BACK TO THE VICTIM AND SAY,
24 THIS IS WHAT YOU TOLD ME?

25 A NO, SIR.

1 Q SO, DID YOU DISCUSS THIS INVESTIGATION WITH OFFICER
2 MCCLURKIN WHEN YOU GOT BACK TO THE POLICE DEPARTMENT?

3 A YES, SIR.

4 Q AND YOU TOLD HIM AT THE TIME THAT YOU WEREN'T ABLE TO
5 COLLECT ANY EVIDENCE?

6 A YES, SIR.

7 Q AND YOU TOLD HIM THE ONLY EVIDENCE WAS CONTAINED IN
8 THE DEER CAMERA?

9 A YES, SIR.

10 Q AND YOU TOLD HIM THE HOMEOWNER WAS GOING TO BRING THE
11 DEER CAMERA AROUND WHEN THEY COULD?

12 A YES, SIR.

13 Q AT THAT POINT DID THE NEWBERRY POLICE SEND ANYBODY
14 BEHIND YOU TO TRY TO REINVESTIGATE THE MATTER?

15 A I AM NOT AWARE OF THAT, NO.

16 Q DID YOU ASK FOR ANYBODY TO GO BACK?

17 A NO.

18 Q NOW, WERE YOU THERE WHEN THE DISK OR THE CD FINALLY
19 SHOWED UP AT THE POLICE DEPARTMENT?

20 A YES, SIR.

21 Q OKAY. AND DID YOU LOOK AT IT THEN?

22 A YES, SIR.

23 Q THAT IS ALL I HAVE. THANK YOU.

24 THE COURT: REDIRECT.

25 REDIRECT EXAMINATION

1 BY MR. MCDANIEL:

2 Q IS THAT THE PICTURE THAT YOU SAW?

3 A YES, SIR.

4 Q DID MR. POTTS SHOW YOU THAT PICTURE?

5 A YES, SIR.

6 Q DID YOU TELL HIM WHAT TO DO WITH THE CAMERA?

7 A YES, SIR.

8 Q WHAT DID YOU TELL HIM TO DO?

9 A I TOLD HIM THAT ONCE HE GOT IT DOWNLOADED HE NEEDED
10 TO RETURN TO THE PD ASAP.

11 Q DID HE DO THAT?

12 A YES, SIR.

13 Q AND WERE YOU THERE WHEN HE SHOWED UP WITH IT?

14 A YES, SIR.

15 Q CAN YOU ALWAYS GET A PRINT OFF OF SOMETHING THAT YOU
16 ARE DUSTING FOR PRINTS?

17 A NO, SIR.

18 Q NOW, YOU DID GO IN HIS HOUSE, RIGHT?

19 A YES, SIR.

20 Q HOW BIG IS HIS HOUSE?

21 A APPROXIMATELY 1500 SQUARE FEET.

22 Q IS IT A SMALL HOUSE?

23 A A SMALL HOUSE, YES.

24 Q BUT IT IS NOT SOME ESTATE THAT YOU DIDN'T SCOUR THE
25 GROUNDS?

1 A NO, SIR.

2 Q NO FURTHER QUESTIONS.

3 MR. CHAPLIN: YOUR HONOR, NO FURTHER QUESTIONS BUT I
4 WOULD LIKE OFFICER MOORE TO BE AVAILABLE IN CASE I NEED TO
5 CALL HER AT A LATER TIME.

6 THE COURT: OKAY, THANK YOU. LET ME SEE THE LAWYERS
7 OVER HERE REAL QUICK, IF I COULD.

8 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
9 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
10 JURY.)

11 THE COURT: CALL YOUR NEXT WITNESS, MR. MCDANIEL.

12 MR. MCDANIEL: THE STATE CALLS ROY MCCLURKIN TO THE
13 STAND.

14 ROY MCCLURKIN, AFTER BEING DULY SWORN,
15 TESTIFIED AS FOLLOWS:

16 DIRECT EXAMINATION

17 BY MR. MCCLURKIN:

18 Q WHERE DO YOU WORK, MR. MCCLURKIN?

19 A WITH THE NEWBERRY CITY POLICE DEPARTMENT.

20 Q WHAT IS YOUR RANK?

21 A I AM A LIEUTENANT.

22 Q HOW LONG HAVE YOU WORKED THERE?

23 A NOVEMBER OF THIS YEAR WILL BE 27 YEARS.

24 Q NOW, AS A LIEUTENANT, WHAT IS YOUR DUTIES?

25 A I AM LIEUTENANT ASSIGNED TO THE INVESTIGATIONS

1 DIVISION.

2 Q CAN YOU EXPLAIN WHAT THAT MEANS?

3 A WELL, WHAT I DO IS EVERY MORNING WE GO THROUGH THE
4 INCIDENT REPORTS AND DETERMINE WHAT NEEDS TO BE FOLLOWED
5 UP ON. ONCE WE DETERMINE WHAT NEEDS TO BE FOLLOWED UP ON
6 I TAKE THAT INCIDENT REPORT AND I GO OUT AND I INTERVIEW
7 WITNESSES, VICTIMS. ALSO DETERMINE WHETHER ANYTHING
8 FURTHER NEEDS TO BE DONE ON THE INCIDENTS REPORTS.

9 Q WERE YOU WORKING ON OCTOBER 28TH OF 2008?

10 A YES SIR, I WAS.

11 Q WHAT TIME DID YOU COME IN?

12 A I CAME TO WORK THAT MORNING AT 8:30 A.M.

13 Q WHAT WAS YOUR RANK AT THAT TIME?

14 A IT WAS STILL LIEUTENANT.

15 Q AND JUST TO GO BACK FOR A LITTLE BIT. YOU HAD BEEN
16 THERE FOR 27 YEARS, WHAT OTHER RANKS HAVE YOU HELD?

17 A WELL, I HAVE BEEN A PATROLMAN WHEN I FIRST STARTED.

18 Q WHEN DID YOU FIRST START?

19 A 1983. AND IN '87 I MADE CORPORAL, '89 I MADE
20 SERGEANT AND IN '91 I MADE LIEUTENANT. I WAS A LIEUTENANT
21 ON THE ROAD IN CHARGE OF A SHIFT AT THAT TIME WHERE I WAS
22 RESPONSIBLE FOR FOUR OTHER EMPLOYEES. I WAS BASICALLY
23 OVER A ROAD PATROL CREW AND WHAT I DID WAS I ASSIGNED
24 CALLS FOR SERVICE, ALSO ANSWERED CALLS MYSELF. I WORKED
25 TRAFFIC, BASICALLY DOING EVERYTHING THAT A PATROLMAN DOES

1 BUT ALSO HAVING THE RESPONSIBILITY TO MAKE SURE THAT THEY
2 DIDN'T GET IN ANY TROUBLE AND DID WHAT THEY NEEDED TO DO.
3 AFTER STAYING ON THE ROAD IN, I THINK IT WAS 2003 I MADE
4 AN INVESTIGATOR. SO, I HAVE BEEN AN INVESTIGATOR FOR
5 APPROXIMATELY SEVEN YEARS NOW.

6 Q THANK YOU. SO, YOU HAVE HAD ABOUT ALL THE JOBS IN
7 NEWBERRY?

8 A THERE ARE ONLY TWO OTHERS AND I DON'T THINK I'LL MAKE
9 THAT, I DON'T THINK I WILL STAY HERE THAT LONG.

10 Q NOW, WERE YOU WORKING OCTOBER 28TH?

11 A YES SIR, I WAS.

12 Q I THINK YOU CAME IN ABOUT 8:00 A.M.

13 A 8:30.

14 Q NOW, DID YOU COME INTO CONTACT WITH MR. POTTS THAT
15 DAY?

16 A I DID.

17 Q DO YOU KNOW HOW THAT CAME ABOUT, WHAT TIME?

18 A YES, IT WAS APPROXIMATELY MAYBE 4:00 OR 4:15 IN THE
19 AFTERNOON. MR. POTTS CAME TO MY OFFICE WITH CORPORAL
20 MOORE. CORPORAL MOORE TOLD ME THAT MR. POTTS HAD BEEN A
21 VICTIM OF A BURGLARY AT [REDACTED] PAULINE STREET. AND IN THE
22 COURSE OF HER GOING TO HIS RESIDENCE AND SPEAKING WITH HIM
23 HE HAD SHOWED HER AN IMAGE ON A DEER CAMERA THAT HE
24 INSTALLED IN HIS HOUSE OF THE SUSPECT INSIDE OF HIS
25 RESIDENCE. CORPORAL MOORE TOLD ME THAT SHE DID NOT

1 RECOGNIZE THE INDIVIDUAL AND MR. POTTS DID NOT RECOGNIZE
2 THE INDIVIDUAL. MR. POTTS HAD IN HIS POSSESSION A DVD OF
3 THE IMAGE OFF OF HIS DEER CAMERA. SHE ASKED IF I WOULD
4 LOOK AT IT AND SEE IF I KNEW THE INDIVIDUAL BECAUSE I HAD
5 BEEN HERE THAT LONG SHE THOUGHT I MIGHT KNOW WHO IT WAS.

6 Q DID YOU LOAD THAT DVD INTO YOUR COMPUTER?

7 A YES SIR, I LOADED IT INTO MY DESKTOP COMPUTER IN MY
8 OFFICE.

9 Q AND STATE'S EXHIBIT 1, IS THAT WHAT YOU LOADED INTO
10 YOUR COMPUTER?

11 A YES, SIR. THAT PARTICULAR DVD.

12 Q HOW MANY IMAGES POPPED UP?

13 A WHEN I LOADED IT INTO MY COMPUTER ONLY ONE IMAGE
14 POPPED UP. THE FIRST IMAGE WHICH I BELIEVE WAS JUST A
15 PICTURE OF THE KITCHEN. SO, MR. POTTS TOLD ME THAT I
16 NEEDED TO GO ON THROUGH THE DVD AND I CONTINUED TO CLICK
17 ON IT TO GO TO THE IMAGES UNTIL I GOT TO THIS IMAGE HERE.
18 I DON'T RECALL WHICH IMAGE IT WAS BUT IT WASN'T THE FIRST
19 IMAGE.

20 Q OKAY. SO, THIS IS STATE'S EXHIBIT 1. IS THAT THE
21 PICTURE YOU USED TO IDENTIFY?

22 A YES SIR, IT IS.

23 Q NOW, WHO DID YOU IDENTIFY AS BEING IN THAT--

24 MR. CHAPLIN: OBJECTION, YOUR HONOR. I WANT TO RENEW
25 MY ORIGINAL OBJECTION IN THIS MATTER UNDER HERRING AND

1 RULE 701, SOUTH CAROLINA RULES OF EVIDENCE.

2 THE COURT: OKAY. OVERRULED, GO AHEAD.

3 A I IDENTIFIED THAT PARTICULAR IMAGE THERE AS BEING
4 BENNIE DARRON MITCHELL.

5 Q HOW DO YOU KNOW IT IS MR. MITCHELL?

6 A I KNOW MR. MITCHELL FROM LIVING IN NEWBERRY FOR OVER
7 20 YEARS AND HE LIVING IN THE COMMUNITY OF NEWBERRY ALSO.

8 Q NOW, IS HE IN THE COURTROOM TODAY?

9 A YES SIR, HE IS.

10 Q COULD YOU PLEASE POINT TO HIM?

11 A HE IS SITTING RIGHT THERE WITH THE WHITE SHIRT ON AT
12 THE DEFENSE TABLE WITH GLASSES.

13 MR. MCDANIEL: YOUR HONOR, MAY THE RECORD REFLECT
14 THAT THE LIEUTENANT POSITIVELY IDENTIFIED BENNIE MITCHELL
15 AS THE PERSON IN THAT PICTURE.

16 THE COURT: OKAY, YOU CAN PROCEED.

17 Q NOW, WHAT IS IN HIS HANDS?

18 A IN THAT PARTICULAR IMAGE THERE IN MR. MITCHELL'S HAND
19 IS A FLASHLIGHT AND ALSO A BAG.

20 Q WHAT WAS YOUR NEXT MOVE AFTER YOU SAW THAT PICTURE?

21 A AFTER I SAW THAT PICTURE IT WAS GETTING CLOSE TO
22 AROUND 4:30 AND GOT OFF AT 5:00 O'CLOCK SO WHAT I DID IS
23 JUST SECURE THE DVD, MR. POTTS LEFT IT WITH ME AND I
24 SECURED IT AT THE POLICE DEPARTMENT ON THE NEXT DAY ON THE
25 29TH. WHEN I CAME IN I TALKED WITH JUDGE KOON, ONE OF OUR

1 MUNICIPAL JUDGES AND EXPLAINED THE CASE TO HIM AS FAR AS
2 THE BURGLARY AND WHAT EVIDENCE I HAD AS FAR AS THE IMAGE
3 OF THE SUBJECT INSIDE THE RESIDENCE AND HE SAID THERE WAS
4 PROBABLE CAUSE FOR AN ARREST WARRANT. SO, I DREW UP AN
5 ARREST WARRANT AND I ALSO DREW UP A SEARCH WARRANT FOR THE
6 RESIDENCE WHERE MR. MITCHELL LIVED.

7 Q AND DID YOU EXECUTE THAT SEARCH WARRANT?

8 A YES SIR, I DID.

9 Q AND WHERE WAS THAT?

10 A [REDACTED] HAVIRD STREET IN THE CITY OF NEWBERRY.

11 Q WAS THE DEFENDANT THERE?

12 A YES SIR, HE WAS.

13 Q AND DID YOU ARREST HIM THERE?

14 A YES SIR, WE TOOK HIM INTO CUSTODY ON THE ARREST
15 WARRANT THAT I HAD.

16 Q DID YOU RECOVER ANY ITEMS?

17 A NO SIR, I DID NOT RECOVER ANY ITEMS PURSUANT TO THE
18 SEARCH WARRANT.

19 Q OKAY. I AM GOING TO HAND YOU WHAT HAS BEEN MARKED AS
20 STATE'S EXHIBIT 9 FOR PURPOSES OF IDENTIFICATION. DO YOU
21 KNOW WHAT THAT IS?

22 A YES SIR, THIS IS AN AERIAL PHOTOGRAPH SHOWING THE
23 LOCATION WHERE MR. POTTS AND ALSO MR. MITCHELL LIVES.

24 Q AND DOES THAT FAIRLY AND ACCURATELY REPRESENT THAT
25 AREA?

1 A YES, IT DOES.

2 Q HAVE ANY ALTERATIONS OR DELETIONS BEEN MADE?

3 A NONE THAT I CAN SEE.

4 MR. MCDANIEL: YOUR HONOR, I WOULD ASK THAT STATE'S
5 EXHIBIT 9 BE MOVED INTO EVIDENCE.

6 MR. CHAPLIN: YOUR HONOR, I AM GOING TO OBJECT TO
7 THAT AS TO RELEVANCE.

8 THE COURT: OKAY, OVERRULED.

9 (WHEREUPON, STATE'S EXHIBIT NO. 9 WAS ADMITTED INTO
10 EVIDENCE.)

11 Q CAN YOU LOCATE THE VICTIM'S HOUSE THERE?

12 A IF YOU ARE FAMILIAR WITH ANYTHING IN NEWBERRY, THIS
13 IS BOUNDARY STREET GOING OUT OF TOWN TOWARDS HIGHWAY 34.
14 WHAT YOU DO IS THIS WOULD BE BACK TOWARDS TOWN AND YOU
15 COME DOWN, THIS IS PAULINE STREET HERE. AND THIS IS THE
16 VICTIM'S HOUSE HERE, [REDACTED] PAULINE STREET.

17 Q AND CAN YOU LOCATE THE DEFENDANT'S HOUSE?

18 A YES, SIR. THIS IS HAVIRD STREET THAT RUNS OFF OF
19 BOUNDARY STREET AND THIS IS THE SUSPECTS RESIDENCE HERE,
20 18 HAVIRD STREET.

21 Q AND THAT IS WHERE YOU EXECUTED THE SEARCH WARRANT?

22 A THAT IS CORRECT.

23 Q AND THAT IS WHERE THE DEFENDANT WAS ARRESTED,
24 CORRECT?

25 A THAT IS CORRECT.

1 Q DO YOU KNOW THE DISTANCE BETWEEN THOSE TWO HOUSES?

2 A YES SIR, THE DISTANCE BETWEEN THE VICTIM'S HOUSE AND
3 THE SUSPECTS HOUSE IS APPROXIMATELY TWO-TENTHS OF A MILE.

4 Q AND HOW DO YOU KNOW THAT?

5 A BECAUSE I DROVE MY PATROL CAR FROM HERE AND USED THE
6 ODOMETER.

7 Q THANK YOU, VERY MUCH. NOW, AFTER THE DEFENDANT WAS
8 ARRESTED DID YOU EVER GO TO MR. POTTS HOME?

9 A YES SIR, I DID.

10 Q DID YOU GO ON THE INCIDENT DATE?

11 A NO SIR, I DID NOT.

12 Q WHY DIDN'T YOU GO ON THE INCIDENT DATE?

13 A CORPORAL MOORE TOLD ME THAT SHE HAD PROCESSED THE
14 CRIME SCENE BY TAKING FINGERPRINTS AND THE EVIDENCE THAT
15 SHE BROUGHT ME, WELL THAT MR. POTTS BROUGHT ME WAS THE
16 PHOTOGRAPH SHOWING THE SUSPECT INSIDE OF THE RESIDENCE.
17 AND I KNEW WHO THE SUSPECT WAS SO I DIDN'T GO BACK TO THE
18 RESIDENCE THAT DAY, I DIDN'T HAVE ANY NEED TO.

19 Q SO, BASICALLY FROM THAT PICTURE YOU GOT AN ARREST
20 WARRANT AND A SEARCH WARRANT?

21 A YES, SIR.

22 Q YOU SAID YOU HAVE BEEN TO THE INCIDENT LOCATION?

23 A YES SIR, I HAVE BEEN BACK TO THE INCIDENT LOCATION.

24 Q AND YOU REMEMBER WHEN YOU WENT TO THE INCIDENT
25 LOCATION?

1 A I THINK IT WAS JANUARY OF THIS YEAR.

2 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED AS
3 STATE'S EXHIBIT 7 AND 8 FOR IDENTIFICATION. HAVE YOU SEEN
4 THOSE BEFORE?

5 A YES SIR, I HAVE.

6 Q WHAT ARE THEY?

7 A THESE ARE PICTURES OF SOME MEASUREMENTS I TOOK INSIDE
8 OF MR. POTTS HOUSE IN JANUARY.

9 Q DOES THAT FAIRLY AND ACCURATELY REPRESENT THE EVENTS
10 THAT TAKES PLACE THAT DAY?

11 A YES SIR, IT DOES.

12 Q ANY ALTERATIONS OR DELETIONS BEEN MADE?

13 A NO, SIR.

14 MR. MCDANIEL: YOUR HONOR, I ASK THAT STATE'S
15 EXHIBITS 7 AND 8 BE INTRODUCED INTO EVIDENCE IN THIS CASE.

16 MR. CHAPLIN: OBJECTION, YOUR HONOR. I RENEW THE
17 SAME OBJECTION I MADE EARLIER WITH REGARDS TO SUBSEQUENTLY
18 TAKING PHOTOGRAPHS UNDER RULE 402 AND 403.

19 THE COURT: OKAY, THANK YOU MR. CHAPLIN. I FIND THE
20 PHOTOGRAPHS ARE ADMISSIBLE. THANK YOU.

21 (WHEREUPON, STATE'S EXHIBIT NOS. 7 AND 8 WERE
22 ADMITTED INTO EVIDENCE.)

23 MR. MCDANIEL: PERMISSION TO PUBLISH TO THE JURY,
24 YOUR HONOR.

25 THE COURT: YES, SIR.

1 Q OKAY, TELL US WHAT THAT IS?

2 A THIS IS THE MEASUREMENT FROM THE FLOOR TO UP ON THE
3 DOOR. WHAT I DID IS I TOOK THE IMAGE OF HIM INSIDE OF THE
4 KITCHEN DOOR THERE OF THE RESIDENCE AND THE IMAGE ON THE
5 DOOR WHERE THE TOP OF HIS HEAD WAS. AND WHAT I DID WAS
6 CAME OVER TO THE DOOR AND MEASURED TO APPROXIMATELY WHERE
7 HIS HEAD WAS ENTERING THE KITCHEN THROUGH THE DOOR. THAT
8 DISTANCE FROM THE FLOOR TO HERE WAS APPROXIMATELY 5'8"
9 TALL.

10 Q HOW TALL IS MR. MITCHELL?

11 A APPROXIMATELY 5'8" TALL.

12 Q AND I AM GOING TO SHOW YOU 8, STATE'S EXHIBIT 8.
13 WHAT IS THIS?

14 A THIS IS COMING INTO THE KITCHEN. AND, AGAIN, WHAT I
15 DID WAS FOUND A REFERENCE POINT OVER HERE ALONG THE WALL
16 IN THE KITCHEN DOOR TO THE SHELF HERE TO APPROXIMATELY
17 WHERE THE TOP OF HIS HEAD WAS COMING INTO THE DOOR AND
18 TOOK A MEASUREMENT. AND THAT MEASUREMENT WAS ALSO
19 APPROXIMATELY 5'8" TALL.

20 Q SHOW US ON THIS WHERE YOU TOOK YOUR MEASUREMENT.

21 A YOU CAN SEE THE TOP HERE AND WHAT I DID WAS DRAW A
22 REFERENCE LINE FROM THE TOP OF HIS HEAD TO OVER HERE AND
23 MEASURE UP.

24 Q STATE'S EXHIBIT 7, WHERE IS THAT MEASUREMENT?

25 A THIS MEASUREMENT IS ALONG THE INSIDE, THIS PANEL IS ON

1 THE OUTSIDE OF THE DOOR. THERE IS ALSO ONE ON THE INSIDE
2 OF THE DOOR RIGHT HERE THAT WE DID ALSO, DRAWING A
3 REFERENCE POINT. AND THAT IS THE PANEL TO WHERE I
4 MEASURED FROM THE FLOOR UP TO THERE AND IT IS
5 APPROXIMATELY 5'8" TALL.

6 Q OKAY. NOW, HAVE YOU SEEN ALL THE IMAGES THAT ARE ON
7 STATE'S EXHIBIT 1?

8 A YES SIR, I WENT THROUGH ALL THE IMAGES.

9 Q THAT IMAGE, I AM GOING TO HAND YOU STATE'S EXHIBIT 8.
10 DID YOU USE THAT AS A REFERENCE POINT?

11 A NO SIR, I DIDN'T USE THAT IMAGE THERE AS A REFERENCE
12 POINT.

13 Q NOW, THESE ARE ALL THE SAME DISK, CORRECT?

14 A THAT IS CORRECT.

15 Q AND THAT IS THE SAME IMAGE, THAT IS A DIFFERENT VIEW
16 OF THE SAME IMAGE?

17 A YES SIR, IT IS.

18 Q CAN YOU EXPLAIN THE PROCESS AND IT HAS BEEN MENTIONED
19 IN HERE OF, YOU AS AN INVESTIGATOR GETTING REPORTS THAT
20 YOU NEED TO INVESTIGATE?

21 A YES, USUALLY WHAT HAPPENS IS THE REPORTS ARE
22 GENERATED AND THE NEXT MORNING WHEN I COME TO WORK WE GET
23 EVERY INCIDENT REPORT THAT HAS BEEN GENERATED BY THE PRIOR
24 SHIFT. AND WE GO THROUGH THEM AND I DON'T DETERMINE WHAT
25 NEEDS FOLLOWING UP ON, MY CAPTAIN DOES. HE DETERMINES

1 WHAT NEEDS TO BE FOLLOWED UP ON AND HE ASSIGNS THOSE CASES
2 TO EACH INDIVIDUAL INVESTIGATOR TO BE FOLLOWED UP ON.

3 Q ARE YOU ASSIGNED ANY SPECIFIC CASE, WHO DOES THAT
4 WORK?

5 A WELL, BECAUSE WE ARE A SMALL DEPARTMENT I BASICALLY
6 HAVE TO INVESTIGATE EVERYTHING. A LOT OF THE LARGER
7 DEPARTMENTS, WHAT THEY DO IS THEY SPECIALIZE IN SOMETHING.
8 WE DON'T SPECIALIZE ON ANYTHING SO I HAVE TO INVESTIGATE
9 ANYTHING FROM VANDALISM, LARCENIES, ASSAULTS, BURGLARIES,
10 ALL THE WAY UP.

11 Q NOW, IN THIS CASE AND YOU ARE AWARE THAT NO PICTURES
12 WERE TAKEN?

13 A THAT IS CORRECT.

14 Q AND NO EVIDENCE WAS RECOVERED?

15 A THAT IS CORRECT.

16 Q WHY DID YOU DETERMINE THAT YOU DIDN'T NEED TO GO BACK
17 TO THE SCENE?

18 A WELL, BASICALLY WHAT I WOULD OF BEEN GOING BACK TO DO
19 WAS TO TRY TO GET FINGERPRINTS AND STUFF LIKE THAT. AND
20 CORPORAL MOORE WHO IS AN OFFICER TOLD ME SHE HAD
21 DETERMINED THAT, WELL, SHE HAD TRIED TO GET FINGERPRINTS
22 AND THERE WASN'T ANY FINGERPRINTS TO OBTAIN. SO, I DIDN'T
23 SEE ANY NEED FOR ME TO GO BACK OVER THERE. IF SHE HAD OF
24 NEEDED AN INVESTIGATOR SHE WOULD OF CALLED ONE.

25 Q IS IT NORMAL OR NOT TO FIND FINGERPRINTS?

1 A YES SIR, IT IS NORMAL. I PROCESS CRIME SCENES AND
2 DIDN'T FIND FINGERPRINTS. I HAVE PROCESSED CRIME SCENES
3 AND FOUND SMUDGES. WHEN YOU ARE DEALING WITH FINGERPRINTS
4 YOU ARE LOOKING FOR RIDGE DETAIL. SO, I COULD PROCESS A
5 CRIME SCENE AND FIND SMUDGES BUT IT WOULD BE IDENTIFIED
6 RIDGE DETAIL TO IDENTIFY SOMEBODY USING FINGERPRINTS.

7 Q SOME SURFACES BETTER TO GET A FINGERPRINT FROM
8 OTHERS?

9 A YES SIR, IT IS.

10 Q REGARDING RECOVERING NO FINGERPRINTS, ARE YOU
11 SURPRISED?

12 A NO SIR, I AM NOT SURPRISED.

13 Q THANK YOU. NO FURTHER QUESTIONS.

14 THE COURT: Y'ALL APPROACH.

15 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
16 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
17 JURY.)

18 THE COURT: WE ARE GOING TO BREAK FOR THE DAY, LADIES
19 AND GENTLEMEN. WE WILL START BACK IN THE MORNING AT 9:30.
20 PLEASE DON'T TALK ABOUT THE CASE AND KEEP AN OPEN MIND.
21 THANK YOU. YOU ARE EXCUSED.

22 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
23 THE DAY.)

24 (WHEREUPON, THE TRIAL WILL RESUME THE NEXT MORNING AT
25 9:30 A.M.)

1 THE COURT: WE ARE BACK ON THE RECORD OF THE STATE
2 VERSUS BENNIE D. MITCHELL. THE REASON WE ARE GETTING A
3 LATE START THIS MORNING IS ONE OF THE JURORS, SHANI M.
4 SHELLS, JUROR NUMBER 135 HAS NOT REPORTED YET THIS
5 MORNING. WE WERE SUPPOSE TO START COURT AT 9:30, IT IS
6 NOW 10:00 O'CLOCK. WE HAVE TRIED THROUGH THE CLERK TO
7 CONTACT HER HOME WHERE THERE WAS NO ANSWER, CONTACTED HER
8 EMERGENCY CONTACT, IT WAS HER MOTHER AND ARE TRYING TO TRY
9 TO FIND OUT HER WHEREABOUTS. WE ARE GOING TO SUBSTITUTE
10 MS. MAYBIN, THE ALTERNATE JUROR, NUMBER 95 IN PLACE OF MS.
11 SHELLS SO WE CAN GET THE CASE UNDERWAY. ANYTHING ELSE
12 BEFORE WE BRING THE JURY OUT?

13 MR. MCDANIEL: NOT FROM THE STATE, YOUR HONOR.

14 MR. CHAPLIN: NOT FROM THE DEFENSE.

15 THE COURT: LIEUTENANT, YOU CAN RESUME THE STAND AND
16 YOU ARE STILL UNDER OATH. BRING THEM IN, PLEASE.

17 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
18 APPROXIMATELY 10:00 A.M.)

19 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, THE
20 REASON IS WE ARE DELAYED THIS MORNING IS THAT ONE OF YOUR
21 FELLOW JURORS HADN'T REPORTED YET AND WE ARE TRYING TO
22 FIND WHERE SHE IS. BUT IN THE MEANTIME MS. MAYBIN, YOU
23 ARE NOW A REGULAR JUROR. WE WILL HAVE THE
24 CROSS-EXAMINATION. MR. CHAPLIN.

25 CROSS-EXAMINATION

1 BY MR. CHAPLIN:

2 Q OFFICER MCCLURKIN, DO YOU HAVE ANY TRAINING IN THE
3 USE OF INFRARED ILLUMINATION?

4 A NO SIR, I DO NOT.

5 Q SO, YOU DON'T KNOW WHAT INFRARED ILLUMINATION, WHEN
6 THIS BECOMES VISIBLE TO THE HUMAN EYE?

7 A NO SIR, I DO NOT.

8 Q YOU DON'T KNOW THE LEVEL OF INFRARED USED IN THIS
9 CAMERA, THE DEER CAMERA?

10 A NO SIR, I DO NOT.

11 Q DO YOU KNOW WHAT THE EFFECT OF INFRARED ILLUMINATION
12 HAS ON SKIN TONE?

13 A NO SIR, I DO NOT.

14 MR. MCDANIEL: JUDGE, HE HAS ESTABLISHED THAT HE
15 DOESN'T KNOW THE INFRARED.

16 MR. CHAPLIN: YOUR HONOR, I WILL MOVE ON.

17 THE COURT: OKAY.

18 Q MR. MCCLURKIN, WHEN MR. POTTS CALLED BACK, I THINK ON
19 THE 30TH AND REPORTED THAT MONEY WAS TAKEN FROM A BOX DID
20 YOU OR ANYONE ELSE GO BACK TO THE HOME TO INVESTIGATE
21 THAT?

22 A NO SIR, WE DID NOT.

23 Q NO FURTHER QUESTIONS FOR OFFICER MCCLURKIN.

24 THE COURT: ANY REDIRECT?

25 MR. MCDANIEL: NONE FROM THE STATE.

1 THE COURT: THE STATE MAY CALL ITS NEXT WITNESS.

2 MR. MCDANIEL: THE STATE RESTS.

3 THE COURT: LADIES AND GENTLEMEN, THE STATE HAS
4 CONCLUDED ITS PRESENTATION OF EVIDENCE AND I HAVE TO TAKE
5 A MATTER UP WITH THE LAWYERS SO I WILL DO THAT NOW. DON'T
6 TALK ABOUT THE CASE AND CONTINUE TO KEEP AN OPEN MIND.
7 THANK YOU.

8 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

9 THE COURT: OKAY, ANY MOTIONS OR MATTERS AT THIS
10 TIME?

11 MR. CHAPLIN: YES, SIR.

12 THE COURT: YES SIR, MR. CHAPLIN.

13 MR. CHAPLIN: YES, SIR. THE DEFENSE ASK FOR A
14 DIRECTED VERDICT AT THIS TIME, YOUR HONOR. WE ARE BASING
15 THAT MOTION ON THE FACT THAT THE STATE HAS FAILED TO PROVE
16 EVERY ELEMENT BEYOND A REASONABLE DOUBT IN THIS MATTER TO
17 INCLUDE THE ID OF THE PERSON IN THE PICTURE.

18 THE COURT: ALL RIGHT. OF COURSE I CAN'T WEIGH THE
19 EVIDENCE AT THIS POINT, I CAN ONLY DETERMINE IF EVIDENCE
20 IS IN EXISTENCE AND I CAN'T MAKE ANY KIND OF CREDIBILITY
21 DETERMINATION. SO, I HAVE TO CONSTRUE THE EVIDENCE IN THE
22 LIGHT MOST FAVORABLE TO THE STATE AND I THINK THERE IS
23 SUFFICIENT EVIDENCE IN THE RECORD NOW AND TO SEND THE CASE
24 TO THE JURY UNDER THE STANDARD SET FORTH BY RULE 19. SO,
25 I RESPECTFULLY DENY THE MOTION.

1 MR. CHAPLIN: THANK YOU, YOUR HONOR.

2 THE COURT: MR. MITCHELL, WE HAVE REACHED THE POINT
3 IN THE TRIAL WHERE YOU CAN PRESENT A DEFENSE IF YOU WISH
4 TO, SIR. SO, I AM GOING TO ASK MS. FOLK TO PLACE YOU
5 UNDER OATH BECAUSE I AM GOING TO GO OVER WITH YOU YOUR
6 RIGHTS TO TESTIFY OR NOT TO TESTIFY.

7 BENNIE DARRON MITCHELL, AFTER BEING DULY SWORN,
8 TESTIFIED AS FOLLOWS:

9 THE COURT: ALL RIGHT, SIR. YOU UNDERSTAND THAT YOU
10 HAVE THE RIGHT TO TESTIFY IN THIS CASE AND TAKE THE STAND
11 AND TELL YOUR VERSION OF THE EVENTS THAT ARE SET FORTH IN
12 ANY DEFENSES THAT YOU MAY HAVE IN YOUR TESTIMONY. AND
13 WHETHER OR NOT YOU TESTIFY IS A PERSONAL CHOICE, IT IS
14 YOUR RIGHT, NOBODY ELSE'S. SO, I JUST NEED TO MAKE SURE
15 YOU UNDERSTAND THE CHOICES YOU HAVE AND THE CONSEQUENCES
16 OF MAKING THAT CHOICE. SO, IF I SAY ANYTHING OR ASK YOU
17 ANY QUESTIONS OR MAKE A STATEMENT THAT YOU DON'T
18 UNDERSTAND OR IF I AM NOT MAKING SENSE TO YOU JUST LET ME
19 KNOW. OKAY, SIR.

20 MR. MITCHELL: YES, SIR.

21 THE COURT: IF YOU TAKE THE STAND YOU WOULD BE
22 SUBJECT TO BEING CROSS-EXAMINED JUST AS YOUR ATTORNEY HAS
23 CROSS-EXAMINED THE STATE'S WITNESSES. AND THAT MEANS THAT
24 THE SOLICITOR COULD ASK YOU ANYTHING THAT MIGHT BEAR ON
25 YOUR CREDIBILITY, ANYTHING THAT MIGHT BE RELEVANT TO THIS

1 CASE AND COULD DEAL WITH THOSE MATTERS ON
2 CROSS-EXAMINATION. I DON'T KNOW IF THERE IS ANY
3 IMPEACHABLE MATERIAL. IS THERE ANY KIND OF RECORD THAT
4 THE STATE WOULD SEEK TO USE IF MR. MITCHELL TOOK THE
5 STAND?

6 MR. MCDANIEL: YES, JUDGE, THE STATE HAS SOME
7 CERTIFIED COPIES OF PRIOR CONVICTIONS.

8 THE COURT: WHAT ARE THEY.

9 MR. MCDANIEL: I BELIEVE THEY ARE AUTO BREAKINGS,
10 LARCENY THIRD, BREAKING INTO MOTOR VEHICLES TIMES TWO, TWO
11 PETTY LARCENIES. TWO THIRD PROPERTY OFFENSES, TWO AUTO
12 BREAKINGS AND THREE AUTO BREAKINGS, JUDGE, THAT FALLS
13 WITHIN THE TEN YEARS.

14 THE COURT: SO, IF YOU TOOK THE STAND IT IS POSSIBLE
15 THE JURY WOULD HEAR ABOUT THOSE PRIOR CONVICTIONS. WHERE
16 AS IF YOU DIDN'T TAKE THE STAND THEY WOULD NOT HEAR ABOUT
17 ANY PRIOR RECORD YOU WOULD HAVE. AND IF YOU CHOSE NOT TO
18 TAKE THE STAND, MR. MITCHELL, THE COURT WOULD TELL THE
19 JURY JUST AS I HAVE ALREADY TOLD THEM THAT YOU DON'T HAVE
20 ANY BURDEN OF PROOF, THE BURDEN IS ONLY ON THE STATE. YOU
21 ARE PRESUMED INNOCENT, YOU DON'T HAVE TO OFFER ANY KIND OF
22 EVIDENCE OR EXPLANATION DURING THIS TRIAL AND YOU
23 CERTAINLY HAVE THE RIGHT NOT TO TESTIFY AND THAT NOT BE
24 HELD AGAINST YOU IN ANY WAY. I WOULD TELL THE JURY THEY
25 COULD NOT EVEN DISCUSS THE FACT THAT YOU HAD NOT TESTIFIED

1 IN THEIR DELIBERATIONS OT TAKEN INTO ACCOUNT WHATSOEVER.
2 DO YOU UNDERSTAND THAT, SIR?

3 MR. MITCHELL: YES, SIR.

4 THE COURT: NOW, UNDERSTANDING THE RIGHTS THAT YOU
5 CAN TESTIFY OR NOT TO TESTIFY HAVE YOU MADE A DECISION AS
6 TO WHICH YOU WOULD LIKE TO DO?

7 MR. MITCHELL: YES, SIR.

8 THE COURT: AND WHAT IS THAT.

9 MR. MITCHELL: NOT TO TESTIFY.

10 THE COURT: NOT TO TESTIFY?

11 MR. MITCHELL: YES, SIR.

12 THE COURT: AND HAVE YOU HAD ENOUGH TIME TO TALK TO
13 MR. CHAPLIN ABOUT YOUR DECISION.

14 MR. MITCHELL: YES, SIR.

15 THE COURT: HAVE YOU UNDERSTOOD ALL OF MY QUESTIONS,
16 SIR?

17 MR. MITCHELL: YES, SIR.

18 THE COURT: THANK YOU, MR. MITCHELL. ARE YOU READY
19 TO PROCEED?

20 MR. CHAPLIN: I AM, YOUR HONOR.

21 THE COURT: OKAY. LET'S BRING THE JURY IN.

22 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
23 APPROXIMATELY 10:10 A.M.)

24 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, WE HAVE
25 REACHED THE STAGE OF THE CASE, LIKE I TOLD YOU AT THE

1 BEGINNING, THE STATE HAS RESTED AND THE DEFENSE HAS THE
2 OPPORTUNITY BUT NOT THE OBLIGATION TO PRESENT ANY EVIDENCE
3 THAT MR. MITCHELL WISHES TO. SO, AT THIS TIME, MR.
4 CHAPLIN.

5 MR. CHAPLIN: YOUR HONOR, THE DEFENSE WOULD CALL
6 THOMAS ALLEY TO THE STAND.

7 THOMAS ALLEY, AFTER BEING DULY SWORN,
8 TESTIFIED AS FOLLOWS:

9 DIRECT EXAMINATION

10 BY MR. CHAPLIN:

11 Q MR. ALLEY, WOULD YOU PLEASE TELL US WHAT YOU DO FOR A
12 LIVING?

13 A I AM A PROFESSOR OF PSYCHOLOGY AT CLEMSON UNIVERSITY.
14 I WOULD LIKE TO ADD TO THAT THAT I AM NOT HERE
15 REPRESENTING THE UNIVERSITY OR MY DEPARTMENT.

16 Q TELL US ABOUT YOUR EDUCATION.

17 A I HAVE A BS DEGREE IN PSYCHOLOGY FROM PENNSYLVANIA
18 STATE UNIVERSITY, A MASTERS, PHD IN EXPERIMENTAL
19 PSYCHOLOGY FROM THE UNIVERSITY OF CONNECTICUT. AND I
20 SPENT THREE YEARS AS A POSTDOCTORAL FELLOW AT THE
21 UNIVERSITY OF CONNECTICUT.

22 Q DO YOU HAVE ANY SPECIAL RECOGNITIONS?

23 A SOME, YES.

24 Q HAVE YOU EVER BEEN A VISITING FELLOW?

25 A YES, I WAS A VISITING FELLOW AT A RESEARCH INSTITUTE

1 IN AUSTRIA FOR THE PORTION OF A YEAR AND SIMILAR I HAVE
2 BEEN A VISITING SCHOLAR ON TWO OCCASIONS AT EMERY
3 UNIVERSITY IN ATLANTA.

4 Q AS FAR AS ANY PUBLICATIONS OR PRESENTATIONS, HAVE YOU
5 HAD ANY?

6 A YES, I HAVE APPROXIMATELY 50 PUBLICATIONS OF VARIOUS
7 SORTS AS WELL AS MAYBE 60 OR SO PRESENTATIONS AT NATIONAL,
8 REGIONAL OR INTERNATIONAL CONFERENCES.

9 Q TELL US ABOUT YOUR TEACHING EXPERIENCE.

10 A I HAVE BEEN TEACHING FOR ABOUT 28 OR 29 YEARS.
11 PRIMARILY OVER THAT PERIOD OF TIME HAVE TAUGHT PERCEPTION
12 AND COGNITIVE PSYCHOLOGY, COGNITIVE PSYCHOLOGY BEING THE
13 STUDY OF ATTENTION, MEMORY, DECISION MAKING AND SIMILAR
14 MATTERS.

15 Q HAVE YOU EVER TAUGHT CLASSES DEALING WITH HUMAN
16 MEMORY AND PERCEPTION?

17 A YES, I REGULARLY, EVERY SEMESTER I TEACH A CLASS
18 DEALING WITH ONE OR THE OTHER OR BOTH.

19 Q AND DO YOU EVER TEACH ABOUT RECOGNITION OF FACES?

20 A YES, THAT IS A STANDARD PART OF COGNITIVE PSYCHOLOGY
21 CLASS, THAT HAS BEEN FOR SOME YEARS NOW BEEN A PRETTY
22 REGULAR PART OF INTRODUCTORY PSYCHOLOGY COURSES.

23 Q NOW, HAVE YOU BEEN PREVIOUSLY QUALIFIED IN COURT AS
24 AN EXPERT IN THE AREA OF PERCEPTION AND EYEWITNESS
25 TESTIMONY?

1 A YES, I HAVE.

2 Q DO COLLEGE TEXT BOOKS COVER THIS AREA?

3 A YES, THERE ARE IN FACT TEXT BOOKS DEVOTED TO THIS
4 AREA AS WELL AS SOME COVERAGE OF THIS IN A GOOD MANY
5 TEXTBOOKS, DOZENS.

6 Q AND ARE YOU FAMILIAR WITH THE RESEARCH IN THESE
7 AREAS?

8 A THERE IS A LOT OF RESEARCH IN THIS AREA. I AM
9 FAMILIAR WITH A LOT OF IT BUT CERTAINLY I KIND OF AM
10 FAMILIAR WITH EVERYTHING.

11 MR. CHAPLIN: YOUR HONOR, AT THIS TIME I WOULD LIKE
12 TO OFFER DR. THOMAS R. ALLEY AS AN EXPERT IN THE AREA OF
13 IDENTIFICATION, SPECIFICALLY FACE RECOGNITION AND
14 PERCEPTION.

15 THE COURT: VOIR DIRE?

16 MR. MCDANIEL: A FEW QUESTIONS, SIR.

17 CROSS-EXAMINATION

18 BY MR. MCDANIEL:

19 Q DR. ALLEY, WHEN YOU WERE QUALIFIED AS AN EXPERT, IT
20 IS PERCEPTION?

21 A MOST OF THE TIME, YES, I HAVE ONCE OR TWICE BEEN
22 QUALIFIED IN CASES INVOLVING PERCEPTION AND ATTENTION.

23 Q HAVE YOU EVER BEEN QUALIFIED AS A FACE RECOGNITION
24 EXPERT?

25 A WITH THAT PHRASE USED BY ITSELF?

1 Q RIGHT.

2 A NO, I DON'T BELIEVE SO.

3 Q BUT EYEWITNESS TESTIMONY, YOU SAY KIND OF IS ALL OF
4 THAT?

5 A WELL, THE EYEWITNESS TESTIMONY TYPICALLY REVOLVES
6 AROUND EYEWITNESS IDENTIFICATION WHICH IS FACE
7 RECOGNITION. SO, IT IS REALLY JUST A DIFFERENT PHRASE FOR
8 THE SAME THING.

9 Q SO, KIND OF A SUBSCIENCE OF THAT OR A SUBSECTION OF
10 EYEWITNESS TESTIMONY?

11 A EYEWITNESS TESTIMONY MIGHT COVER OTHER THINGS AS
12 WELL, LIKE DID SOMEBODY HAVE A GUN OR WHAT DID THEY DO.
13 BUT THE MATTER OFTEN COMES DOWN TO THE IDENTIFICATION
14 PORTION.

15 Q AND YOU MENTIONED, WHEN WAS THE LAST TIME YOU WERE
16 QUALIFIED AS AN EXPERT?

17 A I WOULD SAY ABOUT A YEAR AGO.

18 Q AND WHERE WAS THAT?

19 A I THINK MY LAST CASE WAS GREENVILLE, I AM NOT CERTAIN
20 OF THAT.

21 Q AND WHAT WERE YOU QUALIFIED AS?

22 A I USUALLY USE THE PHRASE, PERCEPTION, MEMORY AND
23 EYEWITNESS IDENTIFICATION TO COVER THE GAMUT OF THINGS
24 THAT COME UP.

25 Q OKAY. THANK YOU.

1 THE COURT: I FIND HE IS QUALIFIED. LADIES AND
2 GENTLEMEN, UNDER THE LAW WITNESSES TYPICALLY CAN ONLY
3 TESTIFY ABOUT THINGS THAT THEY OBSERVE THROUGH THEIR
4 SENSES AND THEY HAVE FIRST HAND KNOWLEDGE ABOUT. THERE IS
5 AN EXCEPTION FOR PEOPLE WHO BY REASONS OF THEIR TRAINING,
6 EDUCATION OR EXPERIENCE HAVE ACHIEVED AN EXPERTISE IN
7 THEIR FIELDS. THESE WITNESSES WHO ARE CALLED EXPERT
8 WITNESSES ARE ALLOWED TO GIVE THEIR OPINIONS ON MATTERS
9 UNLIKE OTHER WITNESSES WHO MAY NOT GIVE THEIR OPINIONS.
10 SO, WITH THAT YOU SHOULD ALSO REMEMBER THAT REGARDLESS OF
11 WHAT TYPE OF WITNESS IT IS YOU AND YOU ALONE DETERMINE THE
12 CREDIBILITY OR BELIEVABILITY OF ALL OF THE TESTIMONY. SO,
13 YES SIR, MR. CHAPLIN.

14 CONTINUE DIRECT EXAMINATION

15 BY MR. CHAPLIN:

16 Q GOOD MORNING, AGAIN, DR. ALLEY.

17 A GOOD MORNING.

18 Q DR. ALLEY, DESCRIBE THE RESEARCH DONE IN THE AREA OF
19 FACE RECOGNITION AND WITNESS TESTIMONY?

20 A WELL, IT IS A GREAT DEAL OF RESEARCH. THIS GOES BACK
21 TO THE FIRST RESEARCH IN APPLIED PSYCHOLOGY BACK IN THE
22 LATE 1800'S. TO SUMMARIZE THAT, IT IS A LITTLE BIT
23 DIFFICULT BUT THERE ARE SEVERAL DIFFERENT AREAS MAYBE OF
24 RESEARCH THAT I COULD STICK THINGS INTO THAT WILL GIVE A
25 GOOD PICTURE OF WHAT TYPES OF THINGS GET DONE. SO, THERE

1 ARE LABORATORY STUDIES WHICH TYPICALLY INVOLVE SHOWING A
2 VIDEO OR A PHOTO OR A NUMBER OF THESE TO PEOPLE ON AN
3 OCCASION. AND THEN SOME LATER TIME TESTING THEIR MEMORY
4 TO SEE IF THEY CAN, FOR INSTANCE, PICK A PERSON THEY HAVE
5 SEEN IN THE VIDEO OUT OF A PHOTO LINEUP OR IDENTIFY WHICH
6 OF A NUMBER OF PEOPLE THEY HAVE OR HAVE NOT SEEN BEFORE.
7 AGAIN, HUNDREDS OF STUDIES OF THAT SORT. THERE IS ALSO A
8 GOOD NUMBER OF FIELD STUDIES WHERE THEY TRY TO TAKE THIS,
9 THE FINDINGS HERE AND SOME OF THE METHODS OUT INTO THE
10 REAL WORLD TO SEE IF WE GET THE SAME SORTS OF FINDINGS
11 THERE. SO, IN THESE FIELD STUDIES THEY MIGHT FOR INSTANCE
12 SEND PEOPLE INTO CONVENIENT STORES AND THEN LATER TEST THE
13 CLERK TO SEE IF THEY CAN REMEMBER WHAT THE PERSON LOOKED
14 LIKE OR IDENTIFY THEM. AND THERE IS A SMALLER AREA BUT AN
15 IMPORTANT AREA INVOLVING ARCHIVAL RESEARCH OF THE LEGAL
16 SYSTEM RECORDS WHERE FOR INSTANCE WE CAN REVIEW THE CASES
17 OF PEOPLE WHO HAVE BEEN CONVICTED OR NOT CONVICTED AND SEE
18 WHY A PARTICULAR INTEREST THERE ARE IN CASES WHERE THERE
19 HAS BEEN A WRONGFUL CONVICTION. FOR INSTANCE, A CASE IN
20 WHICH SOMEBODY WHO HAS BEEN CONVICTED AND YEARS LATER
21 DETERMINED TO BE INNOCENT ON THE BASIS OF ADDITIONAL
22 EVIDENCE, PERHAPS FROM DNA. ON THE BASIS OF THOSE CASES
23 WE SEE A SIMILAR PATTERN OF WHAT YOU MIGHT GUESS FROM THE
24 LABORATORY STUDIES WHICH IS EYEWITNESS IDENTIFICATION CAN
25 BE UNRELIABLE AND CAN LEAD TO WRONGFUL CONVICTIONS.

1 Q THANK YOU. AND SO WHAT GENERAL CONCLUSIONS, IF ANY
2 IN YOUR EXPERT OPINION DO SCIENTIST REACH ON THE BASIS OF
3 THIS RESEARCH?

4 A THERE ARE LOTS OF CONCLUSIONS AND I WILL HIGHLIGHT
5 SOME OF THE MAIN ONES. PROBABLY RIGHT AT THE HEAD OF THE
6 LIST WOULD BE THE RELIABILITY OF EYEWITNESS IDENTIFICATION
7 OR FACE RECOGNITION, ACCURACY WHICH TURNS OUT TO BE
8 SOMEWHAT LOW, LOWER THAN ONE MIGHT HOPE, CERTAINLY LOWER
9 THAN ONE WOULD HOPE WHEN IT GETS USED IN LEGAL MATTERS
10 WHERE YOU HOPE NOBODY WOULD EVER MAKE A MISTAKE. WE ALSO
11 FIND VERY REGULARLY, VERY CONSISTENT FINDING, HAS TO DO
12 WITH THE CONFIDENCE OF PEOPLE MAKING AN EYEWITNESS
13 IDENTIFICATION OR BELIEVING THAT THEY DO OR DO NOT
14 RECOGNIZE A FACE. AND WHAT WE FIND THERE IS THAT THE
15 CONFIDENCE OF A PERSON IS ACTUALLY A VERY POOR INDICATOR
16 OF THEIR ACCURACY OR RELIABILITY. SO, IT IS ROUTINE TO
17 FIND PEOPLE THAT ARE PRETTY CONFIDENT, MAYBE VERY
18 CONFIDENT IN THEIR CHOICE. FOR INSTANCE IDENTIFICATION OR
19 IN THEIR CLAIM OF RECOGNIZING OR NOT RECOGNIZING THE FACE
20 WHO ARE IN FACT WRONG. ALSO HAPPENS THAT YOU GET PEOPLE
21 WHO ARE NOT SO CONFIDENT, MAYBE DON'T LOOK CONFIDENT AT
22 ALL REALLY WHO MIGHT BE CORRECT.

23 Q SO, IN YOUR EXPERT OPINION DOES MISIDENTIFICATION
24 CONTRIBUTE AND IF SO WHAT PERCENTAGE TO WRONGFUL
25 CONVICTIONS?

1 A WELL, THERE HAS BEEN REVIEWS OF STUDIES WHERE THERE
2 IS WRONGFUL CONVICTIONS AND THESE REVIEWS HAVE COME UP
3 WITH REMARKABLY SIMILAR RESULTS WHERE THEY FIND THAT ABOUT
4 HALF THE TIME IN THESE CASES OF WRONGFUL CONVICTION, THE
5 PRIMARY EVIDENCE USED IN THE CASE ORIGINALLY, SOMETIMES
6 THE ONLY EVIDENCE USED IN THE CASE ORIGINALLY WAS
7 IDENTIFICATION, EYEWITNESS IDENTIFICATION. SO, THESE
8 CASES OFTEN HAVE LIMITED AMOUNTS OF PHYSICAL EVIDENCE.
9 FOR INSTANCE, THERE ARE OF COURSE SOME OTHER CASES WHERE
10 OTHER THINGS WENT WRONG. SO, CONTAMINATED EVIDENCE OR
11 WHATNOT.

12 Q NOW, THERE IS A PERCENTAGE ASSOCIATED WITH THE NUMBER
13 OF WRONGFUL CONVICTIONS ASSOCIATED WITH THIS?

14 A YES, I AM SORRY, YOU ASKED ME THAT AND I REALLY
15 DIDN'T ANSWER THAT. YES, SO BOTH OF THE MAIN STUDIES THAT
16 HAVE BEEN DONE INDICATE THAT THE, IT IS ABOUT FIFTY
17 PERCENT. SO, ABOUT HALF THE TIME THE PRIMARY OR ONE OF
18 THE PRIMARY PIECES OF EVIDENCE USED TO OBTAIN A CONVICTION
19 THAT WAS FAULTY WAS AN EYEWITNESS IDENTIFICATION MEANING
20 ABOUT HALF THE TIME THAT IT WAS EVERYTHING ELSE THAT COULD
21 GO WRONG.

22 Q NOW, YOU STATED THAT CONFIDENCE OF A WITNESS IS A
23 POOR INDICATOR FOR ACCURACY?

24 A CORRECT.

25 Q CAN YOU EXPOUND ON THAT FURTHER IN YOUR EXPERT

1 OPINION?

2 A YES. TYPICAL STUDIES AND AGAIN THERE ARE LOTS OF
3 DIFFERENT STUDIES AND THIS IS ONE OF THE VERY SOUND AND
4 OFTEN REPEATED FINDINGS. WE FIND TECHNICALLY WHAT IS
5 KNOWN AS A LOW POSITIVE CORRELATION BETWEEN CONFIDENCE AND
6 ACCURACY. AND WHAT THAT MEANS IN SIMPLE TERMS IS JUST
7 THAT PEOPLE WHO ARE MORE CONFIDENT ARE ONLY SLIGHTLY MORE
8 LIKELY TO BE ACCURATE OR CORRECT THAN PEOPLE THAT ARE LESS
9 CONFIDENT. IN SHORT, CONFIDENCE DOESN'T TELL US MUCH. IT
10 TELLS US VERY LITTLE ABOUT ACCURACY AND FROM A
11 PROFESSIONAL VIEWPOINT SHOULDN'T BE RELIED ON, SHOULDN'T
12 PUT MUCH WEIGHT ON THAT IN DECIDING WHETHER SOMEBODY IS
13 CORRECT OR INCORRECT IN AN IDENTIFICATION.

14 Q DR. ALLEY, WHEN MAKING AN IDENTIFICATION OF SOMEONE
15 FROM A PICTURE WHAT FACTORS WOULD YOU CONSIDER TO MAKE
16 THAT IDENTIFICATION RELIABLE?

17 A WELL, THERE IS QUITE A FEW FACTORS. ONE SET OF
18 FACTORS HAS TO DO WITH THE PICTURE ITSELF. SO, WHAT
19 VIEWPOINT WAS THE PICTURE TAKEN FROM, HOW MUCH DETAIL OR
20 HOW CLEAR IS THAT PICTURE, HOW MUCH CONTRAST IS IN THAT
21 PICTURE, WHAT WAS THE LIGHTING LIKE IN THE PICTURE AND SO
22 ON. AND SOME OF THESE FACTORS ARE PROBABLY FAIRLY OBVIOUS
23 TO MOST PEOPLE. THERE IS A WHOLE OTHER SET OF FACTORS
24 THOUGH WHERE WE WANT TO CONSIDER WHO WAS MAKING THE
25 IDENTIFICATION. SO, IT IS POSSIBLE THAT THE PERSON MAKING

1 IDENTIFICATION IS, FOR INSTANCE, A CHILD OR SOMEBODY WHO
2 IS PRETTY ELDERLY IN WHICH CASE THEY TEND TO BE LESS
3 RELIABLE. THEY TEND TO BE LESS RELIABLE TO CROSS-RACIAL
4 IDENTIFICATION, THEY TEND TO BE LESS RELIABLE IF THEY HAVE
5 SOME KIND OF VISUAL IMPAIRMENT OR SOME OTHER IMPAIRMENT OF
6 THAT SORT. AND THEN THERE IS A THIRD SET OF FACTORS THAT
7 HAS TO DO WITH WHO EXACTLY IS IN THE PHOTOGRAPH THERE.
8 SO, IF THEY ARE, IT IS LIKELY TO BE A MORE RELIABLE
9 IDENTIFICATION IF THE PERSON IN THE PHOTOGRAPH HAS SOME
10 SORT OF DISTINGUISHING FEATURES. FOR INSTANCE, A TATTOO,
11 A SCAR, SOME ODD FACIAL CONFIGURATIONS, BASICALLY ANY
12 UNUSUAL APPEARANCE THAT IS CAPTURED IN THE PHOTOGRAPH AND
13 ALSO KNOWN TO THE PERSON VIEWING IT. A SIMPLE CHANGE IN
14 APPEARANCE. AGAIN, IT WILL BE REDUCED RELIABILITY, IT CAN
15 BE AS SIMPLE AS SEEING SOMEBODY ON ONE OCCASION WITH A HAT
16 AND THEN THE NEXT TIME THEY DON'T HAVE A HAT ON. THAT CAN
17 MAKE IT DIFFICULT TO IDENTIFY THEM.

18 Q DR. ALLEY, IN SUMMARY RESEARCH SHOWS THAT MISTAKES
19 HAVE BEEN MADE IN WITNESS IDENTIFICATION?

20 A YES, NO QUESTION ABOUT THAT.

21 Q DR. ALLEY, ANSWER ANY QUESTIONS THAT THE STATE MAY
22 HAVE.

23 CROSS-EXAMINATION

24 BY MR. MCDANIEL:

25 Q BRIEFLY, YOU ARE NOT A MEDICAL DOCTOR?

1 A NO, I HAVE A PHD.

2 Q YOU DIDN'T GO TO MED SCHOOL?

3 A NO.

4 Q AND ARE YOU BEING PAID FOR YOUR TESTIMONY TODAY?

5 A I AM BEING PAID AS A CONSULTANT. SO, WHETHER I
6 TESTIFY OR NOT IS JUST PART OF THAT.

7 Q HOW MUCH?

8 A \$180.00 DOLLARS AN HOUR.

9 Q AND THIS IN NO WAY, YOU ARE NOT REPRESENTING CLEMSON?

10 A NO, I AM NOT REPRESENTING CLEMSON OR THE DEPARTMENT
11 OR THE STATE OF SOUTH CAROLINA.

12 Q THIS IS JUST SOMETHING, I GUESS NOT IN YOUR FREE TIME
13 BUT WHEN YOU GET A CHANCE, YOU CONSULT OUT ON THESE TYPE
14 OF CASES?

15 A YES.

16 Q I WANT TO TALK A LITTLE ABOUT THESE STUDIES, THE
17 LABORATORY STUDIES. I DIDN'T UNDERSTAND IT, CAN YOU JUST
18 WALK US THROUGH THE THREE AND KIND OF EXPLAIN MORE ABOUT
19 THOSE STUDIES IF YOU DON'T MIND.

20 A SURE. BY LABORATORY STUDIES, I MEAN STUDIES THAT ARE
21 DONE IN A VERY CONTROLLED SETTING WHERE WE CAN KNOW
22 EXACTLY WHAT PEOPLE SEE, FOR INSTANCE THE SAME VIDEOTAPE
23 TO ONE-HUNDRED DIFFERENT PEOPLE AND THEN TRY TO GET THEM
24 TO IDENTIFY, SOMEBODY SAY FIVE MINUTES LATER VERSUS FIVE
25 YEARS LATER. SO, WE CAN THEN DETERMINE, WE'VE CONTROLLED

1 EVERYTHING ELSE, THE REASON FIVE YEARS LATER ARE SO BAD IS
2 BECAUSE OF THE TIME THAT EXPIRED AND NOT BECAUSE THAT IT
3 HAPPENS TO BE PEOPLE THAT SAW SOMETHING DIFFERENT IN THE
4 FIRST PLACE.

5 Q THERE IS A TIME LIMIT, YOU SHOW THEM SOMETHING AND
6 YOU BRING THEM BACK?

7 A FIVE YEARS WOULD BE EXTREME.

8 Q THEY DON'T TRY TO FIGURE THAT PERSON OUT OF LINEUP
9 IMMEDIATELY?

10 A THERE ARE STUDIES OF THAT SORT, WHERE YOU LOOK ALMOST
11 IMMEDIATELY TO COMPARE THAT TO WHAT HAPPENS LATER ON.

12 Q IS THAT FIELD STUDIES?

13 A NO, LABORATORY STUDIES AS WELL. THERE ARE FIELD
14 STUDIES OF THAT SORT. FOR INSTANCE ONE IN WHICH, ONE IN
15 WHICH SUPERMARKET CLERKS WERE ASKED TO MAKE SURE THAT THEY
16 CHECK THE IDENTIFICATION OF PEOPLE COMING THROUGH AND THEY
17 SENT A BUNCH OF THESE FOLKS THROUGH WITH THE WRONG PHOTO
18 ON THE IDENTIFICATION CARD.

19 Q NOW, IN ALL OF THOSE STUDIES, YOU CAN PROBABLY SAY
20 THAT THIS IS A STRANGER TO THE PERSON THAT IS IN THE
21 STUDY?

22 A CERTAINLY THE MAJORITY OF THESE STUDIES, THE PERSON
23 IS A STRANGER.

24 Q IS IT YOUR TESTIMONY THAT HALF OF THE ID'S ARE WRONG?

25 A NO, NOT AT ALL. THESE ARE IN CASES IN WHICH WE HOPE

1 ARE A SMALL MINORITY OF CASES WHERE THERE HAS BEEN A
2 WRONGFUL CONVICTION THEN WE CAN GO BACK AND LOOK AT WHAT
3 WENT WRONG AND TRY TO FIGURE OUT, WHAT IS THE EVIDENCE IN
4 THAT CASE THAT LED TO A CONVICTION. AND WHAT I SAID THERE
5 WAS ABOUT HALF THE TIME WE SEE THAT THE MAIN OR PERHAPS
6 ONLY, THE ONLY PIECE OF EVIDENCE IN THOSE CASES HAPPENS TO
7 BE EYEWITNESS IDENTIFICATION.

8 Q SO, THAT IS A TAB OF A SMALL PERCENTAGE?

9 A I SURE HOPE IT IS A SMALL PERCENTAGE. NOBODY KNOWS
10 WHAT THE PERCENTAGE IS OF COURSE.

11 Q AND THIS CONFIDENCE BEING THE INDICATOR OR ACCURACY,
12 HOW CONFIDENT A WITNESS SEEMS ON THE STAND OR GENERAL?

13 A IT IS SOMETHING THAT YOU WILL PROBABLY FIND TALKING
14 TO FRIENDS ABOUT THEIR MEMORIES. SO MEMORY STUDIES IN
15 GENERAL BUT LOOKING SPECIFICALLY AT IDENTIFICATION OF
16 FACES WE SEE, THE SAME PATTERN THERE THAT JUST BECAUSE
17 SOMEBODY IS REALLY CONFIDENT DOESN'T REALLY GIVE YOU GOOD
18 REASON TO THINK THEY CAN'T BE WRONG AND VICE VERSA.

19 Q AND MOST OF THESE ARE A LINEUP OF PEOPLE YOU PICK
20 OUT?

21 A NO, NOT NECESSARILY, IT COULD BE JUST ONE PERSON
22 SHOWN. IT IS JUST A VERY CONSISTENT FINDING.

23 Q OKAY. AND A LITTLE BIT OF THIS CROSS-RACE
24 IDENTIFICATION. WHAT DO YOUR STUDIES SHOW ABOUT THAT?

25 A I SHOULD CLARIFY THAT. I AM TALKING ABOUT RESEARCH

1 OF HUNDREDS OF STUDIES DONE OVER A PERIOD OF MORE THAN A
2 HUNDRED YEARS. CLEARLY I DID NOT DO MOST OF THIS, I HAVE
3 DONE SOME RESEARCH BUT NOT MOST OF THIS. I HAVE DONE SOME
4 WORK ON CROSS-RACIAL IDENTIFICATION HOWEVER. YES, THOSE
5 STUDIES SHOW THAT A CROSS-RACIAL IDENTIFICATION IS MORE
6 DIFFICULT AND LESS RELIABLE.

7 Q AND THAT WOULD BE?

8 A WHITES IDENTIFYING BLACKS, BLACKS TRYING TO IDENTIFY
9 ASIANS, ASIANS TRYING TO IDENTIFY BLACKS, ANYTHING OF THAT
10 SORT, LOTS OF DIFFERENT COMBINATIONS HAS BEEN TRIED AND IT
11 IS A VERY CONSISTENT FINDING THAT IT IS HARDER.

12 Q THESE PUBLICATIONS THAT YOU, I KNOW YOU DIDN'T
13 SPECIFICALLY CITE A PUBLICATION. BUT DID YOU BRING THOSE
14 WITH YOU?

15 A DID I BRING MY PUBLICATIONS WITH ME?

16 Q YES, I MEAN TO BE PREPARED TO TESTIFY TODAY IN WHAT
17 YOU ARE TESTIFYING ABOUT.

18 A NO.

19 Q YOU JUST STUDY UP AND HOW ARE YOU PREPARED TODAY TO
20 TESTIFY?

21 A BECAUSE I HAVE BEEN WORKING THIS AREA FOR ABOUT 20
22 YEARS, I JUST REMEMBER A LOT OF THIS STUFF. BUT, YES, I
23 ALSO WENT BACK AND LOOKED AT SOME, I LOOKED AT SOME OF THE
24 NEW ARTICLES I HAVEN'T READ YET.

25 Q THANK YOU, THAT IS ALL I HAVE.

1 THE COURT: ANY REDIRECT?

2 MR. CHAPLIN: NO, YOUR HONOR.

3 THE COURT: YOU MAY STEP DOWN. LET'S TAKE A RECESS

4 AND DON'T TALK ABOUT THE CASE AND KEEP AN OPEN MIND.

5 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
6 A BREAK.)

7 THE COURT: WE WILL TAKE A SHORT BREAK.

8 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

9 THE COURT: ANYTHING BEFORE THE JURY COMES IN?

10 MR. MCDANIEL: NO, YOUR HONOR.

11 THE COURT: MR. CHAPLIN?

12 MR. CHAPLIN: NO, YOUR HONOR.

13 THE COURT: LET'S BRING THE JURY IN.

14 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
15 APPROXIMATELY 10:50 A.M.)

16 THE COURT: ALL RIGHT, MR. CHAPLIN, PLEASE CALL YOUR
17 NEXT WITNESS.

18 MR. CHAPLIN: WE CALL DONALD KNEECE TO THE STAND.

19 DONALD KNEECE, AFTER BEING DULY SWORN,
20 TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. CHAPLIN:

23 Q GOOD MORNING, MR. KNEECE.

24 A GOOD MORNING.

25 Q MR. KNEECE, WHAT DO YOU DO FOR A LIVING?

1 A I AM A PRIVATE INVESTIGATOR.

2 Q YOU HAVE HAD SOME MILITARY TRAINING?

3 A YES SIR, I SPENT 20 YEARS IN THE ARMY AS A MILITARY
4 POLICEMAN.

5 Q NOW, WERE YOU TRAINED IN REGARDS TO CRIMINAL
6 INVESTIGATION WHILE YOU WERE IN THE ARMY?

7 A YES SIR, I DID. THERE WAS A, THE MILITARY POLICE
8 SCHOOL AT FORT MCCULLUM, ALABAMA I WAS ONE OF THE
9 INSTRUCTORS AT THE SCHOOL FOR INSTRUCTING THE USE OF
10 COVERT VIDEO SURVEILLANCE EQUIPMENT FOR BOTH CAPTURING
11 AUDIO AND VIDEO.

12 Q HAVE YOU RECEIVED ANY TRAINING IN TECHNICAL
13 SURVEILLANCE?

14 A YES, SIR. I HAVE BEEN TO SEVERAL COURSES THAT THE
15 MILITARY SENT ME TO. SOME OF THEM WERE MILITARY BASED
16 COURSES, SOME OF THEM WERE CIVILIAN COURSES. AND AS A
17 RESULT OF THAT TRINING I WAS AWARDED THE TITLE OF
18 SUBJECT-MATTER EXPERT IN THE USE OF COVERT SURVEILLANCE
19 EQUIPMENT.

20 Q HAVE YOU TRAINED OTHER PEOPLE IN THE USE OF
21 SURVEILLANCE EQUIPMENT?

22 A YES SIR, BACK IN THE EARLY 90'S, LATE 80'S, THE
23 DEPARTMENT OF DEFENSE STARTED A PROGRAM CALLED THE
24 DEPARTMENT OF POLICE COUNTER DRUG TRAINING AND IT WAS AN
25 ORGANIZATION OR A GROUP THAT WAS PUT TOGETHER, HANDPICKED

1 PEOPLE TO PROVIDE TRAINING TO CIVILIAN LAW ENFORCEMENT
2 OFFICERS THROUGHOUT THE UNITED STATES AS PART OF THE WAR
3 ON DRUGS PROGRAM. AND I WAS SELECTED TO BE ON THAT TEAM
4 AND ONE OF THE AREAS THAT I WAS RESPONSIBLE FOR DEVELOPING
5 LESSON PLANS AND PROVIDING INSTRUCTION IN WAS THE USE OF
6 COVERT SURVEILLANCE EQUIPMENT.

7 Q NOW, YOU SINCE RETIRED FROM THE ARMY, IS THAT
8 CORRECT?

9 A THAT IS CORRECT, YES SIR.

10 Q ARE YOU NOW LICENSED AS A PRIVATE INVESTIGATOR?

11 A YES SIR, I AM LICENSED IN THE STATE OF SOUTH CAROLINA
12 AND THE STATE OF GEORGIA.

13 Q AND DO YOU WORK FOR A COMPANY?

14 A I WORK FOR KNEECE INVESTIGATIONS AT THIS TIME. I
15 HAVE WORKED FOR OTHER COMPANIES WHEN I WAS FIRST GETTING
16 INTO THE BUSINESS. BUT NOW I OWN MY OWN COMPANY OUT OF
17 SALUDA.

18 Q YOU WORKED FOR A MANUFACTURER FOR COVERT GPS VEHICLE
19 TRACKING EQUIPMENT?

20 A YES, SIR. A COMPANY OUT OF CALIFORNIA, CSI, I HELP
21 WITH THE RESEARCH AND DEVELOPMENT OF A GPS TRACKING SYSTEM
22 FOR COVERT INSTALLATION ON VEHICLES.

23 Q HAVE YOU EVER ASSISTED IN COLLECTING PHOTOGRAPHS AND
24 OTHER EVIDENCE FOR TRIALS OF THIS NATURE?

25 A YES SIR, I HAVE. I HAVE WORKED BOTH FOR THE STATE IN

1 COLLECTING VIDEO OR PICTURE EVIDENCE TO BE USED IN TRIALS.
2 AND I HAVE WORKED FOR THE DEFENSE. AND IN CIVIL CASES I
3 HAVE WORKED GATHERING VIDEO EVIDENCE FOR USE IN CIVIL
4 CASES ALSO.

5 Q NOW, SINCE YOUR RETIREMENT HAVE YOU TAUGHT CLASSES
6 FOR THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, SLED?

7 A YES SIR, I HAVE. SLED HAS A REQUIREMENT FOR PRIVATE
8 INVESTIGATORS TO GET CONTINUING EDUCATION HOURS. AND THEY
9 BREAK THE TRAINING DOWN INTO TWO CATEGORIES. ONE CATEGORY
10 IS SLED TAUGHT TRAINING AND YOU HAVE TO HAVE FOUR HOURS OF
11 THAT TO RENEW YOUR PI LICENSE. AND YOU HAVE TO HAVE EIGHT
12 HOURS OF SLED APPROVED TRAINING. AND I AM ON THE LIST FOR
13 SLED APPROVED TRAINING AND FOR TWO YEARS I WENT TO THE
14 CRIMINAL JUSTICE ACADEMY QUARTERLY AND I TAUGHT THE SLED,
15 TAUGHT TRAINING FOR SLED FOR THE CONTINUING EDUCATION FOR
16 PRIVATE INVESTIGATORS. AND ALSO CONFERENCES, MY TRAINING
17 HAS BEEN APPROVED THERE ALSO.

18 Q THANK YOU. AND HAVE YOU BEEN QUALIFIED AS AN EXPERT
19 WITNESS IN GENERAL SESSIONS COURT SUCH AS THIS?

20 A YES, SIR. LAST FALL I WAS QUALIFIED IN EDGEFIELD
21 COUNTY TESTIFYING FOR THE STATE IN DIGITAL PHOTOGRAPHY
22 ABOUT THE MANIPULATION AND CHANGING OF TIME-DATE STAMP AND
23 SO FORTH ON DIGITAL PHOTOGRAPHY. I WAS QUALIFIED AT THAT
24 TIME AS AN EXPERT WITNESS IN THIS FIELD.

25 MR. CHAPLIN: YOUR HONOR, AT THIS TIME I OFFER MR.

1 DONALD KNEECE AS AN EXPERT IN THE AREA OF SURVEILLANCE.

2 THE COURT: MR. MCDANIEL, ANY VOIR DIRE?

3 MR. MCDANIEL: YES, SIR.

4 CROSS-EXAMINATION

5 BY MR. MCDANIEL:

6 Q WHEN SLED TAUGHT CLASSES, YOU TAUGHT TO WHOM?

7 A THOSE WERE TO PRIVATE INVESTIGATORS THAT ARE LICENSED
8 IN SOUTH CAROLINA.

9 Q AND WHAT WAS THE TOPIC?

10 A THE TOPIC WAS SURVEILLANCE EQUIPMENT, COVERT VIDEO
11 SURVEILLANCE EQUIPMENT. ONE YEAR THEY WANTED THE SAME
12 SUBJECT TAUGHT EVERY QUARTER SO EVERY PI WOULD GET THE
13 SAME TRAINING. AND SO ONE YEAR IT WAS ON THE USE OF
14 COVERT VIDEO SURVEILLANCE EQUIPMENT AND THE OTHER YEAR IT
15 WAS ON THE USE OF GPS VEHICLE TRACKING EQUIPMENT.

16 Q AND YOU WERE QUALIFIED AS AN EXPERT LAST YEAR?

17 A IN EDGEFIELD COUNTY, YES SIR.

18 Q AND WHAT WERE YOU QUALIFIED AS?

19 A I WAS QUALIFIED AS AN EXPERT WITNESS IN DIGITAL
20 PHOTOGRAPHS, THE TESTIMONY WAS TO ASCERTAIN THE VALIDITY
21 OF THE PHOTOGRAPHS, WHETHER THEY HAD BEEN MANIPULATED OR
22 ALTERED OR WHETHER IT WAS CAPABLE OF MANIPULATING OR
23 ALTERING THE PHOTOGRAPHS TAKEN DIGITALLY.

24 MR. MCDANIEL: YOUR HONOR, I SEE NO REASON NOT TO
25 QUALIFY.

1 MR. CHAPLIN: YOUR HONOR, I OFFER HIM AS AN EXPERT AT
2 THIS TIME.

3 THE COURT: IN THE FIELD OF SURVEILLANCE.

4 MR. MCDANIEL: MY IMPRESSION IS WHAT HE WAS QUALIFIED
5 AT TRIAL FOR DIGITAL PHOTOGRAPH MANIPULATION.

6 MR. CHAPLIN: IN THE AREA, THAT HE HAS SPECIAL SKILLS
7 IN THE AREA OF IDENTIFYING, SPEAKING ON DIGITAL
8 PHOTOGRAPHS THAT WOULD BE OBTAINED THROUGH SURVEILLANCE
9 PROCEDURES, THE TYPE OF EQUIPMENT USED FOR THE
10 SURVEILLANCE AND HOW THAT EQUIPMENT FUNCTIONS.

11 THE COURT: OKAY. HE IS QUALIFIED.

12 CONTINUE DIRECT EXAMINATION

13 BY MR. CHAPLIN:

14 Q ARE YOU FAMILIAR WITH THE PHOTOGRAPHS THAT HAVE BEEN
15 ENTERED INTO EVIDENCE IN THIS CASE, ARE YOU NOT?

16 A YES, SIR. THE DEFENSE PROVIDED ME WITH A CD
17 CONTAINING THE PHOTOGRAPHS.

18 Q AND THESE PHOTOGRAPHS WERE TAKEN WITH A DEER CAMERA,
19 IS THAT RIGHT?

20 A THAT IS WHAT THEY HAD BEEN REPORTED TO ME AS BEING
21 TAKEN BY, YES SIR.

22 Q MR. KNEECE, WHAT IS A DEER CAMERA?

23 A A DEER CAMERA, THE TERM DEER CAMERA IS GENERALLY USED
24 FOR A CAMERA THAT IS DESIGNED TO TAKE PICTURES OF
25 WILDLIFE. IT IS PUT IN A WOODED AREA OR THE OUTDOOR AREA

1 AND IT IS TRIGGERED BY THE MOVEMENT OF A WARM OBJECT IN
2 THE AREA AND THEN IT SNAPS PHOTOGRAPHS OR VIDEO OF
3 WHATEVER CREATED THE MOVEMENT IN THE AREA. IT IS DESIGNED
4 FOR THAT PURPOSE FOR CAPTURING WILDLIFE.

5 Q IS IT CUSTOMARY TO USE A DEER CAMERA FOR SURVEILLANCE
6 PURPOSES?

7 A NO, SIR. THERE IS SOME REASONS WHY YOU WOULD NOT
8 NORMALLY USE IT. THE FORMAT THAT THE PHOTOGRAPHS ARE
9 TAKEN IN ARE EASILY MANIPULATED, THEY ARE EASILY CHANGED,
10 TIME-DATE STAMPS AND THINGS LIKE THAT CAN BE ALTERED ON
11 THEM WITH EASE. RECORDERS OR DIGITAL RECORDERS THAT ARE
12 USED FOR SURVEILLANCE TECHNIQUES GENERALLY USE A
13 PROPRIETARY SOFTWARE THAT PUTS SOME TYPE OF WATERMARK OR
14 SECURITY CODE WITHIN THE PHOTOGRAPHS. SO THAT IF THEY ARE
15 ALTERED OR CHANGED IT IS READILY AVAILABLE OR IT IS EASY
16 TO FIND THOSE CHANGES. SO, IT IS EASIER TO AUTHENTICATE
17 PHOTOS TAKEN WITH THE PROPER SURVEILLANCE EQUIPMENT THAN
18 WITH A DEER CAMERA FOR EXAMPLE.

19 Q SO, WHAT ARE SOME EXAMPLES OF CAMERAS THAT ARE
20 ACTUALLY USED FOR SURVEILLANCE PURPOSES?

21 A WELL, IN COVERT SURVEILLANCE WE USED DIGITAL VIDEO
22 RECORDERS THAT RECORD IN A PROPRIETARY SOFTWARE AND
23 WITHOUT GETTING INTO TOO MUCH OF THE NUTS AND BOLTS OF IT,
24 FILES ARE STORED LIKE .AVI FILES OR .JPEG FILES. THE
25 VIDEO RECORDERS THAT ARE GENERALLY USED FOR SURVEILLANCE

1 STORE THEIR IMAGES IN A PROPRIETARY FORMAT SUCH AS .DVR
2 FILES WHICH MAKES IT DIFFICULT FOR PROGRAMS LIKE WINDOWS
3 TO BE ABLE TO READ THOSE PHOTOGRAPHS OR TO GO IN AND ALTER
4 THOSE PHOTOGRAPHS. AND THEN IT MAKES IT EASY FOR US TO
5 DETECT IF THOSE PHOTOGRAPHS OR VIDEO HAS BEEN ALTERED.

6 Q NOW, I THINK YOU SAID YOU HAVE ASSISTED IN THE PAST
7 IN OBTAINING PHOTOGRAPHS TO USE AT TRIALS?

8 A THAT IS CORRECT, YES SIR.

9 Q HOW IMPORTANT IS THAT THESE PHOTOGRAPHS THAT YOU RELY
10 ON?

11 A IT IS VERY IMPORTANT BECAUSE THEY SOMETIMES ARE THE
12 KEY EVIDENCE OR THE KEY ISSUE IN WHETHER OR NOT SOMETHING
13 HAS OCCURRED.

14 Q NOW, HAVE YOU HAD A CHANCE, I THINK YOU STATED THAT
15 YOU HAVE HAD A CHANCE TO REVIEW THE PHOTOS SUBMITTED TO
16 THE POLICE BY MR. POTTS IN THIS CASE?

17 A YES SIR, I HAVE.

18 Q IN YOUR EXPERT OPINION WHAT DO YOU SAY WITH REGARD TO
19 THE RELIABILITY OF THESE PHOTOS?

20 A I WOULD NOT THINK THAT THEY ARE TOTALLY RELIABLE,
21 THAT YOU COULD TOTALLY RELY UPON THEM BECAUSE THEY ARE SO
22 EASILY CHANGED AND THE CHANGES THAT CAN BE MADE ON THEM IS
23 UNDETECTABLE IN A LOT OF CASES. SO, FOR ME TO SAY THAT
24 THOSE PHOTOGRAPHS ARE GOSPEL I CAN'T DO THAT BECAUSE OF
25 THE TYPE OF FORMAT THAT THE CAMERA STORES THEM IN AND THAT

1 WHEN I EXAMINE THE CAMERA THE PHOTOS WERE STILL NOT IN THE
2 CAMERA AT THAT TIME FOR ME TO BE ABLE TO LOOK AT ANY OF
3 THE ORIGINAL PHOTOGRAPHS.

4 Q DID YOU GET TO SEE, DOES THE DISK CONTAIN ALL OF THE
5 PHOTOGRAPHS?

6 A NO SIR, THEY DID NOT. THE CAMERA ASSIGNS A NUMERICAL
7 SEQUENCE TO THE PHOTOGRAPHS. AND THE PHOTOGRAPHS THAT I
8 OBSERVE THAT I WAS GIVEN I THINK STARTED AT 187 AND SO
9 THAT INDICATES THERE WERE 186 PHOTOGRAPHS PRIOR TO THAT
10 THAT WAS NOT PROVIDED TO ME FOR EXAMINATION AND THEN THE
11 PHOTOGRAPHS I THINK IN IT AT 195. AND SO ANY PHOTOGRAPHS
12 THAT MIGHT OF BEEN ON THE CAMERA AFTER THAT TIME WERE NOT
13 AVAILABLE FOR REVIEW EITHER.

14 Q MR. KNEECE, WHEN YOU GOT TO A LOCATION TO GET
15 PICTURES THAT MIGHT OF BEEN TAKEN FROM A SURVEILLANCE
16 CAMERA, WHO SELECTS THOSE PICTURES?

17 A LAW ENFORCEMENT WILL SELECT WHICH PICTURES ARE
18 RELEVANT AND THEY WILL COPY THOSE OR PRESERVE THOSE. THE
19 SAME WITH ME, IF I AM GOING TO GO TO A LOCATION AND I HAVE
20 BEEN TOLD A CRIME HAS OCCURRED OR AN INCIDENT HAS OCCURRED
21 THERE I AM GOING TO GET ALL THE PHOTOGRAPHS OR VIDEO THAT
22 DEPICTS THAT AND THE ONES LEADING UP TO IT AND THE ONES
23 FOLLOWING IT SO THAT WE CAN ESTABLISH EVERYTHING THAT HAS
24 OCCURRED AT THAT LOCATION.

25 Q NOW, IN YOUR EXPERT OPINION IN THIS PARTICULAR CASE

1 WOULD YOU OF TAKEN THE CAMERA INTO CUSTODY IF YOU HAD BEEN
2 THE FIRST RESPONDENT TO THIS CRIME?

3 A YES SIR, I WOULD HAVE.

4 Q WHY WOULD YOU OF DONE THAT?

5 A BECAUSE I WOULD HAVE WANTED TO REVIEW ALL THE
6 PHOTOGRAPHS THAT WERE STORED THERE TO LOOK FOR ANY
7 EVIDENCE, UNFORTUNATELY THERE ARE TIMES WHEN CRIMES ARE
8 REPORTED AND WE ONLY SEE A SNAPSHOT OF AN EVENT. WE DON'T
9 SEE WHAT LEADS UP TO THAT EVENT, WHAT WAS OCCURRING PRIOR
10 TO THAT EVENT OR WHAT OCCURRED AFTER THAT EVENT. AND SO
11 WE NEED TO BE LOOKING AT THE ENTIRE SEQUENCE THAT IS
12 AVAILABLE. AND I UNDERSTAND THAT NOT ALL TIMES IS ALL THE
13 VIDEO OR ALL THE PHOTOGRAPHS THAT WE WOULD LIKE TO SEE
14 AVAILABLE BUT IF THEY ARE AVAILABLE THEY NEED TO BE
15 PRESERVED AND REVIEWED.

16 Q MR. KNEECE, WHAT TYPE OF ILLUMINATION DOES THIS DEER
17 CAMERA USE?

18 A ONCE THE AMBIENT LIGHT DROPS BELOW APPROXIMATELY ONE
19 LUX AND THAT IS A MEASUREMENT OF LIGHT, THEN WHEN MOTION
20 IS DETECTED THERE IS AN INFRARED ILLUMINATOR THAT COMES ON
21 ON THE FRONT OF THE CAMERA, IT ILLUMINATES THE AREA SO
22 THAT THE PHOTOGRAPH OR THE VIDEO CAN BE TAKEN. DURING THE
23 DAYLIGHT HOURS WILL TAKE COLOR PHOTOGRAPHS AND DURING
24 NIGHTTIME HOURS THEY TAKE BLACK AND WHITE PHOTOGRAPHS
25 BECAUSE INFRARED ILLUMINATION DOES NOT SHOW UP WELL IN

1 COLOR PHOTOGRAPHS, IT HAS TO BE BLACK AND WHITE
2 PHOTOGRAPHS. AND SO AS THIS CAMERA IS TAKING ITS
3 PHOTOGRAPH, MOMENTS BEFORE IT SNAPS THE PICTURE ON THE
4 FRONT OF THE CAMERA AN INFRARED ILLUMINATION APPEARS AND
5 THEN ONCE THE PICTURE IS TAKEN THAT INFRARED ILLUMINATION
6 TURNS OFF AUTOMATICALLY. NOW, WHEN WE TALK ABOUT INFRARED
7 ILLUMINATION EVERYBODY INSTANTLY ASSUMES IF IT IS INFRARED
8 IT CAN'T BE SEEN. BUT INFRARED ILLUMINATION, IF IT IS
9 GREATER THAN 900 NANOMETERS IT IS INVISIBLE TO THE HUMAN
10 EYE, IF IT IS LESS THAN 900 NANOMETERS IT CAN BEEN SEEN.
11 THIS PARTICULAR CAMERA OPERATES AT 860 NANOMETERS WHICH
12 MEANS ANYONE IN FRONT OF THE CAMERA WOULD BE ABLE TO SEE
13 THE MOMENTARY RED GLOW THAT WOULD APPEAR FROM THE INFRARED
14 ILLUMINATION THAT ILLUMINATES DURING THE TAKING OF
15 PHOTOGRAPHS OR VIDEO.

16 Q NOW, DOES INFRARED ILLUMINATION HAVE AN IMPACT ON THE
17 QUALITY OF THE PICTURE SUCH AS SKIN TONE?

18 A YES SIR, IT DOES. THAT IS THE REASON WHY THE CAMERA
19 HAS TO GO TO BLACK AND WHITE IS BECAUSE INFRARED DISTORTS
20 COLOR AND ALSO COLOR CAMERA CAN'T PICK UP INFRARED. AND
21 SO COLORS ARE DISTORTED, NOT ONLY SKIN TONES BUT OTHER
22 OBJECTS IN THE AREA ARE DISTORTED BY INFRARED.

23 Q IS THERE A CONNECTION TO HEAT WITH INFRARED?

24 A INFRARED, SOMETIMES THE TERMS ARE INTERCHANGEABLE.
25 THERE IS A CONNECTION BETWEEN INFRARED ILLUMINATION AND

1 HEAT SOURCES. INFRARED WILL PRODUCE HEAT, IT PRODUCES
2 HIGH HEAT WHEN INFRARED IS PRESENT. THERMAL IMAGING IS A
3 FORM OF INFRARED AND THERMAL IMAGING, IN REALITY THESE
4 CAMERAS, THEY SAY THAT THEY DETECT MOVEMENT THROUGH
5 INFRARED WHICH IS PARTIALLY CORRECT. THEY ARE ACTUALLY
6 DETECTING THE HEAT SIGNATURE THAT IS THERMAL IMAGING BUT
7 IT FALLS, THAT THERMAL IMAGING FALLS INTO THE INFRARED
8 SPECTRUM. SO, THEY USE THE TERM, INFRARED BECAUSE MORE
9 PEOPLE UNDERSTAND THAT THAN THERMAL IMAGING.

10 Q SO, WOULD AN ITEM WITH MORE HEAT LOOK LIGHTER OR
11 DARKER?

12 A WITH THIS PARTICULAR CAMERA IT WOULD HAVE TO BE A
13 GREAT DIFFERENCE IN HEAT. THE NORMAL BODY TEMPERATURE I
14 DON'T THINK WOULD PROVIDE YOU ANY DIFFERENCE IN SKIN TONE
15 COLOR FROM THE HEAT PRODUCED BY A BODY VERSUS THE
16 BACKGROUND HEAT.

17 Q NOW, I THINK YOU INDICATED THAT THESE CAMERAS ARE
18 EASILY MANIPULATED?

19 A YES, SIR. THE PHOTOS TAKEN BY THESE CAMERAS ARE
20 EASILY MANIPULATED.

21 Q ARE YOU PREPARED TO DEMONSTRATE TO US HOW THAT MIGHT
22 BE DONE?

23 A YES, SIR.

24 MR. CHAPLIN: YOUR HONOR, I WOULD ASK THAT THE
25 WITNESS BE ALLOWED TO STAND DOWN AND BE ALLOWED TO COME

1 DOWN.

2 THE COURT: YES, SIR.

3 MR. MCDANIEL: WITHOUT OBJECTION, SIR.

4 A I AM USING THE WINDOWS BASED PROGRAM OF MICROSOFT.
5 AND THIS IS WHAT COMES ON ON MY COMPUTER SO I AM NOT USING
6 ANY SOFTWARE THAT IS NOT READILY AVAILABLE TO THE GENERAL
7 PUBLIC OR ANYONE WHO HAS A COMPUTER THAT HAS MICROSOFT OR
8 WINDOWS ON IT. AND I AM GOING INTO THE VIDEO OR THE
9 PHOTOS THAT WAS PROVIDED TO ME AND I AM JUST GOING TO MOVE
10 BACK HERE TO THE LAST ONE AND I AM GOING TO BRING THIS ONE
11 UP. DOWN AT THE BOTTOM OF IT THIS CAMERA PUTS THE
12 BAROMETRIC PRESSURE, OF WHETHER IT IS RISING OR FALLING,
13 THE TEMPERATURE AT THE TIME THE PHOTOS WAS TAKEN, THE MOON
14 PHASE AT THE TIME THE PHOTO WAS TAKEN. AND IT GIVES A
15 TIME AND DATE STAMP. NOW, THIS TIME AND DATE STAMP HERE
16 OBVIOUSLY HAS BEEN ALTERED. WHAT I AM GOING TO DO IS I AM
17 GOING TO DEMONSTRATE TO YOU HOW EASY IT IS TO ALTER A TIME
18 DATE STAMP USING THE STANDARD SOFTWARE THAT COMES IN A
19 COMPUTER. I AM GOING TO GO TO THE EDIT MODE AND THEN I AM
20 GOING TO COME DOWN TO THE TIME DATE STAMP AND WE ARE GOING
21 TO CHANGE THIS FROM THE THIRTEENTH MONTH TO THE ELEVENTH
22 MONTH FOR THIS DEMONSTRATION. THE FIRST THING THAT I AM
23 GOING TO DO IS I AM GOING TO COME DOWN AND SELECT, I SAY I
24 I AM, I AM GOING TO SELECT A DARK AREA, I AM GOING TO COPY
25 THAT DARK AREA AND THEN PASTE IT IN THE PICTURE. AND THEN

1 I AM GOING TO DRAG THAT DOWN AND I AM GOING TO COVER THE
2 THREE THAT I AM WANTING TO CHANGE TO A ONE. AND THEN I AM
3 GOING TO CAPTURE A ONE, JUST ONE SECOND. I AM GOING TO
4 COPY THAT AND PASTE THAT AND THEN I AM GOING TO DRAG THAT
5 DOWN AND REPLACE THAT. SO, NOW IT WAS TAKEN ON THE
6 ELEVENTH MONTH INSTEAD OF THE THIRTEENTH MONTH THAT WAS
7 SHOWING THERE PREVIOUSLY. AND SO THIS SOFTWARE WHICH
8 COMES IN A COMPUTER, ALL WINDOW BASED COMPUTERS COMES WITH
9 THE SOFTWARE THAT WOULD ALLOW YOU TO CHANGE DATE AND TIMES
10 AS THEY ARE SHOWN ON THE BOTTOM OF THE PICTURE. AND THEN
11 I CAN SAVE THAT PHOTOGRAPH AND GO BACK TO THAT PHOTOGRAPH
12 AND NOW WE HAVE 11/28 AS THE DATE THAT THAT PICTURE WAS
13 TAKEN. AND THAT IS HOW SIMPLE IT IS TO CHANGE IT. THERE
14 IS ONE OTHER PLACE ON THE TIME DATE STAMP THAT IS STORED
15 ON PHOTOGRAPHS. AND IT IS PUT ON THE FILE AND IT IS
16 CALLED THE EXCHANGEABLE INFORMATION FILE ON PHOTOGRAPHS.
17 AND IF YOU, IN THIS CASE, WILL HOVER OVER THE PICTURE AND
18 YOU WILL NOTICE THAT GIVES US, THAT THIS PHOTO WAS TAKEN
19 ON 10/28/2008 AND THAT IS AN EMBEDDED TIME DATE STAMP THAT
20 IS IN THE FILE. BY GOING TO SOFTWARE THAT IS AVAILABLE
21 FOR FREE DOWNLOADS ON THE INTERNET YOU CAN DOWNLOAD SHORT
22 PROGRAMS THAT WILL ALLOW YOU TO ALTER THAT TIME DATE STAMP
23 AND ON THIS PARTICULAR PICTURE THAT I HAVE THE POINTER
24 POINTED TO I HAVE ALTERED THAT TO SHOW THAT THAT PICTURE
25 WAS TAKEN JANUARY THE 6TH OF 2011. SO, ONCE THESE CHANGES

1 ARE MADE TO ANY PHOTOGRAPHS ANYONE THAT GOES IN AND LOOKS
2 AT THE PHOTOGRAPHS, UNLESS THEY HAVE THE PROPER FORENSIC
3 SOFTWARE TO ANALYZE THE PHOTOGRAPHS THEY ARE NOT GOING TO
4 BE ABLE TO DETECT WHETHER OR NOT THEY HAVE BEEN CHANGED.
5 AND SINCE IT IS AN .AVI FILE ORIGINALLY THEN WHENEVER IT
6 IS STORED AND I SAVE IT AND I GO BACK AND TRANSFER THAT TO
7 ANOTHER COMPUTER AND THEN I TRY TO RUN FORENSICS ON IT IT
8 IS NOT EVEN GOING TO SHOW UP THAT IT HAS BEEN ALTERED THEN
9 BECAUSE IT IS NO LONGER ON THE ORIGINAL COMPUTER THAT DID
10 THE ALTERATIONS. SO, PHOTOGRAPHS AND THAT IS WHY IN ONE
11 OF THE QUESTIONS THAT I WAS ASKED EARLIER, CAN I DEPEND ON
12 THESE PHOTOGRAPHS AS BEING WHAT THEY INDICATE THEY ARE.
13 AND, NO, I CAN'T. BECAUSE IT IS SO EASY TO ALTER THESE
14 AND YOU SEE THE TIME THAT IT TAKES TO ALTER THEM.

15 Q CAN YOU ALTER ANYTHING ELSE ON THAT PHOTO?

16 A YES, SIR. YOU CAN USE CUT AND PASTE AND YOU CAN MAKE
17 ALTERATIONS ON THE PHOTOGRAPHS. AND I AM LOOKING FOR ONE.
18 AND YOU CAN CUT AND PASTE AND I JUST TOOK A PIG HEAD OUT
19 OF THE CLIP-ART THAT IS IN THE COMPUTER AND COPIED THE
20 CLIP-ART AND IT PASTED OVER THE HEAD ON THIS PICTURE. SO,
21 THINGS IN THE PICTURE CAN BE ALTERED ALSO.

22 Q THANK YOU, VERY MUCH. YOU CAN RETURN TO YOUR SEAT.
23 I HAVE A FEW MORE QUESTIONS. SO, I UNDERSTAND THAT THESE
24 PICTURES CAN BE ALTERED IN AN UNDETECTABLE MANNER?

25 A YES SIR, THEY CAN BE.

1 Q PLEASE ANSWER ANY QUESTIONS THE STATE MAY HAVE.

2 CROSS-EXAMINATION

3 BY MR. MCDANIEL:

4 Q ARE YOU SAYING THESE PICTURES ARE ALTERED?

5 A NO SIR, I AM NOT SAYING THEY ARE ALTERED. I AM
6 SAYING THAT IF THEY ARE ALTERED--

7 Q THIS WAS INTRODUCED INTO EVIDENCE AND ALLOWED IN HERE
8 AND THE JURY HAS BEEN ABLE TO SEE. YOU ARE SAYING IT IS
9 ALTERED?

10 A NO SIR, I AM NOT SAYING IT IS ALTERED, I AM SAYING
11 THAT IT COULD HAVE BEEN ALTERED PRIOR TO BE GIVEN TO LAW
12 ENFORCEMENT.

13 Q SO, YOU DON'T KNOW?

14 A NO SIR, I DON'T KNOW.

15 Q YOU JUST ARE SAYING SOMEBODY COULD OF ALTERED IT,
16 RIGHT?

17 A YES SIR, THAT IS WHAT I AM SAYING.

18 Q THESE PICTURES, SOMEONE COULD OF PUT A PIG HEAD ON
19 SOMEBODY, RIGHT. SOMEBODY COULD OF PUT A BETTER PICTURE
20 OF MR. MITCHELL ON THERE, CORRECT?

21 A THEY COULD HAVE.

22 Q PUT HIS PHOTO ID IN HIS HAND, RIGHT, SO IT IS EASIER
23 TO IDENTIFY HIM?

24 A YES, SIR. THEY COULD OF DONE THAT IF THEY WOULD OF
25 HAD A PHOTOGRAPH OF THAT TO PUT THERE.

1 Q OKAY. LET'S GO BACK JUST BRIEFLY, WHAT COLLEGES DID
2 YOU ATTEND?

3 A I HAVE ATTENDED CENTRAL TEXAS COLLEGE, MARYLAND AND
4 THAT IS IT.

5 Q WHEN DID YOU GRADUATE?

6 A I DO NOT HAVE A DEGREE, SIR.

7 Q AND YOU HAVEN'T WORKED IN PUBLIC LAW ENFORCEMENT,
8 CORRECT?

9 A YES, SIR.

10 Q YES SIR, WHAT?

11 A YES SIR, I HAVE WORKED IN PUBLIC LAW ENFORCEMENT. I
12 HAVE WORKED FOR BATESBURG/LEESVILLE POLICE DEPARTMENT FOR
13 A SHORT PERIOD OF TIME AFTER I RETIRED OUT OF THE ARMY.

14 Q HOW LONG DID YOU WORK THERE?

15 A I ONLY WORKED THERE FOR ABOUT FOUR TO SIX MONTHS, I
16 DON'T REMEMBER THE EXACT AMOUNT OF TIME.

17 Q OKAY. NOW, THESE CLASSES THAT YOU TEACH AT SLED, YOU
18 TEACH THEM TO OTHER PRIVATE INVESTIGATORS, CORRECT?

19 A THAT IS CORRECT, SIR.

20 Q AND DO YOU TEACH THEM HOW TO ALTER PHOTOS?

21 A NO, SIR.

22 Q NOT AT ALL?

23 A NO, SIR.

24 Q WHAT DO YOU DO IN YOUR JOB?

25 A IN MY JOB?

1 Q YES.

2 A I DO SURVEILLANCE PRIMARILY FOR BOTH DOMESTIC
3 SITUATIONS AND FOR INSURANCE FRAUD INVESTIGATIONS. WE DO
4 SURVEILLANCE, WE DO INTERVIEWS AND GATHER EVIDENCE IN
5 CRIMINAL CASES, I DO CAMERA INSTALLATION FOR LAW
6 ENFORCEMENT.

7 Q BUT A LOT OF WHAT YOU ARE DOING IS TAKING PICTURES OF
8 SPOUSES THAT CHEAT?

9 A A GOOD BIT OF WHAT WE DO, YES SIR.

10 Q SO, ONE WOULD SAY THAT IF YOU ARE ABLE TO DOCTOR A
11 PHOTOGRAPH YOU COULD ALMOST SATISFY YOUR CLIENT EVERY
12 TIME, CORRECT?

13 A YES SIR, BUT THE VIDEO THAT I TAKE IS RECORDED WITH A
14 PROPRIETARY SOFTWARE TYPE RECORDERS.

15 Q JUST, YES, RIGHT. YOU CAN DOCTOR A PHOTOGRAPH.

16 MR. CHAPLIN: OBJECTION.

17 THE COURT: YES, SIR.

18 MR. CHAPLIN: HE HAS THE RIGHT TO ANSWER.

19 THE COURT: HE HAS GOT A RIGHT TO EXPLAIN HIS ANSWER,
20 MR. MCDANIEL.

21 MR. MCDANIEL: YES, SIR.

22 A THE VIDEO THAT I TAKE, WE ARE USING RECORDERS THAT
23 RECORD IN A PROPRIETARY SOFTWARE WHICH HAS WATERMARK
24 EMBEDDED IN IT. AND SO IF ANY OF MY VIDEO IS CHALLENGED
25 OR MY PHOTOS ARE CHALLENGED THE OPPOSING SIDE HAS THE

1 OPPORTUNITY TO EXAMINE THEM OR HAVE THEM EXAMINED TO LOOK
2 AND CHECK THE AUTHENTICITY.

3 Q NOW, YOU HAVE A WEBSITE, CORRECT?

4 A CORRECT.

5 Q YOU SELL SURVEILLANCE EQUIPMENT ON THAT WEBSITE?

6 A YES SIR, I DO.

7 Q AND WHAT IS THE NAME OF THAT WEBSITE?

8 A TECHSURVEILLANCE.COM.

9 Q AND DO YOU SELL AN OUTDOOR DIGITAL CAMERA?

10 A YES, SIR. I SELL SEVERAL. BUT, YES SIR, I DO SELL
11 THEM.

12 Q ONE CAN GO TO YOUR WEBSITE AND PURCHASE THIS CAMERA,
13 CORRECT?

14 A YES, SIR.

15 Q AND THIS CAMERA--

16 A COULD I SEE WHICH ONE YOU ARE REFERRING TO, SIR.

17 Q YES, I WILL HAND THIS UP TO YOU.

18 A YES, SIR.

19 Q OKAY. NOW, THAT CAMERA IS PRETTY DARN SIMILAR TO THE
20 ONE USED HERE, RIGHT?

21 A YES, SIR.

22 Q THE SAME CAPABILITIES?

23 A THE SAME CAPABILITIES.

24 Q SO, PEOPLE THAT VISIT YOUR WEBSITE CAN BUY A CAMERA
25 WITH THE SAME CAPABILITIES AS THE ONE USED HERE AND

1 ENCOURAGED TO USE THAT IN SURVEILLANCE, CORRECT?

2 A NO SIR, THEY ARE NOT ENCOURAGED TO USE THAT IN
3 SURVEILLANCE.

4 Q YOUR WEBSITE IS NOT, WHAT DO THEY ENCOURAGE TO USE
5 THIS FOR?

6 A WHATEVER THEY WANT TO USE IT FOR. BUT IT IS NOT--

7 Q YOU ARE SAYING THAT A PRIVATE INVESTIGATOR THAT RUNS
8 A TECH SURVEILLANCE EQUIPMENT AND TRAINING HEADQUARTERS
9 THAT SELLING SURVEILLANCE EQUIPMENT UNDER, THAT IS
10 REFERRED TO BY PROFESSIONAL GRADE SURVEILLANCE EQUIPMENT.
11 YOU ARE SAYING BUT WE HAVE THIS OTHER OPTION WHERE IF YOU
12 JUST WANT TO HAVE AN OUTDOOR CAMERA?

13 A WE HAVE THAT ON THE WEBSITE, WE DO HAVE BOTH LAW
14 ENFORCEMENT, PRIVATE INVESTIGATORS AND HUNTERS AND PEOPLE
15 LIKE THAT THAT DO VISIT MY WEBSITE. AND THEY DO PURCHASE
16 ALL OF THIS EQUIPMENT.

17 Q BUT THAT IS NOT ON THE WEBSITE, BUT IT DOESN'T SAY
18 FOR HUNTERS FOR SURVEILLANCE EQUIPMENT?

19 A NO, SIR.

20 Q IN FACT, IT IS CALLED OUTDOOR CAMERAS, RIGHT?

21 A IT IS AN OUTDOOR CAMERA, YES SIR.

22 Q SO, YOU DO SELL A CAMERA--

23 A SIMILAR TO THE ONE USED IN THIS CASE.

24 Q AND ALMOST EXACTLY SIMILAR?

25 A SIMILAR TO IT, YES SIR.

1 Q AND IN BOLD, WELCOME TO THE ONLINE VIDEO SURVEILLANCE
2 KNEECE INVESTIGATIONS, LLC.

3 A CORRECT.

4 Q THAT IS YOU?

5 A THAT IS ME.

6 Q NOW, I WANT TO GO BACK BECAUSE I GUESS YOUR
7 TESTIMONY, THE JURY DON'T BELIEVE THESE PHOTOS BECAUSE
8 THEY CAN BE DOCTORED, IS THAT RIGHT?

9 A I DON'T KNOW IF I AM SAYING DON'T BELIEVE THE PHOTOS
10 BECAUSE THEY CAN BE ALTERED.

11 Q YOU ARE SAYING YOU HAVE A CONCERN ABOUT THE
12 AUTHENTICITY OF THEM?

13 A YES SIR, I WOULD SAY THAT I HAVE A CONCERN ABOUT THE
14 AUTHENTICITY OF THEM BECAUSE OF THE FORMAT THAT THEY WERE
15 RECORDED IN AND THAT THEY COULD HAVE BEEN MANIPULATED OR
16 ALTERED.

17 Q HAVE YOU EVER MANIPULATED PHOTOGRAPHS?

18 A THAT WAS GOING TO BE USED AS EVIDENCE, NO SIR.

19 Q OKAY. DOES LAW ENFORCEMENT DO THAT?

20 A NOT TO MY KNOWLEDGE.

21 Q OKAY. WELL, SO YOU HAVE NO KNOWLEDGE, YOU ARE NOT
22 SAYING THAT THAT IS MANIPULATED?

23 A NO SIR, I AM NOT SAYING THAT THAT IS MANIPULATED.

24 AND YOU BROUGHT UP LAW ENFORCEMENT A WHILE AGO AND ONCE
25 LAW ENFORCEMENT TOOK IT INTO THEIR CHAIN OF CUSTODY THEN I

1 WOULDNT'T THINK ANYTHING HAS OCCURRED TO IT FROM THAT POINT
2 ON.

3 Q SO, WHEN DID THIS MANIPULATION HAPPEN?

4 A IF IT WAS MANIPULATED--

5 MR. CHAPLIN: OBJECTION, YOUR HONOR, SPECULATION.

6 THE COURT: I OVERRULE.

7 A IF IT WAS MANIPULATED IT WOULD OF HAD TO HAVE BEEN,
8 IN MY OPINION, MANIPULATED PRIOR TO IT BEING GIVEN TO LAW
9 ENFORCEMENT.

10 Q SO, MR POTTS MANIPULATED IT?

11 A I DON'T KNOW.

12 Q THAT IS NOT WHAT YOU ARE SAYING?

13 A NO, I AM NOT SAYING THAT THEY WERE MANIPULATED. I AM
14 SAYING THAT IF THEY WERE MANIPULATED THAT IT WOULD BE MY
15 OPINION THAT THEY WOULD OF BEEN MANIPULATED PRIOR TO THEM
16 BECOMING CUSTODY OF THE POLICE DEPARTMENT.

17 Q SO, THE POLICE DIDN'T DO ANYTHING BUT MR. POTTS
18 MANIPULATED IT?

19 A YOU ARE TELLING ME THAT MR. POTTS MANIPULATED IT, I
20 DIDN'T.

21 Q I AM ASKING.

22 A AND I AM NOT ANSWERING THAT QUESTION.

23 MR. CHAPLIN: OBJECTION, YOUR HONOR.

24 THE COURT: STOP TALKING OVER EACH OTHER.

25 Q SO, THEORETICALLY WE COULD OF CROPPED A BETTER

1 PICTURE OF BENNIE MITCHELL IN THERE, RIGHT?

2 MR. CHAPLIN: YOUR HONOR, SPECULATION.

3 THE COURT: OVERRULED.

4 A THEORETICALLY IF YOU WOULD OF HAD A BETTER PHOTO OF
5 MR. MITCHELL IT COULD OF BEEN CROPPED OVER.

6 Q NOW, DO YOU HAVE ACCESS TO THE PICTURE?

7 A THE PICTURES THAT I WAS PROVIDED?

8 Q RIGHT, THE ORIGINALS BEFORE THAT YOU MANIPULATED.

9 A YES SIR, I DO.

10 Q WILL YOU ACCESS THIS FOR ME. SHOW US AGAIN, IT
11 LOOKED LIKE WHEN YOU ARE DOWN THERE YOU CLICKED ON IT AND
12 SAID, THIS IS WHEN IT WAS TIME DATED.

13 A LIKE I HAVE GOT IT RIGHT THERE?

14 Q YES. SO, YOU WOULD HAVE TO, THAT IS HOW YOU GOT THE
15 PICTURE, RIGHT?

16 A NO, SIR.

17 Q AND WHAT DOES IT SAY ON THERE?

18 A IT SAYS THAT THE PICTURE WAS TAKEN ON 10/28 OF 2008
19 AT 3:07 A.M.

20 Q AND THAT IS HOW YOU GOT IT?

21 A THAT IS HOW I GOT IT.

22 Q ARE YOU SAYING THAT IS MANIPULATED?

23 A I AM NOT SAYING IT IS MANIPULATED, I AM SAYING IT IS
24 POSSIBLE THAT THAT CAN BE MANIPULATED.

25 Q BUT THAT IS NOT MANIPULATED?

1 A I DON'T KNOW IF IT IS MANIPULATED OR NOT.

2 Q OKAY.

3 A THIS IS HOW IT WAS PROVIDED TO ME.

4 Q I GOT YOU. I AM NOT SAYING THIS ONE IS BUT I AM
5 SAYING SOMEBODY THAT HAD THE SOFTWARE TO DO IT COULD HAVE
6 MANIPULATED THAT PICTURE?

7 A THEY COULD, YES SIR.

8 Q AND AS YOU DID, PUT A PIG HEAD ON THERE?

9 A YES, SIR.

10 Q THAT IS ALL I HAVE. THANK YOU.

11 THE COURT: REDIRECT?

12 MR. CHAPLIN: BRIEFLY, YOUR HONOR.

13 REDIRECT EXAMINATION

14 BY MR. CHAPLIN:

15 Q YOU TESTIFIED THAT YOU TRAINED PRIVATE INVESTIGATORS,
16 IS THAT CORRECT?

17 A YES SIR, I DO.

18 Q DO YOU EVER TRAIN PRIVATE INVESTIGATORS TO USE FIELD
19 CAMERAS FOR SURVEILLANCE?

20 A NO, SIR.

21 Q AND WHY NOT?

22 A BECAUSE THE VIDEO OR THE PHOTOS TAKEN CANNOT EASILY
23 BE AUTHENTICATED.

24 Q NOTHING FURTHER, YOUR HONOR.

25 THE COURT: RECROSS?

1 MR. MCDANIEL: NO, YOUR HONOR.

2 THE COURT: YOU MAY STEP DOWN. YOU MAY CALL YOUR
3 NEXT WITNESS, MR. CHAPLIN.

4 MR. CHAPLIN: YOUR HONOR, THAT WILL BE THE LAST
5 WITNESS FOR THE DEFENSE.

6 THE COURT: LADIES AND GENTLEMEN, THE DEFENSE HAS
7 CONCLUDED ITS PRESENTATION OF THE EVIDENCE AND I WILL ASK
8 YOU TO TAKE A SHORT RECESS AND DON'T TALK ABOUT THE CASE
9 AND CONTINUE TO KEEP AN OPEN MIND. THANK YOU. PLEASE
10 WHILE YOU ARE ON YOUR BREAK SELECT SOMEONE TO BE THE
11 FOREPERSON OF THE JURY AND WRITE THEIR NAME DOWN AND GIVE
12 IT TO THE BAILIFF. THANK YOU.

13 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
14 A BREAK.)

15 THE COURT: ANY MATTERS BEFORE WE HAVE THE CLOSING
16 ARGUMENTS.

17 MR. CHAPLIN: YOUR HONOR, I WOULD LIKE A LITTLE BIT
18 OF TIME TO FINALIZE MY PRESENTATION.

19 THE COURT: HOW MUCH TIME ARE YOU REQUESTING?

20 MR. CHAPLIN: THIRTY MINUTES.

21 THE COURT: ARE THERE ANY MOTIONS OR ANY OTHER
22 MATTERS, ANYONE NEEDS TO PUT ON THE RECORD AT THIS TIME?

23 MR. MCDANIEL: NOT FROM THE STATE, JUDGE.

24 MR. CHAPLIN: YOUR HONOR, I WOULD JUST RENEW MY
25 MOTION FOR A DIRECTED VERDICT AND ALSO FOR THE PURPOSE OF

1 THE RECORD RENEW ALL THE OBJECTIONS THAT WERE MADE DURING
2 THE TRIAL OF THIS MATTER.

3 THE COURT: OKAY. WE WILL TAKE A RECESS FOR THIRTY
4 MINUTES AND THEN WE WILL HAVE THE CLOSING ARGUMENTS.

5 (WHEREUPON, A THIRTY MINUTE BREAK WAS TAKEN.)

6 THE COURT: ANYTHING BEFORE WE BRING THE JURY IN?

7 MR. MCDANIEL: NOT FROM THE STATE.

8 MR. CHAPLIN: NOT FROM THE DEFENSE.

9 THE COURT: BRING THE JURY IN, PLEASE.

10 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
11 APPROXIMATELY 12:20 P.M.)

12 THE COURT: LADIES AND GENTLEMEN, MR. MELLINGER, YOU
13 HAVE BEEN SELECTED TO BE THE FOREMAN. YOU WILL JUST
14 PRESIDE OVER DELIBERATIONS AND IF YOU NEED TO COMMUNICATE
15 WITH ME I CAN ONLY COMMUNICATE OUT HERE IN OPEN COURT ON
16 THE RECORD OR BY WAY OF A NOTE THAT IS MADE PART OF THE
17 RECORD. WITH THAT WE HAVE REACHED THE POINT OF THE TRIAL
18 WHERE THE EVIDENCE HAS ALL BEEN SUBMITTED TO YOU AND IT IS
19 NOW TIME FOR THE CLOSING ARGUMENTS OF THE LAWYER. YES
20 SIR, MR. MCDANIEL.

21 MR. MCDANIEL: WOULD YOU LIKE TO CLOSE ON THE LAW
22 FIRST?

23 THE COURT: YES.

24 MR. MCDANIEL: LADIES AND GENTLEMEN, I WILL HAVE A
25 CHANCE TO SPEAK TO YOU AGAIN. IN SOUTH CAROLINA THE

1 SOLICITORS OFFICE IS ALLOWED, THE STATE IS ALLOWED TO OPEN
2 WITH THE LAW AND REVIEW WHAT THE DEFENDANT IS AT TRIAL
3 FOR. AND I WILL ADDRESS YOU AGAIN AFTER THE DEFENSE
4 CLOSES. HE IS CHARGED WITH FIRST DEGREE BURGLARY. AND
5 WHAT THE STATE HAS TO PROVE IS BEYOND A REASONABLE DOUBT
6 IS THAT THE DEFENDANT ENTERED A DWELLING WITHOUT CONSENT
7 WITH THE INTENT TO COMMIT A CRIME IN THAT DWELLING AND
8 THAT OCCURRED IN THE NIGHTTIME. THAT IS FIRST DEGREE
9 BURGLARY. POSSESSING TOOLS OR BURGLARY TOOLS AND THIS
10 INCLUDES A NUMBER OF ITEMS. IT IS UNLAWFUL FOR A PERSON
11 TO MAKE, TO BE MADE IN HIS POSSESSION AND IT LIST A NUMBER
12 OF EXAMPLES OF STUFF. AND IT ALSO SAYS THAT REALLY
13 ANYTHING THAT WOULD AID IN THE USE OF THE BURGLARY. THE
14 JUDGE, IF I MESS ANYTHING UP OR WHEN YOU HEAR THE JUDGE
15 AND HE WILL GIVE YOU AN INSTRUCTION ON THE LAW AND HIS IS
16 DIFFERENT THAN MINE, ALWAYS LISTEN TO HIM. IF I MESS
17 SOMETHING UP THE JUDGE WILL CORRECT IT AND YOU TAKE WHAT
18 HE SAYS AS THE LAW, NOT WHAT I SAY. AND FINALLY IT IS
19 PETTY LARCENY. AND IT HAS A NUMBER OF NAMES, PETTY
20 LARCENY, SIMPLE LARCENY. THAT IS BASICALLY TAKING
21 ARTICLES OF GOODS FROM SOMEONE WITHOUT PERMISSION AND THE
22 VALUE THAT IS LESS THAN A THOUSAND DOLLARS. AND THOSE ARE
23 THE THREE CHARGES IN THIS CASE. AGAIN, I WILL ADDRESS YOU
24 ON MY CLOSING IN A FEW MINUTES. BUT I WILL SAY THAT I ASK
25 YOU TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT.

1 THE COURT: MR. CHAPLIN.

2 MR. CHAPLIN: LADIES AND GENTLEMEN OF THE JURY, FIRST
3 AND FOREMOST, I WOULD LIKE TO THANK YOU FOR THE TIME,
4 PATIENCE AND DEDICATION THAT YOU HAVE SHOWN THROUGHOUT
5 THIS ENTIRE TRIAL. AS I SAID TO YOU IN MY OPENING THIS IS
6 A CASE OF MISTAKEN IDENTITY. AND THE BURDEN OF PROOF IS
7 ON THE STATE. BENNIE IS PRESUMED INNOCENT AND I SUBMIT TO
8 YOU THAT THE STATE HAS NOT MET THAT REQUIRED BURDEN. THEY
9 HAVE TO SHOW THAT BENNIE COMMITTED THESE CRIMES BEYOND A
10 REASONABLE DOUBT. A REASONABLE DOUBT IS DOUBT THAT WOULD
11 CAUSE A REASONABLE PERSON TO HESITATE. AND ALL OF YOU ARE
12 REASONABLE PEOPLE, THAT IS WHY WE CHOSE YOU. WHAT THE
13 STATE BROUGHT TO YOU IS PROBABLY SOME OF THE SLOPPIEST
14 POLICE WORK IMAGINABLE WHEN YOU CONSIDER THE SEVERITY OF
15 WHAT BENNIE HAS BEEN ACCUSED OF. THEY BROUGHT YOU A
16 BLURRY PICTURE AND THAT IS IT. THEN AN OFFICER SAID THAT
17 THAT IS BENNIE MITCHELL. NOW, YOU HEARD FROM THE EXPERT,
18 DR. TOM ALLEY, WHO SAID THAT JUST BECAUSE YOU ARE
19 CONFIDENT DOES NOT MEAN YOU ARE ACCURATE. THIS MAN HAS
20 DONE A LOT OF RESEARCH IN THE PARTICULAR AREA. THE
21 PICTURES ARE ALSO, COULD BE MANIPULATED. A GREAT CONCERN
22 IS THE FACT THAT THIS CAMERA WAS NEVER PROPERLY TAKEN INTO
23 POLICE CUSTODY WHEN THIS CRIME WAS REPORTED. SOMETIME
24 THEREAFTER THEY ALLOWED THE HOMEOWNER TO DOWNLOAD
25 SOMETHING ONTO A DISK AND BRING IT TO THEM. WE ARE NOT

1 SURE OF DATES OF THOSE PICTURES, WE ARE NOT SURE OF THE
2 TIMES OF THOSE PICTURES, ALL WE HAVE IS A BLURRY PICTURE.
3 NOW, YOU ALSO HEARD DR. TOM ALLEY STATED MISIDENTIFICATION
4 BY A WITNESS IS A MAJOR PROBLEM. PEOPLE GET ACCUSED OF
5 SOMETHING, SOMEBODY SAYS THEY THINK THEY SAW SOMETHING AND
6 THEN LATER ON WHEN OTHER EVIDENCE IS PROVIDED, THEY SAY,
7 OH I AM SORRY, WE HAVE GOT THE WRONG GUY. THAT HAPPENS
8 WAY TOO OFTEN IN THE LEGAL SYSTEM. YOU KNOW, THIS IS A
9 VERY SERIOUS MATTER THAT WE HAVE ASKED YOU TO COME LISTEN
10 TO. YOU WOULD THINK THAT YOU WOULD BE GIVEN RELIABLE
11 EVIDENCE, I SUBMIT TO YOU, THAT YOU WERE NOT GIVEN. YOU
12 NEVER SAW ALL OF THE PICTURES FROM THIS CAMERA AND THERE
13 ARE NO CORROBORATING PIECES OF EVIDENCE SUCH AS
14 FINGERPRINTS, DNA, PHOTOS TAKEN OF THE ORIGINAL CRIME
15 SCENE. THINGS THAT MIGHT HELP YOU FURTHER IN YOUR
16 DELIBERATION. ALL YOU HAVE GOT IS A BLURRY PICTURE. NOW,
17 LADIES AND GENTLEMEN, BENNIE IS NOT GUILTY OF THESE THREE
18 CRIMES. LIKE I SAID THE STATE HAS THE BURDEN OF PROOF
19 BEYOND A REASONABLE DOUBT AND THEY CANNOT MISS THAT
20 BURDEN. THEREFORE, I ASK YOU TO BRING BACK A VERDICT OF
21 NOT GUILTY. LIKE I SAID IN MY OPENING, IF YOU ARE IN
22 DOUBT RULE IT OUT. AND WHEN YOU GO BACK THERE YOU ARE THE
23 JUDGE AND I WANT YOU TO USE YOUR COMMON SENSE AND DO WHAT
24 YOU THINK IS THE RIGHT THING TO DO. AND THE RIGHT THING
25 TO DO IN THIS MATTER IS TO FIND BENNIE NOT GUILTY. THANK

1 YOU, VERY MUCH.

2 THE COURT: MR. MCDANIEL.

3 MR. MCDANIEL: LADIES AND GENTLEMEN, WE HAVE EVIDENCE
4 THAT WE SUBMITTED IN THIS CASE AND YOU WILL BE ABLE TO
5 TAKE THAT BACK WITH YOU, THE PICTURES ON THE CAMERA, YOU
6 WILL BE ALLOWED TO COME OUT IF YOU NEED TO SEE IT ON THE
7 SCREEN. YOU WILL HAVE THIS EVIDENCE BACK THERE WHEN YOU
8 BEGIN YOUR DELIBERATIONS. I WOULD ASK THAT YOU LOOK AT
9 THEM AND SPREAD THEM OUT ON THE TABLE AND COMPARE THAT
10 WITH WHAT YOU HEARD IN HERE TODAY. NOW, LET'S MAKE NO
11 ABSOLUTE MISTAKE ABOUT WHAT THIS TRIAL IS ABOUT, IT IS
12 THIS PICTURE RIGHT HERE, THAT IS IT. AND YOUR DECISION
13 IS, IS THAT BENNIE MITCHELL IN THAT PICTURE. THAT IS IT,
14 IT IS NOT EXPERTS THAT COME IN. AN EXPERT THAT WAS
15 QUALIFIED AS AN EXPERT ON WITNESS IDENTIFICATION AND SAY
16 THAT THIS HAPPENS IN A SMALL PERCENTAGE OF CASES THAT COME
17 BACK, HALF OF THAT TINY PERCENTAGE WAS ON ID. THAT IS
18 WHAT HE SAID, HE WASN'T A LARGE NUMBER, Y'ALL REMEMBER
19 THAT, HE SAT RIGHT HERE ON THE STAND. A WITNESS EXPERT
20 QUALIFIED IN THIS COURT DIDN'T SAY ANYTHING ABOUT THE
21 PICTURE, HAD AN OPPORTUNITY TO BE SHOWN, NOTHING. WHAT
22 DID HE SAY TO Y'ALL. A SMALL PERCENTAGE OF THE TIME YOU
23 CAN MISIDENTIFY SOMEBODY AND A TINY PERCENTAGE REALLY. HE
24 DIDN'T THROW NUMBERS OUT THERE BUT WHAT DID HE SAY, A
25 SMALL PERCENT OF VERDICTS HAVE COME BACK, HALF OF THAT,

1 ROUGHLY HALF OF THAT WAS A MISSED ID. THAT IS WHAT HE
2 SAID. THE POINT IS, BECAUSE THE CASE IS ABOUT THIS
3 PICTURE. AND WHAT THE DEFENSE HAS TO DO IS MUDDY THE
4 WATER, IT CAN'T BE JUST ABOUT A PICTURE, IT HAS TO BE
5 ABOUT THIS. A SMALL PERCENT OF THE TIME, HALF OF THAT
6 SMALL PERCENTAGE OF THE TIME IS THE ID WRONG. THAT IS
7 WHAT HE SAID. AND HE WAS QUALIFIED TO SAY THAT. HE
8 DIDN'T SAY ANYTHING ABOUT THE PICTURE. DON KNEECE, AND I
9 MAY OWE Y'ALL AN APOLOGY AND MR. KNEECE BUT USUALLY I
10 DON'T GET THAT ANGRY. BUT WHAT DID HE SAY AND IT IS THE
11 SAME THING, WELL YOU CAN MANIPULATE THESE. YOU CAN, THIS
12 WASN'T MANIPULATED BUT YOU CAN. ANY EVIDENCE CAN BE
13 MANIPULATED, ANYTHING IN ANY CASE. ANYTHING A HUMAN COMES
14 INTO CONTACT WITH CAN BE MANIPULATED. HE DIDN'T SAY THAT,
15 HE SAID, HEY GUYS, YOU CAN MANIPULATE THESE. I HAD A
16 PROBLEM WITH THE AUTHENTICITY BECAUSE THEY CAN BE
17 MANIPULATED. LADIES AND GENTLEMEN, IT HAS BEEN INTRODUCED
18 AS EVIDENCE IN THIS TRIAL, IT IS AUTHENTICATED. I WANT
19 YOU TO REALIZE THAT HE DIDN'T SAY THIS WAS AND YOU SAW ME,
20 ARE YOU SAYING THIS WAS MANIPULATED. NO. YOU SAYING THE
21 POLICE DID IT. WELL, NO, NO. THE ONLY PERSON WHO COULD
22 HAVE DONE IT WAS MR. POTTS. HE DIDN'T EVEN KNOW THE GUY,
23 HASN'T SEEN HIM BEFORE, WHY WOULD YOU MANIPULATE IT.
24 THERE IS NOTHING IN IT FOR HIM. THIS IS THE SAME CAMERA
25 SOLD ON HIS WEBSITE. STIRRING THE POT, WANTS Y'ALL TO

1 TAKE YOUR EYE OFF OF THIS CASE, THIS PICTURE RIGHT HERE
2 AND THAT IS WHAT THIS CASE IS ALL ABOUT. WE HAVE
3 ESTABLISHED THAT BENNIE MITCHELL IN THIS PICTURE
4 IDENTIFIED BY LIEUTENANT MCCLURKIN WHO HAS KNOWN HIM FOR
5 20 YEARS. AND, YES, HE WAS CONFIDENT BUT I DON'T THINK
6 THAT MAKES HIM ANY LESS SUITABLE TO MISTAKEN IDENTITY AS
7 THE EXPERT. KNOWN HIM FOR 20 YEARS, THAT IS BENNIE
8 MITCHELL. HE DIDN'T HAVE PERMISSION TO BE IN THE HOUSE,
9 WE KNOW THE ITEMS TAKEN WAS BEER, SOCKS, CHANGE, ROUGHLY
10 \$100.00 DOLLARS IN CHANGE. AND WE WILL, FLASHLIGHT, YOU
11 DON'T NEED A FLASHLIGHT IF IT IS NOT AT NIGHT. HE ENTERS
12 MR. POTTS HOUSE WITHOUT CONSENT AT NIGHT WITH THE INTENT
13 TO COMMIT A CRIME AND IN FACT COMMITTED A CRIME. AND HE
14 STOLE THOSE ITEMS AND THE VALUE OF THOSE ITEMS WERE LESS
15 THAN A THOUSAND DOLLARS. AND THE BAG AND THE FLASHLIGHT
16 ARE TOOLS THAT HE USED IN THAT BURGLARY. THAT IS WHAT
17 THIS CASE IS ALL ABOUT. NOW, WHAT ELSE DO WE KNOW OTHER
18 THAN THAT PICTURE OF BENNIE MITCHELL. THE HEIGHT IS THE
19 SAME, YOU WILL HAVE THIS BACK THERE TO LOOK AT THEM, YOU
20 COME BACK OUT HERE AND LOOK AT THIS PICTURE, EXAMINE IT.
21 I WANT YOU TO DO EVERYTHING THAT YOU NEED TO DO TO BE SURE
22 OF THIS. WHAT ELSE DO WE KNOW. BENNIE MITCHELL LIVES .2
23 MILES AWAY. YOU ARE AT A HIGH SCHOOL TRACK, .2 MILES
24 AWAY, LESS THAN ONE LAP AROUND THAT TRACK, BENNIE MITCHELL
25 SITS RIGHT THERE. THE VICTIM'S HOME, BENNIE MITCHELL'S

1 HOME. THAT IS IT, THAT IS WHAT THIS CASE IS ABOUT. THE
2 DEFENSE STIRRED THE POT, NO PICTURES WERE TAKEN, NO
3 EVIDENCE WAS CLAIMED. THEY DIDN'T GET FINGERPRINTS. I
4 WISH THEY HAD TAKEN PICTURES. OF WHAT, REALLY, ULTIMATELY
5 WHAT YOU ARE TRYING TO DECIDE IS WHO DID IT. AND WHEN YOU
6 SHOW UP WITH A PICTURE OF WHO DID IT WHAT ELSE IS THERE TO
7 COLLECT. NOTHING WAS MANIPULATED, NO MISIDENTIFICATION,
8 THAT IS BENNIE MITCHELL. AND WHAT DO WE KNOW. BENNIE
9 MITCHELL DIDN'T HAVE PERMISSION TO BE THERE, BENNIE
10 MITCHELL DID THIS AT NIGHT. MR. POTTS DIDN'T SAY ANYBODY
11 COULD GO IN THERE BUT HIS GIRLFRIEND. BENNIE MITCHELL
12 STOLE ITEMS THAT WERE LESS THAN A THOUSAND DOLLARS, A
13 FLASHLIGHT AND A BAG IN HIS HAND TO HELP HIM TO DO IT.
14 THOSE ARE THE TOOLS THAT HE USED. THAT IS IT. THIS IS
15 ONLY IN THE SOUTH THAT THIS COULD HAPPEN AND THAT IS TRUE.
16 IT IS A DEER CAMERA AND IT IS ACCURATE AND THAT IS WHAT IT
17 TOOK A PICTURE OF, BENNIE MITCHELL. LADIES AND GENTLEMEN,
18 I ASK YOU, I TOLD YOU I WAS GOING TO STAND UP IN FRONT OF
19 YOU AT THE END AND SAY THAT I WANT YOU TO FIND HIM GUILTY
20 OF FIRST DEGREE BURGLARY AND POSSESSION OF BURGLARY TOOLS
21 AND PETTY LARCENY. BENNIE MITCHELL IS GUILTY OF THOSE
22 THREE CRIMES AND I ASK YOU TO RETURN A VERDICT OF GUILTY.
23 THANK YOU.

24 THE COURT: THANK YOU, MR. MCDANIEL. LADIES AND
25 GENTLEMEN, YOU HAVE NOW HEARD ALL THE EVIDENCE AND YOU

1 HAVE HEARD THE ARGUMENTS OF THE LAWYERS AND IT IS NOW MY
2 RESPONSIBILITY TO CHARGE YOU ON THE LAW THAT YOU MUST
3 APPLY TO THE FACTS OF THIS CASE. IT WILL SOON BE YOUR
4 RESPONSIBILITY TO DETERMINE WHAT THE FACTS OF THIS CASE
5 ARE AND TO THOSE FACTS YOU MUST APPLY THE LAW AS I GIVE IT
6 TO YOU AND YOU SHOULD NOT BE CONCERNED WITH WHAT THE LAW
7 SHOULD BE BUT WHAT THE LAW IS. AND THAT MEANS THAT YOU
8 SHOULD NOT BE INFLUENCED IN THIS CASE BY ANY KIND OF
9 BIASED OR PREJUDICE OR UNDUE SYMPATHY OR ANY LIKES OR
10 DISLIKES. AND THAT MEANS THAT YOU MUST DECIDE THIS CASE
11 SOLELY ON THE EVIDENCE ACCORDING TO THE LAW. AND YOU WILL
12 RECALL THAT WHEN YOU TOOK THE OATH YESTERDAY THAT IS
13 EXACTLY WHAT THE OATH SAID, TO DECIDE THE CASE ACCORDING
14 TO THE EVIDENCE AND THE LAW.

15 NOW, PLEASE DO NOT READ INTO ANYTHING THAT I MAY OF
16 SAID OR DONE DURING THE COURSE OF THIS TRIAL OR TO
17 ANYTHING THAT I MAY SAY DURING THE COURSE OF GIVING THESE
18 INSTRUCTIONS AS ANY INDICATION AS TO WHAT I THINK THE
19 FACTS OF THIS CASE ARE OR WHAT I THINK YOUR VERDICT SHOULD
20 BE BECAUSE AS I TOLD YOU AT THE OUTSET YOU AND YOU ALONE
21 ARE THE EXCLUSIVE JUDGE OF THE FACTS. I AM NOT GOING TO
22 INTERFERE WITH YOUR RIGHT TO DETERMINE WHAT THE FACTS ARE,
23 OUR CONSTITUTION GIVES YOU THAT RIGHT EXCLUSIVELY. AND I
24 KNOW THAT YOU WOULD NOT INTERFERE WITH MY RIGHT TO TELL
25 YOU WHAT THE LAW IS. BECAUSE AS THE JUDGE OF THE LAW THAT

1 IS MY PREROGATIVE TO GIVE YOU THE LAW THAT YOU MUST APPLY
2 TO THE FACTS OF THIS CASE. NOW, HOW DO YOU DETERMINE WHAT
3 THE FACTS ARE. YOU DO THAT EVALUATING OR WEIGHING THE
4 EVIDENCE YOU HAVE HEARD DURING THE COURSE OF THIS TRIAL.
5 THERE IS NO WAY FOR YOU TO WEIGH EVIDENCE. I CAN'T GIVE
6 YOU A SET OF SCALES, IT IS INSTEAD A MENTAL PROCESS AND
7 YOU WEIGH AND EVALUATE EVIDENCE SIMPLY BY USING YOUR GOOD
8 COMMON SENSE, YOUR SENSE OF LOGIC AND REASON AND YOUR LIFE
9 EXPERIENCES. YOU BRING THOSE THINGS TO BEAR ON THE
10 EVIDENCE YOU HEARD DURING THE COURSE OF THIS TRIAL.

11 NOW, I TOLD YOU IN DETERMINING THE FACTS YOU WOULD
12 HAVE TO CONFINE YOUR DECISION TO THE EVIDENCE. AND I TOLD
13 YOU EVIDENCE CONSISTS OF TWO SOURCES. ONE IS BY SWORN
14 WITNESS TESTIMONY AND EXHIBITS. THOSE ARE THE ONLY THINGS
15 YOU CAN CONSIDER IN DETERMINING WHAT THE FACTS ARE. YOU
16 CANNOT CONSIDER AS EVIDENCE THE ARGUMENTS OR STATEMENTS OF
17 THE LAWYERS BECAUSE AGAIN THEY ARE NOT WITNESSES. AND
18 WHAT THEY SAY IS NOT EVIDENCE. LIKEWISE YOU SHOULD NOT BE
19 INFLUENCED BY ANY QUESTIONS OR OBJECTIONS THAT THE LAWYERS
20 MAY OF MADE BECAUSE THAT IS THEIR DUTY TO MAKE THE
21 OBJECTIONS AND THAT IS NOT EVIDENCE EITHER. IN ADDITION
22 TO THE DIFFERENT SOURCES OF EVIDENCE THERE IS ALSO
23 DIFFERENT TYPES OF EVIDENCE. AND WHAT I AM TALKING ABOUT
24 IS DIRECT AND CIRCUMSTANTIAL EVIDENCE. DIRECT EVIDENCE IS
25 THE TESTIMONY OF A PERSON WHO CLAIMS TO HAVE ACTUAL AND

1 DIRECT KNOWLEDGE OF A FACT SUCH AS AN EYEWITNESS.
2 CIRCUMSTANTIAL EVIDENCE IS INDIRECT EVIDENCE OR TO PUT
3 ANOTHER WAY CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF
4 FACTS AND CIRCUMSTANCES FROM WHICH YOU COULD FIND ANOTHER
5 FACT EXIST. NOW, THE LAW MAKES NO DISTINCTION BETWEEN THE
6 WEIGHT OR VALUE TO BE GIVEN TO DIRECT OR CIRCUMSTANTIAL
7 EVIDENCE. YOU ARE ENTITLED TO CONSIDER BOTH KINDS. THERE
8 IS NOT A GREATER DEGREE OF CERTAINTY REQUIRED OF
9 CIRCUMSTANTIAL EVIDENCE OVER DIRECT EVIDENCE. AND YOU
10 MUST CONSIDER ALL THE EVIDENCE YOU HAVE HEARD IN THE CASE
11 IN LIGHT OF REASON, COMMON SENSE AND EXPERIENCE. AND
12 AFTER WEIGHING ALL THE EVIDENCE, IF YOU ARE NOT CONVINCED
13 OF THE GUILT OF MR. MITCHELL BEYOND A REASONABLE DOUBT YOU
14 MUST FIND HIM NOT GUILTY. ON THE OTHER HAND IF YOU ARE
15 CONVINCED OF HIS GUILTY BEYOND A REASONABLE DOUBT YOU
16 WOULD BE OBLIGATED TO FIND HIM GUILTY.

17 NOW, IN DETERMINING THE FACTS OF THE CASE, AS I TOLD
18 YOU, YOU MUST CONSIDER AND DETERMINE THE CREDIBILITY OF
19 THE WITNESSES AND OF THE EXHIBITS. AND I TOLD YOU SOME
20 THINGS YOU COULD USE IN ENGAGING CREDIBILITY, I AM NOT
21 GOING TO REPEAT THAT BECAUSE I KNOW YOU HEARD ME THE FIRST
22 TIME. BUT LET ME JUST TELL YOU THAT YOU MAY BELIEVE
23 EVERYTHING A WITNESS SAYS, YOU MAY BELIEVE NOTHING A
24 WITNESS SAYS. YOU MAY BELIEVE PARTS OF A WITNESSES
25 TESTIMONY AND DISREGARD OTHER PARTS. YOU MAY BELIEVE ONE

1 WITNESS OVER SEVERAL OR SEVERAL OVER ONE. BUT REMEMBER
2 THAT YOUR JOB IS TO DETERMINE THE TRUE FACTS OF THE CASE
3 AND WHETHER THE STATE HAS MET ITS BURDEN OF PROOF AND YOU
4 DO THAT BY WEIGHING ALL THE EVIDENCE, REGARDLESS OF WHO
5 CALLED THE WITNESS.

6 NOW, YOU HAVE HEARD TESTIMONY IN THIS CASE FROM
7 PEOPLE WHO WERE DESCRIBED AND QUALIFIED AS EXPERTS AND I
8 TOLD YOU WHAT AN EXPERT WITNESS WAS AS DEFINED BY THE LAW.
9 BUT I WILL TELL YOU AGAIN THAT EXPERT TESTIMONY SHOULD BE
10 JUDGED JUST AS ANY OTHER TESTIMONY IN THIS IMPORTANT
11 SENSE. YOU MAY ACCEPT OR REJECT IT AND GIVE IT AS MUCH
12 WEIGHT AS YOU THINK IT DESERVES CONSIDERING THE WITNESSES
13 EDUCATION OR EXPERIENCE, THE REASONS GIVEN FOR THE OPINION
14 AND ALL THE OTHER EVIDENCE IN THE CASE.

15 NOW, LADIES AND GENTLEMEN, THIS IS A CRIMINAL CASE
16 AND AS I HAVE ALREADY INSTRUCTED YOU THERE ARE CERTAIN
17 PRINCIPLES THAT APPLY TO CRIMINAL CASES. BEGINNING WITH
18 THE PRINCIPLE THAT THE MERE FACT THAT SOMEONE HAS BEEN
19 INDICTED IS NOT EVIDENCE. THE MERE FACT THAT SOMEONE HAS
20 BEEN CHARGED CANNOT BE CONSIDERED BY YOU AS EVIDENCE OF
21 GUILT OR EVEN CREATING A SUSPICION OF GUILT. IT IS SIMPLY
22 THE FORMAL WAY IN WHICH A CASE BEGINS. MR. MITCHELL HAS
23 PLEAD NOT GUILTY TO THE INDICTMENTS AND THAT PUTS THE
24 BURDEN OF PROOF ON THE STATE. A PERSON CHARGED WITH
25 COMMITTING A CRIME IS NEVER REQUIRED TO PROVE HIMSELF

1 INNOCENT OR PROVE HIMSELF NOT GUILTY. AND IT IS A
2 FUNDAMENTAL RULE OF LAW THAT A DEFENDANT, NO MATTER WHAT
3 THE CHARGE MAY BE, WILL ALWAYS BE PRESUMED INNOCENT UNLESS
4 AND UNTIL GUILT HAS BEEN PROVEN BY EVIDENCE SATISFYING YOU
5 OF THAT GUILT BEYOND A REASONABLE DOUBT. THIS PRESUMPTION
6 OF INNOCENCE DOES NOT END WHEN YOU BEGIN YOUR
7 DELIBERATIONS. IT REMAINS WITH THE DEFENDANT AND
8 ACCOMPANIES HIM THROUGHOUT THE TRIAL UNLESS AND UNTIL YOU
9 REACH A VERDICT OF GUILT BY EVIDENCE SATISFYING YOU OF
10 GUILT BEYOND A REASONABLE DOUBT. NOW THE PRESUMPTION OF
11 INNOCENCE IS NOT SOME TECHNICALITY, IT IS INSTEAD A
12 SUBSTANTIAL AND IMPORTANT RIGHT TO WHICH EVERYONE IS
13 ENTITLED TO UNLESS YOU, THE JURY, ARE SATISFIED FROM THE
14 EVIDENCE OF GUILT BEYOND A REASONABLE DOUBT.

15 NOW, WHAT IS A REASONABLE DOUBT IN THE LAW. THE LAW
16 DEFINES A REASONABLE DOUBT AS THE KIND OF DOUBT THAT WOULD
17 CAUSE A REASONABLE SINCERE, HONEST AND CONSCIENTIOUS
18 PERSON TO HESITATE TO ACT IN AN IMPORTANT MATTER IN THEIR
19 OWN AFFAIRS. PROOF BEYOND A REASONABLE DOUBT IS PROOF
20 THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.
21 AND OF COURSE THERE ARE FEW THINGS THAT WE CAN KNOW WITH
22 ABSOLUTE CERTAINTY. AND IN CRIMINAL CASES THE LAW DOES
23 NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. IF
24 BASED ON YOUR VIEW AND WEIGHING OF THE EVIDENCE YOU ARE
25 FIRMLY CONVINCED THAT MR. MITCHELL IS GUILTY OF THE CRIME

1 CHARGED YOU MUST FIND HIM GUILTY. IF ON THE OTHER HAND
2 YOU THINK THERE IS A REAL POSSIBILITY THAT HE IS NOT
3 GUILTY YOU MUST GIVE HIM THE BENEFIT OF THAT DOUBT AND
4 FIND HIM NOT GUILTY. A REASONABLE DOUBT MAY ARISE FROM
5 THE EVIDENCE OR FROM A LACK OF EVIDENCE. AND A DEFENDANT
6 IS ENTITLED TO EVERY REASONABLE DOUBT THAT ARISES IN A
7 CASE WHICH MEANS UPON AN ISSUE OF FACT THAT MAY BE
8 ESSENTIAL TO A CONVICTION AND A VERDICT OF GUILTY, YOU
9 HAVE A REASONABLE DOUBT AS TO HOW THAT ISSUE SHOULD BE
10 RESOLVED IT IS YOUR DUTY TO RESOLVE THAT DOUBT IN FAVOR OF
11 MR. MITCHELL.

12 NOW, LADIES AND GENTLEMEN, THERE ARE THREE CHARGES IN
13 THE CASE AND YOU MUST WEIGH THE EVIDENCE AS TO EACH CHARGE
14 SEPARATELY AND INDIVIDUALLY AND NOT LET YOUR DECISION ON
15 ONE CHARGE AFFECT YOUR DECISION ON THE OTHERS. AND I AM
16 GOING TO GO OVER WITH YOU EACH OF THE CRIMES AND THE
17 ELEMENTS OF THOSE CRIMES AND BEFORE I DO THAT I WANT TO
18 REMIND YOU THAT, OF COURSE, A DEFENDANT DOESN'T HAVE ANY
19 BURDEN OF PROOF. AND THE FACT THAT A DEFENDANT DOES NOT
20 TESTIFY IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY WAY
21 IN YOUR DELIBERATIONS AND IN YOUR CONSIDERATIONS OF THE
22 QUESTION OF GUILT OR NOT GUILTY, IT MUST NOT BE CONSIDERED
23 BY YOU IN ANY MANNER WHATSOEVER. EVERY CITIZEN HAS A
24 CONSTITUTIONAL RIGHT TO REMAIN SILENT AND THE CLAIMING OF
25 THIS RIGHT MUST NOT BE CONSIDERED BY YOU IN YOUR

1 DELIBERATIONS. SO, UNDER YOUR OATH YOU ARE NOT TO DRAW
2 ANY CONCLUSION, WHATSOEVER, FROM THE FACT THAT MR.
3 MITCHELL DID NOT TESTIFY AND THE FACT THAT HE DID NOT
4 TESTIFY SHOULD NOT EVEN BE DISCUSSED IN THE JURY ROOM.
5 THE BURDEN OF PROOF, AS I HAVE REPEATEDLY STATED IS ON THE
6 STATE. MR. MITCHELL IS NOT REQUIRED TO PROVE HIMSELF
7 INNOCENT, OR PROVE HIMSELF NOT GUILTY. THE BURDEN OF
8 PROOF IS ALWAYS ON THE STATE.

9 NOW, THE FIRST CHARGE IS BURGLARY. AND IN ORDER TO
10 CONVICT MR. MITCHELL OF THIS CHARGE THE STATE MUST PROVE
11 BEYOND A REASONABLE DOUBT THAT HE ENTERED A DWELLING
12 WITHOUT CONSENT. A DWELLING IS ANY BUILDING OR PORTION OF
13 A BUILDING IN WHICH A PERSON ORDINARILY SLEEPS. A
14 BUILDING CONSTRUCTED IS A DWELLING THAT HAS NEVER BEEN
15 OCCUPIED, IT CANNOT BE CONSIDERED A DWELLING. BUT A
16 BUILDING IS A DWELLING EVEN IF THE RESIDENTS ARE
17 TEMPORARILY ABSENT FROM THE BUILDING. IN ORDER TO PROVE
18 THAT A DEFENDANT ENTERED THE DWELLING THE STATE DOES NOT
19 HAVE TO SHOW THAT THE DEFENDANT'S ENTIRE BODY ENTERED THE
20 DWELLING, THE SMALLEST ENTRY IS SUFFICIENT. IT MAY BE ANY
21 PART OF THE BODY, SUCH AS A HAND OR A FOOT OR EVEN AN
22 INSTRUMENT SUCH AS A HOOK OR OTHER INSTRUMENT. IN
23 ADDITION, THE STATE DOES NOT HAVE TO PROVE THAT FORCE WAS
24 USED TO GAIN ENTRY. IF A PERSON ENTERS A BUILDING BY
25 USING DECEPTION OR TRICK OR MISREPRESENTATION TO GET

1 CONSENT TO ENTER THIS IS AN ENTRY WITHOUT CONSENT. THE
2 NEXT THING THE STATE MUST PROVE IN ORDER TO CONVICT ONE OF
3 BURGLARY IS THAT THE DEFENDANT INTENDED TO COMMIT A CRIME,
4 EITHER A FELONY OR MISDEMEANOR AT THE TIME OF THE ENTRY.
5 THE MERE ENTRY INTO A DWELLING WITHOUT CONSENT IS NOT
6 BURGLARY. IF THE INTENT TO COMMIT A CRIME IS FORMED AFTER
7 THE ENTRY IT IS NOT BURGLARY. ON THE OTHER HAND, IF THE
8 DEFENDANT INTENDED TO COMMIT A CRIME AT THE TIME OF THE
9 ENTRY IT IS A BURGLARY EVEN IF THE INTENT WAS ABANDONED
10 AFTER THE ENTRY OCCURRED. IT DOES NOT MATTER THAT THE
11 INTENDED CRIME WAS NOT COMPLETED. INTENT MAY BE SHOWN BY
12 ACTS AND CONDUCTS OF THE DEFENDANT AND OTHER CIRCUMSTANCES
13 FROM WHICH YOU MAY NATURALLY AND REASONABLY INFER INTENT.
14 FINALLY THE STATE MUST PROVE BEYOND A REASONABLE DOUBT
15 THAT THE DEFENDANT ENTERED OR REMAINED IN THE DWELLING IN
16 THE NIGHTTIME. NIGHTTIME IS THE PERIOD BETWEEN SUNSET AND
17 SUNRISE DURING WHICH THERE IS NOT ENOUGH DAYLIGHT TO
18 RECOGNIZE A PERSON'S FACE EXCEPT BY ARTIFICIAL LIGHT OR
19 MOONLIGHT.

20 NOW, THE NEXT CHARGE THAT I AM GOING TO DEFINE FOR
21 YOU IS POSSESSION OF BURGLARY TOOLS. AND I WILL TELL YOU
22 THAT UNDER SECTION 16-11-20 OF THE SOUTH CAROLINA CODE OF
23 LAWS IT STATES IN PART: IT IS UNLAWFUL FOR A PERSON TO
24 MAKE OR MEND, CAUSE TO BE MADE OR MENDED, OR HAVE IN HIS
25 POSSESSION ANY ENGINE, MACHINE, TOOL, FALSE KEY, PICKLOCK,

1 BIT, NIPPERS, NITROGLYCERINE, DYNAMITE CAP, COIL OR FUSE,
2 STEEL WEDGE, DRILL, TAP-PIN, OR OTHER IMPLEMENT OR THING
3 ADAPTED, DESIGNED, OR COMMONLY USED FOR THE COMMISSION OF
4 BURGLARY, LARCENY, SAFECRACKING, OR OTHER CRIME, UNDER
5 CIRCUMSTANCES EVINCING AN INTENT TO USE, EMPLOY, OR ALL
6 THE SAME TO BE USED OR EMPLOYED IN THE COMMISSION OF A
7 CRIME, OR KNOWING THAT THE SAME ARE INTENDED TO BE SO
8 USED.

9 FINALLY THE DEFENDANT, MR. MITCHELL, IS CHARGED WITH
10 LARCENY, PETTY LARCENY. AND IN ORDER TO CONVICT MR.
11 MITCHELL OF THIS OFFENSE THE STATE MUST PROVE BEYOND A
12 REASONABLE DOUBT THAT MR. MITCHELL TOOK AND CARRIED AWAY
13 THE PROPERTY OF ANOTHER AGAINST THE WILL OR WITHOUT THE
14 CONSENT OF THE OTHER PERSON. THE SLIGHTEST REMOVAL OF THE
15 PROPERTY OR THE COMPLETE POSSESSION OF THE PROPERTY, EVEN
16 FOR AN INSTANCE BY THE DEFENDANT, IS ENOUGH TO SHOW A
17 TAKING AND CARRYING AWAY OF THE PROPERTY. THE STATE MUST
18 ALSO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT TO
19 PERMANENTLY DEPRIVED THE OWNER OF THE PROPERTY.

20 NOW, LADIES AND GENTLEMEN, IN EVERY CASE THE STATE
21 BEARS THE BURDEN OF PROVING CRIMINAL INTENT. CRIMINAL
22 INTENT IS THE STATE OF MIND, IT IS A CONSCIOUS WRONGDOING
23 AND IT IS UP TO YOU TO DETERMINE WHAT THE DEFENDANT
24 INTENDED TO DO AT THE TIME. OF COURSE, MEDICAL SCIENCE
25 DOES NOT ALLOW US TO DISSECT A PERSON'S BRAIN AND

1 DETERMINE WHAT THEY HAD IN MIND AT A CERTAIN POINT IN
2 TIME. AND BECAUSE OF THAT THE LAW SAYS THAT CRIMINAL
3 INTENT MAY BE INFERRED FROM THE CIRCUMSTANCES SHOWN TO
4 HAVE EXISTED. IT IS NOT NECESSARY TO ESTABLISH INTENT BY
5 DIRECT AND POSITIVE EVIDENCE. BUT IT MAY ESTABLISHED BY
6 CIRCUMSTANTIAL OR INFERENCE AS THE SAME WAY OF ANY OTHER
7 FACT BY TAKING INTO CONSIDERATION THE ACTS OF THE PARTIES
8 AND ALL THE FACTS AND CIRCUMSTANCES.

9 IN ANY CRIMINAL CASE IDENTIFICATION OF THE DEFENDANT
10 AS THE PERSON WHO COMMITTED THE CRIME IS SOMETHING THE
11 STATE BEARS THE BURDEN OF PROVING BEYOND A REASONABLE
12 DOUBT. YOU MUST BE SATISFIED BEYOND A REASONABLE DOUBT OF
13 THE ACCURACY OF THE IDENTIFICATION OF THE DEFENDANT BEFORE
14 YOU MAY CONVICT HIM. IDENTIFICATION TESTIMONY IS AN
15 EXPRESSION OF BELIEF OR IMPRESSION BY A WITNESS. YOU MUST
16 DETERMINE THE ACCURACY OF THE IDENTIFICATION, YOU MAY
17 CONSIDER AND MUST CONSIDER THE BELIEVABILITY OF EACH
18 IDENTIFICATION WITNESS IN THE SAME WAY AS ANY OTHER
19 WITNESS. YOU MAY CONSIDER WHETHER THE WITNESS HAD AN
20 ADEQUATE OPPORTUNITY TO OBSERVE THE OFFENDER AT THE TIME
21 OF THE OFFENSE. THIS WILL BE AFFECTED BY THINGS LIKE HOW
22 LONG OR SHORT OF TIME WAS AVAILABLE, HOW FAR OR HOW CLOSE
23 THE WITNESS WAS, THE LIGHTING CONDITIONS AND WHETHER THE
24 WITNESS HAD THE CHANCE TO SEE OR KNOW THE PERSON IN THE
25 PAST. ONCE AGAIN, I INSTRUCT YOU THAT THE BURDEN OF PROOF

1 OF THE STATE EXTENDS TO EVERY ELEMENT OF THE CRIME CHARGED
2 AND THIS INCLUDES THE BURDEN OF PROVING BEYOND A
3 REASONABLE DOUBT THE IDENTITY OF THE DEFENDANT AS THE
4 PERSON WHO COMMITTED THE CRIME.

5 NOW, THAT COVERS ALL THE SUBSTANTIVE LAW. AND LET ME
6 JUST GIVE YOU A FEW REMARKS ON YOUR DELIBERATIONS BEFORE
7 YOU RETIRE TO THE JURY ROOM TO DO THAT AND START TALKING
8 ABOUT THE CASE. FIRST OF ALL, REMEMBER THAT YOU WEREN'T
9 CHOSEN TO BE A JURY IN THIS CASE, TO BE A PARTISAN OR
10 ADVOCATE FOR EITHER THE STATE OR FOR MR. MITCHELL. YOU
11 WERE CHOSEN BECAUSE BOTH SIDES BELIEVED YOU COULD BE FAIR
12 AND IMPARTIAL AND YOU CAN DECIDE THIS CASE WITHOUT ANY
13 KIND OF BIASED OR PREJUDICE OR PRECONCEIVED IDEAS. AND
14 THAT MEANS YOU USE YOUR COMMON SENSE AND YOUR SENSE OF
15 LOGIC AND REASONS AND YOUR LIFE EXPERIENCES. AND YOU LOOK
16 AT THE EVIDENCE IN THIS CASE AND DETERMINE THE FACTS FROM
17 THAT EVIDENCE, TAKE THE LAW THAT I HAVE GIVEN TO YOU AND
18 APPLY IT TO THOSE FACTS AND ULTIMATELY REACH A VERDICT.
19 IF YOU LOOKED UP THE WORD, JURY, YOU SEE IT CAME AS AN OLD
20 WORD, IT MEANS A COMPANY OF PEOPLE WHO, EXCUSE ME, SWORN
21 TO RENDER A TRUE ANSWER. AND YOU ARE NOT FOR ONE SIDE OR
22 THE OTHER, YOU ARE JUDGES, JUDGES OF THE FACTS AND TO
23 DETERMINE WHAT THE FACTS ARE AND WHETHER THE STATE HAS MET
24 ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT. NOW, I
25 HAVE PREPARED A VERDICT FORM AND MR. MELLINGER, I WILL ASK

1 YOU TO LOOK AT THIS FORM AND IT SETS FORTH THE THREE
2 CHARGES AND ASK YOU TO RETURN WHETHER MR. MITCHELL IS
3 GUILTY OR NOT GUILTY OF THOSE CHARGES. DON'T PLACE ANY
4 SIGNIFICANCE ON WHICH ANSWER I PUT FIRST, I HAVE TO PUT
5 ONE FIRST AND THAT DOESN'T MEAN ANYTHING. OF COURSE, YOU
6 ARE ONLY AUTHORIZED TO SIGN THE FORM WHEN THE VERDICT IS
7 UNANIMOUS. NOW, THE GENIUS OF OUR JURY SYSTEM OF COURSE
8 IS IT ALLOWED TWELVE PEOPLE FROM DIFFERENT BACKGROUNDS AND
9 WALKS OF LIFE AND LIFE EXPERIENCES TO COME TOGETHER AND
10 DISCUSS THE EVIDENCE AND ULTIMATELY REACH A VERDICT.
11 DON'T BE AFRAID TO CHANGE YOUR OPINION IF YOUR DISCUSSIONS
12 PERSUADE THAT YOU SHOULD. BUT DON'T CHANGE YOUR OPINION
13 SIMPLY TO GET THE CASE OVER WITH OR TO REACH A UNANIMOUS
14 VERDICT BECAUSE THIS CASE IS IMPORTANT, IT IS IMPORTANT
15 FOR THE STATE AND FOR MR. MITCHELL. AND THIS IS EVERYONES
16 DAY IN COURT ON THIS MATTER AND THEY ARE ALL ENTITLED TO
17 YOUR FAIR AND IMPARTIAL CONSIDERATION OF THE EVIDENCE AND
18 YOUR VERDICT. THE RECORD IS CLOSED, THERE ARE NOT GOING
19 TO BE ANY MORE WITNESSES AND THERE ARE NOT GOING TO BE ANY
20 MORE EXHIBITS SO YOU WILL HAVE TO DETERMINE THE CASE ON
21 EITHER THE EXHIBITS YOU HAVE IN THERE OR YOUR MEMORY OF
22 THE TESTIMONY. IF YOU NEED TO CONTACT ME IT MUST BE BY
23 WAY OF A NOTE. DON'T START TALKING ABOUT THE CASE YET
24 BECAUSE I HAVE ONE MORE MATTER TO TAKE UP WITH THE LAWYERS
25 AND WHEN YOU RECEIVE THE EXHIBITS THAT WILL BE YOUR SIGNAL

1 THAT YOU CAN BEGIN DELIBERATING ABOUT THIS MATTER. THANK
2 YOU FOR YOUR ATTENTION AND ALSO I WILL LET YOU KNOW THE
3 CLERK'S OFFICE HAS ORDERED LUNCH. IT SHOULD BE HERE IN
4 THE NEXT FIFTEEN MINUTES OR SO.

5 FOREPERSON: WILL WE HAVE A CHANCE TO VIEW THAT
6 PICTURE A LITTLE BIT CLOSER.

7 THE COURT: YOU ARE TALKING ABOUT WHAT IS ON THE
8 DISK?

9 FOREPERSON: THE PICTURE OF THE SUBJECT.

10 THE COURT: LET ME TALK TO THE LAWYERS ABOUT HOW WE
11 CAN ARRANGE THAT AND I WILL LET YOU KNOW. WHEN YOU GET
12 THE EXHIBITS, DON'T START TALKING ABOUT THE CASE UNTIL
13 THEN. THANK YOU VERY MUCH.

14 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

15 THE COURT: OKAY, ANY OBJECTIONS OR EXCEPTIONS TO THE
16 CHARGE FROM THE STATE?

17 MR. MCDANIEL: NOT FROM THE STATE.

18 THE COURT: FROM THE DEFENSE?

19 MR. CHAPLIN: NOT FROM THE DEFENSE, YOUR HONOR.

20 THE COURT: WHAT ABOUT THE REQUEST TO VIEW THE
21 PICTURE.

22 MR. MCDANIEL: I DO HAVE A HARD COPY OF THOSE. IT
23 SOUNDED LIKE HE WANTED SOMETHING TO ACTUALLY EXAMINE.

24 THE COURT: WELL, IF THE DISK WHICH IS EXHIBIT 1,
25 STATE'S EXHIBIT 1 GOES BACK THERE IS THERE NO WAY THEY

1 CAN--

2 MR. MCDANIEL: UNLESS THEY HAD A LAPTOP.

3 THE COURT: MR. CHAPLIN, WHAT IS YOUR POSITION ON
4 THAT, SIR.

5 MR. CHAPLIN: YOUR HONOR, I THINK THAT IF THEY WANT
6 TO SEE THE COMPUTER SCREEN AGAIN I THINK WE NEED TO HELP
7 THEM.

8 MR. MCDANIEL: I CAN SEND MY COMPUTER BACK, I WOULD
9 JUST THINK THAT SOMEBODY WOULD NEED TO BE THERE TO MAKE
10 SURE THAT THEY JUST ACCESS THAT.

11 THE COURT: CAN THEY SET THIS UP BACK THERE, CAN YOU
12 SET THE SCREEN IN THE JURY ROOM SO IT IS UP THERE. THAT
13 IS WHAT THEY WANT.

14 MR. CHAPLIN: I THINK THAT IS WHAT THEY WANT.

15 MR. MCDANIEL: I GUESS WHEN THEY LEAVE FOR LUNCH I
16 CAN GO BACK THERE AND SET EVERYTHING UP.

17 THE COURT: HOW LONG WOULD IT TAKE YOU TO SET IT UP.

18 MR. MCDANIEL: JUST SLIDE IT IN THERE IN JUST A FEW
19 MINUTES. I NEED THE COMPUTER AND THE PROJECTOR.

20 THE COURT: ASK THE FOREPERSON TO COME BACK OUT HERE.

21 MR. CHAPLIN: I GUESS THERE NEEDS TO BE SOME
22 ASSURANCE THAT ALL THEY ARE ACCESSING IS THOSE PICTURES.

23 (WHEREUPON, THE FOREPERSON CAME INTO THE COURTROOM.)

24 THE COURT: WE CAN DO ONE OF TWO THINGS. YOU CAN
25 COME OUT HERE AND LOOK AT IT OR WE CAN SET IT UP IN THERE

1 FOR YOU.

2 FOREPERSON: IT WILL BE ALL RIGHT TO COME IN HERE.

3 THE COURT: OKAY.

4 FOREPERSON: JUST HAVE A STRAIGHT LOOK AT IT.

5 MR. CHAPLIN: WE WILL TURN TO THAT ONE FRAME.

6 THE COURT: WE WILL SET THAT UP AND JUST TELL US WHEN
7 YOU ARE READY TO COME LOOK AT THEM.

8 (WHEREUPON, THE FOREPERSON WAS EXCUSED TO THE JURY
9 ROOM.)

10 THE COURT: OKAY, GO AHEAD AND SET IT UP.

11 (WHEREUPON, THE PICTURE WAS SET UP FOR THE JURY TO
12 VIEW.)

13 THE COURT: THEY CAN COME ON OUT.

14 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT 12:38
15 TO VIEW THE PICTURE.)

16 THE COURT: OKAY.

17 (WHEREUPON, THE JURY RETURNED TO THE COURTROOM.)

18 THE COURT: MAKE SURE THE EXHIBITS ARE ALL THERE.

19 (WHEREUPON, THE COURT REPORTER AND THE ATTORNEYS
20 CHECK THE EXHIBITS.)

21 THE COURT: TELL THEM THEY CAN START DELIBERATING.

22 (WHEREUPON, THE JURY STARTED DELIBERATIONS AT
23 APPROXIMATELY 12:44 P.M.)

24 THE COURT: THE JURY WANTS TO VIEW THE PICTURE AGAIN.
25 BRING THEM IN.

1 (WHEREUPON, THE JURY CAME INTO OPEN COURT TO VIEW THE
2 PICTURE AT APPROXIMATELY 2:00 P.M.)

3 (WHEREUPON, THE JURY WAS EXCUSED TO CONTINUE
4 DELIBERATIONS AT APPROXIMATELY 2:03 P.M.)

5 THE COURT: THE JURY HAS REACHED A VERDICT. ANY
6 MATTERS BEFORE WE BRING THE JURY OUT?

7 MR. MCDANIEL: NOT FROM THE STATE, JUDGE.

8 MR. CHAPLIN: NOTHING.

9 THE COURT: I APPRECIATE THE PRESENTATION FROM BOTH
10 SIDES AND WITH THAT BRING THE JURY IN.

11 (WHEREUPON, THE JURY CAME INTO OPEN COURT WITH THE
12 VERDICT AT APPROXIMATELY 2:25 P.M.)

13 THE COURT: ALL RIGHT, MR. FOREMAN, HAS THE JURY
14 REACHED A UNANIMOUS VERDICT, SIR?

15 FOREPERSON: YES, SIR.

16 THE COURT: IF YOU WILL HAND IT TO MR. COATS WE WILL
17 RECEIVE IT AND PUBLISH IT.

18 (WHEREUPON, THE FOREPERSON HANDS THE VERDICT TO THE
19 BAILIFF.)

20 THE COURT: OKAY, MADAM CLERK.

21 THE CLERK: THE STATE OF SOUTH CAROLINA VERSUS BENNIE
22 DARRON MITCHELL, INDICTMENT 2009-GS-36-39, 37 AND
23 2010-GS-36-87. AS TO THE CHARGE OF BURGLARY, INDICTMENT
24 2009-GS-36-37, WE THE JURY UNANIMOUSLY FIND THE DEFENDANT
25 GUILTY.

1 AS TO THE CHARGE OF POSSESSION OF BURGLARY TOOLS,
2 2009-GS-36-39, WE THE JURY UNANIMOUSLY FIND THE DEFENDANT
3 GUILTY.

4 AS TO THE CHARGE OF PETTY LARCENY, 2010-GS-36-87, WE
5 THE JURY UNANIMOUSLY FIND THE DEFENDANT NOT GUILTY.

6 THAT IS SIGNED, TERRY E. MELLINGER, FOREPERSON.

7 MR. FOREMAN AND LADIES AND GENTLEMEN, IF THESE ARE
8 YOUR VERDICTS PLEASE INDICATE BY RAISING YOUR RIGHT HAND.

9 (WHEREUPON, ALL JURORS RAISED THEIR HAND.)

10 THE COURT: IS THERE A REQUEST OF POLLING OF THE
11 JURY?

12 MR. MCDANIEL: NOT FROM THE STATE.

13 MR. CHAPLIN: YES, YOUR HONOR.

14 THE COURT: YES MA'AM, MS. BOWERS, IF YOU WILL POLL
15 THE JURY.

16 THE CLERK: AS I CALL YOUR NAME PLEASE RAISE YOUR
17 HAND.

18 THE CLERK: CAROL M. MAZZA, WAS THIS YOUR VERDICT?

19 JUROR: YES.

20 THE CLERK: IS IT STILL YOUR VERDICT?

21 JUROR: YES.

22 THE CLERK: JACQUELINE SMITH, WAS THIS YOUR VERDICT?

23 JUROR: YES.

24 THE CLERK: IS IT STILL YOUR VERDICT?

25 JUROR: YES.

1 THE CLERK: DONALD HURST, WAS THIS YOUR VERDICT?

2 JUROR: YES.

3 THE CLERK: IS IT STILL YOUR VERDICT?

4 JUROR: YES.

5 THE CLERK: KIMBERLY WEST, WAS THIS YOUR VERDICT?

6 JUROR: YES.

7 THE CLERK: IS IT STILL YOUR VERDICT?

8 JUROR: YES.

9 THE CLERK: ELIZABETH MONTGOMERY, WAS THIS YOUR
10 VERDICT?

11 JUROR: YES.

12 THE CLERK: IS IT STILL YOUR VERDICT?

13 JUROR: YES.

14 THE CLERK: BENJAMIN WESTWOOD, WAS THIS YOUR VERDICT?

15 JUROR: YES.

16 THE CLERK: IS IT STILL YOUR VERDICT?

17 JUROR: YES.

18 THE CLERK: DEBRA METTS, WAS THIS YOUR VERDICT?

19 JUROR: YES.

20 THE CLERK: IS IT STILL YOUR VERDICT?

21 JUROR: YES.

22 THE CLERK: DEBORAH STEVENS, WAS THIS YOUR VERDICT?

23 JUROR: YES.

24 THE CLERK: IS IT STILL YOUR VERDICT?

25 JUROR: YES.

1 THE CLERK: TERRY MELLINGER, WAS THIS YOUR VERDICT?

2 JUROR: YES.

3 THE CLERK: IS IT STILL YOUR VERDICT?

4 JUROR: YES.

5 THE CLERK: MARGARET TERRANA, WAS THIS YOUR VERDICT?

6 JUROR: YES.

7 THE CLERK: IS IT STILL YOUR VERDICT?

8 JUROR: YES.

9 THE CLERK: RUSSELL PITTS, WAS THIS YOUR VERDICT?

10 JUROR: YES.

11 THE CLERK: IS IT STILL YOUR VERDICT?

12 JUROR: YES.

13 THE CLERK: TERESA MAYBIN, WAS THIS YOUR VERDICT?

14 JUROR: YES.

15 THE CLERK: IS IT STILL YOUR VERDICT?

16 JUROR: YES.

17 THE CLERK: THANK YOU.

18 THE COURT: ANY MATTERS OR MOTIONS BEFORE THE JURY IS
19 DISCHARGED. FROM THE STATE?

20 MR. MCDANIEL: NOT FROM THE STATE, JUDGE.

21 THE COURT: FROM THE DEFENSE?

22 MR. CHAPLIN: NO MOTIONS.

23 THE COURT: LADIES AND GENTLEMEN, THANK YOU FOR YOUR
24 SERVICE. THERE ARE NOT GOING TO BE ANY MORE CASES CALLED
25 BY THE SOLICITOR SO YOUR JURY OBLIGATION IS COMPLETE. AND

1 YOU HAVE A THREE YEAR EXEMPTION FROM BEING CALLED TO
2 CIRCUIT COURT JURY DUTY. THANK YOU FOR YOU PATIENCE WITH
3 THIS WEEK AND IF YOU NEED ANYTHING FOR WORK FOR
4 VERIFICATION THAT YOU WERE HERE, THE CLERK'S STAFF CAN DO
5 THAT FOR YOU. THANK YOU AGAIN FOR YOUR SERVICE.

6 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT
7 APPROXIMATELY 2:27 P.M.)

8 THE COURT: ANY MOTIONS AT THIS TIME?

9 MR. MCDANIEL: NOT FROM THE STATE.

10 MR. CHAPLIN: NOT AT THIS TIME, YOUR HONOR.

11 THE COURT: ALL RIGHT, MR. MCDANIEL.

12 MR. MCDANIEL: YOUR HONOR, THE ONLY ADDITION TO ADD
13 IS MR. MITCHELL'S PRIOR RECORD. '81 IS A PETTY LARCENY;
14 SHOPLIFTING, '81'; '82 IS BREAKING INTO MOTOR VEHICLES,
15 TWO COUNTS AND A GRAND LARCENY; '84 IS SIMPLE ASSAULT;
16 '85, DUI; '86 BREAKING INTO A MOTOR VEHICLE AND PETTY
17 LARCENY AND RECEIVED 3 YEARS. IN '87, ATTEMPTED BREAKING
18 INTO A MOTOR VEHICLE, 18 MONTHS; '89, BREAKING INTO A
19 MOTOR VEHICLE; IT LOOKS LIKE THREE COUNTS OF THAT IN '89;
20 '90 IS A BURGLARY SECOND AND A LARCENY; '95, DISTRIBUTION
21 OF CRACK, 5 YEARS; 2001 RECEIVING STOLEN GOODS; 2003 WAS A
22 THIRD OR SUBSEQUENT PROPERTY OFFENSE AND I BELIEVE HE
23 RECEIVED 8 YEARS ON THAT AND I BELIEVE THAT WAS A TRIAL.
24 IT WAS THREE BREAKING INTO MOTOR VEHICLES AND TWO PETTY
25 LARCENIES. SOME MINOR STUFF AND THEN IN '08, BREAKING

1 INTO AN AUTO IN '08 AND RECEIVED ONE YEAR. AND THAT IS
2 HIS PRIOR RECORD.

3 THE COURT: MR. CHAPLIN, ARE YOU READY TO COME
4 AROUND?

5 MR. CHAPLIN: YES.

6 THE COURT: YOU CAN GO AHEAD AND CUFF HIM, PLEASE.
7 YES SIR, MR. CHAPLIN.

8 MR. CHAPLIN: YOUR HONOR, I REPRESENT MR. BENNIE
9 MITCHELL IN THIS PARTICULAR MATTER AND FOR THE VERDICT AND
10 FOR NOW HERE FOR SENTENCING.

11 THE COURT: AND I APPRECIATE THE REPRESENTATION YOU
12 PROVIDED TO HIM AND THE SUBSTANTIALLY DEFENSE YOU PROVIDED
13 HIM AND I APPRECIATE THE COURTESIES ON BOTH SIDES. DID
14 THE VICTIMS WISH TO SPEAK?

15 VICTIM ADVOCATE: NO SIR, THEY ARE SATISFIED WITH THE
16 RESULTS.

17 THE COURT: OKAY. AND, MR. MITCHELL, ANYTHING THAT
18 YOU WOULD LIKE TO SAY, SIR?

19 MR. MITCHELL: I KNOW--

20 MR. CHAPLIN: YOUR HONOR, I THINK MR. MITCHELL IS A
21 LITTLE OVERWHELMED AT THIS POINT BUT IF I COULD, TO TAKE
22 THE OPPORTUNITY TO SAY THAT, YOU KNOW, I HAD THE
23 OPPORTUNITY TO REALLY GET TO KNOW MR. MITCHELL THROUGHOUT
24 MY REPRESENTATION. MR. MITCHELL IS A GOOD GUY, I THINK
25 HIS RECORD CLEARLY, THERE MAY BE CONCERNS WITH THAT AND

1 MR. MITCHELL HAS NOT GOTTEN INTO ANY SERIOUS TROUBLE FOR
2 SOME TIME. MR. MITCHELL IS SOMEONE THAT WOULD BENEFIT
3 FROM ANY TYPE OF REHABILITATION OR WHATEVER THE CASE YOUR
4 HONOR MIGHT SUGGEST. AND MR. MITCHELL HAS AN ELDERLY
5 MOTHER, SHE IS 80 SOMETHING YEARS OLD AND SHE WOULD
6 BENEFIT FROM HIM BEING AROUND TO ASSIST HER. SHE IS NOT
7 VERY AMBULATORY. AND WE JUST ASK THE COURT FOR MERCY WITH
8 REGARDS TO SENTENCING IN THIS MATTER.

9 THE COURT: THANK YOU. OKAY. HOW LONG HAS HE BEEN
10 IN CUSTODY?

11 MR. CHAPLIN: GOING ON 19 MONTHS, YOUR HONOR.

12 MR. MITCHELL: YOUR HONOR?

13 THE COURT: YES SIR, MR. MITCHELL.

14 MR. MITCHELL: I HAVE -- HAVE MERCY.

15 THE COURT: OKAY, THE OFFENSE OF BURGLARY FIRST IS
16 CLASSIFIED AS A VIOLENT OFFENSE AND A MOST SERIOUS OFFENSE
17 UNDER STATE LAW, IT CARRIES A POTENTIAL SENTENCE OF 15 TO
18 LIFE. POSSESSION OF BURGLARY TOOLS CARRIES A MAXIMUM
19 SENTENCE OF 5 YEARS. THE SENTENCE OF THE COURT ON
20 BURGLARY FIRST IS YOU BE COMMITTED TO THE DEPARTMENT OF
21 CORRECTIONS FOR A PERIOD OF 20 YEARS. THE SENTENCE ON THE
22 BURGLARY TOOLS IS YOU BE COMMITTED TO THE DEPARTMENT OF
23 CORRECTIONS FOR A PERIOD OF 5 YEARS, CONCURRENT. GOOD
24 LUCK TO YOU, SIR.

25 MR. MCDANIEL: THANK YOU, YOUR HONOR.

1 MR. CHAPLIN: THANK YOU, YOUR HONOR.

2 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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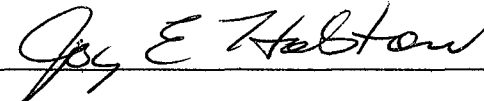
CERTIFICATE OF REPORTER

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 THE COURT OF GENERAL SESSIONS FOR
NEWBERRY COUNTY, SOUTH CAROLINA, ON THE 19TH DAY OF APRIL,
2010.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

AUGUST 4, 2010



JOY E. HOLSTON, COURT REPORTER

MY COMMISSION EXPIRES: MARCH 13, 2016

STATE OF SOUTH CAROLINA)
 COUNTY OF NEWBERRY)

IN THE COURT OF GENERAL SESSIONS)
 FOR THE EIGHTH JUDICIAL CIRCUIT)

WARRANT NOS.: I-008487, I-008488,
 I-008490

STATE OF SOUTH CAROLINA,)

POST TRIAL MOTIONS

VS.)

NOTICE AND MOTION TO RECONSIDER)
 SENTENCE/ MOTION FOR A NEW TRIAL)

BENNIE MITCHELL.)

TO: Assistant Solicitor Austin McDaniel

YOU WILL PLEASE TAKE NOTICE that on April 27, 2010 or as soon thereafter as counsel may be heard, the defendant will move through his attorney, Mathias G. Chaplin, before the Court for a hearing regarding reconsideration of the sentence imposed by the Honorable D. Garrison Hill on April 21, 2010 or a new trial.

The Defendant was convicted and sentenced to 20 years in the Department of Corrections for Burglary 1st and Possession of Burglary Tools.

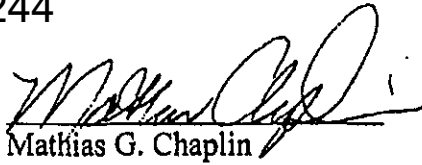
The Defendant, Bennie Mitchell, is currently in the custody of the Newberry County Detention Center. This notice is a formal request to have the Defendant transported to the Newberry County Courthouse from the Newberry County Detention Center or from the Department of Corrections at the time of this hearing.

Counsel is respectfully requesting an opportunity to bring the Defendant in front your honor for the purposes indicated above. Fifteen minutes is requested for this matter.

Respectfully Submitted,

2010 APR 26 P 1:34
 CLERK

182



Mathias G. Chaplin
Attorney for Defendant
Columbia, SC

April 26, 2010

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

STATE OF SOUTH CAROLINA,

VS.

BENNIE MITCHELL.

TO: Assistant Solicitor Austin McDaniel

IN THE COURT OF GENERAL SESSIONS
FOR THE EIGHTH JUDICIAL CIRCUIT

WARRANT NOS.: I-008487, I-008488,
I-008490

CASE NO's: 2009-GS-36-0037, 2009-GS-36-
00038, 2009-GS-36-0039, 2010-GS-36-0087

**MEMORANDUM TO SUPPORT
POST TRIAL MOTIONS**

YOU WILL PLEASE TAKE NOTICE that as soon as counsel may be heard, the defendant will move through his attorney, Mathias G. Chaplin, before the Court for a hearing regarding a new trial or reconsideration of the sentence imposed by the Honorable D. Garrison Hill on April 21, 2010.

The Defendant, Bennie Mitchell, is currently in the custody of the Kirkland Correctional Facility on Broad River Road in Columbia, SC. This notice is a formal request to have the Defendant transported to the Newberry County Courthouse at the time of this hearing. Counsel is respectfully requesting an opportunity to bring the Defendant in front of your honor for the purposes indicated above. Fifteen minutes is requested for this matter.

This Post Trial Motion was filed with the Newberry County Clerk of Court on April 26, 2010. Assistant Solicitor Austin McDaniel was personally served a copy of this Post Trial Motion on April 26, 2010 by Attorney Mathias G. Chaplin. This

SCANNED

B. McDaniel

Memorandum has been prepared to provide additional information to the Solicitor and Court regarding notice and the grounds for this Post Trial Motion.

MEMORANDUM

Defendant Bennie D. Mitchell hereby moves the Court, pursuant to Rule 29, S.C. R. Crim.P. for a new trial. In the alternative, Bennie D. Mitchell hereby moves the Court, pursuant to Rule 29, S.C.R. Crim.P. for reconsideration of the 20 year sentence imposed at the conclusion of this trial.

The motion for a new trial is based upon the grounds that the jury found Bennie D. Mitchell innocent of petit larceny in this matter. In short, he is not guilty of stealing anything from the home of Steven Potts.

The motion for reconsideration of the sentence imposed is based upon the fact that alternative sentencing options are available and the Defendant respectfully requests that a suspended sentence of less time be considered.

MOTION FOR A NEW TRIAL

Bennie D. Mitchell was charged with Burglary 1st (Section 16-11-311(A)). Under this statute, the State must prove four elements: 1)entry into a dwelling, 2)without consent, 3)with the intent to commit a crime therein, 4)presence of an aggravating circumstance. Based on the fact the Defendant was found not guilty of petit larceny, the Defense argues element 3 has not been met. The jury charge in this matter clearly states: "Mere entry into a dwelling without consent is not sufficient to constitute first degree burglary; there must have been an intent to commit a crime once inside." *Ralph King Anderson, Jr., South Carolina Requests to Charge – Criminal, 2007, Section 2-13.*

Proof of intent necessarily rests on inference from conduct. *Ralph King Anderson, Jr.,*

B. Mitchell

South Carolina Requests to Charge – Criminal, 2007, Section 2-13. The inferred conduct in this case was that someone stole beers and coins. However, the jury rejected this notion and returned a verdict of not guilty as to the crime of petit larceny. Therefore, any inference made to the conduct of stealing appears to have been eliminated.

Criminal intent includes those consequences which represent the very purpose for which an act is done. *Ralph King Anderson, Jr., South Carolina Requests to Charge – Criminal, 2007, Section 2-13.* In this matter the State represents the purpose for which the act was done was to take away beers and coins from the home of Steven Potts. However, the jury determined this act was not done.

The trial judge is empowered by South Carolina law to sit as an alternate "Thirteenth Juror." The South Carolina Supreme Court reaffirmed and explained this doctrine a few years ago:

This Court has reviewed the thirteenth juror doctrine on several occasions and has refused to abolish it or to require trial judges to provide reasons for their decisions... As the "thirteenth juror", the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. Norton v. Norfolk Southern Ry. Co., 350 SC 473, 567 S.E. 2d 851 (S.C. 2002).

The Thirteenth Juror Doctrine provides an all important, fail safe for justice. If the Judge, in his role as the "Thirteenth Juror", finds reasonable doubt about the propriety of the verdict, then he is empowered by law to veto the verdict. Here, the fact that the jury returned a verdict of not guilty as to Petit Larceny appears to create an issue with the verdict of guilty as to the crime of Burglary 1st. We ask that your honor consider this issue as the Thirteenth Juror.

B.M.

When a Judge exercises his prerogatives under this doctrine, he is doing precisely what the South Carolina case law instructs him to do. Fundamentally, the Court must answer for itself the crucial question: "Is this Court really prepared to send the Defendant to jail for 20 years for a crime, the basis of which, the jury states did not occur.

Therefore, a new trial is requested on the premise that the required element of intent to commit a crime therein has not been established based upon the fact the jury found the Defendant not guilty of the crime of petit larceny.

MOTION TO RECONSIDER

It appears there was no consideration given to the fact that the sentence for Burglary 1st may be suspended. The general power to suspend sentences derives from S.C. Code Ann. 24-21-410 (1989). This power does not extend to offenses where the legislature has specifically mandated that no part of a sentence may be suspended. State v. Johnson, 343, S.C. 693, 541 S.E. 2d 855 (Ct. App. 2001); State v. Taub, 336 S.C. 310, 519 S.E. 2d 797 (Ct. App. 1999); and State v. Tisdale, 321 S.C. 153, 467 S.E. 2d 270 (Ct. App. 1996).

The criminal statute violated in this case allows the Court, in its discretion to sentence the Defendant to a term of not less than 15 years. (Section 16-11-311 SC Code of Laws). This statute does not specifically prohibit suspension of this sentence.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of legislature. Howell v. US Fidelity and Guar. Ins. Co., 370 S.C. 505, 636 S.E. 2d 626 (2006). Penal statutes are to be construed strictly against the State and in favor of the defendant. State v. Muldrow, 348 S.C. 264, 559 S.E. 2d 847 (2002).

In numerous penal statutes, the legislature has included specific provisions to

B.M.

prohibit suspension, in whole or in part, of sentences to fines and imprisonment. The legislature expressly included limiting provisions in numerous statutes. Here, however, the omission of any such provision in the statute for Burglary 1st, indicates the legislature did not intend to limit the general authority to suspend sentences for this offense.

Therefore, it is requested that this Court consider suspending the sentence imposed in this matter. The purpose of incarceration should be to rehabilitate a person. Bennie Mitchell is 48 years old and has an ailing mother that needs his attention. The home owner in this matter did not request a particular sentence and a shorter sentence is not in violation of the statute he is charged with violating.

Therefore, the Defendant, Bennie Mitchell, begs upon this court for a reduced sentence that will allow him to return to society in a shorter amount of time and be a responsible citizen.

Respectfully Submitted,


Matthias G. Chaplin
Attorney for Defendant

Columbia, SC

April 30, 2010



STATE OF SOUTH CAROLINA)
 COUNTY OF NEWBERRY)

IN THE COURT OF GENERAL SESSIONS
 FOR THE EIGHTH JUDICIAL CIRCUIT

WARRANT NOS.: I-008487, I-008488,
 I-008490

STATE OF SOUTH CAROLINA,)

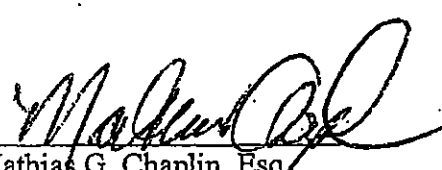
CASE NO's: 2009-GS-36-0037, 2009-GS-36-
 00038, 2009-GS-36-0039, 2010-GS-36-0087

VS.)

Proof of Service

BENNIE MITCHELL.)

The undersigned, Mathias G. Chaplin, being sworn says that he served the Memorandum to Support Post Trial Motions and a copy of Post Trial Motions (personally served on ASOL McDaniel on April 26, 2010) by depositing a copy of each in the United States Mail, postage prepaid, on April 30, 2010 addressed to Assistant Solicitor Austin McDaniel of the Newberry County Solicitor's Office, P.O. Box 516, Greenwood, South Carolina 29648. Copies of same were also mailed to Judge G. Hill and the Newberry Clerk of Court for filing on April 30, 2010.


 Mathias G. Chaplin, Esq.
 Attorney for Defendant Bennie Mitchell



STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF GENERAL SESSIONS

State of South Carolina,

Plaintiff,

V.

Bennie Mitchell,

Defendant.

C.A. Nos: 2009-GS-36-0037, 0038, 0039
2010-GS-36-0087

**ORDER DENYING DEFENDANT'S
POST-TRIAL MOTION TO RECONSIDER
AND MOTION FOR A NEW TRIAL**

The court has carefully reviewed Defendant's Post Trial Motion to Reconsider the Sentence imposed on April 21, 2010 as well as Defendant's Motion for a New Trial. The court finds these motions are without merit, therefore they are respectfully DENIED.

IT IS SO ORDERED!

May 7, 2010
Greenville, South Carolina

D. Garrison Hill
13th Circuit Judge

BM.

SECRET

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE MITCHELL,

APPELLANT

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

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

ATTORNEY FOR APPELLANT

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Rule 701, SCRE	passim

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing a lay witness, the police officer, Lieutenant McClurkin, to identify appellant from the photographs taken by the victim's deer camera, which had been mounted on the victim's refrigerator, on the basis that Lieutenant McClurkin knew appellant from being in the same community with him for twenty years when this identification by the police officer was prejudicial in violation of Rule 403, SCRE, and Rule 701, SCRE?
2. Did the trial court err in allowing the CD from the deer camera which contained the photographs to be admitted into evidence when the photographs were not properly authenticated because the police did not take the camera into custody but left it with the victim to download the photographs onto his personal computer which violated Rules 1001, 1002, and 1003, SCRE ?
3. Did the trial court err by not granting appellant's post trial motion for a new trial on the burglary first charge when all of the elements of burglary first were not met when the jury found appellant not guilty of petty larceny which meant the intent to commit a crime element was not proven?

STATEMENT OF THE CASE

In January 2009, the Newberry County Grand Jury indicted Bennie Darron Mitchell on the charges of burglary first degree, possession of burglary tools, and larceny. The state withdrew the larceny indictment and re-indicted Mitchell on the charge of petty larceny. R.2, ll. 1 – 22. On April 19, 2010, Mitchell proceeded to trial before the Honorable D. Garrison Hill and a jury. The jury returned a verdict of not guilty on the petty larceny charge but found him guilty of the burglary first degree and the possession of burglary tools. Judge Hill sentenced Mitchell to twenty years on the burglary charge and to five years concurrent on the possession of burglary tools. Mitchell's attorney filed a post trial motion for a new trial or reconsideration of the sentence on April 26, 2010. Judge Hill issued an order on May 7, 2010 denying the post trial motion for a new trial or reconsideration of the sentence. Mitchell's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in allowing a lay witness, the police officer, Lieutenant McClurkin, to identify appellant from the photographs taken by the victim's deer camera, which had been mounted on the victim's refrigerator, on the basis that Lieutenant McClurkin knew appellant from being in the same community with him for twenty years when this identification by the police officer was prejudicial in violation of Rule 403, SCRE and Rule 701, SCRE.

Around one o'clock early in the morning of October 28, 2008, Stephen Potts, who was one of the owners of the Blue Moon Restaurant, returned home to find that someone had been in his home and had taken between \$70 and \$100 dollars worth of quarters, socks and beer. R.3, ll. 19 – 25; R.30, ll. 6 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.52, ll. 22 – 25; R.53, ll. 1 – 25. Potts knew someone had been in his kitchen because he set up a deer camera on top of his refrigerator for the purpose of catching anyone who may break into his home. He did this because about ten days prior to this incident, there was other activity in his house. When he viewed the pictures on the camera, he did not know the person caught on his deer camera. R.3, ll. 19 – 25; R.4, ll. 1 – 25; R.5, ll. 1 – 25; R.32, ll. 21 – 25; R.33, ll. 1 – 25.

When the police arrived the next morning after he called them upon awakening, he told them what happened, and that he did not know the person. R.33, ll. 16 – 25. The police allowed him to take the camera to the Blue Moon and download the pictures onto his laptop computer from which he burned a CD of the pictures. He then provided that CD to the

police. R.37, ll. 19 – 25; R.38, ll. 1 – 24; R.45, ll. 1 – 25; R.46, ll. 1 – 25; R.47, ll. 1 – 25; R.48, ll. 1 – 23.

Corporal Allison Moore of the Newberry Police Department, testified that she responded to the call on October 28, 2008, and she went to Potts' home. She could not identify the person on the deer camera. She dusted for fingerprints but could not recover any. R.78, ll. 22 – 25; R.79, ll. 1 – 25; R.80, ll. 1 – 25; R.81, ll. 1 – 25.

Lieutenant Roy McClurkin of the Newberry City Police Department, testified that he had been with the Newberry Police for twenty-seven years. R.100, ll. 11 – 25. He met with Potts on the afternoon of October 28, 2008, when Potts brought the DVD to the police that he made of the pictures on his deer camera on October 27, 2008. R.101, ll. 1 – 25; R.102, ll. 1 – 25; R.103, ll. 1 – 5. Corporal Moore asked Lieutenant McClurkin to view the DVD to see if he could identify the person in the pictures since he had been with the police department a long time. He loaded the DVD onto his desktop computer and viewed the pictures. He identified the person in the pictures as Bennie Mitchell whom he knew from both of them living in the Newberry community over twenty years. R.103, ll. 1 – 25; R.104, ll. 1 – 25. He obtained an arrest warrant and search warrant for Mitchell's home. He arrested Mitchell at his home, but did not find any items in Mitchell's home related to the burglary. R.105, ll. 1 – 25.

Defense counsel objected when Lieutenant McClurkin identified Mitchell based on counsel's pretrial objection under Rule 701, SCRE and State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). The judge overruled the objection. R.103, ll. 13 – 25; R.104, ll. 1 – 4.

In a pretrial motion, defense counsel argued that the case was based on the mistaken identity of Mitchell from the DVD. Counsel argued that the alleged identification of

Mitchell by Lieutenant McClurkin from the DVD should be suppressed because it was lay opinion offered by a police officer in violation of Rule 701, SCRE. Counsel argued that Lieutenant McClurkin was not an eyewitness to the burglary; therefore, his identification of Mitchell from the DVD was simply his opinion of what was on the video. Counsel argued that the jury could observe the DVD or the pictures from it and draw their own conclusion as to the identity. The trial judge stated that as far as the lay opinion, the identity would require expert opinion testimony. R.11, ll. 1 – 25; R.12, ll. 1 – 8.

The judge said: “Doesn’t it cause undue prejudice to the defendant to have a police officer say he recognizes that person and in his opinion that is who it is?” He was concerned about the impact on the jury of having the police officer identify Mitchell. R.21, ll. 1 – 16. The state agreed that it was prejudicial but not unduly prejudicial. R.21, ll. 17 – 25; Defense counsel argued that it was unduly prejudicial because the lay witness was a police officer which was a violation of Rule 403, SCRE. R. 22, ll. 23 – 25; R.23, ll. 1 – 25; R.24, ll. 1.

Defense counsel cited the case of State v. Herring, 387 S.C. 201, ^92 S.E.2d 490 (2009) to support his argument. Counsel argued that Mitchell’s case was very similar to Herring in the legal issues involved. R.12, ll. 9 – 25; R.13, ll. 1 – 25; R.14, ll. 1 – 25; R.15, ll. 1 – 25; R.16, ll. 1 – 25.

In State v. Herring, id., the defendant was convicted of murder when he allegedly shot through his car window hitting the bouncer and killing him as the defendant was leaving Chastity’s night club. The incident was caught on video tape. Three lay witnesses offered their interpretation of the video from Chastity’s that the flash of light on the video was a gunshot. Defense counsel objected to the lay opinion because the witnesses did not personally observe the events but only viewed them on the tape. Herring’s defense counsel

asked for a mistrial. The trial judge offered a curative instruction to the jury where he told the jury to strike the lay opinion from their memory because "you are the only ones who can draw from conclusions from what you saw on the tape and testimony in this regard." The trial judge stated further:

It's the same instruction I gave you with regard to another witness that looked at the same video and saw what he thought was one said a light, one said a shot. That's an opinion. Just take it at that. Nobody saw the shot fired based on the testimony we've heard so far. It's all from the video. You are going to have the video. You can look at it. You can determine whatever you choose to determine from it.

State v. Herring, *supra*, at 217.

The Supreme Court found that the curative instructions were sufficient to cure any prejudice, and there was no error in denying the mistrial motion. State v. Herring, *supra*.

Mitchell's trial judge stated he saw no rules that the Supreme Court cited regarding lay opinion. R.17, ll. 11 – 25; R.18, ll. 1 – 25. The judge issued his ruling after a lengthy discussion of the issue where he denied defense counsel's motion to exclude the opinion testimony of the officer as to the identity of Mitchell in the deer camera photograph. R.25, ll. 1 – 25; R.11 – 44.

Rule 701, SCRE provides that if the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences must be limited to his opinions which are (a) rationally based on the perception of the witness; (b) are helpful to a clear understanding of the witness's testimony of determination of a fact in issue; (c) and do not require special knowledge, skill, experience or training.

The opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973).

Lieutenant McClurkin did not personally observe Mitchell in the home of Stephen Potts. He offered his opinion as to the identity of the person on the video. This was in the province of the jury because they observed the video, and could draw their own conclusion. The jury in Mitchell's case viewed the DVD. R.48, ll. 1 – 23.

The trial judge misinterpreted the ruling in State v. Herring, *supra*. Because the trial judge in Herring's case issued a curative instruction to the jury and told them to erase the lay opinions from their memory because the lay witnesses could not give an opinion as to whether the flash was a gunshot, he was saying the opinions of the lay witnesses should not have been admitted. When the Supreme Court affirmed the Herring trial judge by saying the curative instructions were sufficient, the implication to be drawn was that the Supreme Court was stating that the lay witnesses in Herring's case could not offer their lay opinions as to their interpretation of the video.

The lay opinion of the police lieutenant McClurkin that the person in the video was Mitchell was prejudicial because it was a lay opinion not based on personal observation, and the witness was a police officer offering his opinion as to the identity. This was in violation of Rule 701 and Rule 403, SCRE.

ARGUMENT

II.

The trial court erred in allowing the CD from the deer camera which contained the photographs to be admitted into evidence when the photographs were not properly authenticated because the police did not take the camera into custody but left it with the victim to download the photographs onto his personal computer which violated Rules 1001, 1002, and 1003, SCRE.

In a pretrial motion, defense counsel moved to exclude the video photographs from the victim's deer camera "based on the requirement that the State authenticates these photographs" and for a chain of custody. R.7, ll. 10 – 25. Counsel argued that this case "turns on some pictures Mr. Potts says he took". The judge ruled that a chain of custody was not necessary but that the state would have to "lay the foundation which would be for a witness to authenticate that they constitute an accurate and fair representation of what is depicted on the photograph". R.8, ll. 1 – 25; R.9, ll. 1 – 25.

The judge told defense counsel that he was "not entitled to a dry run", but that he could object at the time when the foundation was laid. R.10, ll. 1 – 22.

During the trial, after Potts testified that he had put the deer camera on top of his refrigerator to catch anyone burglarizing his home, the state moved to admit the photographs from the deer camera into evidence. Defense counsel objected and asked for a hearing outside the presence of the jury. R.30, ll. 4 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.33, ll. 1 – 25.

Defense counsel argued that the CD with the photographs should not be admitted into evidence because the admission would violate Rules 1002, 1003, and 1004 , SCRE

because the rules provided that a duplicate was admissible only if there was not a genuine question as to the authenticity of the original. Counsel argued that there was a genuine issue as to the authenticity of the photographs. R.33, ll. 23 – 25; R.34, ll. 1 – 25; R.35, ll. 1 – 25; R.36, ll. 1 – 25. The judge granted counsel's request to proffer the testimony regarding this issue. R.37, ll. 1 – 20.

Potts testified that he took the camera to the Blue Moon where he downloaded nine photographs from the camera to a laptop computer at the restaurant. His girlfriend then "burned" the photographs onto a disk or CD. That was the DVD he provided to the police. He said no alterations had been made to the images. R.37, ll. 22 – 25; R.38, ll. 1 – 25; R.39, ll. 1 – 18.

On cross examination, Potts said he decided which photographs to download, and he downloaded nine pictures although he admitted that the camera held more than nine pictures. There were pictures of him on the camera as well. R.39, ll. 20 – 25; R.40, ll. 1 – 25; R.41, ll. 1 – 25. Potts testified that the photographs he took to the police had the wrong date stamp of three o'clock A.M., and the pictures had been taken before he arrived at home around one o'clock A.M. He said the clock on the camera was wrong. R.42, ll. 1 – 25.

Defense counsel argued at the close of the proffer that there was a genuine question as to the authenticity of the photographs. R.42, ll. 25; R.43, ll. 1 – 10. The judge ruled that the photographs met the definition of "original" as defined in Rule 1001, SCRE. He overruled defense counsel's motion. R.43, ll. 1 – 25; R.44, ll. 1 – 25.

Corporal Allison Moore of the Newberry Police Department testified that she responded to the call at Potts' home regarding the burglary. R.79, ll. 1 – 25; R.80, ll. 1 – 12.

Potts showed her the deer camera and she saw the image of a person on the camera, but could not identify the person. R.80, ll. 13 – 25.

Potts was unable to download the photographs from the camera onto a disk that day, so she told him to go ahead and download it at the Blue Moon and bring it to the police department which he did the next day. Corporal Moore never had the camera or disk in her possession. R.82, ll. 1 – 25; R.84, ll. 1 – 25; R.85, ll. 1 – 5.

On cross examination, Corporal Moore stated that she did not obtain any fingerprints, did not try to obtain any DNA, and did not take any pictures of the crime scene. R.85, ll. 6 – 25; R.86, ll. 1 – 25; R.87, ll. 1 – 25. She did not see an entry into the home. R.88, ll. 13 – 15. She saw the image of a person on the computer but she did not collect or take the computer into police possession because she said it was Potts' personal computer. She did nothing to preserve the image she saw on the camera. She did not check the time stamp on the camera. R.89, ll. 1 – 25; R.90, ll. 1 – 25; R.91, ll. 1 – 25. She admitted that she left the **only** piece of evidence from this crime, the photographs on the deer camera, with Potts and did nothing to preserve the evidence for trial. R.95, ll. 1 – 25; R.96, ll. 1 – 13.

Rule 1001 (3) , SCRE, provides: “an original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original”.

Rule 1003, SCRE, provides concerning the admissibility of duplicates that a “duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”

Rule 1002, SCRE, provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."

The question of whether to admit evidence under the "Best Evidence Rule" is addressed to the discretion of the trial court. State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). For an error of law to warrant reversal based on the exclusion of evidence, the appellant must prove the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the verdict was influenced by the lack of the evidence. State v. Halcomb, Id.

ARGUMENT

III.

The trial court erred by not granting appellant's post trial motion for a new trial on the burglary first charge when all of the elements of burglary first were not met when the jury found appellant not guilty of petty larceny which meant the intent to steal element was not proven.

Defense counsel filed a post trial motion asking the judge for a new trial or reconsideration of the sentence. Counsel argued a new trial was warranted because all of the elements for burglary first were not met because the intent to steal was not proven after the jury found Mitchell not guilty of the petit larceny. R. 136.

Counsel wrote that the inferred conduct showing intent to steal was that someone stole beer and coins. However, the jury rejected that by returning a verdict of not guilty as to the crime of petit larceny. R. 140. Counsel asked the trial judge to act as the "Thirteenth Juror" by vetoing the verdict and granting a new trial. R. 140-141. Judge Hill denied the motion by order on May 7, 2010.

S.C. Code Section 16-11-311(A) provides:

A person is guilty of burglary in the first degree if the person enters a dwelling without consent **and** with the intent to commit a crime in the dwelling, and either:

In South Carolina, a trial judge may grant a new trial following a jury verdict under the "Thirteenth Juror" doctrine, which entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial

based solely upon the facts. Lane v. Gilbert Construction Company, LTD., 383 S.C. 590, 681 S.E.2d 879 (2009).

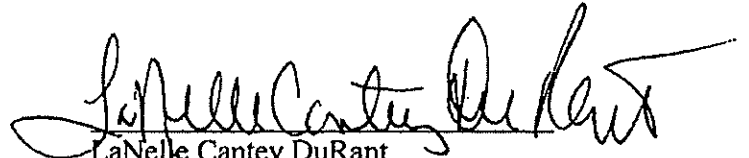
Under the “Thirteenth Juror” doctrine, which is the standard for granting a new trial in state law actions, the trial judge essentially sits as the thirteenth juror and may grant a new trial based solely upon the facts if he finds that the evidence does not justify the verdict. Norton v. Norfolk Southern Railway Company, 350 S.C. 473, 567 S.E.2d 851 (2002). Upon review, a trial judge’s order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Id.

The trial judge should have granted a new trial because the jury basically nullified the burglary first guilty verdict when they found Mitchell not guilty of the petit larceny. The jury heard the law as defined by the state and the judge in his jury charge so they knew that the intent to commit a crime was required for the burglary first conviction. R.116, ll. 1 – 25; R. 117 – 230.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

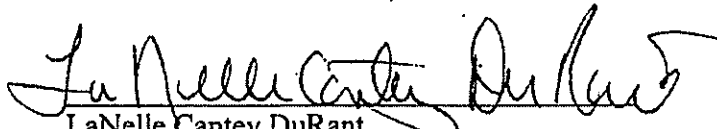
V.

BENNIE MITCHELL,

APPELLANT

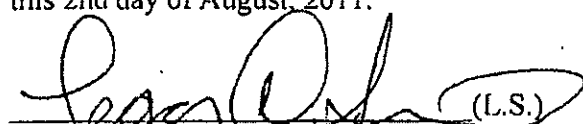
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 2nd day of August, 2011.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2011.


(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
The Honorable D. Garrison Hill, Circuit Court Judge

THE STATE

Respondent

VS.

BENNIE MITCHELL

Appellant

FINAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUES ON APPEAL**I.**

The circuit court properly allowed a witness to identify Mitchell as the person in the deer camera photographs based on the witness' personal knowledge of Appellant.

II.

The circuit court did not abuse its discretion in allowing into evidence a disk of photographs the victim prepared and turned over to police.

III.

The circuit court properly denied Mitchell's new trial motion on the first degree burglary charge because there was ample evidence to support the jury's determination he broke into the victim's home in the nighttime with the intent to commit a crime therein.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In the early morning hours of October 27, 2008, Stephen Potts ("Potts"), returned to his home in Newberry County, South Carolina, and realized someone broke into the house while he was gone. When he checked a motion-activated deer camera on top of his refrigerator, Potts saw photographs of a man in the kitchen. A police officer subsequently identified the man in the photographs as Appellant Bennie Mitchell ("Mitchell").

In January 2009, the Newberry County Grand Jury indicted Mitchell on one count of first degree burglary, one count of possession of burglary tools, and one count of enhancement of larceny.¹ In February 2010, the Grand Jury also indicted Mitchell on one count of petit larceny. (Indictment Nos. 2009-GS-36-037, 2009-GS-36-039, 2010-GS-36-087; Record on Appeal [R.], pp. 146-151). The matter was called for a jury trial on April 29, 2010, before the Honorable D. Garrison Hill, Circuit Court Judge.

Prior to trial, Mitchell moved to require the State to establish the authenticity and foundation for the photographs from Potts' deer camera. The circuit court denied the request to conduct that inquiry pre-trial, but indicated Mitchell could object at the appropriate time during trial. (TT, pp. 25-28; R., pp. 7-10).

Mitchell also moved to exclude testimony from Lieutenant Roy McClurkin ("Lt. McClurkin"), of the Newberry Police Department, regarding his identification of Mitchell as the person in the photographs from Potts' deer camera. He contended the testimony was a lay opinion, the jury could determine whether he was the person in the photographs without the testimony, and allowing the testimony would be unduly prejudicial because of Lt.

¹The enhancement of larceny indictment was *nolle prossed* on April 21, 2010.

McClurkin's police officer status. The circuit court denied the motion, finding the proposed testimony met the requirements for admissibility under Rule 701, SCRE. The court further found the testimony's probative value outweighed any prejudice to Mitchell, but excluded similar testimony from other police officers as cumulative and prejudicial. (TT, pp. 28-47; R., pp. 10-29).

Potts testified he lived in Newberry County in October 2008, and due to some break-ins at his home, he mounted a motion-activated deer camera on top of his refrigerator. When he returned home from work at approximately 1:00 a.m. on October 28, 2008, he noticed the window next to his back door was messed up. He went inside and checked the camera, which had taken photographs of someone in the kitchen that night. He contacted the police and told them what he found. (TT, pp. 83-86; R., pp. 30-33).

Mitchell objected to admission of the disk containing the photographs, arguing it was not the "original" as required by the South Carolina Rules of Evidence, and there was a genuine issue regarding the original's authenticity. Potts testified *in camera* that he had possession of the deer camera from the time he returned home on the night in questions until he took it to his business and personally downloaded the photographs to his computer, and he was present when his girlfriend used the computer to put the photographs on a disk. He then identified the photographs on the disk as the ones he downloaded directly from the camera. (TT, pp. 87-95, State's Exhibit 1 (CD); R., pp. 34-42).²

The circuit court overruled Mitchell's objection, finding the photographs on the disk were data stored in a computer put in a format readable by sight, and were "originals" as

²State's Exhibit 1 (CD) has been transported to the Court for consideration.

defined in Rule 1001, SCRE. (TT, pp. 95-97; R., pp. 42-44). Potts then testified before the jury about the photographs, and stated he did not know the person in the photographs. He testified approximately \$100 in quarters, some clothing and some beer were taken from his home. (TT, pp. 98-131; R., pp. 45-60).

Corporal Allison Moore ("Cpl. Moore"), of the Newberry Police Department, testified she responded to Potts' residence on October 28, 2008, and he showed her the photographs on the deer camera. Potts was unable to download the photographs at his residence, but told her he could download them on the computer at his business. She advised him to bring the photographs to the police department after he got them downloaded, and he brought a disk containing the photographs to the department later that day. (TT, pp. 132-138; R., pp. 79-85).

Lt. McClurkin testified Potts and Cpl. Moore came to his office the afternoon of October 28, 2008, and asked him if he recognized the person in the photographs from Potts' deer camera. He brought the photographs up on his office computer, and recognized Mitchell as the person in the photographs. Lt. McClurkin testified, over Mitchell's objection, he knew Mitchell from living in Newberry for over twenty years. (TT, pp. 153-157; R., pp. 100-104).

The jury convicted Mitchell on the first degree burglary and possession of burglary tools charges, and acquitted him on the petty larceny charge. (TT, pp. 234-235; R., pp. 131-132). Mitchell moved for a new trial on the ground the State failed to establish all elements of the burglary charge because the jury acquitted him of petty larceny. (Post-Trial Motions dated April 26, 2010; R., pp. 136-137). The circuit court denied the motion, and this appeal

followed. (Order dated May 7, 2010; R., p. 144).

ARGUMENT

I. The circuit court properly allowed a witness to identify Mitchell as the person in the deer camera photographs based on the witness' personal knowledge of Appellant.

Mitchell contends the circuit court erred in allowing Lt. McClurkin to identify Mitchell as the person in the photographs from Potts' deer camera. Relying on State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), he argues the identification constituted inadmissible lay opinion testimony.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Wright, 391 S.C. 436, 706 S.E.2d 324, 326 (2011) (*citing* State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 [2002]). An abuse of discretion occurs when the trial court's ruling is based on an error of law, or is without evidentiary support when grounded on factual conclusions. *Id.* (*citing* Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 [2000]).

The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Rule 701, SCRE; *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49, 54 (1996); 31A Am.Jur.2d Expert and Opinion Evidence §30; 23 C.J.S. Criminal Law §1050. Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense they will be of no value to the jury. Williams, 469 S.E.2d at 54.

"The terms 'fact' and 'opinion' denote merely a difference of degree of concreteness of description." *Id.* (*citing* McCormick on Evidence, 12 [3rd Ed.1984]). Some statements are impressions drawn from collected, observed facts, rather than mere opinions, and a

natural inference based on stated facts is not opinion evidence. *Id.* "Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge." *Id.*

Lt. McClurkin personally knew Mitchell based on twenty years of living in the same community. Therefore, his identification of Mitchell from the deer camera photographs was a natural inference based on observed facts rather than mere "opinion" testimony.

Even if the identification testimony constituted lay opinion evidence, however, the circuit court properly admitted it. A lay witness may give an opinion regarding the identity of a person in a surveillance photograph if there is some basis for concluding the witness is more likely to correctly identify the person from the photograph than the jury. See United States v. Ellis, 121 F.3d 908, 926-927 (4th Cir. 1997) (citing United States v. Robinson, 804 F.2d 280 [4th Cir. 1986]); see also United States v. Pierce, 136 F.3d 770, 774-75 (11th Cir. 1998) (discussing similar cases from other circuits, and holding probation officer's identification of defendant from surveillance photograph was admissible); Hardy v. State, 804 So.2d 247, 268-269 (Ala. Ct.Crim.App. 1999) (police officers' identification of defendant as person in surveillance videotape was properly admitted even though officers did not know defendant prior to the crime); State v. Benton, 567 So.2d 1067 (Fla. 2d. D.C.App. 1990). "[T]estimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants." United States v. Allen, 787 F.2d 933, 936 (4th Cir.1986).

Mitchell's reliance on Herring is misplaced. In Herring, the lay witnesses, none of whom personally witnessed the incident but viewed a videotape of it, testified a flash of light

coming from inside the defendant's vehicle was a gunshot. The defendant objected and moved for a mistrial on the ground the witnesses did not personally observe the events. The trial court denied the mistrial motion, and gave a curative instruction to the jury to the effect the witnesses could not give an opinion about whether the flash of light was a gunshot, which was a question for the jury's determination. The Supreme Court affirmed, finding the curative instruction cured any prejudice from the witnesses' testimony regarding the flash of light. 692 S.E.2d at 498.

There was no evidence the witnesses in Herring had any prior experience with gunshots, or any special knowledge about muzzle flashes associated with gunshots, that would assist the jury in determining whether the flash of light inside the defendant's car was from a gunshot. In this case, however, Lt. McClurkin's identification testimony was based on his personal knowledge of Mitchell after a twenty year history with him in the community, which was undisputed. The photographs at issue were grainy black and white photographs taken with infrared lighting, his twenty year history with Mitchell made it more likely Lt. McClurkin could correctly identify the person in the photographs, and his testimony could assist the jury.³ (State's Exhibit 1 [CD]). Therefore, the Herring analysis is inapplicable.

Mitchell correctly notes the circuit court expressed concern about the potential prejudice from having a police officer identify Mitchell as the person in the photographs. The court then found the probative value of Lt. McClurkin's testimony outweighed the potential prejudice, but excluded testimony from another police officer who also recognized

³Lt. McClurkin's testimony was also relevant, and indeed critical, to show how the police investigation developed Mitchell as a suspect.

Mitchell. (TT, pp. 38-39, 43, 45; R., pp. 20-21, 25, 27). The court clearly conducted the appropriate Rule 403, SCRE, probative value/prejudice analysis, and its ruling is supported by the record.

Lt. McClurkin simply testified he knew Mitchell from "living in Newberry for over 20 years and he (sic) living in the community of Newberry also." (TT, p. 157; R., p. 104). He did not even imply he knew Mitchell through his position as a police officer, or that Mitchell had prior interaction with law enforcement. Therefore, the potential prejudice from having a police officer identify Mitchell in the photographs was minimized by the content of Lt. McClurkin's actual testimony.

The circuit court properly exercised its discretion in allowing Lt. McClurkin's testimony identifying Mitchell as the person in the photographs from Potts' deer camera. Accordingly, the court's ruling should be affirmed.

II. The circuit court did not abuse its discretion in allowing into evidence a disk of photographs the victim prepared and turned over to police.

Mitchell also contends the circuit court erred in admitting the disk containing photographs from Potts' deer camera because the State failed to properly authenticate the photographs. He asserts the photographs were inadmissible because police left the camera with Potts, who downloaded the photographs onto his personal computer and created the disk offered as evidence.

For purposes of the Rules of Evidence, a "photograph" is defined as "still photographs, X-ray films, video tapes, motion pictures or other similar methods of recording information." Rule 1001(2), SCRE. An "'original' of a photograph includes the negative or any print therefrom." Rule 1001(3), SCRE. "If data are stored in a computer **or similar device**, any printout or **other output** readable by sight, shown to reflect the data accurately, is an 'original.'" *Id.* (emphasis added).

Except as otherwise provided by the Rules of Evidence, an original photograph is required to prove its contents. Rule 1002, SCRE (best evidence rule). The question of whether to admit evidence under the best evidence rule is addressed to the trial court's discretion. State v. Halcomb, 382 S.C. 432, 676 S.E.3d 149, 154 (Ct.App. 2009).

Mitchell contends the circuit court abused its discretion in admitting the disk containing the photographs from Potts' deer camera because he challenged the authenticity of the photographs under Rule 1003, SCRE. The fallacy of his contention is that Rule 1003 only applies if a "duplicate" is offered as evidence rather than an "original."

As set forth above, Rule 1001(3) expressly provides that in cases involving data

“stored in a computer or any similar device,” “original” for evidentiary purposes includes “any printout or other output readable by sight, shown to reflect the data accurately.” The deer camera was clearly a device similar to a computer in that it stored data. The circuit court expressly determined the disk constituted “other output readable by sight,” and therefore, the disk was an “original” for purposes of the best evidence rule. (TT, pp.95-97; R., pp. 42-44).

Mitchell does not challenge the validity of the circuit court’s ruling, but merely recites the evidence presented. At most, Mitchell’s argument goes to the weight of the evidence.

Sufficiency of evidence regarding the creation and verification of particular data goes to the weight of the evidence rather than its admissibility, and thus constitutes a question for the jury. State v. McFadden, 318 S.C. 404, 458 S.E.2d 61, 66 (Ct. App. 1995). Where the identity of persons handling evidence is established, evidence regarding its care goes only to its weight as credible evidence. State v. Carter, 344 S.C. 419, 544 S.E.2d 835, 837 (2001).

Potts testified regarding how the deer camera worked and how the disk containing the photographs at issue was created, and stated the photographs on the disk accurately reflected the photographs on the deer camera. The sufficiency of the evidence presented goes to its weight rather than admissibility, and the circuit court’s ruling should be affirmed.

III. The circuit court properly denied Mitchell's new trial motion on the first degree burglary charge because there was ample evidence to support the jury's determination he broke into the victim's home in the nighttime with the intent to commit a crime therein.

Relying on the "thirteenth juror" doctrine, Mitchell contends the circuit court erred in denying his motion for a new trial on the burglary charge. He asserts his acquittal on the petty larceny charge mandated a finding the State failed to prove an intent to commit a crime in Potts' home for purposes of the burglary charge, essentially nullifying the burglary conviction. In essence, Mitchell argues the verdicts were inconsistent because the jury's determination he did not steal anything from Potts' home necessarily leads to the conclusion he did not enter Potts' home with the intent to commit a crime.

Generally, the grant or refusal of a new trial is within the trial judge's discretion and will not be disturbed on appeal without a clear abuse of discretion. State v. Smith, 316 S.C. 53, 447 S.E.2d 175, 176 (1993); State v. Garrett, 350 S.C. 613, 567 S.E.2d 523, 526 (Ct.App. 2002). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Hughes, 346 S.C. 339, 552 S.E.2d 35, 36 (Ct.App. 2001).

In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the Supreme Court abolished the rule prohibiting inconsistent verdicts. See Wertz v. State, 349 S.C. 291, 562 S.E.2d 654, 657 (2002); see also Garrett, 567 S.E.2d at 526 (same). Citing United States v. Powell, 469 U.S. 57 (1984), the Court acknowledged "a jury might merely be lenient towards a defendant when it refuses to convict him of all counts," and "the government has no recourse to attack the inconsistency by arguing on appeal for conviction on all counts."

Alexander, 401 S.E.2d at 149-150. Therefore, even if the verdicts in this case are inconsistent, and the State submits they are not, a new trial is not required.

As a threshold matter, to establish burglary, the State must prove the defendant entered "without consent and with **the intent** to commit a crime," S.C. Code §16-11-311(A) (2003) (emphasis added). The State is **not** required to prove the defendant actually committed a separate crime after entry. The jury may well find the defendant intended to commit a crime at the time he entered the building, but failed to complete a separate criminal offense after he entered. Significantly, the circuit court instructed the jury in this case, without objection, that in order to convict Mitchell of burglary, it had to find he **intended** to commit a crime at the time he entered Potts' home, even if he abandoned that intent after entry occurred and the intended crime was **not** completed. (TT, pp. 225-226, 231; R., pp. 124-125, 130).

It is undisputed Mitchell did not have consent to enter Potts' home. Once the jury determined Mitchell was the person who entered the home, it could infer he intended to commit a crime therein from the circumstances, including the time of entry and the fact he had a flashlight and a bag in his hands when he walked into the kitchen.

Even though it clearly found Mitchell intended to commit a crime when he entered Potts' home, the jury could, and apparently did, find there was insufficient evidence he actually committed a separate crime after he entered the home. Such a finding mandated acquittal on the petty larceny charge, but did not preclude conviction on the burglary charge

or require a new trial.⁴ Therefore, the circuit court's denial of Mitchell's new trial motion should be affirmed.

⁴Noise from the camera or outside the home could have made Mitchell leave before he took anything. Also, there was some confusion regarding when the missing items were taken because there were earlier break-ins at Potts' home.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 27, 2011.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Newberry County
The Honorable D. Garrison Hill, Circuit Court Judge

THE STATE,

Respondent,

vs.

BENNIE MITCHELL,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR RESPONDENT

July 27, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Newberry County
The Honorable D. Garrison Hill, Circuit Court Judge

THE STATE,

Respondent,

vs.

BENNIE MITCHELL,

Appellant.

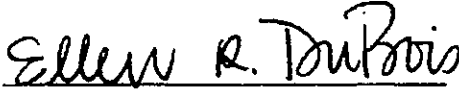
PROOF OF SERVICE

I, Ellen R. DuBois, certify I served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
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I further certify all parties required by Rule to be served have been served.

This 27th day of July, 2011.


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bennie Mitchell, Appellant.

Appellate Case No. 2010-159286

Appeal From Newberry County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5009.
Heard April 25, 2012 – Filed July 25, 2012

AFFIRMED

Appellate Defender LaNelle C. DuRant, of Columbia, for
Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, and Assistant Deputy
Attorney General Deborah R.J. Shupe, all of Columbia;
and Solicitor Jerry W. Peace, of Greenwood, for the
State.

LOCKEMY, J.: In this criminal action, Bennie Mitchell argues the trial court erred in: (1) allowing a police officer to identify Mitchell from photographs taken by the victim's deer camera because it was in violation of Rule 403, SCRE, and Rule 701, SCRE; (2) admitting a disk containing photographs from a deer camera because it was in violation of Rules 1001, 1002, and 1003, SCRE; and (3) failing

to grant Mitchell's post-trial motion for a new trial on the first-degree burglary charge when all of the elements of the charge were not met. We affirm the trial court.

FACTS

In the early morning of October 28, 2008, Stephen Potts returned to his home in Newberry County and discovered someone had broken into his home during his absence. After reviewing a motion-activated deer camera that had been placed on top of his refrigerator, Potts saw photographs of a man in his kitchen. A police officer subsequently identified the man in the photographs as Mitchell.

In January 2009, the Newberry County Grand Jury (Grand Jury) indicted Mitchell on one count of first-degree burglary, one count of possession of burglary tools, and one count of enhancement of larceny.¹ In February 2010, the Grand Jury also indicted Mitchell on one count of petit larceny. The matter was called for a jury trial on April 19, 2010.

In a pre-trial hearing, Mitchell moved to require the State to establish the authenticity and foundation of the photographs from Potts's deer camera. The trial court denied his request but indicated Mitchell could object at the appropriate time during the trial.

Additionally, Mitchell moved to exclude testimony from Lieutenant (Lt.) Roy McClurkin, of the Newberry Police Department, regarding Lt. McClurkin's identification of Mitchell as the person in the photographs from Potts's deer camera. He objected on several grounds: (1) the testimony was a lay opinion; (2) the jury could determine whether Mitchell was the person in the photographs without Lt. McClurkin's testimony; and (3) the testimony would be unduly prejudicial because of Lt. McClurkin's position as a police officer. The trial court denied his motion, finding the proposed testimony met the requirements for admissibility under Rule 701, SCRE. The trial court further found the testimony's probative value outweighed any prejudice to Mitchell, but it excluded similar testimony from other police officers as cumulative and prejudicial.

Potts testified he lived in Newberry County in October 2008, and due to some break-ins at his home, he mounted a motion-activated deer camera on top of his

¹ The enhancement of larceny indictment was nolle prossed on April 21, 2010.

refrigerator. Potts stated that upon returning home from work at approximately 1:00 a.m. on October 28, 2008, he noticed someone or something had tampered with the window next to his back door. After going inside his home and checking the deer camera, he discovered photographs of someone in his kitchen that he did not recognize. He waited to contact the police until around 10 a.m. and then told them of the photographs.

Mitchell objected to the admission of a disk containing the photographs from the deer camera, arguing it was not the "original" as required by the South Carolina Rules of Evidence and maintaining there was a genuine issue with the original's authenticity. Potts testified during the in camera hearing that he had possession of the deer camera from the time he returned home on the night of the alleged incident until he took it to his business and downloaded the data onto a laptop. He identified the photographs on the disk as the ones he downloaded directly from the camera. Potts stated the police officer viewed the photographs on his personal laptop at his home on October 28 but that laptop could not download the photographs to print them out. He then took the camera to the police station, but the police station was not able to download and print the photographs either. At that point, Potts took the deer camera back to his business where he downloaded the photographs and copied them onto a disk. The State argued that the deer camera photographs were meant to be downloaded and then printed out. It then analogized the deer camera to a regular film camera because when one takes a picture with a regular film camera, the original is on the film and then the person can get them developed to produce a copy of what came from the original. Thus, the State maintained the photographs fell under the definition of an original.

Potts admitted the pictures had a timestamp of 3:00 a.m., even though he testified he returned home from work around 1:00 or 1:30 a.m. He stated the clock was wrong on the deer camera because he had just set it up and had not properly programmed the clock feature yet.

The trial court overruled Mitchell's objection, finding the photographs on the disk were data stored in a computer put in a format readable by sight. Further, the photographs were the same as the ones on the deer camera based upon the foundation offered by the State. The trial court determined the photographs were "originals" as defined in Rule 1001, SCRE. Potts then testified before the jury regarding the photographs and stated he did not know the person pictured in them. Further, he testified that approximately one hundred dollars in quarters, some clothing, and some beer were taken from his home.

Corporal (Cpl.) Allison Moore of the Newberry Police Department testified she responded to Potts's residence on October 28, 2008. She stated Potts showed her the photographs on the deer camera, and she thought they depicted the unknown suspect well. Cpl. Moore could not determine where the person entered Potts's home and could not recover any fingerprints. When Potts came to the police station with the deer camera as requested, he met Cpl. Moore and they discovered the police station did not have the ability to download and print the photographs either. Potts informed Cpl. Moore that he could download the photographs at his place of business. She advised him to bring the photographs to the police department after he downloaded them, and he did so later that day on October 28.

Lt. McClurkin stated that Potts and Cpl. Moore came to his office with the disk on the afternoon of October 28, 2008, and asked him if he recognized the person in the photographs taken from Potts's deer camera. Lt. McClurkin testified, over Mitchell's objection, that he viewed the photographs from the disk on his office computer and recognized Mitchell as the person in the photographs. He stated that in one of the photographs, the person he believed to be Mitchell was standing with a flashlight and a bag in his hands. Lt. McClurkin explained he knew Mitchell from living in Newberry for over twenty years.

The jury convicted Mitchell of first-degree burglary and possession of burglary tools, but it acquitted him of the petit larceny charge. Mitchell moved for a new trial based on the ground that the State failed to establish all elements of the burglary charge because the jury acquitted him of petit larceny. The trial court denied his motion, and this appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. Identification of Mitchell

Mitchell contends it was reversible error to allow Lt. McClurkin to identify Mitchell at trial from photographs taken from the deer camera because it was in

violation of Rule 701, SCRE, and Rule 403, SCRE. Specifically, Mitchell argues Lt. McClurkin was not an eyewitness to the burglary; therefore, his identification of Mitchell from the photographs from the disk was simply his opinion of what was on the video. Further, Mitchell states the jury could observe the photographs themselves and draw their own conclusion as to identity. We disagree.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Fripp*, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "Rule 701 of the South Carolina Rules of Evidence explains when lay witness testimony is admissible." *Id.* at 439, 721 S.E.2d at 467.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Fripp*, 396 S.C. at 439, 721 S.E.2d at 467 (quoting Rule 704, SCRE).

Mitchell also argues the police officer's testimony violated Rule 403, SCRE, which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, SCRE.

Mitchell cites *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009), in support of his argument that the police officer's identification was in violation of Rule 701, SCRE. However, in *Fripp* this court determined that two witnesses could testify to the identity of a person depicted on surveillance videotape. 396 S.C. at 438-40, 721 S.E.2d at 467-68. The defendant was charged with second-degree burglary after he was identified as the suspect in a burglary at a general store. *Id.* at 436-37, 721 S.E.2d at 466. The burglary took place around 4:00 a.m. with no one else present in the general store. *Id.* at 437, 721 S.E.2d at 466. An alarm triggered the police response, and the suspect's image was caught on the store's surveillance videotape. *Id.* In explaining how she was able to identify the suspect on the videotape as being the defendant, one witness, the store manager, indicated she knew the defendant "very well" and "saw him all the time." *Id.* at 437-38, 721 S.E.2d at 466. The second witness, a store employee, testified she was able to identify the defendant because she was acquainted with him through his family. *Id.* at 438, 721 S.E.2d at 466. This court found their testimony was "rationally based on their perceptions of Fripp's appearance including his physical appearance, mannerisms, and clothing." *Id.* at 439, 721 S.E.2d at 467. Additionally, this court concluded the two witnesses' opinions were helpful in determining a key fact in issue—"whether [the defendant] was the person depicted on the videotape." *Id.*

This court then proceeded to analyze federal authority construing the element of helpfulness in determining a key fact in issue.² *Id.* at 439-40, 721 S.E.2d at 467-68. In *United States v. Allen*, 787 F.2d 933 (4th Cir. 1986), *vacated on other grounds*, 479 U.S. 1077 (1987), the court permitted identification testimony by witnesses based on surveillance photographs. That court stated:

We believe . . . testimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye over time. These witnesses had interacted with defendants in a way the jury could not,

² Rule 701 of the Federal Rules of Evidence states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their testimony provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting.

This fuller perspective is especially helpful where, as here, the photographs used for identification are less than clear.

Id. at 936.

"In *United States v. Robinson*, 804 F.2d 280 (4th Cir.1986), the court concluded the defendant's brother's identification testimony, based on surveillance photographs, was admissible under Federal Rule 701 as it would aid the jury in determining a key fact in issue." *Fripp*, 396 S.C. at 440, 721 S.E.2d at 468.

Sylvester Robinson was an individual who could testify under this rule as a lay witness. His testimony was based upon his perceptions from viewing the photographs and from his perceptions of and close association with his brother over the years. Although the defendant's appearance may not have physically changed from the time of the bank surveillance photograph until the time of trial, the individual in the photograph was wearing a hat and dark glasses, and the testimony of Sylvester Robinson could be helpful to the jury on the issue of fact of whether the appellant was the person shown in the bank surveillance photographs. A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury. Sylvester Robinson certainly qualified as a person more likely to correctly identify the individual shown in the photograph.

Id. at 440-41, 721 S.E.2d at 468 (quoting *Robinson*, 804 F.2d at 282).

After analyzing federal law, this court stated "the surveillance video was not crystal clear and the perpetrator sought, in some measure, to obscure his identity by wearing the hood of his jacket up." *Id.* at 441, 721 S.E.2d at 468. "While the jury, having observed Fripp for a relatively brief period of time in the courtroom setting, may have believed Fripp was the person on the videotape, Brown's and Young's testimonies, based on their perceptions of him over time, aided the jury in making an ultimate determination as to the burglar's identity." *Id.* We then found that "the identification of a familiar person does not require any specialized knowledge, skill, experience, or training as contemplated by subpart (3) of Rule 701." *Id.* "Consequently, [this court] affirm[ed] the trial court's admission of Brown's and Young's identification testimonies." *Id.*

Here, we find these facts are analogous to *Fripp*, and the trial court did not err in introducing Lt. McClurkin's testimony pursuant to Rule 701, SCRE. Lt. McClurkin's perception of the person in the photographs was based on his first-hand knowledge of Mitchell. While Lt. McClurkin was not present during the alleged crime, he knew Mitchell through his twenty years of living in the Newberry area. This was the only fact presented at trial that allowed Lt. McClurkin to identify Mitchell, whereas in *Fripp*, the witnesses seemed to be able to describe their knowledge of the defendant from the community in more detail. However, that fact did give a basis for concluding that Lt. McClurkin was more likely to correctly identify the defendant from the photograph than the jury. Furthermore, the identity of the person in the photographs was a fact in issue, and Lt. McClurkin's identification of who he thought was in the photographs was surely helpful to the jury.

As we noted, we do not find Lt. McClurkin's testimony's probative value was outweighed by the prejudicial value under Rule 403, SCRE, based on Mitchell's contention that it was a lay opinion not based on personal observation. We also find the probative value of his testimony was not outweighed by the prejudicial effect based upon Mitchell's argument that Lt. McClurkin was a police officer offering his opinion as to Mitchell's identity. Lt. McClurkin was available for cross-examination by Mitchell, and his basis for identification was stated as simply having been in the Newberry community for twenty years. The trial court's jury instructions further undermined any prejudicial effect Lt. McClurkin's testimony may have had.³ For the foregoing reasons, we affirm the trial court.

³ The jury instructions included the following statements, "[A]s I told you, you must consider and determine the credibility of the witnesses and of the exhibits.

II. Authentication of the disk with downloaded photographs

Mitchell contends the trial court erred in allowing the disk with the downloaded deer camera photographs to be admitted when the photographs were not properly authenticated. Specifically, Mitchell maintains that because the police did not take the camera into custody but left it with Potts to download the photographs onto his business computer, the evidence was admitted in violation of Rules 1001, 1002, and 1003, SCRE.⁴ We disagree.

The pertinent section of Rule 1001, SCRE, states:

An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

Rule 1001(3), SCRE. Further, Rule 1001 defines a duplicate as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical

And I told you some things you could use in engaging credibility . . . [Y]ou may believe everything a witness says, you may believe nothing a witness says. You may believe parts of a witnesses [sic] testimony and disregard other parts. You may believe one witness over several or several over one. But remember that your job is to determine the true facts of the case and whether the state has met its burden of proof and you do that by weighing all the evidence, regardless of who called the witness."

⁴ At trial, Mitchell objected to the chain of custody of the disk as well. However, he appears to have abandoned that argument on appeal. See *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal).

or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Rule 1001(4), SCRE.

Rule 1002, SCRE, in addressing the requirements of an original, states that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." In addressing the admissibility of duplicates, Rule 1003, SCRE, states that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

"The question of whether to admit evidence under [Rules 1001 to 1004, collectively known as the best evidence rule,] is also addressed to the discretion of the trial court." *State v. Halcomb*, 382 S.C. 432, 443-44, 676 S.E.2d 149, 154-55 (Ct. App. 2009).

We find the photographs from the disk were originals pursuant to Rule 1001, SCRE. Rule 1001(3), SCRE ("If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'."). A digital camera was used, and the photographs from the disk were testified to as being the same photographs that were on the deer camera on October 28, 2008. Mitchell had the opportunity to cross-examine Potts and the police officers as to the handling of the photographs and disk on which the photographs were downloaded. We conclude the trial court properly admitted the photographs from the disk as originals, and thus, Rule 1003 is not relevant to our analysis. For the forgoing reasons, we affirm the trial court.

III. Motion for New Trial

Mitchell argues the trial court erred in denying his post-trial motion for a new trial on his first-degree burglary charge. Specifically, Mitchell contends all of the elements of first-degree burglary were not met because the intent to steal element was not proven since the jury found Mitchell not guilty of petit larceny. We disagree.

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion." *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct. App. 2011) (quoting *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565

(2009)). "If there is no evidence to support a conviction, [this court] should uphold an order granting a new trial." *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) (citing *State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)). "However, if competent evidence supports the jury's verdict, the trial [court] may not substitute [its] own judgment for that of the jury and overturn that verdict." *Id.* (citing *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985)).

We believe Mitchell's argument is referencing the "inconsistent verdict theory." However, our supreme court has abolished the rule against inconsistent verdicts in this state. *State v. Alexander*, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991). Moreover, we find the verdicts are not necessarily inconsistent. Mitchell was charged and convicted of first-degree burglary, pursuant to section 16-11-311(A) of the South Carolina Code (2003). The pertinent portion of the statute states: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling . . .*" S.C. Code Ann. § 16-11-311(A) (2003) (emphasis added). Mitchell was identified from photographs on the deer camera in Potts's home. Potts testified that he did not recognize the person in the photographs and had not given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts's home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime. Thus, the trial court did not err in denying Mitchell's post-trial motion for a new trial. For the forgoing reasons, we affirm the trial court.

CONCLUSION

Accordingly, we find the trial court did not abuse its discretion regarding the issues on appeal. Thus, we affirm the trial court.

AFFIRMED.

WILLIAMS AND THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENNIE MITCHELL,

APPELLANT

Appeal from Newberry County

D. Garrison Hill, Circuit Court Judge

Opinion No. 5009

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on July 25, 2012. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Mitchell argued three issues on appeal: (1) the trial court erred in allowing a police officer to identify Mitchell from photographs taken by the victim's deer camera because it was a violation of Rule 403, SCRE and rule 701, SCRE; (2) the trial court erred in admitting a disk containing photographs from a deer camera because it was a violation of Rules 1001, 1002, and 1003, SCRE;

(3) the trial court erred by failing to grant Mitchell's post-trial motion on the burglary first degree charge when all of the elements were not met.

The Court of Appeals affirmed the trial court on all three issues. On Issue One, the Court of Appeals held that the police officer, Lt. McClurkin, was not present at the crime, but he knew Mitchell from twenty years in the community. His identification did not violate rule 701, SCRE because the identity of the person was a fact in issue; Lt. McClurkin was more likely to identify Mitchell than the jury and the identity was helpful to the jury. The Court held that the identity did not violate Rule 403, SCRE because the probative value outweighed the prejudicial because Lt. McClurkin's basis for identification was having been in the community for twenty years.

On Issue Two, the Court of Appeals held that the photographs were originals pursuant to Rule 1001, SCRE, and that the trial court correctly admitted them as originals. Thus Rule 1003 was not relevant to the court's analysis.

On Issue Three, the Court of Appeals held that Mitchell's argument referenced the "inconsistent verdict" theory which has been abolished. The Court held that the statute for burglary first degree requires that the person enters the dwelling with the intent to commit a crime. Because the photograph showed the person with a bag and flashlight, the jury could have inferred the person intended to commit a crime.

The Court of Appeals misapprehended the issues.

ISSUE ONE: Around one o'clock early in the morning of October 28, 2008, Stephen Potts, who was one of the owners of the Blue Moon Restaurant, returned home to find that someone had been in his home and had taken between \$70 and \$100 dollars worth of quarters, socks and beer. R.3, ll. 19 – 25; R.30, ll. 6 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.52, ll. 22 – 25; R.53, ll. 1 – 25. Potts knew someone had been in his kitchen because he had set up a deer camera on top of his refrigerator

for the purpose of catching anyone who may break into his home. He did this because about ten days prior to this incident, there was other activity in his house. When he viewed the pictures on the camera, he did not know the person caught on his deer camera. R.3, ll. 19 – 25; R.4, ll. 1 – 25; R.5, ll. 1 – 25; R.32, ll. 21 – 25; R.33, ll. 1 – 25.

When the police arrived the next morning after he called them upon awakening, he told them what happened, and that he did not know the person. R.33, ll. 16 – 25. The police allowed him to take the camera to the Blue Moon and download the pictures onto his laptop computer from which he burned a CD of the pictures. He then provided that CD to the police. R.37, ll. 19 – 25; R.38, ll. 1 – 24; R.45, ll. 1 – 25; R.46, ll. 1 – 25; R.47, ll. 1 – 25; R.48, ll. 1 – 23.

Corporal Allison Moore of the Newberry Police Department, testified that she responded to the call on October 28, 2008, and she went to Potts' home. She could not identify the person on the deer camera. She dusted for fingerprints but could not recover any. R.78, ll. 22 – 25; R.79, ll. 1 – 25; R.80, ll. 1 – 25; R.81, ll. 1 – 25.

Lieutenant Roy McClurkin of the Newberry City Police Department, testified that he had been with the Newberry Police for twenty-seven years. R.100, ll. 11 – 25. He met with Potts on the afternoon of October 28, 2008. Potts brought the DVD that he had made of the pictures from his deer camera on October 27, 2008. R.101, ll. 1 – 25; R.102, ll. 1 – 25; R.103, ll. 1 – 5. Corporal Moore asked Lieutenant McClurkin to view the DVD to see if he could identify the person in the pictures since he had been with the police department a long time. McClurkin loaded the DVD onto his desktop computer and viewed the pictures. He identified the person in the pictures as Bennie Mitchell whom he knew from both of them living in the Newberry community over twenty years. R.103, ll. 1 – 25; R.104, ll. 1 – 25. He obtained an arrest warrant and search warrant for Mitchell's

home. He arrested Mitchell at his home, but did not find any items in Mitchell's home related to the burglary. R.105, ll. 1 – 25.

Defense counsel objected when Lieutenant McClurkin identified Mitchell based on counsel's pretrial objection under Rule 701, SCRE and State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). The judge overruled the objection. R.103, ll. 13 – 25; R.104, ll. 1 – 4. In a pretrial motion, defense counsel argued that the case was based on the mistaken identity of Mitchell from the DVD. Counsel argued that the alleged identification of Mitchell by Lieutenant McClurkin from the DVD should be suppressed because it was lay opinion offered by a police officer in violation of Rule 701, SCRE. Counsel argued that Lieutenant McClurkin was not an eyewitness to the burglary; therefore, his identification of Mitchell from the DVD was simply his opinion of what was on the video. Counsel argued that the jury could observe the DVD or the pictures from it and draw their own conclusion as to the identity. The trial judge stated that as far as the lay opinion, the identity would require expert opinion testimony. R.11, ll. 1 – 25; R.12, ll. 1 – 8.

The judge said: "Doesn't it cause undue prejudice to the defendant to have a police officer say he recognizes that person and in his opinion that is who it is?" He was concerned about the impact on the jury of having the police officer identify Mitchell. R.21, ll. 1 – 16. The state agreed that it was prejudicial but not unduly prejudicial. R.21, ll. 17 – 25; Defense counsel argued that it was unduly prejudicial because the lay witness was a police officer which was a violation of Rule 403, SCRE. R. 22, ll. 23 – 25; R.23, ll. 1 – 25; R.24, ll. 1.

Defense counsel cited the case of State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009) to support his argument. Counsel argued that Mitchell's case was very similar to Herring in the legal issues involved. R.12, ll. 9 – 25; R.13, ll. 1 – 25; R.14, ll. 1 – 25; R.15, ll. 1 – 25; R.16, ll. 1 – 25.

In State v. Herring, id., the defendant was convicted of murder when he allegedly shot through his car window hitting a nightclub bouncer and killing him as the defendant was leaving. The incident was caught on video tape. Three lay witnesses offered their interpretation of the video from Chastity's that the flash of light on the video was a gunshot. Defense counsel objected to the lay opinion because the witnesses did not personally observe the events but only viewed them on the tape. Herring's defense counsel asked for a mistrial. The trial judge offered a curative instruction to the jury where he told the jury to strike the lay opinion from their memory because "you are the only ones who can draw from conclusions from what you saw on the tape and testimony in this regard." The trial judge stated further:

It's the same instruction I gave you with regard to another witness that looked at the same video and saw what he thought was one said a light, one said a shot. That's an opinion. Just take it at that. Nobody saw the shot fired based on the testimony we've heard so far. It's all from the video. You are going to have the video. You can look at it. You can determine whatever you choose to determine from it.

State v. Herring, supra, at 217.

The Supreme Court found that the curative instructions were sufficient to cure any prejudice, and there was no error in denying the mistrial motion. State v. Herring, supra.

Mitchell's trial judge stated he saw no rules that the Supreme Court cited regarding lay opinion. R.17, ll. 11 - 25; R.18, ll. 1 - 25. The judge issued his ruling after a lengthy discussion of the issue where he denied defense counsel's motion to exclude the opinion testimony of the officer as to the identity of Mitchell in the deer camera photograph. R.25, ll. 1 - 25; R.11 - 44.

Rule 701, SCRE provides that if the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences must be limited to his opinions which are (a) rationally based on the perception of the witness; (b) are helpful to a clear understanding of the

witness's testimony of determination of a fact in issue; (c) and do not require special knowledge, skill, experience or training.

The opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973).

Lieutenant McClurkin did not personally observe Mitchell in the home of Stephen Potts. He offered his opinion as to the identity of the person on the video. This was in the province of the jury because they observed the video, and could draw their own conclusion. The jury in Mitchell's case viewed the DVD. R.48, II. 1 – 23.

The trial judge misinterpreted the ruling in State v. Herring, *supra*. The trial judge in Herring's case issued a curative instruction to the jury and told them to erase the lay opinions from their memory because the lay witnesses could not give an opinion as to whether the flash was a gunshot. He did not rule that the opinions of the lay witnesses should have been admitted. The Supreme Court affirmed the Herring trial judge by saying the curative instructions were sufficient. The clear implication to be drawn was that the Supreme Court was ruling that the lay witnesses in Herring's case could not offer their opinions to interpret the video.

The Court of Appeals misapprehended the issue because the lay opinion of the police Lieutenant McClurkin that the person in the video was Mitchell was prejudicial. It was a lay opinion not based on personal observation, and the witness was a police officer offering his opinion as to the identity. The fact that a police officer said he knew Mitchell from twenty years in the community could lead the jury to believe that Mitchell had been in trouble with the law for twenty years. This was in violation of Rule 701 and Rule 403, SCRE.

ISSUE TWO: In a pretrial motion, defense counsel moved to exclude the video photographs from the victim's deer camera "based on the requirement that the State authenticates these photographs"

and for a chain of custody. R.7, ll. 10 – 25. Counsel argued that this case “turns on some pictures Mr. Potts says he took”. The judge ruled that a chain of custody was not necessary but that the state would have to “lay the foundation which would be for a witness to authenticate that they constitute an accurate and fair representation of what is depicted on the photograph”. R.8, ll. 1 – 25; R.9, ll. 1 – 25.

The judge told defense counsel that he was “not entitled to a dry run”, but that he could object at the time when the foundation was laid. R.10, ll. 1 – 22.

During the trial, after Potts testified that he had put the deer camera on top of his refrigerator to catch anyone burglarizing his home, the state moved to admit the photographs from the deer camera into evidence. Defense counsel objected and asked for a hearing outside the presence of the jury. R.30, ll. 4 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.33, ll. 1 – 25.

Defense counsel argued that the CD with the photographs should not be admitted into evidence because the admission would violate Rules 1002, 1003, and 1004, SCRE because the rules provided that a duplicate was admissible only if there was not a genuine question as to the authenticity of the original. Counsel argued that there was a genuine issue as to the authenticity of the photographs. R.33, ll. 23 – 25; R.34, ll. 1 – 25; R.35, ll. 1 – 25; R.36, ll. 1 – 25. The judge granted counsel’s request to proffer the testimony regarding this issue. R.37, ll. 1 – 20.

Potts testified that he took the camera to the Blue Moon Restaurant where he downloaded nine photographs from the camera to a laptop computer. His girlfriend then “burned” the photographs onto a disk or CD. That was the DVD he provided to the police. He said no alterations had been made to the images. R.37, ll. 22 – 25; R.38, ll. 1 – 25; R.39, ll. 1 – 18.

On cross examination, Potts said he decided which photographs to download, and he downloaded nine pictures although he admitted that the camera held more than nine pictures. There

were pictures of him on the camera as well. R.39, ll. 20 – 25; R.40, ll. 1 – 25; R.41, ll. 1 – 25. Potts testified that the photographs he took to the police had the wrong date stamp of three o'clock A.M., and the pictures had been taken before he arrived at home around one o'clock A.M. He said the clock on the camera was wrong. R.42, ll. 1 – 25.

Defense counsel argued at the close of the proffer that there was a genuine question as to the authenticity of the photographs. R.42, ll. 25; R.43, ll. 1 – 10. The judge ruled that the photographs met the definition of 'original' as defined in Rule 1001, SCRE. He overruled defense counsel's motion. R.43, ll. 1 – 25; R.44, ll. 1 – 25.

Corporal Allison Moore of the Newberry Police Department testified that she responded to the call at Potts' home regarding the burglary. R.79, ll. 1 – 25; R.80, ll. 1 – 12. Potts showed her the deer camera and she saw the image of a person on the camera, but could not identify the person. R.80, ll. 13 – 25.

Potts was unable to download the photographs from the camera onto a disk that day, so she told him to go ahead and download it at the Blue Moon and bring it to the police department which he did the next day. Corporal Moore never had the camera or disk in her possession. R.82, ll. 1 – 25; R.84, ll. 1 – 25; R.85, ll. 1 – 5.

On cross examination, Corporal Moore stated that she did not obtain any fingerprints, did not try to obtain any DNA, and did not take any pictures of the crime scene. R.85, ll. 6 – 25; R.86, ll. 1 – 25; R.87, ll. 1 – 25. She did not see an entry into the home. R.88, ll. 13 – 15. She saw the image of a person on the computer but she did not collect or take the computer into police possession because she said it was Potts' personal computer. She did nothing to preserve the image she saw on the camera. She did not check the time stamp on the camera. R.89, ll. 1 – 25; R.90, ll. 1 – 25; R.91, ll. 1 – 25. She admitted that she left the **only** piece of evidence from this crime, the

photographs on the deer camera, with Potts and did nothing to preserve the evidence for trial. R.95, ll. 1 – 25; R.96, ll. 1 – 13.

Rule 1001 (3) , SCRE, provides: “an original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original”.

Rule 1003, SCRE, provides concerning the admissibility of duplicates that a “duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”

Rule 1002, SCRE, provides: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.”

The question of whether to admit evidence under the “Best Evidence Rule” is addressed to the discretion of the trial court. State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). For an error of law to warrant reversal based on the exclusion of evidence, the appellant must prove the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the verdict was influenced by the lack of the evidence. State v. Halcomb, Id.

The Court of Appeals misapprehended the issue because the photographs were not stored in the computer but on a deer camera. The victim downloaded nine photographs from the camera to a laptop computer at the restaurant. The photographs were then “burned” onto a disk or CD. That was the DVD the victim provided to the police. Therefore, the authenticity of the photographs remained a question because the photographs were not originals. R.37, ll. 22 – 25; R.38, ll. 1 – 25; R.39, ll. 1 – 18.

ISSUE THREE: Defense counsel filed a post trial motion asking the judge for a new trial or reconsideration of the sentence. Counsel argued a new trial was warranted because all of the elements for burglary first were not met because the intent to steal was not proven after the jury found Mitchell not guilty of the petit larceny. R. 136.

Counsel wrote that the inferred conduct showing intent to steal was that someone stole beer and coins. However, the jury rejected that by returning a verdict of not guilty as to the crime of petit larceny. R. 140. Counsel asked the trial judge to act as the "Thirteenth Juror" by vetoing the verdict and granting a new trial. R. 140-141. Judge Hill denied the motion by order on May 7, 2010.

S.C. Code Section 16-11-311(A) provides:

A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with the intent to commit a crime in the dwelling, and either:

In South Carolina, a trial judge may grant a new trial following a jury verdict under the "Thirteenth Juror" doctrine, which entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts. Lane v. Gilbert Construction Company, LTD., 383 S.C. 590, 681 S.E.2d 879 (2009).

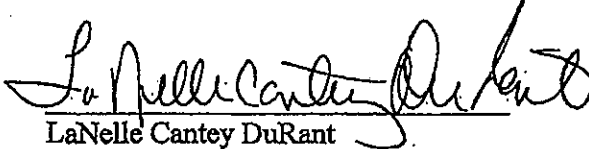
Under the "Thirteenth Juror" doctrine, which is the standard for granting a new trial in state law actions, the trial judge essentially sits as the thirteenth juror and may grant a new trial based solely upon the facts if he finds that the evidence does not justify the verdict. Norton v. Norfolk Southern Railway Company, 350 S.C. 473, 567 S.E.2d 851 (2002). Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Id.

The Court of Appeals misapprehended the issue because Mitchell was not alleging inconsistent verdict. He argued that the elements for burglary first were not proved. The trial judge

should have granted a new trial because the jury basically nullified the burglary first guilty verdict when they found Mitchell not guilty of the petit larceny. The jury heard the law as defined by the state and the judge in his jury charge so they knew that the intent to commit a crime was required for the burglary first conviction. R.116, ll. 1 – 25; R. 117 – 230.

THEREFORE, we respectfully request the Court of Appeals to reconsider its rulings.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 8th day of August, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

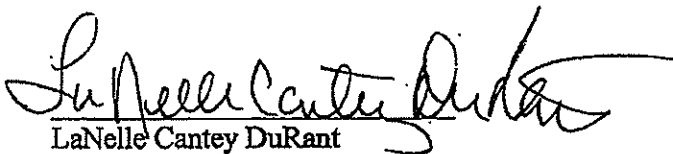
V.

BENNIE MITCHELL,

APPELLANT

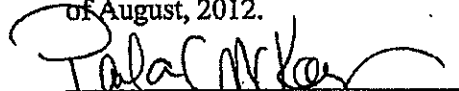
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, this 8th day of August, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day
of August, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Bennie Mitchell, Appellant.

Appellate Case No. 2010-159286

ORDER

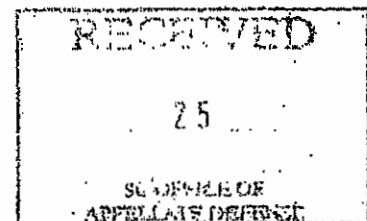
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

W. B. Use J.
Paul D. Turner J.
James E. Schryer J.

Columbia, South Carolina

cc:

Bennie Mitchell
Alan McCrory Wilson
LaNelle Cantey DuRant
John W. McIntosh
Deborah R.J. Shupe
Salley W. Elliott
Bennie D. Mitchell



FILED

October 25, 2012

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

D. Garrison Hill, Circuit Court Judge

Opinion No. 5009 (S.C. Ct. App. filed 7/25/2012)

09-GS-36-00037, 00039

RECEIVED

JAN 28 2013

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

BENNIE MITCHELL,

PETITIONER

APPELLATE CASE NO. 2012-213463

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate DefenderSouth Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 25, 2012.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court in allowing a lay witness, the police officer, Lieutenant McClurkin, to identify appellant from the photographs taken by the victim's deer camera, which had been mounted on the victim's refrigerator, on the basis that Lieutenant McClurkin knew appellant from being in the same community with him for twenty years when this identification by the police officer was prejudicial in violation of Rule 403, SCRE, and Rule 701, SCRE?
2. Did the Court of Appeals err in affirming the trial court in allowing the CD from the deer camera which contained the photographs to be admitted into evidence when the photographs were not properly authenticated because the police did not take the camera into custody but left it with the victim to download the photographs onto his personal computer which violated Rules 1001, 1002, and 1003, SCRE?
3. Did the Court of Appeals err in affirming the trial court when it denied appellant's post trial motion for a new trial on the burglary first charge when all of the elements of burglary first were not met when the jury found appellant not guilty of petty larceny which meant the intent to commit a crime element was not proven?

STATEMENT OF THE CASE

Procedural History

In January 2009, the Newberry County Grand Jury indicted Bennie Darron Mitchell on the charges of burglary first degree, possession of burglary tools, and larceny. The state withdrew the larceny indictment and re-indicted Mitchell on the charge of petty larceny. R. 2, ll. 1 – 22. On April 19, 2010, Mitchell proceeded to trial before the Honorable D. Garrison Hill and a jury. The jury returned a verdict of not guilty on the petty larceny charge but found him guilty of the burglary first degree and the possession of burglary tools. Judge Hill sentenced Mitchell to twenty years on the burglary charge and to five years concurrent on the possession of burglary tools. Mitchell's attorney filed a post trial motion for a new trial or reconsideration of the sentence on April 26, 2010. Judge Hill issued an order on May 7, 2010 denying the post trial motion for a new trial or reconsideration of the sentence. Mitchell's attorney filed a notice of appeal. The Office of Appellate Defense perfected the appeal, and the Court of Appeals affirmed Mitchell's convictions and sentences on July 25, 2012. State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. July 25, 2012). App. 1 – 11. Appellate counsel filed a petition for rehearing on August 8, 2012. App. 12 – 22. The Court of Appeals issued an Order on October 25, 2012 denying Mitchell's petition for rehearing. App. 24. This petition for a writ of certiorari to the Court of Appeals follows.

Relevant Facts

Around one o'clock early in the morning of October 28, 2008, Stephen Potts, who was one of the owners of the Blue Moon Restaurant, returned home to find that someone had been in his home and had taken between \$70 and \$100 dollars worth of quarters, socks and beer. R.3, ll. 19 – 25; R.30, ll. 6 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.52, ll. 22 – 25; R.53, ll. 1 – 25. Potts knew

someone had been in his kitchen because he set up a deer camera on top of his refrigerator for the purpose of catching anyone who may break into his home. He did this because about ten days prior to this incident, there was other activity in his house. When he viewed the pictures on the camera, he did not know the person caught on his deer camera. R.3, ll. 19 – 25; R.4, ll. 1 – 25; R.5, ll. 1 – 25; R.32, ll. 21 – 25; R.33, ll. 1 – 25.

When the police arrived the next morning after he called them upon awakening, he told them what happened, and that he did not know the person. R.33, ll. 16 – 25. The police allowed him to take the camera to the Blue Moon and download the pictures onto his laptop computer from which he burned a CD of the pictures. He then provided that CD to the police. R.37, ll. 19 – 25; R.38, ll. 1 – 24; R.45, ll. 1 – 25; R.46, ll. 1 – 25; R.47, ll. 1 – 25; R.48, ll. 1 – 23.

Corporal Allison Moore, of the Newberry Police Department, testified that she responded to the call on October 28, 2008, and she went to Potts' home. She could not identify the person on the deer camera. She dusted for fingerprints but could not recover any. R.78, ll. 22 – 25; R.79, ll. 1 – 25; R.80, ll. 1 – 25; R.81, ll. 1 – 25.

Lieutenant Roy McClurkin of the Newberry City Police Department, testified that he had been with the Newberry Police for twenty-seven years. R.100, ll. 11 – 25. He met with Potts on the afternoon of October 28, 2008, when Potts brought the DVD to the police that he made of the pictures on his deer camera on October 27, 2008. R.101, ll. 1 – 25; R.102, ll. 1 – 25; R.103, ll. 1 – 5.

Corporal Moore asked Lieutenant McClurkin to view the DVD to see if he could identify the person in the pictures since he had been with the police department a long time. He loaded the DVD onto his desktop computer and viewed the pictures. He identified the person in the pictures as Bennie Mitchell whom he knew from both of them living in the Newberry community over twenty

years. R.103, ll. 1 – 25; R.104, ll. 1 – 25. He obtained an arrest warrant and search warrant for Mitchell's home. He arrested Mitchell at his home, but did not find any items in Mitchell's home related to the burglary. R.105, ll. 1 – 25.

ARGUMENT I

The Court of Appeals erred in affirming the trial court in allowing a lay witness, the police officer, Lieutenant McClurkin, to identify appellant from the photographs taken by the victim's deer camera, which had been mounted on the victim's refrigerator, on the basis that Lieutenant McClurkin knew appellant from being in the same community with him for twenty years when this identification by the police officer was prejudicial in violation of Rule 403, SCRE, and, and Rule 701, SCRE.

In a pretrial motion, defense counsel argued that the case was based on the mistaken identity of Mitchell from the DVD. Counsel argued that the alleged identification of Mitchell by Lieutenant McClurkin from the DVD should be suppressed because 'it was lay opinion offered by a police officer in violation of Rule 701, SCRE. Counsel argued that Lieutenant McClurkin was not an eyewitness to the burglary; therefore, his identification of Mitchell from the DVD was simply his opinion of what was on the video. Counsel argued that the jury could observe the DVD or the pictures from it and draw their own conclusion as to the identity. The trial judge stated that as far as the lay opinion, the identity would require expert opinion testimony. R.11, ll. 1 – 25; R.12, ll. 1 – 8.

Defense counsel objected when Lieutenant McClurkin identified Mitchell based on counsel's pretrial objection under Rule 701, SCRE and State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). The judge overruled the objection. R.103, ll. 13 – 25; R.104, ll. 1 – 4.

The judge said: "Doesn't it cause undue prejudice to the defendant to have a police officer say he recognizes that person and in his opinion that is who it is?" He was concerned about the impact on the jury of having the police officer identify Mitchell. R.21, ll. 1 – 16. The state agreed that it was prejudicial but not unduly prejudicial. R.21, ll. 17 – 25; Defense counsel argued that it

was unduly prejudicial because the lay witness was a police officer which was a violation of Rule 403, SCRE. R. 22, ll. 23 – 25; R.23, ll. 1 – 25; R.24, ll. 1.

Defense counsel cited the case of State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009) to support his argument. Counsel argued that Mitchell's case was very similar to Herring in the legal issues involved. R.12, ll. 9 – 25; R.13, ll. 1 – 25; R.14, ll. 1 – 25; R.15, ll. 1 – 25; R.16, ll. 1 – 25.

In State v. Herring, id., the defendant was convicted of murder when he allegedly shot through his car window hitting the bouncer and killing him as the defendant was leaving Chastity's night club. The incident was caught on video tape. Three lay witnesses offered their interpretation of the video from Chastity's that the flash of light on the video was a gunshot. Defense counsel objected to the lay opinion because the witnesses did not personally observe the events but only viewed them on the tape. Herring's defense counsel asked for a mistrial. The trial judge offered a curative instruction to the jury where he told the jury to strike the lay opinion from their memory because "you are the only ones who can draw from conclusions from what you saw on the tape and testimony in this regard." The trial judge stated further:

It's the same instruction I gave you with regard to another witness that looked at the same video and saw what he thought was-one said a light, one said a shot. That's an opinion. Just take it at that. Nobody saw the shot fired based on the testimony we've heard so far. It's all from the video. You are going to have the video. You can look at it. You can determine whatever you choose to determine from it.

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The Supreme Court found that the curative instructions were sufficient to cure any prejudice, and there was no error in denying the mistrial motion. State v. Herring, *supra*.

Mitchell's trial judge stated he saw no rules that the Supreme Court cited regarding lay opinion. R.17, ll. 11 – 25; R.18, ll. 1 – 25. The judge issued his ruling after a lengthy discussion of

the issue where he denied defense counsel's motion to exclude the opinion testimony of the officer as to the identity of Mitchell in the deer camera photograph. R. 25, ll. 1 – 25; R.11 – 44.

Rule 701, SCRE provides that if the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences must be limited to his opinions which are (a) rationally based on the perception of the witness; (b) are helpful to a clear understanding of the witness's testimony of determination of a fact in issue; (c) and do not require special knowledge, skill, experience or training.

The opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973).

Lieutenant McClurkin did not personally observe Mitchell in the home of Stephen Potts. He offered his opinion as to the identity of the person on the video. This was in the province of the jury because they observed the video, and could draw their own conclusion. The jury in Mitchell's case viewed the DVD. R. 48, ll. 1 – 23.

The trial judge misinterpreted the ruling in State v. Herring, *supra*. Because the trial judge in Herring's case issued a curative instruction to the jury and told them to erase the lay opinions from their memory because the lay witnesses could not give an opinion as to whether the flash was a gunshot, he was saying the opinions of the lay witnesses should not have been admitted. When the Supreme Court affirmed the Herring trial judge by saying the curative instructions were sufficient, the implication to be drawn was that the Supreme Court was stating that the lay witnesses in Herring's case could not offer their lay opinions as to their interpretation of the video.

The lay opinion of the police lieutenant McClurkin that the person in the video was Mitchell was prejudicial because it was a lay opinion not based on personal observation, and the witness was

a police officer offering his opinion as to the identity. This was in violation of Rule 701 and Rule 403, SCRE.

The Court of Appeals held that the police officer, Lt. McClurkin, was not present at the crime, but he knew Mitchell from twenty years in the community. His identification did not violate rule 701, SCRE because the identity of the person was a fact in issue; Lt. McClurkin was more likely to identify Mitchell than the jury and the identity was helpful to the jury. The Court held that the identity did not violate Rule 403, SCRE because the probative value outweighed the prejudicial because Lt. McClurkin's basis for identification was having been in the community for twenty years. App. 4 - 8.

The Court of Appeals misapprehended the issue because the lay opinion of the police Lieutenant McClurkin that the person in the video was Mitchell was prejudicial. It was a lay opinion not based on personal observation, and the witness was a police officer offering his opinion as to the identity. The fact that a police officer said he knew Mitchell from twenty years in the community could lead the jury to believe that Mitchell had been in trouble with the law for twenty years. This was in violation of Rule 701 and Rule 403, SCRE.

ARGUMENT II

The Court of Appeals erred in affirming the trial court in allowing the CD from the deer camera which contained the photographs to be admitted into evidence when the photographs were not properly authenticated because the police did not take the camera into custody but left it with the victim to download the photographs onto his personal computer which violated Rules 1001, 1002, and 1003, SCRE.

In a pretrial motion, defense counsel moved to exclude the video photographs from the victim's deer camera "based on the requirement that the State authenticates these photographs" and for a chain of custody. R.7, ll. 10 – 25. Counsel argued that this case "turns on some pictures Mr. Potts says he took". The judge ruled that a chain of custody was not necessary but that the state would have to "lay the foundation which would be for a witness to authenticate that they constitute an accurate and fair representation of what is depicted on the photograph". R. 8, ll. 1 – 25; R. 9, ll. 1 – 25.

The judge told defense counsel that he was "not entitled to a dry run", but that he could object at the time when the foundation was laid. R.10, ll. 1 – 22.

During the trial, after Potts testified that he had put the deer camera on top of his refrigerator to catch anyone burglarizing his home, the state moved to admit the photographs from the deer camera into evidence. Defense counsel objected and asked for a hearing outside the presence of the jury. R. 30, ll. 4 – 25; R. 31, ll. 1 – 25; R. 32, ll. 1 – 25; R. 33, ll. 1 – 25.

Defense counsel argued that the CD with the photographs should not be admitted into evidence because the admission would violate Rules 1002, 1003, and 1004, SCRE because the rules provided that a duplicate was admissible only if there was not a genuine question as to the

authenticity of the original. Counsel argued that there was a genuine issue as to the authenticity of the photographs. R. 33, ll. 23 – 25; R. 34, ll. 1 – 25; R. 35, ll. 1 – 25; R. 36, ll. 1 – 25. The judge granted counsel's request to proffer the testimony regarding this issue. R. 37, ll. 1 – 20.

Potts testified that he took the camera to the Blue Moon where he downloaded nine photographs from the camera to a laptop computer at the restaurant. His girlfriend then "burned" the photographs onto a disk or CD. That was the DVD he provided to the police. He said no alterations had been made to the images. R. 37, ll. 22 – 25; R. 38, ll. 1 – 25; R. 39, ll. 1 – 18.

On cross examination, Potts said he decided which photographs to download, and he downloaded nine pictures although he admitted that the camera held more than nine pictures. There were pictures of him on the camera as well. R. 39, ll. 20 – 25; R. 40, ll. 1 – 25; R. 41, ll. 1 – 25. Potts testified that the photographs he took to the police had the wrong date stamp of three o'clock A.M., and the pictures had been taken before he arrived at home around one o'clock A.M. He said the clock on the camera was wrong. R. 42, ll. 1 – 25.

Defense counsel argued at the close of the proffer that there was a genuine question as to the authenticity of the photographs. R. 42, ll. 25; R. 43, ll. 1 – 10. The judge ruled that the photographs met the definition of 'original' as defined in Rule 1001, SCRE. He overruled defense counsel's motion. R. 43, ll. 1 – 25; R. 44, ll. 1 – 25.

Corporal Allison Moore of the Newberry Police Department testified that she responded to the call at Potts' home regarding the burglary. R. 79, ll. 1 – 25; R. 80, ll. 1 – 12. Potts showed her the deer camera and she saw the image of a person on the camera, but could not identify the person. R. 80, ll. 13 – 25.

Potts was unable to download the photographs from the camera onto a disk that day, so she told him to go ahead and download it at the Blue Moon and bring it to the police department which

he did the next day. Corporal Moore never had the camera or disk in her possession. R. 82, ll. 1 – 25; R. 84, ll. 1 – 25; R. 85, ll. 1 – 5.

On cross examination, Corporal Moore stated that she did not obtain any fingerprints, did not try to obtain any DNA, and did not take any pictures of the crime scene. R. 85, ll. 6 – 25; R. 86, ll. 1 – 25; R. 87, ll. 1 – 25. She did not see an entry into the home. R. 88, ll. 13 – 15. She saw the image of a person on the computer but she did not collect or take the computer into police possession because she said it was Potts' personal computer. She did nothing to preserve the image she saw on the camera. She did not check the time stamp on the camera. R. 89, ll. 1 – 25; R. 90, ll. 1 – 25; R. 91, ll. 1 – 25. She admitted that she left the **only** piece of evidence from this crime, the photographs on the deer camera, with Potts and did nothing to preserve the evidence for trial. R. 95, ll. 1 – 25; R. 96, ll. 1 – 13.

Rule 1001 (3), SCRE, provides: “an original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original”.

Rule 1003, SCRE, provides concerning the admissibility of duplicates that a “duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”

Rule 1002, SCRE, provides: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.”

The question of whether to admit evidence under the “Best Evidence Rule” is addressed to the discretion of the trial court. State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009).

For an error of law to warrant reversal based on the exclusion of evidence, the appellant must prove the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the verdict was influenced by the lack of the evidence. State v. Halcomb, Id.

The Court of Appeals held that the photographs were originals pursuant to Rule 1001, SCRE, and that the trial court correctly admitted them as originals. Thus Rule 1003 was not relevant to the court's analysis. App. 9 -10. The Court of Appeals misapprehended the issue because the photographs were not stored in the computer but on a deer camera. The victim downloaded nine photographs from the camera to a laptop computer at the restaurant. The photographs were then "burned" onto a disk or CD. That was the DVD the victim provided to the police. Therefore, the authenticity of the photographs remained a question because the photographs were not originals. R.37, ll. 22 – 25; R.38, ll. 1 – 25; R.39, ll. 1 – 18.

ARGUMENT III

The Court of Appeals erred in affirming the trial court when it denied appellant's post trial motion for a new trial on the burglary first charge when all of the elements of burglary first were not met when the jury found appellant not guilty of petty larceny which meant the intent to commit a crime element was not proven.

Defense counsel filed a post trial motion asking the judge for a new trial or reconsideration of the sentence. Counsel argued a new trial was warranted because all of the elements for burglary first were not met because the intent to steal was not proven after the jury found Mitchell not guilty of the petit larceny. R. 136.

Counsel wrote that the inferred conduct showing intent to steal was that someone stole beer and coins. However, the jury rejected that by returning a verdict of not guilty as to the crime of petit larceny. R. 140. Counsel asked the trial judge to act as the "Thirteenth Juror" by vetoing the verdict and granting a new trial. R. 140-141. Judge Hill denied the motion by order on May 7, 2010.

S.C. Code Section 16-11-311(A) provides:

A person is guilty of burglary in the first degree if the person enters a dwelling without consent **and** with the intent to commit a crime in the dwelling, and either:

In South Carolina, a trial judge may grant a new trial following a jury verdict under the "Thirteenth Juror" doctrine, which entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts. Lane v. Gilbert Construction Company, LTD., 383 S.C. 590, 681 S.E.2d 879 (2009).

Under the "Thirteenth Juror" doctrine, which is the standard for granting a new trial in state law actions, the trial judge essentially sits as the thirteenth juror and may grant a new trial based

solely upon the facts if he finds that the evidence does not justify the verdict. Norton v. Norfolk Southern Railway Company, 350 S.C. 473, 567 S.E.2d 851 (2002). Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Id.

The trial judge should have granted a new trial because the jury basically nullified the burglary first guilty verdict when they found Mitchell not guilty of the petit larceny. The jury heard the law as defined by the state and the judge in his jury charge so they knew that the intent to commit a crime was required for the burglary first conviction. R. 116, ll. 1 – 25; R. 117 – 230.

The Court of Appeals held that Mitchell's argument referenced the "inconsistent verdict" theory which has been abolished. The Court held that the statute for burglary first degree requires that the person enters the dwelling with the intent to commit a crime. Because the photograph showed the person with a bag and flashlight, the jury could have inferred the person intended to commit a crime. App. 10 – 11.

The Court of Appeals misapprehended the issue because Mitchell was not alleging inconsistent verdict. He argued that the elements for burglary first were not proved. The trial judge should have granted a new trial because the jury basically nullified the burglary first guilty verdict when they found Mitchell not guilty of the petit larceny. The jury heard the law as defined by the state and the judge in his jury charge so they knew that the intent to commit a crime was required for the burglary first conviction. R.116, ll. 1 – 25; R. 117 – 230.

CONCLUSION

Based on the above, certiorari should be granted, the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is fluid and cursive, with the first name "LaNelle" being particularly prominent.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 28th day of January, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5009 (S.C. Ct. App. filed 7/25/2012)
09-GS-36-00037, 00039

THE STATE,

RESPONDENT,

V.

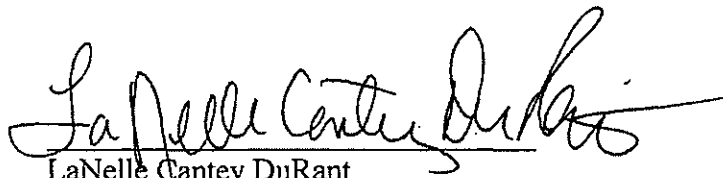
BENNIE MITCHELL,

PETITIONER

APPELLATE CASE NO. 2012-213463

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, this 28th day of January, 2013.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of January, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

FEB 27 2013

S.C. Supreme Court

Appeal From Newberry County
 On Petition for Writ of Certiorari to the Court of Appeals
 The Honorable D. Garrison Hill, Circuit Court Judge
 Appellate Case No. 2012-213463

THE STATE,

Respondent,

vs.

BENNIE MITCHELL,

Petitioner.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
 TO THE COURT OF APPEALS**

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QUESTIONS PRESENTED**I.**

Did the Court of Appeals err in affirming the circuit court's ruling that a witness could identify Mitchell as the person in the deer camera photographs based on the witness' personal knowledge of Mitchell over a twenty year period of living in the same community?

II.

Did the Court of Appeals err in finding the circuit court did not abuse its discretion in allowing into evidence a disk of photographs the victim prepared and turned over to police?

III.

Did the Court of Appeals err in affirming the circuit court denial of Mitchell's new trial motion on the first degree burglary charge based on the jury's acquittal of Mitchell on the petty larceny charge?

STATEMENT OF THE CASE

Respondent concurs with the "Procedural History" portion of Petitioner's Statement of the Case.

STATEMENT OF FACTS

In the early morning hours of October 27, 2008, Stephen Potts ("Potts"), returned to his home in Newberry County, South Carolina, and realized someone broke into the house while he was gone. When he checked a motion-activated deer camera on top of his refrigerator, Potts saw photographs of a man in the kitchen. A police officer subsequently identified the man in the photographs as Petitioner Bennie Mitchell ("Mitchell").

In January 2009, the Newberry County Grand Jury indicted Mitchell on one count of first degree burglary, one count of possession of burglary tools, and one count of enhancement of larceny.¹ In February 2010, the Grand Jury also indicted Mitchell on one count of petit larceny. (Record on Appeal [R.], pp. 146-151). The matter was called for a jury trial on April 29, 2010, before the Honorable D. Garrison Hill, Circuit Court Judge.

Prior to trial, Mitchell moved to require the State to establish the authenticity and foundation for the photographs from Potts' deer camera. The circuit court denied the request to conduct that inquiry pre-trial, but indicated Mitchell could object at the appropriate time during trial. (R., pp. 7-10).

Mitchell also moved to exclude testimony from Lieutenant Roy McClurkin ("Lt. McClurkin"), of the Newberry Police Department, regarding his identification of Mitchell as the person in the photographs from Potts' deer camera. He contended the testimony was a lay opinion, the jury could determine whether he was the person in the photographs without the testimony, and allowing the testimony would be unduly prejudicial because of Lt. McClurkin's police officer status. The circuit court denied the motion, finding the proposed

¹The enhancement of larceny indictment was *nolle prossed* on April 21, 2010.

testimony met the requirements for admissibility under Rule 701, SCRE. The court further found the testimony's probative value outweighed any prejudice to Mitchell, but excluded similar testimony from other police officers as cumulative and prejudicial. (R., pp. 10-29).

Potts testified he lived in Newberry County in October 2008, and due to some break-ins at his home, he mounted a motion-activated deer camera on top of his refrigerator. When he returned home from work at approximately 1:00 a.m. on October 28, 2008, he noticed the window next to his back door was messed up. He went inside and checked the camera, which had taken photographs of someone in the kitchen that night. He contacted the police and told them what he found. (R., pp. 30-33).

Mitchell objected to admission of the disk containing the photographs, arguing it was not the "original" as required by the South Carolina Rules of Evidence, and there was a genuine issue regarding the original's authenticity. Potts testified *in camera* that he had possession of the deer camera from the time he returned home on the night in question until he took it to his business and personally downloaded the photographs to his computer, and he was present when his girlfriend used the computer to put the photographs on a disk. He then identified the photographs on the disk as the ones he downloaded directly from the camera. (R., pp. 34-42).²

The circuit court overruled Mitchell's objection, finding the photographs on the disk were data stored in a computer put in a format readable by sight, and were "originals" as defined in Rule 1001, SCRE. (R., pp. 42-44). Potts then testified before the jury about the photographs, and stated he did not know the person in the photographs. He testified

²State's Exhibit 1 (CD) was transported to the Court of Appeals for consideration.

approximately \$100 in quarters, some clothing and some beer were taken from his home. (R., pp. 45-60).

Corporal Allison Moore ("Cpl. Moore"), of the Newberry Police Department, testified she responded to Potts' residence on October 28, 2008, and he showed her the photographs on the deer camera. Potts was unable to download the photographs at his residence, but told her he could download them on the computer at his business. She advised him to bring the photographs to the police department after he got them downloaded, and he brought a disk containing the photographs to the department later that day. (R., pp. 79-85).

Lt. McClurkin testified Potts and Cpl. Moore came to his office the afternoon of October 28, 2008, and asked him if he recognized the person in the photographs from Potts' deer camera. He brought the photographs up on his office computer, and recognized Mitchell as the person in the photographs. Lt. McClurkin testified, over Mitchell's objection, he knew Mitchell from living in Newberry for over twenty years. (R., pp. 100-104).

The jury convicted Mitchell of first degree burglary and possession of burglary tools, and acquitted him of petty larceny. (R., pp. 131-132). Mitchell moved for a new trial on the ground the State failed to establish all elements of the burglary charge because the jury acquitted him of petty larceny. (R., pp. 136-137). The circuit court denied the motion, and this appeal followed. (R., p. 144).

The South Carolina Court of Appeals affirmed Mitchell's conviction. The Court found no error in admitting Lt. McClurkin's identification testimony because it was based on his first-hand knowledge of Mitchell, and the testimony simply indicated the basis was being in the same community for twenty years. As to the photographs, the Court found the

photographs from the disk were originals pursuant to Rule 1001, SCRE, and Mitchell had amply opportunity to cross-examine Potts and the police officers regarding the handling of the photographs and disk. The Court further found the circuit court did not err in denying Mitchell's new trial motion because there was evidence to support the jury's verdict. (Appendix, pp. 1-11). By Order filed October 25, 2012, the Court denied Mitchell's Petition for Rehearing. On January 28, 2013, Mitchell filed a Petition for Writ of Certiorari, asking this Court to review and reverse the Court of Appeals decision.

ARGUMENT

I. The circuit court properly allowed Lt. McClurkin to identify Mitchell as the person in the deer camera photographs based on his personal knowledge of Mitchell from living in the same community for twenty years.

Mitchell contends the circuit court erred in allowing Lt. McClurkin to identify Mitchell as the person in the photographs from Potts' deer camera. Relying on State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), he argues the identification constituted inadmissible lay opinion testimony.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Wright, 391 S.C. 436, 706 S.E.2d 324, 326 (2011) (*citing* State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 [2002]); State v. Fripp, 396 S.C. 434, 721, S.E.2d 467, 467 (Ct. App. 2012) (same). An abuse of discretion occurs when the trial court's ruling is based on an error of law, or is without evidentiary support when grounded on factual conclusions. Wright, 706 S.E.2d at 326 (*citing* Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 [2000]).

The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Rule 701, SCRE; *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49, 54 (1996); 31A Am.Jur.2d Expert and Opinion Evidence §30; 23 C.J.S. Criminal Law §1050. Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense they will be of no value to the jury. Williams, 469 S.E.2d at 54.

“The terms ‘fact’ and ‘opinion’ denote merely a difference of degree of concreteness of description.” *Id.* (*citing* McCormick on Evidence, 12 [3rd Ed.1984]). Some statements

are impressions drawn from collected, observed facts, rather than mere opinions, and a natural inference based on stated facts is not opinion evidence. *Id.* “Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge.” *Id.*

Lt. McClurkin personally knew Mitchell based on twenty years of living in the same community. Therefore, his identification of Mitchell from the deer camera photographs was a natural inference based on observed facts rather than mere “opinion” testimony.

Even if the identification testimony constituted lay opinion evidence, however, the circuit court properly admitted it. A lay witness may give an opinion regarding the identity of a person in a surveillance photograph if there is some basis for concluding the witness is more likely to correctly identify the person from the photograph than the jury. *See United States v. Ellis*, 121 F.3d 908, 926-927 (4th Cir. 1997) (*citing United States v. Robinson*, 804 F.2d 280 [4th Cir. 1986]); *see also United States v. Pierce*, 136 F.3d 770, 774-75 (11th Cir. 1998) (discussing similar cases from other circuits, and holding probation officer’s identification of defendant from surveillance photograph was admissible); *Hardy v. State*, 804 So.2d 247, 268-269 (Ala. Ct.Crim.App. 1999) (police officers’ identification of defendant as person in surveillance videotape was properly admitted even though officers did not know defendant prior to the crime); *State v. Benton*, 567 So.2d 1067 (Fla. 2d. D.C.App. 1990). “[T]estimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants.” *United States v. Allen*, 787 F.2d 933, 936 (4th Cir.1986), *vacated on other grounds*, 479 U.S. 1077 (1987); *see also Fripp*, 721 S.E.2d at 467-468 (citing *Allen*).

Mitchell's reliance on Herring is misplaced. In Herring, the lay witnesses, none of whom personally witnessed the incident but viewed a videotape of it, testified a flash of light coming from inside the defendant's vehicle was a gunshot. The defendant objected and moved for a mistrial on the ground the witnesses did not personally observe the events. The trial court denied the mistrial motion, and gave a curative instruction to the jury to the effect the witnesses could not give an opinion about whether the flash of light was a gunshot, which was a question for the jury's determination. The Supreme Court affirmed, finding the curative instruction cured any prejudice from the witnesses' testimony regarding the flash of light. 692 S.E.2d at 498.

There was no evidence the witnesses in Herring had any prior experience with gunshots, or any special knowledge about muzzle flashes associated with gunshots, that would assist the jury in determining whether the flash of light inside the defendant's car was from a gunshot. In this case, however, Lt. McClurkin's identification testimony was based on his personal knowledge of Mitchell after a twenty year history with him in the community, which was undisputed. The photographs at issue were grainy black and white photographs taken with infrared lighting, his twenty year history with Mitchell made it more likely Lt. McClurkin could correctly identify the person in the photographs, and his testimony could assist the jury.³ (State's Exhibit 1 [CD]). Therefore, the Herring analysis is inapplicable.

Mitchell correctly notes the circuit court expressed concern about the potential prejudice from having a police officer identify Mitchell as the person in the photographs.

³Lt. McClurkin's testimony was also relevant, and indeed critical, to show how the police investigation developed Mitchell as a suspect.

The court then found the probative value of Lt. McClurkin's testimony outweighed the potential prejudice, but excluded testimony from another police officer who also recognized Mitchell. (R., pp. 20-21, 25, 27). The court clearly conducted the appropriate Rule 403, SCRE, probative value/prejudice analysis, and its ruling is supported by the record.

Lt. McClurkin simply testified he knew Mitchell from "living in Newberry for over 20 years and he (sic) living in the community of Newberry also." (R., p. 104). He did not even imply he knew Mitchell through his position as a police officer, or that Mitchell had prior interaction with law enforcement. Therefore, the potential prejudice from having a police officer identify Mitchell in the photographs was minimized by the content of Lt. McClurkin's actual testimony.

The circuit court properly exercised its discretion in allowing Lt. McClurkin's testimony identifying Mitchell as the person in the photographs from Potts' deer camera. Accordingly, the Court of Appeals properly affirmed the circuit court's ruling, and the Petition for Writ of Certiorari on this issue should be denied.

II. The circuit court did not abuse its discretion in allowing into evidence a disk of photographs the victim prepared and turned over to police.

Mitchell also contends the circuit court and the Court of Appeals erred regarding the admissibility of the disk containing photographs from Potts' deer camera because the State failed to properly authenticate the photographs. He asserts the photographs were inadmissible because police left the camera with Potts, who downloaded the photographs onto his personal computer and created the disk offered as evidence.

For purposes of the Rules of Evidence, a "photograph" is defined as "still photographs, X-ray films, video tapes, motion pictures or other similar methods of recording information." Rule 1001(2), SCRE. An "'original' of a photograph includes the negative or any print therefrom." Rule 1001(3), SCRE. "If data are stored in a computer **or similar device**, any printout or **other output** readable by sight, shown to reflect the data accurately, is an 'original.'" *Id.* (emphasis added).

Except as otherwise provided by the Rules of Evidence, an original photograph is required to prove its contents. Rule 1002, SCRE (best evidence rule). The question of whether to admit evidence under the best evidence rule is addressed to the trial court's discretion. State v. Halcomb, 382 S.C. 432, 676 S.E.3d 149, 154 (Ct.App. 2009).

Mitchell contends the circuit court abused its discretion in admitting the disk containing the photographs from Potts' deer camera because he challenged the authenticity of the photographs under Rule 1003, SCRE, which governs admissibility of "duplicates." He further contends the Court of Appeals "misapprehended" the issue in affirming the circuit court's ruling, because the photographs were stored on a deer camera rather than a computer,

and they were downloaded from the camera to a laptop computer and then put on a disk. The fallacy of his contentions are laid bare by the plain language of Rule 1001.

As set forth above, Rule 1001(3) expressly provides that in cases involving data “stored in a computer **or any similar device**,” “original” for evidentiary purposes includes “any printout or **other output** readable by sight, shown to reflect the data accurately.” The deer camera was clearly a device similar to a computer in that it stored data. The circuit court expressly determined, and the Court of Appeals agreed, that the disk constituted “other output readable by sight,” and therefore, the disk was an “original” for purposes of the best evidence rule. (R., pp. 42-44). The deer camera was a “similar device,” and the laptop computer was used to store the photographs on the deer camera.

Mitchell does not seriously challenge the validity of the circuit court’s ruling, but merely recites the evidence presented. At most, Mitchell’s argument goes to the weight of the evidence.

Sufficiency of evidence regarding the creation and verification of particular data goes to the weight of the evidence rather than its admissibility, and thus constitutes a question for the jury. State v. McFadden, 318 S.C. 404, 458 S.E.2d 61, 66 (Ct. App. 1995). Where the identity of persons handling evidence is established, evidence regarding its care goes only to its weight as credible evidence. State v. Carter, 344 S.C. 419, 544 S.E.2d 835, 837 (2001).

The sufficiency of the evidence presented regarding how the photographs were created and stored goes its weight rather than admissibility, the Court of Appeals properly affirmed the circuit court’s ruling, and the Petition for Writ of Certiorari on this issue should be denied.

III. The circuit court properly denied Mitchell's new trial motion on the first degree burglary charge because there was ample evidence to support the jury's determination he broke into the victim's home in the nighttime with the intent to commit a crime therein.

Relying on the "thirteenth juror" doctrine, Mitchell contends the circuit court erred in denying his motion for a new trial on the burglary charge, and the Court of Appeals again "misapprehended" the issue. He asserts his acquittal on the petty larceny charge mandated a finding the State failed to prove an intent to commit a crime in Potts' home for purposes of the burglary charge, essentially nullifying the burglary conviction.

Mitchell's effort to distance his argument from the abolished "inconsistent verdicts" doctrine is true smoke and mirrors. In essence, he argues the verdicts on the burglary and petty larceny charges were inconsistent because the jury's determination he did not steal anything from Potts' home necessarily leads to the conclusion he did not enter Potts' home with the intent to commit a crime.

Generally, the grant or refusal of a new trial is within the trial judge's discretion and will not be disturbed on appeal without a clear abuse of discretion. State v. Smith, 316 S.C. 53, 447 S.E.2d 175, 176 (1993); State v. Garrett, 350 S.C. 613, 567 S.E.2d 523, 526 (Ct.App. 2002). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Hughes, 346 S.C. 339, 552 S.E.2d 35, 36 (Ct.App. 2001).

In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the Supreme Court abolished the rule prohibiting inconsistent verdicts. See Wertz v. State, 349 S.C. 291, 562 S.E.2d 654, 657 (2002); see also Garrett, 567 S.E.2d at 526 (same). Citing United States v. Powell, 469 U.S. 57 (1984), the Court acknowledged "a jury might merely be lenient towards

a defendant when it refuses to convict him of all counts,” and “the government has no recourse to attack the inconsistency by arguing on appeal for conviction on all counts.” Alexander, 401 S.E.2d at 149-150. Therefore, even if the verdicts in this case are inconsistent, and the State submits they are not, a new trial is not required.

As a threshold matter, to establish burglary, the State must prove the defendant entered “without consent and with **the intent** to commit a crime,” S.C. Code §16-11-311(A) (2003) (emphasis added). The State is **not** required to prove the defendant actually committed a separate crime after entry. As the Court of Appeals noted, the jury may well find the defendant intended to commit a crime at the time he entered the building, but failed to complete a separate criminal offense after he entered. Significantly, Mitchell concedes the circuit court properly instructed the jury regarding the elements of burglary, including the requirement that the jury find Mitchell **intended** to commit a crime at the time he entered Potts’ home, even if he abandoned that intent after entry occurred and the intended crime was **not** completed. (R., pp. 124-125, 130).

It is undisputed Mitchell did not have consent to enter Potts’ home. Once the jury determined Mitchell was the person who entered the home, it could infer he intended to commit a crime therein from the circumstances, including the time of entry and the fact he had a flashlight and a bag in his hands when he walked into the kitchen.

Even though it clearly found Mitchell intended to commit a crime when he entered Potts’ home, the jury could, and apparently did, find there was insufficient evidence he actually committed a separate crime after he entered the home. Such a finding mandated acquittal on the petty larceny charge, but did not preclude conviction on the burglary charge

or require a new trial.⁴ Therefore, the Court of Appeal properly affirmed the circuit court's denial of Mitchell's new trial motion, and the Petition for Writ of Certiorari on this issue should be denied.

⁴Noise from the camera or outside the home could have made Mitchell leave before he took anything. Also, there was some confusion regarding when the missing items were taken because there were earlier break-ins at Potts' home.

CONCLUSION

Based on the foregoing, Respondent respectfully submits the Petition for Writ of Certiorari to the Court of Appeals should be denied in its entirety.

Respectfully submitted,

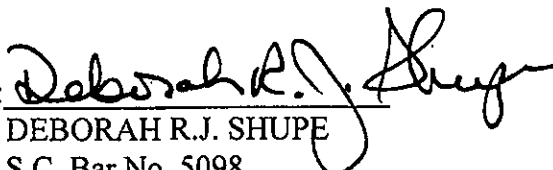
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ATTORNEYS FOR RESPONDENT

February 27, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

FEB 27 2013

Appeal From Newberry County
 On Petition for Writ of Certiorari to the Court of Appeals
 The Honorable D. Garrison Hill, Circuit Court Judge
 Appellate Case No. 2012-213463

S.C. Supreme Court

THE STATE,

Respondent,

vs.

BENNIE MITCHELL,

Petitioner.

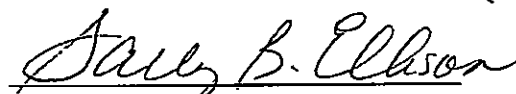
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
 South Carolina Commission on Indigent Defense
 Division of Appellate Defense
 PO Box 11589
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I further certify all parties required by Rule to be served have been served.

This 27th day of February, 2013.



SALLY B ELLISON

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The Supreme Court of South Carolina

The State, Respondent,

v.

Bennie Mitchell, Petitioner.

Appellate Case No. 2012-213463

Lower Court Case No's. 2009GS3600037;

2009GS3600036; 2009GS3600038 and

2009GS3900039

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012). We deny the petition.


C.J.
FOR THE COURT

Columbia, South Carolina

March 6, 2014

cc: The Honorable Jenny Abbott Kitchings
Deborah R. Shupe, Esquire
Salley W. Elliott, Esquire
LaNelle Cantey DuRant, Esquire
The Honorable Jackie S. Bowers
The Honorable Harold P. Welborn, Jr.

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSION
COUNTY OF NEWBERRY) 2009-GS-36-37, 38, 39

STATE OF SOUTH CAROLINA)
) VS.) TRANSCRIPT OF RECORD
)
BENNIE MITCHELL)
) DEFENDANT)

APRIL 19, 2010
NEWBERRY, SOUTH CAROLINA

B E F O R E:

HONORABLE D. GARRISON HILL, JUDGE.

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

AUSTIN MCDANIEL, ASSISTANT SOLICITOR
ATTORNEY FOR THE STATE

MATHIAS CHAPLIN, ESQ.
ATTORNEY FOR THE DEFENDANT

JOY E. HOLSTON
OFFICIAL COURT REPORTER

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

(DW) - DENOTES DEFENSE WITNESS
(SW) - DENOTES STATE'S WITNESS

(SW) STEPHEN POTTS

DIRECT EXAMINATION BY MR. MCDANIEL:	83
PROFFER DIRECT EXAMINATION BY MR. MCDANIEL:	90
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REDIRECT EXAMINATION BY MR. MCDANIEL:	123
RECROSS EXAMINATION BY MR. CHAPLIN:	131

(SW) ALLISON MOORE

DIRECT EXAMINATION BY MR. MCDANIEL:	131
CROSS-EXAMINATION BY MR. CHAPLIN:	138
REDIRECT EXAMINATION BY MR. MCDANIEL:	151

(SW) ROY MCCLURKIN

DIRECT EXAMINATION BY MR. MCDANIEL:	153
CROSS-EXAMINATION BY MR. CHAPLIN:	164

1	<u>(DW) DR. TOM ALLEY</u>	
2	DIRECT EXAMINATION BY MR. CHAPLIN:	172
3	VOIR DIRE EXAMINATION BY MR. MCDANIEL:	174
4	CONTINUE DIRECT EXAMINATION BY MR. CHAPLIN:	176
5	CROSS-EXAMINATION BY MR. MCDANIEL:	181
6		
7	<u>(DW) DONALD KNEECE</u>	
8	DIRECT EXAMINATION BY MR. CHAPLIN:	186
9	VOIR DIRE EXAMINATION BY MR. MCDANIEL:	190
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14	JURY CHARGE:	218
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EXHIBITSSTATE'S

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1 THE COURT: YES SIR, MR. MCDANIEL.

2 MR. MCDANIEL: THANK YOU, YOUR HONOR. THIS IS THE
3 STATE OF SOUTH CAROLINA VERSUS BENNIE MITCHELL.
4 INDICTMENT 2009-GS-36-37, BURGLARY FIRST DEGREE; 38 IS A
5 LARCENY THIRD OFFENSE, 39 IS POSSESSION OF BURGLARY TOOLS.
6 THIS IS A DEFENSE MOTION, I BELIEVE THERE ARE A NUMBER OF
7 PRETRIAL MOTIONS. BEFORE WE GET STARTED THE STATE, WE
8 HAVE HIM REINDICTED. IT LOOKS LIKE THE FIRST INDICTMENT
9 THAT I MENTIONED, THE 2009-GS-36-038 IS AN INDICTMENT FOR
10 LARCENY. THE ACTUAL INDICTMENT IS FOR THE ENHANCEMENT OF
11 A THIRD PROPERTY OFFENSE. SO I REINDICTED HIM FOR JUST
12 PETTY LARCENY, JUDGE. HE NEEDS TO BE ARRAIGNED ON THAT
13 INDICTMENT. HIS DEFENSE COUNSEL HAS SEEN, HE DOES HAVE AN
14 OBJECTION TO, IT LOOKS LIKE THERE IS A SCRIBNER'S ERROR ON
15 THE BACK STATING THAT \$100.00 DOLLARS U.S. CURRENCY WAS
16 STOLEN AND IT WAS ACTUALLY \$70.00 DOLLARS. AND ALSO THERE
17 WAS A PACKAGE OF SOCKS THAT WAS TAKEN AND IT LOOKS LIKE
18 THAT WAS A SEPARATE INCIDENT AND IT WAS INCLUDED IN THE
19 INDICTMENT BY ERROR. WE ARE NOT GOING FORWARD ON THE
20 SECOND SEPARATE INCIDENT, JUDGE. IT LOOKS LIKE THE
21 \$100.00 DOLLARS SHOULD BE \$70.00 DOLLARS AND THE PACKAGE
22 OF SOCKS SHOULD BE OMITTED.

23 MR. CHAPLIN: YOUR HONOR, IF I MAY ADDRESS THE COURT.
24 ATTORNEY MATHIAS CHAPLIN FOR THE DEFENDANT, BENNIE
25 MITCHELL. THAT IS CORRECT, I WOULD LIKE TO HAVE THE

1 ENHANCEMENT OF LARCENY THIRD OR GREATER, I WOULD LIKE TO
2 HAVE THAT NOLLE PROS WITH A NEW INDICTMENT AND HAVE HIM
3 ARRAIGNED ON THAT. HOWEVER, I DO HAVE SOME CONCERNS WITH
4 THE LANGUAGE IN THE NEW INDICTMENT. AND THAT IS, LIKE MR.
5 MCDANIEL POINTED OUT, THE INCIDENT REPORT FROM THIS
6 INCIDENT STATED THAT THE ONLY THING THAT WAS STOLEN WAS
7 FOUR TO FIVE CANS OF BEER. AND THEN IT GOES DOWN AT THE
8 BOTTOM OF THE REPORT AND SAYS THAT MR. POTTS CALLED BACK
9 AND SAID THAT \$70.00 DOLLARS IN COINS HAD BEEN STOLEN ON
10 THE 28TH OF THAT YEAR. NOW, I DON'T KNOW IF THAT IS
11 ANOTHER INCIDENT OR IF THAT IS CONSIDERED TO BE THE TIME
12 THAT HE LOST THE FOUR TO FIVE CANS OF BEER. THAT IS NOT
13 CLEAR, THEREFORE I WOULD ASK THAT THE INDICTMENT ONLY SHOW
14 FOUR TO FIVE CANS OF BEER.

15 THE COURT: OKAY, SIR.

16 MR. MCDANIEL: THE STATE'S POSITION IS THAT IT SHOULD
17 SAY \$70.00 DOLLARS AND WE DO ADMIT THAT THE PACKAGE OF
18 SOCKS SHOULD BE OMITTED.

19 MR. CHAPLIN: AND, YOUR HONOR, I AM LOOKING AT THE
20 INCIDENT REPORT. AND THERE ARE SEVERAL INCIDENTS ON THIS
21 REPORT WHICH MAKES IT CONFUSING. BUT AT THE TIME OF THE
22 INCIDENT, AT THE TOP OF THE PAGE IT SAYS 10/27/08 AND AT
23 THE BOTTOM THERE IS AN ADDITION THAT SAYS ON 10/28/08
24 \$70.00 DOLLARS IN COINS WAS STOLEN. I ARGUE THAT THAT IS
25 NOT RELEVANT TO THIS MATTER.

1 MR. MCDANIEL: JUDGE, FACTUALLY SPEAKING THE INCIDENT
2 TAKES PLACE ON 10/27 AND 10/28. AND THIS CLEARLY HAPPENED
3 WITHIN THE 28TH OR THE 27TH. IT HAPPENED SOMETIME
4 BETWEEN, YOU KNOW, 11:00 O'CLOCK AT NIGHT THROUGH PAST
5 MIDNIGHT. AND THE INCIDENT REPORT REFLECTS THAT IT
6 HAPPENED DURING THAT PERIOD OF TIME. HIS CONCERN IS THAT
7 THE VICTIM IN THIS CASE CALLS LAW ENFORCEMENT BACK A
8 COUPLE OF DAYS LATER AND SAID, LOOK I REALIZE THAT SOME
9 CHANGE IN MY ROOM WAS ALSO TAKEN. WHILE WE HAVE IT AS A
10 \$100.00 DOLLARS THE INCIDENT REPORT SHOWS THAT IT WAS
11 \$70.00 DOLLARS.

12 THE COURT: MAY I SEE THE INDICTMENT.

13 MR. MCDANIEL: YES, SIR.

14 MR. CHAPLIN: YOUR HONOR, DO YOU HAVE A COPY OF THE
15 INCIDENT REPORT?

16 THE COURT: NO SIR, I DON'T HAVE ANYTHING. THIS IS
17 ON INDICTMENT NUMBER 10-GS-36-87. THE STATE WISHES TO
18 AMEND THE INDICTMENT TO ALLEGE THAT THE AMOUNT OF MONEY
19 WAS \$70.00 DOLLARS. AND WHAT OTHER DETAIL?

20 MR. MCDANIEL: THE PACKAGE OF SOCKS, JUDGE, SHOULD
21 NOT HAVE BEEN INCLUDED.

22 THE COURT: AND, MR. CHAPLIN, ON BEHALF OF MR.
23 MITCHELL DO YOU CONTEND THAT THE INCIDENT REPORT ALLEGES
24 CERTAIN ITEMS OF PERSONAL PROPERTY THAT WOULD MORE
25 CORRESPOND TO A FACTUAL SETTING THAN WHAT THE INDICTMENT

1 ALLEGES. IS THAT THE SITUATION?

2 MR. CHAPLIN: YOUR HONOR, YES, WHAT I AM SAYING IS
3 THAT THERE ARE SEVERAL DIFFERENT INCIDENCES ON THAT ONE
4 REPORT. AND I AM NOT QUITE SURE WHAT THE LOGIC BEHIND
5 THAT WAS. HOWEVER, THE ONLY THING THAT MY CLIENT IS
6 CHARGED WITH IS SOMETHING THAT OCCURRED ON 10/27. AND
7 THERE ARE THINGS THAT OCCURRED PRIOR TO THAT DATE AND
8 THERE ARE DATES THAT HE CALLED ON THE 30TH OF OCTOBER AND
9 SAID SOMETHING THAT HE IS ALSO MISSING \$70.00 DOLLARS. I
10 DON'T KNOW IF SOMEONE ELSE REENTERED HIS HOME, TOOK THE
11 MONEY, WHATEVER THE CASE MIGHT BE. WE ARE HERE SAYING
12 THAT THAT SHOULD BE FOUR TO FIVE CANS OF BEER.

13 THE COURT: I DON'T KNOW OF ANY AUTHORITY THAT I
14 WOULD HAVE TO AMEND THE INDICTMENT OVER OBJECTION ON THESE
15 FACTUAL MATTERS, MR. MCDANIEL. DO YOU HAVE ANY AUTHORITY
16 YOU ARE RELYING ON. I AM NOT CONCERNED ABOUT THE DATES,
17 THAT IS SOMETHING THAT THE JURY WOULD HAVE TO DETERMINE.
18 I DON'T THINK WHAT IT IS ON OR ABOUT THE 27TH DAY OF
19 OCTOBER OF 2008, THAT WOULD BE SOME KIND OF FAVORABLE
20 MATTER. BUT NEVERTHELESS, AS FAR AS THE PERSONAL PROPERTY
21 TAKEN IN THE ALLEGED LARCENY HOW CAN I AMEND THE ACTUAL
22 DESCRIPTION OF THE PROPERTY ON THE BASIS OF A SCRIBNER'S
23 ERROR ON SOME ITEMS THAT THE GRAND JURY FOUND AND THEN
24 AMENDING THE AMOUNTS OF MONEY THAT THE GRAND JURY ALSO
25 FOUND.

1 MR. MCDANIEL: JUDGE, I MEAN THE MONEY I THINK, I
2 BELIEVE THAT THE \$100.00 DOLLARS, I KNOW THEY WERE TRYING
3 TO GET THAT AMENDED TO \$70.00 AND I THINK THAT WAS MORE
4 THAN I AGREED, IT SHOULD OF BEEN \$70.00. I DON'T THINK
5 THAT WOULD AFFECT YOUR ABILITY TO CHANGE IT. I DON'T KNOW
6 THAT YOU HAVE TO BECAUSE ALL WE CAN PROVE IS \$70.00. AND
7 I THINK THE ARGUMENT IS THAT THE JURY IS NOT GOING TO, TO
8 GET THE INDICTMENT AND IT WAS JUST AN ERROR THAT WAS
9 \$70.00 AND IT SHOULD OF BEEN, IT IS \$100.00 AND IT SHOULD
10 OF BEEN \$70.00 DOLLARS. I BELIEVE YOUR HONOR, IF YOU
11 THOUGHT IT APPROPRIATE, CHANGE THAT \$70.00 DOLLARS. AT
12 LEAST INSTRUCT THE JURY THAT IT WAS \$70.00 DOLLARS. THE
13 SOCKS, I DON'T KNOW, I MEAN I AM NOT RELYING ON ANY
14 AUTHORITY THAT WAS JUST, IT IS IN THERE BASED ON AN
15 INCIDENT REPORT AND WE ARE NOT GOING FORWARD ON THE SOCKS
16 AND WE NEVER ALLEGED THAT THE SOCKS WERE TAKEN DURING THIS
17 INCIDENT DATE. IT IS A SCRIBNER'S ERROR, YOUR HONOR HAS
18 THE ABILITY TO AMEND THE INDICTMENT.

19 THE COURT: ALL RIGHT, WELL, I DON'T THINK THAT IT IS
20 A SCRIBNER'S ERROR BUT I WILL BE GLAD TO REVISIT THAT AT
21 THE DIRECTED VERDICT STAGE IF YOU HAVE OTHER AUTHORITY.
22 BUT I DON'T KNOW OF ANY DECISION THAT WOULD ALLOW ME TO
23 REWRITE THE INDICTMENT. I WILL RESPECTFULLY DENY THE
24 MOTION AT THIS STAGE. OKAY, MR. CHAPLIN, YOU HAD SOME
25 OTHER MOTIONS. I KNOW YOU WROTE ME SEVERAL WEEKS AGO AND

1 I THINK I RESPONDED THAT WE WOULD TAKE THEM UP. I WILL BE
2 GLAD TO HEAR YOU.

3 MR. MCDANIEL: YOUR HONOR, WE JUST NEED TO GET HIM
4 ARRAIGNED ON THAT INDICTMENT.

5 MR. CHAPLIN: YOUR HONOR.

6 THE COURT: YES.

7 MR. CHAPLIN: SO, MY CONCERN WITH THIS MATTER BEFORE
8 YOU RIGHT NOW IS WE ARE GOING TO NOLLE PROS THE INDICTMENT
9 THAT IT HAS THE ENHANCEMENT OF LARCENY THIRD OR GREATER.
10 AND ARRAIGNING HIM ON A NEW INDICTMENT, I HAVE SERIOUS
11 CONCERNS ABOUT THE WRITING IN THAT NEW INDICTMENT. AND I
12 AM STILL NOT CLEAR ON EXACTLY HOW WE SHOULD PROCEED WITH
13 THAT. I AM TROUBLED BY ARRAIGNING HIM ON SOMETHING THAT
14 IS INACCURATE.

15 THE COURT: I DON'T KNOW IF IT IS ACCURATE OR NOT,
16 HOW COULD I POSSIBLY KNOW IF IT IS ACCURATE OR NOT.

17 MR. CHAPLIN: YOUR HONOR, I AM BASING IT ON THE
18 INCIDENT REPORT.

19 THE COURT: I DON'T KNOW WHAT THE GRAND JURY HEARD.
20 I MEAN, WHAT ARE YOU ASKING ME TO DO.

21 MR. CHAPLIN: I GUESS WHAT I WOULD LIKE TO DO IS
22 REFLECT WHAT IS IN THE INCIDENT REPORT.

23 THE COURT: BUT I DON'T KNOW WHAT THE GRAND JURY
24 HEARD SO I DON'T KNOW, YOU KNOW, I GUESS YOU ARE ASKING ME
25 TO QUASH THE INDICTMENT. IS THAT WHAT YOU ARE ASKING ME

1 TO DO?

2 MR. CHAPLIN: WELL, YOUR HONOR, MY ORIGINAL ISSUE
3 INVOLVING THIS MATTER, I FELT THAT THE INDICTMENT STATING
4 THAT MR. MITCHELL HAS PRIOR CONVICTIONS WILL BE EXTREMELY
5 PREJUDICIAL. THAT IS WHY WE WOULD LIKE TO HAVE IT SAY
6 PETTY LARCENY. THE ONLY PROBLEM IS THAT THE PETTY LARCENY
7 INDICTMENT IS INCORRECT.

8 THE COURT: WELL, THE GRAND JURY RETURNED IT, IT IS
9 PRESUMABLY VALID. FOR THE COURT TO SAY THAT IT IS INVALID
10 AND INCORRECT WILL BE A STEP THAT I COULDN'T TAKE AT THIS
11 STAGE. I MEAN HE GOES TO TRIAL ON THE INDICTMENT AND HE
12 IS EITHER FOUND GUILTY OR NOT GUILTY OR IS DISMISSED AT
13 SOME STAGE. BUT I DON'T KNOW OF ANY BASIS ON WHICH I CAN,
14 ON THE BASIS OF AN INCIDENT REPORT, TURN AROUND AND
15 DISMISS AN INDICTMENT THAT CONFLICTS WITH THE INCIDENT
16 REPORT. BECAUSE THAT HAPPENS ALL THE TIME, DOESN'T IT?

17 MR. CHAPLIN: I AM NOT SURE IF IT HAPPENS ALL THE
18 TIME, YOUR HONOR, I AM JUST CONCERNED THAT THE LANGUAGE IN
19 THAT INDICTMENT, MY UNDERSTANDING IS THAT YOUR HONOR HAS
20 THE ABILITY TO CORRECT THE LANGUAGE.

21 THE COURT: I CAN CORRECT A SCRIBNER'S ERROR AND I
22 HAVE ALREADY DECLINED TO DO THAT. SO, AT THIS POINT, IF
23 THE STATE CALLS THE CASE FOR TRIAL I DON'T KNOW OF ANY WAY
24 THAT I CAN KEEP THEM FROM DOING THAT AT THIS STAGE. THERE
25 IS NO WAY I CAN KEEP HIM FROM DOING THAT IS FROM WHAT HE

1 TOLD ME. BUT I CERTAINLY WILL CONSIDER SOMETHING THAT I
2 MAY OF OVERLOOKED.

3 MR. CHAPLIN: YOUR HONOR, IF THAT IS THE CASE THEN I
4 WOULD BE BETTER WITH BRINGING TO THE COURT'S ATTENTION THE
5 PREJUDICIAL IMPACT OF THIS INDICTMENT, THE ORIGINAL
6 INDICTMENT AND HAVING THE COURT RULE ON THAT.

7 THE COURT: WHAT IS THE STATE'S RESPONSE TO THAT?

8 MR. MCDANIEL: JUDGE, I AM GOING FORWARD ON THE
9 INDICTMENT.

10 THE COURT: SO, THE STATE SAYS THEY ARE GOING FORWARD
11 ON THE INDICTMENT FOR PETTY LARCENY. THAT IS THE CASE?

12 MR. CHAPLIN: THAT IS CORRECT, YOUR HONOR.

13 THE COURT: WHAT OTHER INDICTMENT NUMBER?

14 MR. MCDANIEL: BURGLARY, THAT IS INDICTMENT
15 2009-GS-36-037. AND 2009-GS-36-039 IS POSSESSION OF
16 BURGLARY TOOLS.

17 MR. CHAPLIN: I BEG THE COURT'S INDULGENCE.

18 THE COURT: YES, SIR.

19 MR. MCDANIEL: YOUR HONOR, MAY WE APPROACH?

20 THE COURT: YES, SIR.

21 (WHEREUPON, A BENCH CONFERENCE WAS HELD.)

22 THE COURT: MADAM CLERK.

23 THE CLERK: BENNIE DARRON MITCHELL, IF YOU ANSWER TO
24 THAT NAME HOLD UP YOUR RIGHT HAND.

25 (WHEREUPON, MR. MITCHELL HOLDS UP HIS HAND.)

1 THE CLERK: YOU STAND INDICTED BY THE NAME OF BENNIE
2 DARRON MITCHELL. FOR THAT YOU AT A COURT OF GENERAL
3 SESSIONS, CONVENED ON THE 5TH DAY OF FEBRUARY OF 2010, THE
4 GRAND JURY OF NEWBERRY COUNTY PRESENT UPON THE OATH THAT
5 BENNIE DARRON MITCHELL DID IN NEWBERRY COUNTY, STATE
6 AFORESAID ON OR ABOUT THE 27TH DAY OF OCTOBER, 2008
7 FELONIOUSLY TAKE AND CARRY AWAY THE PERSONAL GOODS OF
8 STEPHEN LEE POTTS OF THE VALUE OF LESS THAN ONE-THOUSAND
9 DOLLARS DESCRIBED AS FOLLOWS: FOUR TO FIVE CANS OF BEER,
10 ONE-HUNDRED DOLLARS UNITED STATES CURRENCY, ONE PACKAGE OF
11 SOCKS WITH INTENT TO DEPRIVE THE OWNER PERMANENTLY OF SUCH
12 GOODS IN VIOLATION OF SECTION 16-13-38 OF THE SOUTH
13 CAROLINA CODE OF LAWS, 1976 AS AMENDED AGAINST THE PEACE
14 AND DIGNITY OF THE STATE AND CONTRARY TO THE STATUTE IN
15 SUCH CASES MADE AND PROVIDED. AND THAT IS SIGNED, JERRY
16 PEACE, SOLICITOR. ARE YOU GUILTY OF THE FELONY WHEREIN
17 YOU STAND INDICTED OR NOT GUILTY?

18 MR. MITCHELL: NOT GUILTY.

19 THE CLERK: ARE YOU READY TO COME TO TRIAL?

20 MR. MITCHELL: YES, MA'AM.

21 THE CLERK: HOW WILL YOU BE TRIED?

22 MR. MITCHELL: A JURY.

23 THE CLERK: GOD SEND YOU TRUE DELIVERANCE.

24 THE COURT: DOES THE STATE HAVE ANYTHING FURTHER AT
25 THIS POINT?

1 MR. MCDANIEL: NO, SIR.

2 THE COURT: YES SIR, MR. CHAPLIN, WHENEVER YOU ARE
3 READY.

4 MR. CHAPLIN: THANK YOU, YOUR HONOR. JUDGE HILL, WE
5 ARE HERE ON THE MATTER REFERRED TO BY ASSISTANT SOLICITOR
6 MCDANIEL, THE STATE VERSUS BENNIE MITCHELL. I FILED A
7 MOTION TO HAVE PRETRIAL MATTERS. PRIOR TO THIS HEARING,
8 YOUR HONOR, I HAVE HAD CONSULTATIONS WITH THE ASSISTANT
9 SOLICITOR AND FOR THE RECORD I WOULD LIKE TO NOTE THAT
10 SOME THINGS HAVE BEEN RESOLVED AND WE DO HAVE SOME ISSUES
11 THAT NEEDED TO BE BROUGHT TO THIS COURT'S ATTENTION FOR
12 GUIDANCE. THE FIRST ISSUE THAT I BROUGHT TO THE COURT'S
13 ATTENTION WAS EXCLUDING THE IN-COURT IDENTIFICATION OF
14 DEFENDANT MITCHELL BY MR. POTTS. AND I THINK THE STATE'S
15 RESPONSE IS--

16 MR. MCDANIEL: WE DO NOT INTEND TO HAVE THE VICTIM
17 IDENTIFY THE DEFENDANT, JUDGE.

18 THE COURT: MR. POTTS IS THE VICTIM?

19 MR. MCDANIEL: YES SIR, STEPHEN LEE POTTS.

20 THE COURT: OKAY.

21 MR. CHAPLIN: SECONDLY, YOUR HONOR, WE FILED A MOTION
22 FOR REDACTION FROM AN IRRELEVANT AND/OR PREJUDICIAL
23 INFORMATION CONTAINED IN THE INCIDENT REPORT RELATED TO
24 THIS MATTER. YOUR HONOR, THE BASIS OF THAT MOTION IS THE
25 FACT THAT THIS INCIDENT REPORT, IN ADDITION TO BE POORLY

1 WRITTEN, CONTAINS NUMEROUS DIFFERENT INCIDENTS THAT HAVE
2 NOTHING TO DO WITH MY CLIENT. AND THE CONCERN, YOUR
3 HONOR, IS THAT THIS INFORMATION MAY BE MISINTERPRETED BY
4 THE JURY AND THEY MAY ASSOCIATE MR. MITCHELL WITH THESE
5 OTHER EVENTS. THEREFORE I WANT TO MAKE SURE THAT THE ONLY
6 ISSUE THAT MR. MITCHELL IS ANSWERING TO IS THE ONE THAT HE
7 WAS INDICTED ON WHICH IS THE INCIDENT THAT OCCURRED ON
8 10/27/08, NOTHING THAT OCCURRED ON 10/18 OR ANYTHING THAT
9 OCCURRED PRIOR TO THAT OR ANYTHING THAT OCCURRED AFTER
10 10/27. AND THE INCIDENT REPORT, YOUR HONOR, AGAIN IT JUST
11 CONTAINS A WHOLE MISMATCH OF INFORMATION.

12 THE COURT: ALL RIGHT, SIR.

13 MR. MCDANIEL: THE STATE'S POSITION IS THAT WE DON'T
14 WANT TO INTRODUCE PREJUDICIAL EVIDENCE AGAINST THE
15 DEFENDANT THAT HE IS NOT AT TRIAL FOR. I BELIEVE THE
16 DEFENSE'S ISSUE IS, YOUR HONOR, CAN I GIVE YOU A BRIEF
17 FACTUAL OVERVIEW AND I THINK THAT WILL EXPLAIN IT.

18 THE COURT: OKAY.

19 MR. MCDANIEL: THE VICTIM IN THIS CASE COMES HOME TEN
20 DAYS PRIOR TO THIS INCIDENT DATE FROM A CLEMSON GAME ON
21 SATURDAY AND NOTICES THAT SOMEONE HAD BEEN IN HIS HOUSE.
22 AND BASED ON THAT HE BUYS, PURCHASES A DEER CAMERA AND
23 PLACES THAT DEER CAMERA ON THE REFRIGERATOR AND THEN ON
24 THE INCIDENT DATE CATCHES WHO WE BELIEVE IS THE DEFENDANT,
25 ENTERING HIS HOME WHILE HE IS NOT THERE, CATCHES A FEW

1 IMAGES OF THAT.

2 THE COURT: HOW DO YOU PUT IT ON A REFRIGERATOR.

3 MR. MCDANIEL: IT IS JUST ON TOP OF THE REFRIGERATOR,
4 IT IS NOT ACTUALLY CONNECTED TO IT. AND I THINK THE
5 DEFENSE'S CONCERN IS THAT IF WE, ON THAT FIRST INCIDENT
6 THAT HE IS NOT AT TRIAL FOR, NOR DO WE HAVE ANY EVIDENCE
7 THAT HE WAS THE ONE WHO ENTERED THAT HOUSE, HE IS
8 CONCERNED THAT WE WILL GET INTO, I GUESS ON THAT TIME.
9 THE STATE'S POSITION IS THAT I THINK WE CAN GET INTO WHY
10 HE PURCHASED THE CAMERA, YOU KNOW, HE NOTICED SOME ITEMS
11 MISSING FROM HIS HOME AND HE PURCHASED A DEER CAMERA. BUT
12 WE, IN NO WAY, IN OUR CASE-IN-CHIEF ARE GOING TO TRY TO
13 ASSOCIATE THAT THE DEFENDANT ENTERED THE HOME AT THAT
14 TIME. WE JUST WANTED THE JURY TO KNOW AND I THINK IT
15 WOULD BE DETRIMENTAL TO US IF WE JUST WENT IN AND I HAD A
16 DEER CAMERA ON MY REFRIGERATOR. I THINK THE JURY, THE
17 STATE CAN PRESENT SOME EVIDENCE AND IT WILL BE CAREFULLY
18 TAILORED TO WHAT WE ARE TRYING TO ACCOMPLISH, YOU KNOW,
19 SOME CRIMINAL BEHAVIOR OF THE DEFENDANT ON THAT PART. BUT
20 I GUESS WE ARE TRYING TO FIND SOME TYPE OF GUIDANCE FROM
21 YOUR HONOR.

22 THE COURT: YOU ARE NOT PLANNING TO INTRODUCE THE
23 INCIDENT REPORT, ARE YOU?

24 MR. MCDANIEL: NO, SIR.

25 THE COURT: SO, YOU ARE JUST ASKING HOW YOU CAN

1 ELICIT THE EXPLANATION AS TO WHY THE DEER CAMERA WAS
2 PURCHASED?

3 MR. MCDANIEL: YES, SIR.

4 THE COURT: WHAT ABOUT THAT, MR. CHAPLIN?

5 MR. CHAPLIN: YOUR HONOR, THAT IS EXACTLY WHY I AM
6 CONCERNED AND THAT IS THAT NONE OF THE PRIOR INCIDENTS BE
7 ASSOCIATED WITH MR. MITCHELL. AS FAR AS MR. POTTS
8 TESTIFYING AS TO HIS MOTIVE BEHIND DOING SOMETHING OR
9 WHATEVER, THAT WOULD BE, I GUESS THAT WOULD BE HIS OPTION.
10 HOWEVER IT NEEDS TO BE CLEARLY STATED THAT MR. MITCHELL
11 WAS NOT CHARGED WITH ANY ADDITIONAL OFFENSE AND HE IS NOT
12 HERE TO ANSWER TO ANY OF THOSE OFFENSES. AND, YOUR HONOR,
13 I AM CONCERNED, PURSUANT TO RULE 403, WITH REGARDS TO
14 PREJUDICIAL IMPACT OF THAT. I MEAN HE CAN SAY THAT HE HAD
15 SOME PRIOR BREAK-INS AND BOUGHT A DEER CAMERA BUT THE
16 SPECIFICITY OF THIS REPORT CONNECTED TO OUR INCIDENT
17 REPORT OR THE INCIDENT REPORT FROM THE 10/27 INCIDENT THAT
18 WE ARE HERE TO DEFEND, TO ME IT JUST MIGHT LEAD SOMEONE ON
19 THE JURY TO BELIEVE THAT MY CLIENT MIGHT OF BEEN
20 RESPONSIBLE FOR ALL OF THAT AND THAT IS NOT THE CASE.

21 THE COURT: OKAY. SO, IS THAT SUITABLE FOR THE
22 STATE?

23 MR. MCDANIEL: YES, SIR.

24 THE COURT: OKAY. LET'S MAKE SURE THE WITNESSES DO
25 KNOW THE LIMITS OF WHAT THEY NEED TO SAY AND NOT TO SAY.

1 MR. MCDANIEL: YES, YOUR HONOR.

2 MR. CHAPLIN: SO, YOUR HONOR, JUST FOR CLARIFICATION.
3 SO THEN, MY UNDERSTANDING IS THAT MR. POTTS MIGHT SAY THAT
4 HE HAD PRIOR BREAK-INS AND EVEN AT THAT OR IS HE ALLOWED
5 TO GO INTO SPECIFICITY.

6 THE COURT: HE CAN JUST SAY THAT, HE BOUGHT THE DEER
7 CAMERA BECAUSE HE HAD PRIOR BREAK-INS, HE IS NOT TO REFER
8 DIRECTLY OR INDIRECTLY AS TO ANY MATCHING, BETWEEN THOSE
9 AND MR. MITCHELL. AND IF THAT WERE TO HAPPEN THEN IT
10 WOULD RESULT IN A MISTRIAL. IT IS GOING TO BE CONFINED TO
11 A GENERIC EXPLANATION OF WHY HE PURCHASED THE DEER CAMERA.
12 SO, THE STATE CAN PUT IT INTO CONTEXT TO THE JURY.

13 MR. CHAPLIN: THANK YOU, YOUR HONOR. I THINK THAT
14 ACTUALLY WILL ADDRESS NUMBER TWO. YOUR HONOR, YOU DO HAVE
15 A COPY OF THIS MOTION, DO YOU NOT?

16 THE COURT: I DO NOT. THANK YOU.

17 MR. CHAPLIN: SO THAT WOULD ADDRESS ITEM NUMBER TWO
18 AND I THINK IT WOULD ALSO SPEAK TO ITEM NUMBER EIGHT.
19 YOUR HONOR, I KNOW WE ARE GOING TO HAVE A GREAT DEAL OF
20 DISCUSSION ON ITEM NUMBER THREE. IF I COULD COME BACK TO
21 THAT I WOULD APPRECIATE IT.

22 THE COURT: ALL RIGHT, SIR.

23 MR. CHAPLIN: NUMBER FOUR AS WELL. AND I WOULD LIKE
24 TO MOVE TO NUMBER FIVE.

25 THE COURT: OKAY.

1 MR. CHAPLIN: YOUR HONOR, THIS IS A MOTION TO EXCLUDE
2 TESTIMONY ABOUT ANY OF THE STATE'S WITNESSES, IN
3 PARTICULAR LAW ENFORCEMENT AS TO HOW THE DEFENDANT,
4 MITCHELL, IT HAS ALREADY BEEN ESTABLISHED THAT THE ALLEGED
5 VICTIM IN THIS MATTER, MR. POTTS DOES NOT KNOW MR.
6 MITCHELL BASED ON WHAT I AM HEARING. SO, WHAT I AM
7 CONCERNED ABOUT IS THAT, QUITE FRANKLY THAT THIS IS A CASE
8 OF MISTAKEN IDENTITY. THERE IS WITNESSES BY THE STATE
9 THAT, MY UNDERSTANDING IS THAT THEY PLAN TO SAY IN COURT,
10 THEY LOOKED AT A PICTURE AND IDENTIFIED THAT PERSON TO BE
11 MR. MITCHELL. AND I AM CONCERNED WITH REGARDS TO WHAT
12 MIGHT BE SAID AS WHAT WAS THE BASIS OF THAT. AND I WOULD
13 SAY ANY RECORD, ANY MENTION OF ANY TYPE OF PRIOR OFFENSES
14 OF MR. MITCHELL WOULD BE OFF LIMITS UNLESS HE TOOK THE
15 STAND. AND THAT THE STATE SHOULD NOT BE ABLE TO MENTION
16 ANY OF THAT. SO, I AM NOT QUITE SURE HOW THAT MATTER WILL
17 BE TESTIFIED TO AND I HAVE A GREAT DEAL OF CONCERN.

18 THE COURT: ALL RIGHT, YES SIR, MR. MCDANIEL.

19 MR. MCDANIEL: OUR INTENT IS TO, IS TO BASICALLY
20 OFFER EVIDENCE FROM LIEUTENANT MCCLURKIN, HE IS FROM
21 WHITMIRE, HE WORKED FOR LAW ENFORCEMENT. BUT THAT IS IT,
22 THEY BASICALLY GREW UP TOGETHER, HE HAS KNOWN HIM FOR 20
23 YEARS.

24 MR. CHAPLIN: YOUR HONOR, I THINK WE CAN CERTAINLY
25 APPRECIATE THE CONCERN I HAVE WITH A PERSON IN LAW

1 ENFORCEMENT MAKING A STATEMENT OF THAT NATURE, THAT I KNOW
2 THE, I AM STILL NOT CLEAR. I HAVE KNOWN MR. MITCHELL FOR
3 20 YEARS. I AM NOT SURE WHAT THEY ARE INTENDING TO
4 SUGGEST.

5 THE COURT: I DON'T KNOW HOW IT CAN VOICE THE
6 WITNESSES KNOWLEDGE IF IT IS BASED ON LIVING IN THE SAME
7 COMMUNITY, I MEAN, SOMEONE HE GREW UP WITH. I CAN PREVENT
8 THE STATE'S WITNESSES FROM COMMENTING ON OR IMPLYING ABOUT
9 ANY PRIOR RECORD OR SUSPICION THAT MR. MITCHELL COMMITTED
10 A CRIME. CERTAINLY WE CAN DO THAT BUT I AM NOT SURE I CAN
11 SAY, EVEN THOUGH YOU GREW UP WITH THE PERSON YOU CAN'T
12 TELL THE JURY THAT.

13 MR. CHAPLIN: WELL, YOUR HONOR, IF THAT IS WHAT THE
14 TESTIMONY IS GOING TO BE, I GREW UP WITH THIS INDIVIDUAL
15 OR I AM NOT QUITE SURE THAT IS ACCURATE.

16 THE COURT: IT MAY NOT BE, BUT I MEAN I UNDERSTOOD--

17 MR. MCDANIEL: JUDGE, MAY I JUST--

18 THE COURT: SURE.

19 MR. MCDANIEL: I DON'T HAVE A PROBLEM IF WE JUST GO
20 IN AND SAY, LIVED IN THE COMMUNITY TOGETHER FOR 20 YEARS.
21 YOUR HONOR, WE ARE NOT TRYING TO SLIP, THE LAST THING I
22 WANT TO DO IS A MISTRIAL. AND I THINK THAT WE CAN AT
23 LEAST ESTABLISH PERSONAL KNOWLEDGE.

24 MR. CHAPLIN: SO, WHAT ARE YOU SUGGESTING TO BE SAID?

25 MR. MCDANIEL: THEY LIVED IN THE COMMUNITY TOGETHER

1 FOR X AMOUNT OF YEARS.

2 MR. CHAPLIN: I BEG THE COURT'S INDULGENCE.

3 THE COURT: SURE.

4 MR. CHAPLIN: YOUR HONOR, AS LONG AS THERE IS NO
5 CONNECTION BETWEEN WHAT HE SAYS AS A POLICE OFFICER. SO,
6 I GREW UP WITH HIM IN THE COMMUNITY OR I HAVE LIVED IN THE
7 COMMUNITY, WHATEVER THE CASE MIGHT BE. BUT THERE CAN'T BE
8 ANY STATEMENTS PROVIDED, YOU KNOW, I HAVE BEEN IN LAW
9 ENFORCEMENT FOR 20 YEARS AND BLA, BLA, BLA. ANYTHING LIKE
10 THAT WOULD BE OFF LIMITS.

11 MR. MCDANIEL: JUDGE, THEY WILL TESTIFY AS TO THEIR
12 EMPLOYMENT. ESPECIALLY LIEUTENANT MCCLURKIN IS THE
13 INVESTIGATING OFFICER IN THIS CASE. SO, WE ARE NOT GOING,
14 HE CAN TESTIFY TO WHAT HE DOES, HOW LONG HE HAS WORKED
15 THERE AND HE IDENTIFIES THE DEFENDANT ON HOW HE KNEW HIM
16 AND HE CAN SAY I KNEW HIM FOR 20 YEARS, WE HAVE LIVED IN
17 THE SAME COMMUNITY FOR 20 YEARS. BUT WE ARE NOT, I
18 UNDERSTAND THE DEFENSE'S CONCERN, THE STATE IS NOT TRYING
19 TO SNEAK SOMETHING IN.

20 THE COURT: I DON'T THINK--

21 MR. MCDANIEL: ANY IDENTIFICATION BY POLICE IS
22 PREJUDICIAL, I UNDERSTAND THAT BUT WE ARE, I KNOW THIS
23 COULD BE SENSITIVE.

24 THE COURT: I UNDERSTAND MR. CHAPLIN'S CONCERN AND OF
25 COURSE IF LAW ENFORCEMENT TESTIFIES THAT THEY KNOW MR.

1 MITCHELL BECAUSE HE IS ALWAYS A USUAL SUSPECT BUT I THINK
2 THAT IS WHAT HE IS TRYING TO MAKE SURE DOESN'T HAPPEN.
3 AND CERTAINLY NO ONE WANTS THAT TO HAPPEN. AND AS I
4 UNDERSTAND IT, THE TESTIMONY WILL ARISE IN THE FOLLOWING
5 SCENARIO, THAT THEY ALSO WILL TESTIFY THAT MR. MITCHELL
6 WAS IDENTIFIED IN WHAT CONTEXT?

7 MR. MCDANIEL: LIEUTENANT MCCLURKIN IDENTIFIES
8 PICTURES OF THE DEFENDANT. AND FACTUALLY, THE VICTIM
9 BRINGS THE CAMERA.

10 THE COURT: OKAY. WELL, THAT HE RECOGNIZED MR.
11 MITCHELL FOR 20 YEARS AND LIVED IN THE SAME COMMUNITY. I
12 DON'T SEE ANYTHING WRONG WITH THAT. HE IS NOT CONNECTING
13 HIS KNOWLEDGE TO MR. MITCHELL'S INVOLVEMENT OR ANY
14 SUSPICION OF CRIMINAL ACTIVITY.

15 MR. CHAPLIN: I THINK THAT WOULD COVER IT, LIVING IN
16 THE SAME COMMUNITY. I THINK THAT WOULD BE SUFFICIENT.

17 THE COURT: ALL RIGHT, SIR.

18 MR. CHAPLIN: YOUR HONOR, THE NEXT ITEM IS EXCLUDING
19 THE VIDEOTAPES AND PHOTOGRAPHS. I WOULD LIKE TO LUMP THAT
20 INTO THREE AND FOUR AND COME BACK TO THAT. I THINK THAT
21 IS GOING TO TAKE A LITTLE BIT OF TIME. SO, I KNOW WE HAVE
22 RESOLVED NUMBER ONE, NUMBER TWO AND NUMBER FIVE AND NUMBER
23 EIGHT. SO, NUMBER SEVEN, TO EXCLUDE ANY TESTIMONY OR
24 DOCUMENTATION INDICATING PRIOR CRIMES WITH POLICE
25 INTERACTION WITH DEFENDANT MITCHELL. AND I THINK YOU

1 ACTUALLY RESOLVED THAT MATTER. MY UNDERSTANDING IS THAT,
2 WELL THE STATE--

3 MR. MCDANIEL: UNLESS THE DEFENDANT TAKES THE STAND
4 WE WON'T GET INTO ANY PRIOR RECORD. THAT SEEMS SIMILAR TO
5 THE OTHER ONE, UNLESS THE DOOR IS OPEN.

6 THE COURT: OKAY.

7 MR. CHAPLIN: YOUR HONOR, NUMBER NINE, YOU MIGHT OF
8 ADDRESSED THAT ALREADY. EXCLUDING TESTIMONY AS TO ITEMS
9 SEIZED FROM THE RESIDENCE OF DEFENDANT, MITCHELL, NOT
10 APPEARING. A DESCRIPTION OF THE SEARCH WARRANT AND A
11 CONCERN THERE, YOUR HONOR, IS THAT WHEN THE POLICE
12 OFFICERS WENT TO MR. MITCHELL'S HOME AND SEARCHED IT THERE
13 WERE ITEMS THAT WERE NOT INDICATED ON THE SEARCH WARRANT
14 THAT LAW ENFORCEMENT TOOK. THEREFORE I THINK I SPOKE WITH
15 MR. MCDANIEL PRIOR TO THIS AND WE HAVE AGREED THAT THE
16 TESTIMONY WOULD BE THAT THEY WENT TO MR. MITCHELL'S HOME
17 BUT THEY FOUND NOTHING AS A RESULT OF THE SEARCH. IS THAT
18 CORRECT?

19 MR. MCDANIEL: THAT IS CORRECT, JUDGE.

20 THE COURT: SO THERE WILL BE NO DISCUSSIONS ABOUT THE
21 ITEMS SEIZED, IS THAT RIGHT?

22 MR. MCDANIEL: THAT IS CORRECT, JUDGE. JUST FOR YOUR
23 HONOR'S CLARIFICATION. THESE ITEMS OBTAIN A SUSPICION OF
24 ANOTHER CRIME, TURNED OUT THEY WEREN'T AND THAT THEY WERE
25 RETURNED.

1 THE COURT: AND THEN NUMBER TEN, YOUR HONOR, WOULD BE
2 ITEMS NOT PROVIDED IN A TIMELY MANNER PURSUANT TO RULE 5
3 AND BRADY WHICH WERE SERVED ON OCTOBER 8TH OF 2009 FROM
4 THE STATE, ASSISTANT SOLICITOR MCDANIEL.

5 MR. MCDANIEL: ALL BRADY MATERIAL HAS BEEN TURNED
6 OVER.

7 THE COURT: OKAY.

8 MR. CHAPLIN: SO, YOUR HONOR, I UNDERSTAND TEN TO BE
9 THAT, IF I DON'T HAVE IT AT THIS TIME IT DOESN'T EXIST AND
10 IT DOESN'T COME IN.

11 MR. MCDANIEL: BRADY RULE 5 MATERIAL, WE HAVE HAD
12 DISCUSSIONS ABOUT WHAT I PLAN TO INTRODUCE AT TRIAL BUT
13 BRADY AND RULE 5 MATERIAL HAVE BEEN TURNED OVER.

14 THE COURT: OKAY.

15 MR. CHAPLIN: SO, IS MY UNDERSTANDING CORRECT, YOUR
16 HONOR?

17 THE COURT: I DON'T KNOW, IT IS NOT REALLY SOMETHING
18 THAT I CAN SAY IT IS A BALL OR STRIKE AT THIS POINT. YOU
19 ARE ASKING ME FOR SOMETHING THAT I CAN'T SEE SO I AM NOT
20 GOING TO DO THAT.

21 MR. CHAPLIN: I AM JUST BASICALLY SAYING, WE ARE AT
22 THE PRETRIAL HEARING ON THIS MATTER AND IT IS MY
23 UNDERSTANDING THAT IF I DO NOT HAVE EVIDENCE, WHAT HAS
24 BEEN TURNED OVER THAT IT SHOULD NOT BE ADMITTED. AND IF
25 IT IS ADMITTED THAT WOULD BE A VIOLATION OF THE RULES OF

1 DISCOVERY AND NON-COMPLIANT WITH THESE MOTIONS.

2 THE COURT: LIKE I SAY, I CAN'T, THERE IS NO WAY FOR
3 ME TO KNOW WHAT TO RULE ON ON THAT. SO, I CAN'T REALLY, I
4 DON'T HAVE ANY CONTEXT FOR RULING, YOU ARE JUST ASKING ME
5 FOR SOME KIND OF ADVISORY OPINION.

6 MR. CHAPLIN: WELL, YOUR HONOR, IF SOMETHING SPECIFIC
7 SHOULD COME UP IN THE MATTER OF THIS HEARING I WILL THEN
8 MAKE THAT MOTION.

9 THE COURT: SURE.

10 MR. CHAPLIN: YOUR HONOR, AT THIS TIME I WOULD LIKE
11 TO GO BACK UP TO ACTUALLY NUMBER SIX. A MOTION TO EXCLUDE
12 VIDEOTAPE PHOTOGRAPHS IN THIS MATTER AND I MAKE THAT
13 MOTION BASED ON REQUIREMENT THAT THE STATE AUTHENTICATE
14 THESE ITEMS AND ALSO SHOW A PROPER CHAIN OF CUSTODY.

15 THE COURT: OKAY. YES SIR, MR. MCDANIEL.

16 MR. MCDANIEL: WELL, YOUR HONOR, WE WILL OFFER AT THE
17 CORRECT TIME THE PHOTOGRAPHS. YOU KNOW, IT IS NOT A
18 VIDEO, THESE ARE PICTURES, THERE IS NO VIDEOTAPE, THEY ARE
19 PICTURES THAT ARE TAKEN FROM A CAMERA THAT A CHAIN OF
20 CUSTODY IS NOT REQUIRED FOR A CAMERA. AS TO THE
21 PHOTOGRAPHS, REALLY ANYONE WHO CAN STATE THAT IT TRULY
22 REFLECTS WHAT I INTEND FOR THAT PICTURE TO REFLECT,
23 WHOEVER CAN AUTHENTICATE IT THAT WAY IS ENOUGH. AND AS
24 FAR AS GETTING PHOTOGRAPHS IN, THE ACTUAL PERSON WHO TOOK
25 THE PICTURES DO NOT, WILL NOT TESTIFY TO THAT. IT IS JUST

1 SOMEBODY WHO HAS SEEN THE SCENE OR WHO HAS SEEN WHAT I AM
2 TRYING TO REFLECT IN THE PICTURE. AND WE PLAN ON DOING
3 THAT, JUDGE.

4 MR. CHAPLIN: YOUR HONOR, LET ME JUST TRY TO BE MORE
5 SPECIFIC. THERE ARE SOME PICTURES OR VIDEO, WHATEVER THE
6 CASE MIGHT BE, THAT THE ALLEGED VICTIM, MR. POTTS, TOOK
7 WITH THE DEER CAMERA. AND I AM ASKING AT THIS PRETRIAL
8 HEARING THAT THAT, THAT THOSE PICTURES BE AUTHENTICATED
9 AND A PROPER CHAIN OF CUSTODY BE ESTABLISHED AT THIS TIME.

10 THE COURT: WELL, I DON'T THINK I CAN MAKE THE STATE,
11 BEFORE TRIAL AND I APPRECIATE WHAT YOU ARE DOING, I
12 UNDERSTAND THAT YOU ARE TRYING--

13 MR. CHAPLIN: AND I DON'T THINK THE STATE IS OPPOSED
14 TO THAT, I THINK THEY ARE PREPARED TO--

15 MR. MCDANIEL: I JUST DON'T THINK THAT, I THINK IT IS
16 A TRIAL ISSUE, I DON'T, I UNDERSTAND WHAT HE IS TRYING TO
17 SHOW BUT TO ME THAT IS SOMETHING THAT HE NEEDS TO PUT UP
18 IN RESPONSE TO THE STATE'S CASE. I WILL DO, I AM PREPARED
19 TO AUTHENTICATE THE PICTURES AND TO SHOW THE PICTURES.
20 BUT TO ME IT APPEARS LIKE THIS IS A TRIAL ISSUE OF WHAT
21 THE DEFENSE IS TRYING TO PUT UP AND NOT, IF I DON'T
22 AUTHENTICATE THE PHOTOS AT TRIAL THEY DON'T COME IN. I
23 DON'T HAVE TO HAVE A CHAIN AS FAR AS THE CAMERA BUT AT
24 LEAST IT DOESN'T SEEM LIKE IT IS AN ITEM THAT DOES REQUIRE
25 A CHAIN.

1 THE COURT: I DON'T THINK HE HAS TO HAVE A CHAIN OF
2 CUSTODY FOR THESE EXHIBITS. IN ORDER TO HAVE THEM
3 ADMITTED INTO EVIDENCE, HOWEVER, HE WOULD HAVE TO LAY THE
4 FOUNDATION WHICH WOULD BE FOR A WITNESS TO AUTHENTICATE
5 THAT THEY CONSTITUTE AN ACCURATE AND FAIR REPRESENTATION
6 OF WHAT IS DEPICTED ON THE PHOTOGRAPH. BEYOND THAT I AM
7 NOT SURE WHAT ELSE WOULD BE REQUIRED UNDER THE RULES OF
8 EVIDENCE TO MAKE IT ADMISSIBLE.

9 MR. CHAPLIN: YOUR HONOR, IT WAS MY UNDERSTANDING
10 THAT ONE OF THE REASONS THAT WE WERE COMING PRIOR TO THIS
11 TRIAL TOMORROW MORNING IS SO THAT WE CAN AUTHENTICATE AND
12 ENSURE, I MEAN THIS CASE TURNS ON SOME PICTURES THAT MR.
13 POTTS SAYS HE TOOK. NOW, IF THOSE PICTURES DON'T COME IN
14 FOR WHATEVER REASON THEN THERE IS A POSSIBILITY THAT WE
15 DON'T HAVE TO STRIKE A JURY OR DO ANYTHING ELSE. IT JUST
16 SEEMS THAT IT WOULD BE APPROPRIATE AT THIS TIME WE HAVE
17 EVERYBODY HERE, WE HAVE THE TECHNOLOGY, WE HAVE EVERYTHING
18 THAT WE NEED THAT WE CAN MOVE FORWARD AND AUTHENTICATE
19 THOSE PICTURES AT THIS TIME.

20 THE COURT: WELL, IS THE STATE INTENDING TO CALL MR.
21 POTTS AS A WITNESS TOMORROW?

22 MR. MCDANIEL: YES, SIR.

23 THE COURT: AND WILL HE BE A WITNESS THROUGH WHICH
24 CERTAIN PHOTOGRAPHS TAKEN FROM THE DEER CAMERA SUBMITTED
25 IN THE STATE'S CASE?

1 MR. MCDANIEL: YES, SIR.

2 THE COURT: I DON'T THINK THAT YOU ARE ENTITLED TO
3 HAVE A DRY RUN OF THAT, MR. CHAPLIN.

4 MR. CHAPLIN: SO, I TAKE IT THEN, YOUR HONOR, THAT
5 YOU ARE DENYING THAT MOTION?

6 THE COURT: WELL, I DON'T KNOW, YOU ARE ASKING FOR A
7 PRETRIAL REHEARSAL OF THE STATE'S CASE AND I DO DENY THAT.
8 AND IF YOU CAN PROVIDE ME AUTHORITY TO SUPPORT THAT I WILL
9 BE GLAD TO CONSIDER IT.

10 MR. CHAPLIN: YOUR HONOR, MAY WE APPROACH?

11 THE COURT: ABSOLUTELY.

12 (WHEREUPON, A BENCH CONFERENCE WAS HELD.)

13 THE COURT: YES SIR, MR. CHAPLIN.

14 MR. CHAPLIN: SO IT IS MY UNDERSTANDING THEN THAT AS
15 FAR AS ITEM SIX IS CONCERNED, THAT THE TRIAL IN THIS
16 MATTER THAT IS WHEN THE FOUNDATION WILL BE LAID AND
17 AUTHENTICATION AND THOSE ISSUES WILL BE ADDRESSED AND I
18 WILL HAVE AN OPPORTUNITY TO OBJECT AT THAT TIME.

19 THE COURT: SO, WHEN THEY ARE, IF THEY ARE PROPOSED
20 AS EVIDENCE IN THIS CASE YOU WILL CERTAINLY HAVE AN
21 OPPORTUNITY TO MAKE ANY OBJECTION YOU DEEM FURTHER, YES
22 SIR.

23 MR. CHAPLIN: YOUR HONOR, THEN WE WILL GO UP TO
24 NUMBER THREE. I GUESS WE CAN DO THREE AND FOUR, EXCLUDING
25 OPINION TESTIMONY BY LIEUTENANT MCCLURKIN AS TO THE

1 IDENTIFICATION OF THE IMAGES IN THE VIDEOTAPE.

2 THE COURT: OKAY.

3 MR. CHAPLIN: YOUR HONOR, THIS IS A SOMEWHAT UNIQUE
4 SITUATION IN THAT UNDER NEIL V. BIGGERS WE WOULD HAVE A
5 HEARING TO DETERMINE WHETHER OR NOT THE ID OF A WITNESS IS
6 RELIABLE. HOWEVER, IN THIS CASE WE HAVE SOMEONE WHO LOOKS
7 AT A PICTURE FROM A DEER CAMERA AND MAKES THE
8 IDENTIFICATION. IT IS MY UNDERSTANDING THAT THIS PERSON
9 WILL BE MAKING AN IN-COURT IDENTIFICATION OF, INTENDS TO
10 SAY THAT IS MY CLIENT IN THE PICTURE. THEREFORE I WANTED
11 TO ADDRESS THE MATTER UNDER NEIL V. BIGGERS AND ASK THE
12 COURT'S GUIDANCE WITH REGARDS TO SINCE THIS IS NOT BASED
13 ON THEIR PERSONAL KNOWLEDGE OF THE INCIDENT, THEY WEREN'T
14 THERE, THEY HAVE NO INFORMATION ON A PERSONAL LEVEL ON
15 WHAT OCCURRED. ALL THEY ARE SEEING IS THAT THEY SEE
16 SOMEBODY IN A PICTURE AND BASED ON LIVING IN THIS
17 COMMUNITY FOR AROUND 20 YEARS THAT THEY MAKE AN
18 IDENTIFICATION. BASICALLY THEY ARE GIVING AN OPINION AS A
19 LAY PERSON IN THIS PARTICULAR MATTER.

20 THE COURT: OKAY. WHAT IS THE STATE'S RESPONSE TO
21 THAT OBJECTION?

22 MR. MCDANIEL: I THINK WE COVERED THAT EARLIER, I
23 GUESS IT IS LAY OPINION BUT IT IS FIRST HAND PERSONAL
24 KNOWLEDGE THAT THAT IS, THE STATE'S POSITION IS THAT, WHAT
25 LAW ENFORCEMENT CAN SAY IS WE THINK THAT IS HIM. THE JURY

1 IS GOING TO DECIDE WHETHER OR NOT THAT IS HIM OR NOT. THE
2 STATE'S POSITION IS THAT THEY CAN TESTIFY TO WHO THEY
3 THOUGHT WAS HIM BASED ON THEIR PERSONAL KNOWLEDGE OF HIM.

4 THE COURT: WELL, AS TO THE OBJECTION OF IT BEING LAY
5 OPINION, WHETHER THEY THINK SOMEONE IN THE PHOTOGRAPH IS A
6 CERTAIN PERSON, IDENTIFY THE INDIVIDUAL WOULD REQUIRE
7 EXPERT OPINION TESTIMONY. I THINK YOUR OBJECTION MAY BE
8 TO THE CONSTITUTIONAL ISSUES, IS THAT RIGHT?

9 MR. CHAPLIN: I WILL TRY TO BE A LITTLE MORE
10 SPECIFIC. YOUR HONOR, THIS EXACT SAME ISSUE WAS BROUGHT
11 TO THE ATTENTION OF THE SUPREME COURT HERE IN SOUTH
12 CAROLINA IN A RECENT CASE OF 2009 WHICH I WILL PROVIDE AND
13 IT IS INVOLVING AN ATTORNEY THAT WAS CONVICTED OF
14 MURDERING SOMEONE IN A NIGHTCLUB. YOUR HONOR, I THINK WE
15 HAVE SOME GUIDANCE IN THIS PARTICULAR MATTER IN THAT THESE
16 CASES ARE VERY SIMILAR. AND IN THE HERRING MATTER, YOUR
17 HONOR, POLICE OFFICERS AND OTHER PERSONS LOOKED AT AN
18 IMAGE AND THEN TESTIFIED TO THE COURT AS TO WHAT THEIR
19 OPINION WAS AS TO WHAT IS IN THAT IMAGE OR THAT PICTURE.
20 THE ATTORNEY FOR MR. HERRING OBJECTED AT THAT TIME AND
21 ASKED FOR A MISTRIAL AS A RESULT OF THAT TESTIMONY. AND
22 IT IS EXACTLY WHAT YOUR HONOR MENTIONED EARLIER, LAY
23 OPINIONS REGARDING THIS MATTER. AND ON PAGE EIGHT OF THAT
24 DECISION, YOUR HONOR, IT CLEARLY STATES LAY OPINIONS
25 REGARDING VIDEOTAPES. PARAGRAPH THREE STATES, THREE

1 WITNESSES TESTIFIED AS TO THEIR INTERPRETATION OF A VIDEO.
2 I COMPARE THAT TO A WITNESS TESTIFYING AS TO HIS
3 INTERPRETATION OF A PICTURE. IN THIS CASE THEY WERE
4 DEPICTING THE OUTSIDE OF A CLUB AT THE NIGHT IN QUESTION.
5 IN MY CASE WE ARE TALKING ABOUT A PICTURE THAT WAS
6 ALLEGEDLY TAKEN AT THE HOME OF MR. POTTS AT THE NIGHT IN
7 QUESTION. SO, IT GOES ON TO SAY TWO WITNESSES AND A
8 POLICE OFFICER TESTIFIED AND THEY SAW A FLASH OF LIGHT
9 COMING FROM THE VEHICLE. THE THIRD WITNESS TESTIFIED THAT
10 HE SAW A SHOT FIRED FROM THE VEHICLE LATER CLARIFYING THAT
11 OBVIOUSLY WE SAW THE VIDEO WHERE THE SHOT WAS FIRED FROM
12 INSIDE THE VEHICLE. SO, THERE ARE LAY PEOPLE LOOKING AT
13 PICTURES OR VIDEOS AND GIVING OPINIONS. AND THE COURT
14 SAID IN RESPONSE TO HERRING'S OBJECTIONS, TO THE TESTIMONY
15 THE TRIAL JUDGE ISSUED A CURATIVE INSTRUCTION TO THE JURY
16 IN EACH INSTANCE. THAT IS WHAT IT TOOK TO RESOLVE THIS
17 MATTER, IT TOOK A CURATIVE INSTRUCTION. AND WHAT THE
18 JUDGE IN THAT SAID, IN THAT CASE SAID TO THE EFFECT THAT
19 THE WITNESS COULD NOT GIVE AN OPINION AS TO WHETHER OR NOT
20 THE FLASH WAS A GUNSHOT. IN MY CASE I AM SAYING THE
21 WITNESS CANNOT SAY WHETHER OR NOT IN THEIR OPINION THE
22 PERSON IN THAT PICTURE IS MR. MITCHELL. AND THEN THE
23 COURT GOES ON TO INSTRUCT, SAID THE JURY SHOULD STRIKE ANY
24 SUCH INFERENCE FROM ITS MEMORY. NOW, WE DON'T HAVE TO
25 WORRY ABOUT THAT IN A CURATIVE MATTER, YOUR HONOR, BECAUSE

1 WE ARE HERE TODAY TO ADDRESS IT UPFRONT. THE TRIAL COURT
2 INSTRUCTED THE JURY THAT YOU ARE, THE ONLY ONES WHO CAN
3 DRAW FROM CONCLUSIONS FOR WHAT YOU SAW ON THE TAPE AND
4 HERRING'S TESTIMONY IN THIS REGARD GOES ON FURTHER TO SAY
5 THAT NOBODY SAW A SHOT FIRED BASED ON THE TESTIMONY THAT
6 WE HAVE HEARD SO FAR, IT IS ALL FROM THE VIDEO. THAT IS
7 THE SAME IN THIS CASE, YOUR HONOR, NO ONE SAW ANYONE IN
8 THAT PARTICULAR HOUSE, IT IS ALL FROM THE PICTURES OR THE
9 VIDEO, WHATEVER WAS CONTAINED IN THAT DEER CAMERA. AND IT
10 GOES ON TO SAY, YOU ARE GOING TO HAVE THE VIDEO, YOU CAN
11 LOOK AT IT, YOU CAN DETERMINE WHATEVER YOU CHOOSE TO
12 DETERMINE FROM IT. I AM ASKING THAT THAT BE THE SAME
13 HERE, I DON'T SEE WHY WE SHOULD DEPART FROM AN ORDER OF
14 THE SUPREME COURT. NOW, THE COURT GAVE A CURATIVE
15 INSTRUCTION IN THAT CASE, YOUR HONOR, BECAUSE AND I STILL
16 DON'T KNOW IF THAT REALLY FIXED THE PROBLEM. I DO NOT
17 THINK THAT THAT WOULD ADDRESS THE ISSUE HERE. AND THE
18 OTHER DISSIMILARITY IS THAT THERE WAS A LOT OF OTHER
19 EVIDENCE THAT THIS JURY COULD PAY ATTENTION TO. IN THIS
20 CASE, YOUR HONOR, THIS IS THE ONLY PIECE OF EVIDENCE THAT
21 IS REALLY GOING OUT THERE TO THEM. THE QUESTION AT THIS
22 TRIAL IS WHO IS THE PERSON IN THIS PICTURE. AND IN THE
23 HERRING DECISION, YOUR HONOR, THE COURT CLEARLY STATES YOU
24 ARE GOING TO HAVE THE VIDEO, IN THIS CASE THEY ARE GOING
25 TO HAVE THE PICTURES, THEY CAN LOOK AT IT AND THEY CAN

1 DETERMINE WHATEVER THEY CHOOSE TO DETERMINE FROM IT. AND
2 I ASK THE COURT NOT DEPART FROM THIS DECISION AND APPLY
3 THE RULING IN HERRING TO THIS PARTICULAR MATTER.

4 THE COURT: WELL, WHAT RULE DID THE SUPREME COURT
5 STATE THAT FOR THE ADMISSION OF THE OPINION TESTIMONY
6 ABOUT WHAT THE GUN FLASH WAS, OR WHATEVER THE GUN FLASH AT
7 NIGHT. WHAT RULE DID THEY SAY THAT VIOLATED, I DON'T
8 UNDERSTAND.

9 MR. CHAPLIN: YOUR HONOR, I AM READING THE ORDER FROM
10 THE SUPREME COURT. I AM LOOKING AT THE FACTS IN THIS
11 CASE, I AM LOOKING AT THE FACTS IN MY CASE, I AM TELLING
12 YOU THAT THESE ARE VERY SIMILAR IN NATURE AND THAT WE
13 SHOULD COMPLY WITH THESE DIRECTIONS. THAT IS MY ARGUMENT.

14 THE COURT: WELL, THEY NEVER DID SAY WHAT WAS WRONG
15 WITH THAT.

16 MR. CHAPLIN: WHAT THEY SAID WAS THAT IT WAS IMPROPER
17 FOR THESE LAY PEOPLE TO TESTIFY AS TO WHAT THEY ARE
18 SEEING, AN ISSUE HERE, YOUR HONOR, IT IS JUST RIGHT IN OUR
19 FACE. THE JURY IS GOING TO SEE THE PICTURES, THEY HAVE AN
20 OPPORTUNITY TO REVIEW IT AND IF ANYTHING THE COURT WAS
21 CONCERNED ABOUT THE PREJUDICIAL IMPACT THAT IT WOULD HAVE
22 OR IT DID HAVE ON MR. HERRING'S CASE FOR THESE PEOPLE TO
23 INTERPRET SOMETHING THAT THE JURY CAN CLEARLY INTERPRET ON
24 THEIR OWN. THESE PEOPLE ARE NOT EXPERTS, THEY ARE GIVING
25 LAY OPINIONS AND IT IS NOT APPROPRIATE. AND THAT IS WHAT

1 THE COURT RULED. AND, YOUR HONOR, THIS CASE IS IDENTICAL
2 TO THE ONE THAT YOUR HONOR WOULD BE HEARING TOMORROW.

3 THE COURT: WELL, I UNDERSTAND YOUR ARGUMENT BASED ON
4 THE HERRING CASE AND MR. MCDANIEL, WHAT IS YOUR POSITION,
5 SIR.

6 MR. MCDANIEL: YOUR HONOR, I THINK WHAT IS IN DISPUTE
7 HERE IS WHAT A FLASH OF LIGHT WAS AND THERE IS NOT AN
8 IDENTIFICATION OF A PERSON. IT ALSO SAYS THAT A CURATIVE
9 INSTRUCTION IS WHAT I THINK YOU WOULD INSTRUCT ANY JURY
10 ABOUT, I MEAN, YOU GIVE IT AS MUCH WEIGHT AS YOU WANT TO
11 AND IT SEEMS LIKE THAT IS WHAT THE COURT DID HERE. AND
12 THEY FOUND THAT THE COURT'S CURATIVE INSTRUCTION WAS
13 SUFFICIENT IN CURING THE PREJUDICE. IT LOOKS LIKE THESE,
14 THEY HAD THREE WITNESSES TRYING TO DETERMINE WHAT A FLASH
15 OF LIGHT WAS. I MEAN IT IS A TOTAL DIFFERENT ISSUE OF TWO
16 LAW ENFORCEMENT OFFICERS THAT HAS KNOWN SOMEBODY FOR 20
17 YEARS AND 35 YEARS AND BEING TO IDENTIFY THE PICTURE OF
18 WHAT THEY THINK OR WHO THEY THINK IS THAT PERSON. I THINK
19 THERE IS CONCERNS THAT, I GUESS HERE WE DON'T KNOW HOW THE
20 FOUNDATION IS LAID, THAT THESE WITNESSES WERE ABLE TO SAY,
21 WELL, THAT IS GUNSHOT. HERE THE LAW ENFORCEMENT WOULD
22 SAY, I HAVE LIVED HERE 20 YEARS AND IDENTIFY BENNIE
23 MITCHELL. SO, THE DIFFERENCE IS WHAT WE ARE LOOKING AT IN
24 A CASE, I AM NOT SURE THAT ANY OF THESE LAY PERSONS WERE
25 QUALIFIED TO DECIDE WHAT A FLASH WAS OR NOT ON VIDEO. BUT

1 HERE THE STATE'S BURDEN, I GUESS LAY A FOUNDATION THAT
2 THEY CAN IDENTIFY AND ALSO IT IS GOING TO DETERMINE
3 WHETHER OR NOT THE JURY FEELS LIKE THEY BELIEVE OR NOT.
4 AND I DON'T KNOW WHETHER IT GOES INTO LAY OPINION
5 TESTIMONY. THE OFFICER WILL SAY I HAVE KNOWN HIM FOR 20
6 YEARS. WE ARE NOT TRYING TO INTERPRET SOMETHING ON VIDEO,
7 THEY ARE POSITIVELY IDENTIFYING SOMEBODY THEY HAVE KNOWN
8 FOR 20 YEARS AND I THINK THAT IS DIFFERENT THAN HAVING
9 THREE PEOPLE TESTIFY TO INTERPRET THIS VIDEO OF WHAT YOU
10 SEE.

11 THE COURT: WELL, I DON'T SEE ANY RULES THAT THE
12 SUPREME COURT EVER RECITED AGAINST DISCUSSION, LAY
13 OPINION. I AM ASSUMING THAT THEY ARE RELYING ON RULE 701
14 AND THE SUPPOSED ERROR WAS IN ADMITTING THE TESTIMONY OF
15 VIEWING THE VIDEOTAPE AND INTERPRETING THE IMAGE ON THE
16 TAPE. THE PEOPLE DID NOT PERSONALLY OBSERVE IS THE
17 QUESTION ON THE TAPE. IN ORDER FOR A LAY OPINION TO BE
18 ADMISSIBLE UNDER RULE 701 IT HAS TO BE BASED OF OPINIONS
19 OR INFERENCES THAT ARE, NUMBER ONE, ARE RATIONALLY BASED
20 ON THE PERCEPTION OF THE WITNESS; NUMBER TWO, IT MUST ALSO
21 BE A CLEAR UNDERSTANDING OF THE WITNESSES TESTIMONY OR THE
22 DETERMINATION OF THE FACT IN ISSUE. AND THIRD, DO NOT
23 REQUIRE SPECIAL KNOWLEDGE, SKILL. IT IS A PERSONAL
24 KNOWLEDGE REQUIREMENT REQUIRED IN THAT FIRST PRONG ON RULE
25 701. BUT I AM NOT SO SURE THAT PERSONAL KNOWLEDGE ELEMENT

1 WOULD NOT BE MET BY SOMEONE IN THE PHOTOGRAPH OF SOMEONE
2 RATHER THAN SEEING THE PERSON. SO, I DON'T HAVE A PROBLEM
3 FINDING THE FIRST PRONG OF THAT. I DO HAVE SOME CONCERN
4 ABOUT WHETHER THE OFFICER'S TESTIMONY ABOUT AND I ASSUME
5 THIS IS GOING TO ARISE IN THE CONTEXT SOME OF THE STATE'S
6 WITNESSES, THE POLICE OFFICERS THAT HAVE SEEN THE
7 PHOTOGRAPHS ON THE DEER CAMERA AND SAYING I LOOKED AT
8 THEM, I RECOGNIZE MR. MITCHELL. AND THE REASON I
9 RECOGNIZE HIM BECAUSE I HAVE KNOWN HIM 20 YEARS. IS THAT
10 CORRECT?

11 MR. MCDANIEL: THAT IS CORRECT.

12 THE COURT: HOW DOES THAT HELP THE JURY?

13 MR. MCDANIEL: WELL, IT GOES TO THE PERSONAL
14 KNOWLEDGE OF THE PICTURE, OF THE IDENTIFICATION. I MEAN
15 IT HELPS THE JURY KNOWING THAT SOMEONE HAS KNOWN THIS
16 PERSON THAT IS ON TRIAL, THAT HAS KNOWN THIS PERSON FOR 20
17 YEARS. SO, IT HELPS THEM, A CLEAR UNDERSTANDING OF THE
18 WITNESSES TESTIMONY OR DETERMINATION OF THE FACT AT ISSUE.
19 THE FACT AT ISSUE IS THAT HE, THE PICTURE, THE PERSON IN
20 THE PICTURE. SO, SOMEONE THAT HAS KNOWN HIM FOR 20 YEARS,
21 THAT WOULD HELP THE JURY TO GO TO THAT ULTIMATE FACT THAT
22 THAT WAS HIM AND THAT IS THE FACT THAT IS IN DISPUTE. AND
23 THAT WOULD AID THE JURY IN DECIDING ONE WAY OR THE OTHER.
24 IT AIDS THEM IN DETERMINING THE ULTIMATE FACT AT ISSUE
25 HERE. WHETHER OR NOT THAT WAS BENNIE MITCHELL IN THE

1 HOUSE AND ON THAT PICTURE.

2 THE COURT: WELL, HOW IS THAT DIFFERENT, YOU THINK
3 THE STATE WOULD BE ABLE TO CALL IN, FOR INSTANCE, MR.
4 MITCHELL'S HIGH SCHOOL CLASSMATES AND ASK THEM TO LOOK AT
5 THE PICTURE AND SAY, DO YOU RECOGNIZE THAT PERSON. DO YOU
6 THINK THAT WOULD BE PROPER?

7 MR. MCDANIEL: I JUST DON'T THINK THAT IT IS, I THINK
8 IT IS OUTSIDE, I DON'T KNOW WHETHER THAT IS PROBATIVE IN
9 THE CASE AT HAND.

10 THE COURT: HOW IS THAT DIFFERENT THAN HAVING AN
11 OFFICER?

12 MR. MCDANIEL: WELL, THIS IS THE INVESTIGATING
13 OFFICER AND HE, IF I JUST BROUGHT SOMEBODY IN THAT
14 WOULDN'T HELP THEM DETERMINE ON THE FACT THAT IT IS GOING
15 TO THIS INCIDENT. WHO WAS IN THAT HOUSE THAT NIGHT. BUT
16 ALSO HAS KNOWN FOR 20 YEARS TO SAY THAT IS BENNIE
17 MITCHELL, THAT GOES TO THE DETERMINING FACT THAT BENNIE
18 MITCHELL WAS IN THE HOUSE THAT NIGHT. I GUESS THAT IS
19 WHAT HE IS BEING TRIED FOR. THE ULTIMATE FACT IS THE
20 IDENTIFICATION AND AN OFFICER THAT HAS KNOWN HIM FOR 20
21 YEARS THAT IS INVOLVED IN THE CASE LENDS ITSELF MUCH MORE
22 TO THE IDENTIFICATION THAN BRINGING SOMEBODY WHO IS NOT
23 INVOLVED IN THE CASE JUST FOR AN IDENTIFIER. I MEAN, THEN
24 I WOULD THINK YOU WOULD HAVE A PROBLEM WITH BIGGERS ISSUE
25 THAT MR. CHAPLIN IS CONCERNED ABOUT. I GUESS SOMEBODY WHO

1 WENT TO HIGH SCHOOL WITH HIM WOULD OF ONLY REMEMBERED HIM
2 AS HE WAS IN HIGH SCHOOL. IT HAS BEEN SOME YEARS LATER
3 AND I THINK SOMEBODY THAT HAS KNOWN HIM OVER 20 YEARS
4 WOULD BE ABLE TO MORE IDENTIFY HIM.

5 THE COURT: WHAT ABOUT A FAMILY MEMBER, WHAT IS YOUR
6 OPINION. ISN'T THAT WHAT THE JURY, AS YOU JUST SAID,
7 ULTIMATELY CHARGED WITH THE RESPONSIBILITY OF DETERMINING
8 WHETHER THAT IS HIM IN THE PICTURE. THAT IS AN ULTIMATE
9 ISSUE WHICH UNDER RULE 704--

10 MR. MCDANIEL: 704?

11 THE COURT: 704. BUT IT STILL HAS TO BE HELPFUL TO
12 THE JURY AND NOT ESSENTIALLY TELL THEM WHAT RESULT TO
13 REACH. THERE IS A LOT OF WHAT OPINION TESTIMONY CASES ARE
14 DISCUSSED. AND AGAIN, ASSUMING THAT IS WHAT THEY WERE
15 CONCERNED ABOUT IN THE HERRING CASE.

16 MR. MCDANIEL: IN THE HERRING CASE, IT LOOKS LIKE YOU
17 HAVE AN EXPERT TO TRY TO DETERMINE WHAT IS ON THAT VIDEO.
18 I MEAN, IT HAS NOTHING TO DO WITH THE IDENTIFICATION OF
19 THE DEFENDANT IN THE HERRING CASE. IT IS THREE PEOPLE
20 THAT WERE ACTUALLY ON THE SCENE THAT NIGHT AND PLAY A
21 VIDEO AND SAY, WHAT DO YOU THINK YOU SEE THERE. I MEAN I
22 AM ASSUMING THAT IS HOW THEY KIND OF OFFERED THE
23 TESTIMONY.

24 THE COURT: WELL, YOU ARE RIGHT, WE DON'T KNOW. BUT
25 I CAN GLEAM FROM THE OPINION ITSELF THAT THEY WERE

1 CONCERNED ABOUT THE PERSONAL KNOWLEDGE REQUIREMENT. AND
2 AGAIN THEIR DISCUSSION ISSUE UNDER LAY OPINION, LAY
3 OPINION REGARDING THE VIDEO TAPE. SO, YOU MAY BE RIGHT,
4 IT MAY OF BEEN MORE THE EXPERT WITNESSES TESTIMONY ISSUE,
5 APPARENTLY WE WILL NEVER KNOW. BUT NEVERTHELESS, I AM
6 CONCERNED HOW IT IS HELPFUL TO THE JURY AND HOW IT
7 OVERCOMES RULE 403, HAVING THE OFFICER IDENTIFY HIM BASED
8 ON VIDEOTAPE. I MAY NOT BE CLEAR, I AM NOT CONCERNED
9 ABOUT PERSONAL KNOWLEDGE REQUIREMENT, I AM CONCERNED ABOUT
10 HELPING THE JURY. WHAT DOES IT REALLY BRING TO THE TABLE
11 FOR A LAW ENFORCEMENT OFFICER TO SAY, YEAH, I RECOGNIZE
12 HIM IN THAT. IF THE IDENTITY OF THE DEFENDANT, THE
13 PERPETRATOR IS IN FACT THE ULTIMATE ISSUE THE JURY HAS TO
14 DETERMINE, DOESN'T IT CAUSE UNDUE PREJUDICE TO THE
15 DEFENDANT TO HAVE A POLICE OFFICER SAY HE RECOGNIZES THAT
16 PERSON AND IN HIS OPINION THAT IS WHO IT IS.

17 MR. MCDANIEL: OF COURSE, THERE IS PREJUDICE, I WOULD
18 ADMIT THAT IT ALWAYS IS IN A COURT OF IDENTIFICATION BUT
19 IT IS NOT UNDUE BASED ON HOW WE HAVE DECIDED TO PRESENT IT
20 TO THE JURY, YOUR HONOR. I MEAN, I THINK YOUR HONOR, I
21 UNDERSTAND THAT IT LOOKS LIKE THE POLICE OFFICER IDENTIFY,
22 IT ADDS BUT THAT IS NO DIFFERENCE THAN BRINGING SOMEONE
23 OFF THE STREET AND JUST SAYING, I HAVE KNOWN HIM FOR 20
24 YEARS AND THAT IS HIM. WE ARE PRESENTING THE FACT THAT I
25 HAVE LIVED IN THIS COMMUNITY AND I KNOW BENNIE MITCHELL.

1 THAT IS HOW FOR THE JURY IT GOES TO THE ULTIMATE FACT.

2 THE COURT: WELL, MR. CHAPLIN, LET ME ASK YOU THIS.
3 LET'S SAY, CHANGE THE SCENARIO A LITTLE BIT. IF THE
4 OFFICER IS, JUST HAPPENS TO BE WALKING BY AND SOMEBODY
5 RUNS OUT OF THE BANK WITH A MASK ON AND A BAG AND DOLLAR
6 BILLS AND TWENTIES AND HUNDREDS ARE FLYING OUT OF THE BAG
7 THROUGH THE WIND AND THE PERPETRATOR HAS GOT A GUN AND HE
8 RUNS AWAY AND THE OFFICER COMES INTO COURT AND SAYS, WELL,
9 I WAS INVESTIGATING THIS CASE AND IN FACT I WAS THERE AND
10 I SAW THE PERSON RUNNING AND HE RUNS JUST LIKE JOE RUSSELL
11 WHO I WENT TO HIGH SCHOOL WITH. AND BASED ON THAT IN MY
12 OPINION THAT WAS MR. RUSSELL WHO RAN OUT OF THE BANK.
13 WHAT RULE OF EVIDENCE IS PART OF THAT TESTIMONY?

14 MR. CHAPLIN: WELL, YOUR HONOR, I THINK THAT THAT
15 SCENARIO IS MORE IN LINE WITH THE NEIL V. BIGGERS ISSUE,
16 THE RELIABILITY OF THE IDENTIFICATION. I THINK WHAT YOUR
17 HONOR JUST STATED IS THAT IF AN OFFICER WAS ON THE SCENE,
18 HE SAW A PERSON RUNNING OUT OF THE BANK WITH A MASK ON, HE
19 HAD PERSONAL KNOWLEDGE OF WHAT WAS GOING ON, THE WHOLE
20 NINE YARDS.

21 THE COURT: MAYBE THE MASK WASN'T A GOOD FACT. I
22 TAKE THE MASK OFF.

23 MR. CHAPLIN: HE IS THERE TESTIFYING AS TO WHAT HE
24 SAW. WHAT THIS CASE IS ABOUT, YOUR HONOR, DIRECTLY ON
25 POINT WITH WHAT WE ARE PRESENTING AND THAT IS SOMEBODY

1 LOOKING AT A VIDEO OR A PICTURE AND THEN GIVING THEIR
2 OPINION TO TWELVE PEOPLE WHO CLEARLY HAVE THE ABILITY TO
3 FORM THEIR OWN OPINION. THAT IS WHAT WE ARE ASKING THEM
4 TO COME HERE TOMORROW AND DO. THEY ARE TELLING THEM WHAT
5 TO PICK AND THAT IS NOT FAIR TO THE DEFENSE. AND I THINK
6 THAT IS WHAT THE SUPREME COURT WAS MORE CONCERNED THAN
7 ANYTHING, IS THAT LIKE IN THAT CASE IT WAS A VERY SERIOUS
8 MATTER. MY CLIENT IS ON TRIAL FOR A VERY SERIOUS MATTER.
9 AND THE OTHER ISSUE IS THAT, IN THE HERRING CASE, YOUR
10 HONOR, I WASN'T THERE BUT I UNDERSTAND THAT THERE WAS A
11 GREAT DEAL OF EVIDENCE FOR THE JURY TO LOOK AT. SO, I
12 THINK THE JURY INSTRUCTION MIGHT OF WORKED IN THAT CASE,
13 IT WON'T WORK HERE BECAUSE THERE IS ONLY ONE THING THAT
14 THE JURY IS GOING TO BE SEEING TOMORROW AND THAT IS A
15 PICTURE. AND THEY WILL HAVE IT, THEY WILL GET TO TAKE IT
16 BACK WITH THEM TO DELIBERATE, THEY WILL LOOK AT, THEY WILL
17 EXAMINE IT UP AND DOWN, THE STATE HAS ALREADY SAID THEY
18 ARE GOING TO HAVE TO AUTHENTICATE IT, TO GET ALL OF THAT
19 DONE. THEN WE ARE GOING TO TURN THAT OVER TO THEM AND
20 SAY, NOW YOU TELL US WHO YOU THINK THAT IS. NOW, FOR A
21 POLICE OFFICER'S TO GET ON THE STAND AND GIVE THEIR LAY
22 OPINION WHICH IS A TOTAL VIOLATION IN THE RULING OF
23 HERRING IS VERY PREJUDICIAL IN VIOLATION OF RULE 403 AND
24 THE OPEN ISSUE THAT WE ARE HERE TO DECIDE, WE ARE
25 BASICALLY DECIDING FOR THEM. AND IT WILL BE A REVERSAL

1 ERROR.

2 THE COURT: THE ISSUE OF THE OFFICER BEING PRESENT AT
3 THE SCENE WHEN THE CRIME OCCURRED, IN OTHER WORDS, THE
4 BASIS OF THE WITNESSES KNOWLEDGE WAS UNIQUE, UNLIKE HERE
5 WHERE THE BASIS OF THE WITNESSES KNOWLEDGE IS SOMETHING
6 THAT YOU SAY THE JURY WILL HAVE AS WELL. CERTAINLY
7 WOULDN'T HAVE THE EYEWITNESS SCENARIO. SO, I GUESS I AM
8 GOING BACK, MR. MCDANIEL, I AM ASKING YOU AGAIN WHAT IS IT
9 THAT WE CAN DO ADVANCE THE BALL OF THE STATE'S CASE TO
10 ALLOW THE OFFICER TO TESTIFY WHAT HIS OPINION IS TO THE
11 VIDEOTAPE.

12 MR. MCDANIEL: IT IS THE ONLY IDENTIFICATION THAT CAN
13 BE MADE IN THIS CASE. I MEAN, THERE IS NO EYEWITNESS,
14 NOBODY WAS PRESENT IN THE HOME AND THE VICTIM IN THIS CASE
15 WAS UNABLE TO IDENTIFY THE DEFENDANT. IT FURTHERS THE
16 CASE IN THAT THE IDENTITY OF THE DEFENDANT IS AT ISSUE AND
17 I HAVE A LAW ENFORCEMENT OFFICER WHO HAS KNOWN HIM FOR 20
18 YEARS WHO CAN POSITIVELY IDENTIFY HIM. NOW, IT IS HIS
19 OPINION BASED ON HIS PERSONAL KNOWLEDGE OF THE DEFENDANT.
20 AND I THINK THAT IS WHAT THE JURY ULTIMATELY DECIDES, HOW
21 MUCH WEIGHT THEY GIVE THAT BUT IT ADVANCES THE STATE'S
22 CASE IN THAT IT IS THE CRITICAL ELEMENT OF US PROVING THAT
23 THE DEFENDANT ACTUALLY WAS THE DEFENDANT IN THAT HOUSE
24 THAT NIGHT AND HE IS THE CORRECT INDIVIDUAL BEING TRIED
25 BEFORE A JURY.

1 THE COURT: WELL, THE JURY OF COURSE MAKES THE
2 ULTIMATE DETERMINATION. THEY CERTAINLY CAN DECIDE THE
3 FACT, THE CREDIBILITY OF THE EVIDENCE, WHETHER TO ACCEPT
4 IT OR REJECT IT WOULD BE THE WEIGHT THAT THEY THINK IT
5 DESERVES. I DO FIND THAT THE IDENTIFICATION IS RELEVANT.
6 I DO FIND THAT IN THIS CASE WHAT HAS BEEN PRESENTED TO ME
7 MEETS THE CRITERIA OF RULE 701. AND THAT IT IS LAY
8 EVIDENCE AND CAN FORM AN OPINION, IT IS RATIONAL BASED ON
9 EXCEPTION OF A WITNESS, IT IS HELPFUL IN DETERMINATION OF
10 THE FACT OF ISSUE AND A CLEAR UNDERSTANDING OF THE
11 WITNESSES TESTIMONY. IT DOES NOT REQUIRE SPECIAL
12 KNOWLEDGE, SKILL, EXPERIENCE OR TRAINING. I FIND THAT ITS
13 PROBATIVE VALUE IS NOT SUBSTANTIALLY OUTWEIGHED BY THE
14 UNFAIR PREJUDICE OF MISLEADING THE JURY OR ANY OTHER
15 CONSIDERATION. I WOULD RESPECTFULLY DENY THE DEFENSE
16 MOTION EXCLUDING OPINION TESTIMONY OF THE OFFICER AS AN
17 IDENTITY AS A PERSON IN THE DEER CAMERA PHOTOGRAPH.

18 MR. CHAPLIN: YOUR HONOR.

19 THE COURT: YES, SIR.

20 MR. CHAPLIN: I WOULD JUST LIKE TO SAY AT THIS POINT
21 THAT THE COURT IN HERRING WAS SO SPECIFIC AS TO SAY THAT
22 AN OFFICER COULDN'T IDENTIFY OR GIVE THEIR OPINION AS TO
23 WHETHER OR NOT A GUNSHOT WAS A GUNSHOT. BECAUSE THEY
24 WEREN'T THERE, THEY ARE LOOKING AT A VIDEO.

25 THE COURT: RIGHT.

1 MR. CHAPLIN: AND I STRUGGLE TO SEE THE DISTINCTION
2 FROM THAT CASE TO THIS CASE.

3 THE COURT: WELL, FIRST OF ALL I HAVE ALREADY RULED.
4 AND I UNDERSTAND THAT YOU DON'T AGREE WITH MY RULING AND I
5 NOTE YOUR OBJECTION TO IT. I WILL MAKE THIS THE FINAL
6 WORD ON THE SUBJECT. THE RATHER BRIEF DISCUSSION IN
7 HERRING BEGINS AFTER A SESSION CALLED LAY OPINIONS
8 REGARDING THE VIDEOTAPE. IT CONCERNED A GUNSHOT
9 IDENTIFICATION TESTIMONY. THEY NEVER SAID WHETHER IT WAS
10 IN ERROR FOR THE STATE TO ADMIT THAT EVIDENCE, FOR THE
11 TRIAL JUDGE TO ALLOW ITS ADMISSION. THEY NEVER DID SAY
12 THAT, THEY NEVER CITED A RULE, THEY NEVER CITED A CASE
13 THAT DEALT WITH WHETHER IT WAS ERROR. ALL THEY DID, MR.
14 CHAPLIN, IS FIND THAT THE TRIAL COURT'S CURATIVE
15 INSTRUCTION WAS SUFFICIENT TO CURE ANY PREJUDICE SUCH THAT
16 THERE WAS NO ERROR IN DENYING THE DEFENDANT'S MOTION FOR A
17 MISTRIAL. SO IT CAME UP IN THE CONTEXT OF A MOTION FOR A
18 MISTRIAL. THEY NEVER ELABORATED ON IF, NEVER MADE ANY
19 FINDING ABOUT WHETHER THE IDENTIFICATION TESTIMONY WAS
20 REVERSIBLE ERROR. SO IT IS HARD FOR ME TO TAKE FROM THAT
21 TO THE CONCLUSION THAT YOU WISH ME TO REACH. AND RELYING
22 ON THE LAW OF THE RULES OF EVIDENCE, SPECIFIC RULES AND
23 HOW THEY ARE INTERPRETED IN CASE LAW I HAVE MADE MY
24 RULING. WHAT IS THE NEXT MOTION.

25 MR. CHAPLIN: I BEG THE COURT'S INDULGENCE.

1 THE COURT: OKAY. LET'S TAKE A BREAK.

2 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

3 THE COURT: YES SIR, MR. CHAPLIN.

4 MR. CHAPLIN: YOUR HONOR, I WILL AGAIN ASK, I GUESS
5 THE ONLY THING LEFT WOULD BE NUMBER FOUR. AND I WOULD
6 ARGUE THAT ADDITIONAL OFFICERS WOULD BE CUMULATIVE AND I
7 WOULD AGAIN BE CONCERNED OF THE PREJUDICIAL EFFECT THAT
8 THAT WOULD HAVE.

9 THE COURT: NUMBER FIVE?

10 MR. CHAPLIN: NUMBER FOUR.

11 THE COURT: OKAY. ALL RIGHT. MR. MCDANIEL, WHAT IS
12 YOUR RESPONSE TO THAT.

13 MR. MCDANIEL: I DON'T THINK IT WOULD BE CUMULATIVE,
14 JUDGE, IT IS JUST A SECOND INDICATION, FACTUALLY AFTER
15 LIEUTENANT MCCLURKIN MAKES AN IDENTIFICATION THEN CHIEF
16 SWINDLER WILL ALSO MAKE AN IDENTIFICATION.

17 THE COURT: I NEED TO KNOW EXACTLY WHAT THE TESTIMONY
18 IS GOING TO BE.

19 MR. MCDANIEL: I MEAN BASICALLY THE SAME AS MR.
20 MCCLURKIN THAT I VIEWED THE PICTURE, THAT IS BENNIE
21 MITCHELL.

22 THE COURT: I THINK I AM GOING TO GRANT THE DEFENSE
23 MOTION ON THAT. I THINK WHAT IT WOULD BE IS ALMOST
24 BOLSTERING THE CREDIBILITY WITH LIEUTENANT MCCLURKIN BY
25 OTHER OFFICERS. I THINK ALLOWING LIEUTENANT MCCLURKIN TO

1 IDENTIFY WOULD BE SUFFICIENT TO EXPLAIN TO THE JURY
2 ESSENTIALLY WHY MR. MITCHELL WAS ON TRIAL, WHY HE WAS
3 DEVELOPED AS A SUSPECT. I THINK BEYOND THAT IT BECOMES
4 CUMULATIVE AND RULE 403 CONCERNS WOULD BE INDICATED TO THE
5 POINT THAT THAT SHOULD NOT BE ALLOWED.

6 MR. MCDANIEL: YES, SIR.

7 MR. CHAPLIN: YOUR HONOR, JUST TO BE THOROUGH, IF I
8 COULD, GO BACK TO NUMBER ONE. THAT MOTION WAS GRANTED.
9 NUMBER TWO, WE AGREED THAT THE ONLY TESTIMONY WOULD BE
10 PERTAINING TO MATTERS DIRECTLY RELATED TO THE INCIDENT ON
11 10/27/08. ALTHOUGH I HAVE OBJECTED AND DISAGREE FOR YOU
12 TO ALLOW LIEUTENANT MCCLURKIN TO PROVIDE ANY TESTIMONY AS
13 TO THE IDENTIFICATION IN THE PICTURE THAT WAS DENIED.
14 FOUR, GRANTED IT ON THE GROUNDS THAT IT WOULD BE
15 CUMULATIVE AND PURSUANT TO RULE 403, PREJUDICIAL,
16 BOLSTERING. NUMBER FIVE, STATE'S WITNESSES CAN ONLY SAY
17 THAT THEY KNOW MR. MITCHELL BECAUSE THEY LIVED IN THE
18 COMMUNITY OVER THE PAST 20 YEARS AND KNOW MR. MITCHELL AS
19 A MEMBER OF THE COMMUNITY. AS FAR AS THE VIDEOTAPE OR
20 PICTURES OF THE INCIDENT ALLEGEDLY TAKEN BY MR. POTTS ON
21 THE NIGHT OF 10/27, WE WILL ADDRESS THOSE ISSUES AT THE
22 TIME THE STATE INTENDS TO INTRODUCE THAT. SO THAT IS
23 DEFERRED. NUMBER SEVEN, UNDERSTAND AS LONG AS MR.
24 MITCHELL DOES NOT TAKE THE STAND THAT THERE WILL BE NO
25 TESTIMONY REGARDING ANY PRIOR CRIMES. AS FAR AS EIGHT,

1 MR. POTTS IS LIMITED TO SAYING THAT HE HAS HAD PRIOR
2 BREAK-INS AND THAT IS THE EXTENT. JUST SO THE JURY WILL
3 UNDERSTAND THE BASIS OF PROVIDING THE DEER CAMERA. NUMBER
4 NINE, WE SETTLED THAT, THE TESTIMONY WILL BE THEY SEARCHED
5 THE HOME OF MR. MITCHELL AND DIDN'T FIND ANYTHING PURSUANT
6 TO THAT SEARCH WARRANT. AND THEN WE ALSO ADDRESSED THE
7 MATTER OF NOLLE PROSING THE ENHANCEMENT INDICTMENT AND
8 REPLACING IT WITH A PETTY LARCENY INDICTMENT WHICH I NOTED
9 MY CONCERNS REGARDING THE DESCRIPTION OF THAT INDICTMENT
10 PRIOR TO MR MITCHELL'S ARRAIGNMENT. THANK YOU, YOUR
11 HONOR.

12 THE COURT: LET ME JUST SAY THAT SOME CASES COULD OF
13 ALLOWED LAY OPINIONS ON SIMILAR ISSUES WOULD INCLUDE
14 UNITED STATES VERSUS YAZZIE, 976, F2D, 1252, 9TH CIRCUIT,
15 1992 TO ALLOW LAY OPINION EVIDENCE ON A STATUTORY RAPE
16 TRIAL. UNITED STATES VERSUS LOPEZ, 478, F.3D, 1213, IT IS
17 A TENTH CIRCUIT CASE FROM 2007 WHICH UPHELD THE
18 ADMISSIBILITY OF THE LAY OPINION THAT WAS AN
19 IDENTIFICATION BY AN FBI AGENT VOICE ON AN AUDIOTAPE AND
20 AN IMAGE ON A VIDEOTAPE. SO, WITH THAT IS THERE ANYTHING
21 FURTHER FOR CONSIDERATION TODAY?

22 MR. CHAPLIN: THOSE TWO CASES, CAN YOU GIVE THEM
23 AGAIN?

24 THE COURT: SURE. 478, F.3D, 1213 IS UNITED STATES
25 VERSUS LOPEZ. AND UNTIED STATES VERSUS YAZZIE, 976, F2D,

1 1252. THANK YOU. WHAT TIME IS THE JURY COMING IN?

2 MR. MCDANIEL: 9:30, JUDGE.

3 THE COURT: WE WILL SEE YOU IN THE MORNING AT 9:30.

4 THANK YOU.

5 (WHEREUPON, THE TRIAL WILL RESUME THE NEXT MORNING AT
6 9:30 A.M.)

7 APRIL 20, 2010.

8 THE COURT: MR. MCDANIEL, CALL YOUR CASE, PLEASE.

9 MR. MCDANIEL: YOUR HONOR, THE CASE IS THE STATE
10 VERSUS BENNIE DARRON MITCHELL CHARGED ON INDICTMENT
11 2009-GS-36-037, FIRST DEGREE BURGLARY. 2009-GS-36-039,
12 POSSESSION OF BURGLARY TOOLS. INDICTMENT 2010-GS-36-087,
13 PETTY LARCENY.

14 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, WE ARE
15 NOW GOING TO SELECT THE JURY IN THE CASE OF THE STATE
16 VERSUS BENNIE DARRON MITCHELL. AND OUR PURPOSE IS TO
17 INSURE THAT EVERYONE SELECTED CAN BE FAIR AND IMPARTIAL
18 AND DECIDE THIS CASE WITHOUT ANY KIND OF BIASED OR
19 PREJUDICE OR ANY KIND OF PRECONCEIVED NOTIONS.

20 MR. MCDANIEL: YOUR HONOR, I DO HAVE A WITNESS LIST.

21 THE COURT: OKAY, THANK YOU. FIRST OFF I AM GOING TO
22 ASK MR. MITCHELL TO STAND SO THE JURY CAN SEE YOU, SIR.

23 (WHEREUPON, MR. MITCHELL STANDS.)

24 THE COURT: THANK YOU. LADIES AND GENTLEMEN, THIS IS
25 A CRIMINAL CASE AND THERE ARE CERTAIN PRINCIPLES THAT

1 APPLY TO ALL CRIMINAL CASES. AND I AM GOING TO READ TO
2 YOU THE INDICTMENTS. THERE ARE THREE INDICTMENTS BUT
3 BEFORE I DO THAT I WANT TO ADVISE YOU AND INSTRUCT YOU
4 THAT THESE INDICTMENTS ARE NOT EVIDENCE. AN INDICTMENT IS
5 SIMPLY A WAY A CASE GETS STARTED, IT IS A FORMAL WAY A
6 CASE CAN BEGIN AND THE STATE CAN START A PROSECUTION
7 AGAINST A CITIZEN AND LETS A CITIZEN KNOW WHAT HE IS BEING
8 CHARGED WITH. THE ALLEGATIONS IN THE INDICTMENT ARE NOT
9 PROOF OF ANYTHING, THEY ARE NOT EVIDENCE, THEY DON'T EVEN
10 CREATE A SUSPICION OF GUILT. THEY ARE SIMPLY ALLEGATIONS
11 AT THIS STAGE. MR. MITCHELL HAS PLEAD NOT GUILTY TO THE
12 INDICTMENT AND THAT PUTS THE BURDEN OF PROOF ON THE STATE.
13 AND MR. MITCHELL MAY ONLY BE CONVICTED IF THE JURY FINDS
14 UNANIMOUSLY THAT THE STATE HAS PROVEN EACH ELEMENT OF EACH
15 CRIME BEYOND A REASONABLE DOUBT. THERE ARE THREE CHARGES
16 IN THIS CASE SO THE JURY WILL HAVE TO INDEPENDENTLY WEIGH
17 THE EVIDENCE AS TO EACH CHARGE AND DETERMINE WHETHER THE
18 STATE HAS MET ITS BURDEN OF PROOF ON EACH CHARGE AND NOT
19 THEIR DECISION ON ONE CHARGE INFLUENCE THEIR DECISION ON
20 ANOTHER CHARGE. MR. MITCHELL IS PRESUMED INNOCENT, HE
21 DOESN'T HAVE TO OFFER ANY KIND OF EXPLANATION OR EVIDENCE
22 WHATSOEVER. THE BURDEN OF PROOF, AS I HAVE SAID IS
23 ENTIRELY ON THE STATE. THE PRESUMPTION OF INNOCENCE WILL
24 STAY WITH MR. MITCHELL NOT ONLY RIGHT DURING THE JURY
25 SELECTION BUT ONCE THE CASE STARTS HE WILL STILL BE

1 PRESUMED INNOCENT. ONCE THE CASE ENDS AND YOU GO BACK
2 INTO THE JURY ROOM HE WILL STILL BE PRESUMED INNOCENT.
3 AND THAT PRESUMPTION OF INNOCENCE CAN ONLY BE REMOVED IF
4 YOU, THE JURY, FIND UNANIMOUSLY THE STATE HAS PROVEN GUILT
5 BEYOND A REASONABLE DOUBT AS TO EACH ELEMENT OF THE CRIME.
6 SO THOSE ARE CERTAIN PRINCIPLES THAT APPLY TO THIS CASE
7 AND ARE FUNDAMENTAL TO OUR CRIMINAL JUSTICE SYSTEM. NOW,
8 THE INDICTMENTS ALLEGE AS FOLLOWS. INDICTMENT
9 09-GS-36-37, IT ALLEGES THAT BENNIE DARRON MITCHELL DID IN
10 NEWBERRY COUNTY BETWEEN THE DATES OF 27TH DAY OF OCTOBER
11 OF 2008 AND THE 28TH DAY OF OCTOBER OF 2008 WILLFULLY AND
12 UNLAWFULLY ENTER A DWELLING WITHOUT CONSENT AND WITH THE
13 INTENT TO COMMIT A CRIME THEREIN WHEN SUCH ENTERING OR
14 REMAINING OCCURRED IN THE NIGHTTIME. THE SAID DWELLING
15 BEING OWNED AND OR OPERATED BY STEPHEN LEE POTTS IN
16 VIOLATION OF SECTION 16-11-311 OF THE SOUTH CAROLINA CODE
17 OF LAWS.

18 THE SECOND INDICTMENT ALLEGES THAT MR. MITCHELL DID
19 IN THIS COUNTY ON OR ABOUT THE 27TH DAY OF OCTOBER OF 2008
20 KNOWINGLY, WILLFULLY AND UNLAWFULLY MAKE OR CAUSE TO BE
21 MADE OR AMENDED OR POSSESS ANY IMPLEMENT OR THING ADAPTED,
22 DESIGNED OR COMMONLY USED FOR THE COMMISSION OF BURGLARY,
23 LARCENY, SAFECRACKING OR OTHER CRIME IN VIOLATION OF
24 SECTION 16-11-20 OF THE SOUTH CAROLINA CODE.

25 AND THE THIRD AND FINIAL INDICTMENT ALLEGES THAT MR.

1 MITCHELL DID IN THIS COUNTY ON OR ABOUT THE 27TH DAY OF
2 OCTOBER OF 2008 FELONIOUSLY TAKE AND CARRY AWAY THE
3 PERSONAL GOODS OF STEPHEN LEE POTTS OF THE VALUE OF LESS
4 THAN ONE-THOUSAND DOLLARS DESCRIBED AS FOLLOWS: FOUR TO
5 FIVE CANS OF BEER, ONE-HUNDRED DOLLARS OF UNITED STATES
6 CURRENCY, ONE PACKAGE OF SOCKS WITH INTENT TO DEPRIVE THE
7 OWNER PERMANENTLY OF SUCH GOODS IN VIOLATION OF SECTION
8 16-13-30 (A) OF THE SOUTH CAROLINA CODES. THOSE ARE THE
9 ALLEGATIONS IN THE INDICTMENTS AND AGAIN THEY ARE JUST
10 THAT, ALLEGATIONS. MR. MITCHELL HAS PLEAD NOT GUILTY. HE
11 DOESN'T HAVE THE BURDEN OF PROOF. THE STATE CARRIES THE
12 SOLE BURDEN OF PROOF AND HE IS PRESUMED INNOCENT. NOW,
13 THE FIRST THING THAT I NEED TO ASK IF THERE IS ANYONE WHO
14 IS RELATED BY BLOOD OR MARRIAGE OR KIN TO IN ANY WAY TO
15 MR. BENNIE DARRON MITCHELL OR MR. STEPHEN LEE POTTS. IF
16 SO, PLEASE STAND. YES, MA'AM.

17 JUROR: SHIRLEAN BROWN.

18 THE COURT: AND YOUR RELATIONSHIP?

19 JUROR: I AM KIN TO MR. MITCHELL.

20 THE COURT: WE WILL EXCUSE YOU FROM THIS CASE. THANK
21 YOU. IS THERE ANYONE WHO KNOWS ANYTHING ABOUT THIS CASE
22 OTHER THAN WHAT YOU HAVE HEARD HERE FROM ME THIS MORNING.
23 IF SO, PLEASE STAND.

24 (NO RESPONSE.)

25 THE COURT: IS THERE ANYONE WHO HAS ANY PERSONAL,

1 SOCIAL OR BUSINESS RELATIONSHIP WITH EITHER MR. MITCHELL
2 OR MR. POTTS. OKAY.

3 JUROR: RENEE FOULIS. I HAVE A BUSINESS RELATIONSHIP
4 IN NEWBERRY WITH MR. POTTS.

5 THE COURT: CAN YOU BE FAIR AND DECIDE THIS CASE
6 SOLELY ON THE EVIDENCE PRESENTED?

7 JUROR: YES, SIR.

8 THE COURT: THANK YOU.

9 JUROR: I AM DEBBIE ST. MARK AND I DO FREQUENT THE
10 ESTABLISHMENT OF MR. POTTS.

11 THE COURT: AND WOULD THAT AFFECT YOUR ABILITY TO BE
12 FAIR AND IMPARTIAL IN THIS CASE?

13 JUROR: NO, SIR.

14 THE COURT: YOU CAN PUT THAT ASIDE AND DECIDE THIS
15 CASE SOLELY ACCORDING TO THE EVIDENCE AND THE LAW?

16 JUROR: YES, SIR.

17 THE COURT: OKAY.

18 JUROR: JUSTIN DERRICK, I ALSO GO TO THEIR
19 ESTABLISHMENT SOMETIMES.

20 THE COURT: AND COULD YOU PUT THAT RELATIONSHIP ASIDE
21 AND DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE LAW?

22 JUROR: YES, SIR.

23 THE COURT: YOU COULD BE FAIR AND IMPARTIAL TO BOTH
24 MR. POTTS AND MR. MITCHELL?

25 JUROR: YES, SIR.

1 THE COURT: IS THERE ANYONE ELSE WHO IS A CUSTOMER OF
2 OR WHO HAS BEEN EMPLOYED BY OR HAD A MEMBER OF THEIR
3 IMMEDIATE FAMILY BE EMPLOYED OR HAVE ANY OTHER BUSINESS
4 RELATIONSHIP WITH AN ENTITY KNOWN AS THE BLUE MOON. IF
5 SO, PLEASE STAND. OKAY.

6 JUROR: CAYCI BANKS. I HAVE BEEN TO THE BLUE MOON
7 AND MY HUSBAND IS FRIENDS OF HIS.

8 THE COURT: WOULD THAT AFFECT YOUR ABILITY TO BE FAIR
9 AND IMPARTIAL?

10 JUROR: NO, SIR.

11 THE COURT: YOU CAN DECIDE THE CASE SOLELY ON THE
12 EVIDENCE ACCORDING TO THE LAW?

13 JUROR: YES, SIR.

14 THE COURT: OKAY.

15 JUROR: ROBERT REYNOLDS. I HAVE BEEN TO THE BLUE
16 MOON.

17 THE COURT: WOULD THAT AFFECT YOUR ABILITY TO BE FAIR
18 AND IMPARTIAL?

19 JUROR: NO, SIR.

20 THE COURT: YOU COULD DECIDE THE CASE ACCORDING TO
21 THE EVIDENCE IN THE LAW?

22 JUROR: YES, SIR.

23 THE COURT: THANK YOU. I AM GOING TO ASK THE LAWYERS
24 WHO ARE GOING TO BE INVOLVED IN THE TRIAL TO INTRODUCE
25 THEMSELVES AND THE PEOPLE AT THEIR TABLE. MR. MCDANIEL.

1 MR. MCDANIEL: MY NAME IS AUSTIN MCDANIEL, ASSISTANT
2 SOLICITOR FOR THE EIGHTH CIRCUIT, NEWBERRY AND LAURENS
3 COUNTY. TO MY RIGHT IS KENN WILTSHIRE AND LIEUTENANT
4 MCCLURKIN, THE INVESTIGATOR IN THE CASE. YOU HAVE MET MR.
5 POTTS. ALSO SEATED HERE IS NEICY POLIFRONE. ALLISON
6 MOORE IS ALSO EMPLOYED WITH THE NEWBERRY POLICE
7 DEPARTMENT.

8 THE COURT: MR. CHAPLIN.

9 MR. CHAPLIN: GOOD MORNING, MY NAME IS MATHIAS
10 CHAPLIN AND I AM AN ATTORNEY HERE IN SOUTH CAROLINA. I
11 PRACTICE IN COLUMBIA, SOUTH CAROLINA AND ALSO IN
12 WALTERBORO, SOUTH CAROLINA. HERE WITH ME IS BENNIE DARRON
13 MITCHELL. THANK YOU. AND I ALSO SEATED WITH ME IS
14 ELIZABETH COOK WHO HAS ALSO REPRESENTED SOME PEOPLE IN THE
15 STATE OF SOUTH CAROLINA. AND SHE IS NOW WORKING AS AN
16 INVESTIGATOR IN THIS CASE.

17 THE COURT: IS THERE ANYONE WHO IS RELATED BY BLOOD
18 OR MARRIAGE OR KIN TO IN ANY WAY EITHER TO MR. CHAPLIN OR
19 MR. MCDANIEL OR ANY OF THE PEOPLE THAT THEY INTRODUCED.
20 IF SO, PLEASE STAND.

21 (NO RESPONSE.)

22 THE COURT: DOES ANYONE HAVE ANY BUSINESS, SOCIAL OR
23 PERSONAL RELATIONSHIP WITH MR. CHAPLIN OR MR. MCDANIEL OR
24 ANYONE THEY INTRODUCED. IF SO, PLEASE STAND.

25 (NO RESPONSE.)

1 OR MR. MCDANIEL OR THE SOLICITORS OFFICE OF THE EIGHTH
2 CIRCUIT. IF SO, PLEASE STAND.

3 (NO RESPONSE.)

4 THE COURT: HAS ANYONE EVER BEEN REPRESENTED BY OR
5 HAD THE OTHER SIDE REPRESENTED BY MR. CHAPLIN OR MR.
6 MCDANIEL. IF SO, PLEASE STAND.

7 (NO RESPONSE.)

8 THE COURT: ALL RIGHT, THE PEOPLE WHO MAY TESTIFY IN
9 THIS CASE INCLUDE JACKIE SWINDLER, ROY MCCLURKIN, KEVIN
10 ATKINS, DON KNEECE, ALLISON MOORE, TOM ALLEY, EDMUND
11 PEREIRA, P-E-R-E-I-R-A AND ELIZABETH COOK. IS THERE
12 ANYONE RELATED BY BLOOD OR MARRIAGE TO ANY OF THESE
13 POTENTIAL WITNESSES OR KIN TO ANY OF THEM. IF SO, PLEASE
14 STAND.

15 (NO RESPONSE.)

16 THE COURT: DOES ANYONE HAVE ANY PERSONAL, SOCIAL OR
17 BUSINESS RELATIONSHIP WITH ANY OF THESE POTENTIAL
18 WITNESSES. IF SO, PLEASE STAND. YES, SIR.

19 JUROR: LELAND JACKSON, I KNOW THE OFFICER.

20 THE COURT: PART OF YOUR JOB AS A JUROR WOULD BE TO
21 EVALUATE WHETHER THE WITNESSES ARE CREDIBLE OR BELIEVABLE.
22 DO YOU THINK THAT YOU CAN DO THAT FAIRLY AND IMPARTIALLY
23 BASED ON THE FACT THAT YOU KNOW THEM?

24 JUROR: YES, SIR.

25 THE COURT: AND YOU CAN DECIDE THE CASE ACCORDING TO

1 THE EVIDENCE AND THE LAW?

2 JUROR: YES, SIR.

3 THE COURT: THANK YOU.

4 JUROR: MARY DAWKINS, I KNOW THE OFFICERS.

5 THE COURT: DO YOU THINK THAT YOU CAN BE FAIR AND
6 IMPARTIAL?

7 JUROR: YES, SIR.

8 THE COURT: YOU CAN DECIDE THE CASE ON THE EVIDENCE
9 AND THE LAW?

10 JUROR: YES, SIR.

11 THE COURT: DOES ANYONE KNOW OF ANY REASON WHY THEY
12 COULD NOT BE FAIR AND IMPARTIAL IN THIS CASE OR DOES
13 ANYONE HAVE ANY BIASED OR PREJUDICE THAT THEY HAVE
14 CONCERNING ANY ISSUE OR ANYONE INVOLVED IN THIS MATTER.
15 IF SO, PLEASE STAND.

16 (NO RESPONSE.)

17 THE COURT: ANY FURTHER VOIR DIRE FROM THE STATE?

18 MR. MCDANIEL: NOT FROM THE STATE, JUDGE.

19 THE COURT: FROM THE DEFENSE?

20 MR. CHAPLIN: NOTHING FURTHER, YOUR HONOR.

21 THE COURT: THANK YOU. WE WILL NOW PROCEED WITH THE
22 SELECTION OF THE JURY AND WHEN YOUR NAME IS CALLED YOU MAY
23 SIMPLY STAND UP WHERE YOU ARE AND EACH SIDE HAS A CERTAIN
24 NUMBER OF STRIKES. THE STRIKES ARE FIVE AND TEN AND WE
25 WILL HAVE ONE ALTERNATE. AND THE STRIKES WILL BE ONE AND

1 TWO ON THAT. SO, IF YOU ARE SELECTED THEY WILL ASK YOU TO
2 BRING YOUR BELONGINGS WITH YOU AND COME UP AND HAVE A SEAT
3 IN THE JURY BOX AND WITH THAT YOU MAY PROCEED.

4 THE CLERK: NUMBER 97, CAROL MAZZA. WHAT SAYS THE
5 STATE?

6 MR. MCDANIEL: PLEASE SEAT THE JUROR.

7 THE CLERK: WHAT SAYS THE DEFENSE?

8 MR. CHAPLIN: PLEASE SEAT THE JUROR.

9 THE CLERK: NUMBER 38, DEXTER DOUGLAS. WHAT SAYS THE
10 STATE?

11 MR. MCDANIEL: PLEASE EXCUSE MR. DOUGLAS.

12 THE CLERK: NUMBER 114, ALLEN O'SHIELDS. WHAT SAYS
13 THE STATE?

14 MR. MCDANIEL: PLEASE PRESENT MR. O'SHIELDS.

15 THE CLERK: WHAT SAYS THE DEFENSE?

16 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

17 THE CLERK: NUMBER 123, ROBERT REYNOLDS. WHAT SAYS
18 THE STATE?

19 MR. MCDANIEL: PLEASE PRESENT MR. REYNOLDS.

20 THE CLERK: WHAT SAYS THE DEFENSE?

21 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

22 THE CLERK: NUMBER 24, ANN COTNEY. WHAT SAYS THE
23 STATE?

24 MR. MCDANIEL: PLEASE SEAT MS. COTNEY.

25 THE CLERK: WHAT SAYS THE DEFENSE?

1 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

2 THE CLERK: NUMBER 77, LELAND JACKSON. WHAT SAYS THE
3 STATE?

4 MR. MCDANIEL: PLEASE SEAT MR. JACKSON.

5 THE CLERK: WHAT SAYS THE DEFENSE?

6 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

7 THE CLERK: NUMBER 141 JACQUELINE SMITH. WHAT SAYS
8 THE STATE?

9 MR. MCDANIEL: PLEASE SEAT MS. SMITH.

10 THE CLERK: WHAT SAYS THE DEFENSE?

11 MR. CHAPLIN: PLEASE SEAT THE JUROR.

12 THE CLERK: NUMBER 113, DANIEL NOBLES. WHAT SAYS THE
13 STATE?

14 MR. MCDANIEL: PLEASE EXCUSE MR. NOBLES.

15 THE CLERK: NUMBER 36, JUSTIN DICKERT. WHAT SAYS THE
16 STATE?

17 MR. MCDANIEL: PLEASE SEAT MR. DICKERT.

18 THE CLERK: WHAT SAYS THE DEFENSE?

19 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

20 THE CLERK: NUMBER 74, DONALD HURST. WHAT SAYS THE
21 STATE?

22 MR. MCDANIEL: PLEASE SEAT MR. HURST.

23 THE CLERK: WHAT SAYS THE DEFENSE?

24 MR. CHAPLIN: PLEASE SEAT THE JUROR.

25 THE CLERK: NUMBER 154, KIMBERLY WEST. WHAT SAYS THE

1 STATE?

2 MR. MCDANIEL: PLEASE SEAT MS. WEST.

3 THE CLERK: WHAT SAYS THE DEFENSE?

4 MR. CHAPLIN: PLEASE SEAT THE JUROR.

5 THE CLERK: NUMBER 20, JOSHUA CHEATHAM. WHAT SAYS
6 THE STATE?

7 MR. MCDANIEL: PLEASE EXCUSE MR. CHEATHAM.

8 THE CLERK: NUMBER 100, ELIZABETH MONTGOMERY. WHAT
9 SAYS THE STATE?

10 MR. MCDANIEL: PLEASE SEAT MS. MONTGOMERY.

11 THE CLERK: WHAT SAYS THE DEFENSE?

12 MR. CHAPLIN: PLEASE SEAT THE JUROR.

13 THE CLERK: NUMBER 153, TRACY WERTS. WHAT SAYS THE
14 STATE?

15 MR. MCDANIEL: PLEASE SEAT MS. WERTS.

16 THE CLERK: WHAT SAYS THE DEFENSE?

17 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

18 THE CLERK: NUMBER 13, JANA BOICE. WHAT SAYS THE
19 STATE?

20 MR. MCDANIEL: PLEASE EXCUSE MS. BOICE.

21 THE CLERK: NUMBER 32, MARY DAWKINS. WHAT SAYS THE
22 STATE?

23 MR. MCDANIEL: PLEASE PRESENT MS. DAWKINS.

24 THE CLERK: WHAT SAYS THE DEFENSE?

25 MR. CHAPLIN: PLEASE EXCUSE MS. DAWKINS.

1 THE CLERK: NUMBER 106, WILLIE NANCE. WHAT SAYS THE
2 STATE?

3 MR. MCDANIEL: PLEASE EXCUSE MR. NANCE.

4 THE CLERK: NUMBER 155, BENJAMIN WESTWOOD. ANY
5 CHALLENGE FOR CAUSE BY THE STATE?

6 MR. MCDANIEL: NOT FROM THE STATE.

7 THE CLERK: WHAT SAYS THE DEFENSE?

8 MR. CHAPLIN: PLEASE SEAT THE JUROR.

9 THE CLERK: NUMBER 58, PAMELA GRIFFIN. ANY CHALLENGE
10 FOR CAUSE BY THE STATE?

11 MR. MCDANIEL: NOT BY THE STATE.

12 THE CLERK: WHAT SAYS THE DEFENSE?

13 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

14 THE CLERK: NUMBER 99, DEBRA METTS. ANY CHALLENGE
15 FOR CAUSE BY THE STATE?

16 MR. MCDANIEL: NOT BY THE STATE.

17 THE CLERK: WHAT SAYS THE DEFENSE?

18 MR. CHAPLIN: PLEASE SEAT THE JUROR.

19 THE CLERK: NUMBER 112, HENRY NICHOLSON, JR. ANY
20 CHALLENGE FOR CAUSE BY THE STATE?

21 MR. MCDANIEL: NO, MA'AM.

22 THE CLERK: WHAT SAYS THE DEFENSE?

23 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

24 THE CLERK: NUMBER 135, SHANI SHELLS. ANY CHALLENGE
25 FOR CAUSE BY THE STATE?

1 MR. MCDANIEL: NO, MA'AM.

2 THE CLERK: WHAT SAYS THE DEFENSE?

3 MR. CHAPLIN: PLEASE SEAT THE JUROR.

4 THE CLERK: NUMBER 145, DEBORAH STEVENS. ANY
5 CHALLENGE FOR CAUSE BY THE STATE?

6 MR. MCDANIEL: NO, MA'AM.

7 THE CLERK: WHAT SAYS THE DEFENSE?

8 MR. CHAPLIN: PLEASE SEAT THE JUROR.

9 THE CLERK: NUMBER 98, TERRY MELLINGER. ANY
10 CHALLENGE FOR CAUSE BY THE STATE?

11 MR. MCDANIEL: NO, MA'AM.

12 THE CLERK: WHAT SAYS THE DEFENSE?

13 MR. CHAPLIN: PLEASE SEAT THE JUROR.

14 THE CLERK: NUMBER 6, ANGELA BAGGOTT. ANY CHALLENGE
15 FOR CAUSE BY THE STATE?

16 MR. MCDANIEL: NO, MA'AM.

17 THE CLERK: WHAT SAYS THE DEFENSE?

18 MR. CHAPLIN: PLEASE EXCUSE THE JUROR.

19 THE CLERK: NUMBER 150, MARGARET TERRANA. ANY
20 CHALLENGE FOR CAUSE BY THE STATE?

21 MR. MCDANIEL: NO, MA'AM.

22 THE CLERK: CHALLENGE FOR CAUSE BY THE DEFENSE?

23 MR. CHAPLIN: NO, MA'AM.

24 THE CLERK: NUMBER 120, RUSSELL PITTS. CHALLENGE FOR
25 CAUSE BY THE STATE?

1 MR. MCDANIEL: NO, MA'AM.

2 THE CLERK: CHALLENGE FOR CAUSE BY THE DEFENSE?

3 MR. CHAPLIN: NO, MA'AM.

4 THE CLERK: FOR THE ALTERNATE. NUMBER 95, TERESA
5 MAYBIN. WHAT SAYS THE STATE?

6 MR. MCDANIEL: PLEASE SEAT MS. MAYBIN.

7 THE CLERK: WHAT SAYS THE DEFENSE?

8 MR. CHAPLIN: PLEASE SEAT THE JUROR.

9 THE COURT: ALL RIGHT, ANY OBJECTIONS OR EXCEPTIONS
10 TO THE COMPOSITION OF THE JURY, THE SELECTION PROCESS FROM
11 THE STATE?

12 MR. MCDANIEL: NOT FROM THE STATE.

13 THE COURT: FROM THE DEFENSE?

14 MR. CHAPLIN: NOT FROM THE DEFENSE, YOUR HONOR.

15 THE COURT: LADIES AND GENTLEMEN OF THE JURY, YOU
16 HAVE BEEN SELECTED TO BE THE JURY FOR THE STATE VERSUS
17 BENNIE MITCHELL. AND I AM GOING TO ASK YOU TO GO BACK TO
18 THE JURY ROOM RIGHT NOW. THE BAILIFF WILL SHOW YOU WHERE
19 THAT IS AND WE ARE GOING TO TRY TO HAVE SOME OF THE
20 OPENING ARGUMENTS THIS MORNING. YOU ARE EXCUSED.

21 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

22 (WHEREUPON, THE REMAINING JURY PANEL WAS EXCUSED FROM
23 OPEN COURT.)

24 THE COURT: ANYTHING BEFORE WE BRING THE JURY IN?

25 MR. MCDANIEL: NOT FROM THE STATE, YOUR HONOR.

1 MR. CHAPLIN: NO, SIR.

2 THE COURT: BRING THE JURY IN, PLEASE.

3 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
4 APPROXIMATELY 11:55 P.M.)

5 THE COURT: GOOD AFTERNOON. WE ARE GOING TO DO THE
6 OPENING STATEMENTS AND THEN WE ARE GOING TO BREAK FOR
7 LUNCH AND I AM GOING TO GIVE YOU A FEW PRELIMINARY
8 INSTRUCTIONS RIGHT NOW. AND BEFORE I DO THAT I WANT TO
9 AGAIN THANK YOU FOR YOUR SERVICE THIS WEEK. I KNOW IT IS
10 INCONVENIENT FOR YOU TO BE HERE AND I AM TAKING YOU AWAY
11 FROM YOUR JOBS AND YOUR FAMILY AND OTHER IMPORTANT ASPECTS
12 OF YOUR LIFE ASKING YOU TO COME DOWN HERE AND RESOLVE
13 SOMETIMES DIFFICULT ISSUES. BUT AS I SAID BEFORE, THE
14 JURY TRIAL RIGHT IS A RIGHT FOR THE FOUNDERS OF OUR
15 COUNTRY THAT IT WAS FUNDAMENTALLY IMPORTANT, SO IMPORTANT
16 THAT NOT ONLY DID THEY FORM THE CONSTITUTION ITSELF, THE
17 TEN AMENDMENTS AND THE BILL OF RIGHTS AND THAT IS HOW
18 STRONGLY THEY FELT ABOUT IT. AND YOU ARE MAKING IT
19 POSSIBLE FOR THAT RIGHT TO HAVE LIGHT HERE TODAY IN
20 NEWBERRY COUNTY. I AM GARY HILL, A CIRCUIT JUDGE IN
21 GREENVILLE. MS. JOY HOLSTON IS THE COURT REPORTER AND SHE
22 TAKES DOWN EVERY WORD THAT IS SAID AND KEEPS TRACK OF THE
23 EXHIBITS DURING THE COURSE OF THE TRIAL. NEXT TO HER IS
24 YOUR CLERK OF COURT, JACKIE BOWERS AND BETH FOLK IS HER
25 ASSISTANT. THE BAILIFFS ARE HERE FOR YOUR ASSISTANCE

1 WHILE YOU ARE SERVING ON THE JURY. EVERYONE THAT I HAVE
2 INTRODUCED TO YOU AND CERTAINLY I DID THIS AND CERTAINLY
3 THE LAWYERS ARE HERE TO DO THIS, WE HAVE TAKEN AN OATH TO
4 DO OUR JOB AND YOU ARE GOING TO TAKE AN OATH AS WELL. AT
5 THIS TIME I WILL ASK THE CLERK TO ADMINISTER THAT OATH TO
6 YOU. AND LISTEN TO IT VERY CAREFULLY BECAUSE IT HAS BEEN
7 AROUND A LONG TIME AND IT TELLS YOU IN A NUTSHELL WHAT
8 YOUR DUTIES ARE.

9 (WHEREUPON, THE JURY WAS SWORN AT APPROXIMATELY 12:00
10 P.M.)

11 THE COURT: EVEN THOUGH I INTRODUCED MYSELF TO YOU I
12 REALLY DIDN'T TELL YOU WHAT MY JOB IS SO I AM GOING TO
13 TELL YOU WHAT MY ROLE IS IN THE PROCESS. MY ROLE IS
14 PRETTY SIMPLE WHEN YOU COMPARE IT TO YOURS. I AM THE
15 JUDGE OF THE LAW SO THAT MEANS DURING THE COURSE OF THIS
16 TRIAL IF SOMEONE OBJECTS TO EVIDENCE I WILL HAVE TO RULE
17 ON WHETHER IT IS ADMISSIBLE UNDER THE LAW. DON'T HOLD IT
18 AGAINST THE LAWYERS FOR OBJECTING, THEY ARE SIMPLY DOING
19 THEIR JOBS AND THEY HAVE AN ETHICAL DUTY TO OBJECT IF THEY
20 THINK THE EVIDENCE IS IMPROPER. BUT IF SOMEONE DOES
21 OBJECT DURING THE TRIALS EVIDENCE I WILL RULE ON IT AND I
22 CAN USUALLY RULE ON IT RIGHT HERE IN THE COURTROOM,
23 SOMETIMES THINGS GET A LITTLE TRICKY AND WE HAVE GOT TO
24 TAKE A BREAK SO WE CAN DO IT MORE EFFICIENTLY OUTSIDE OF
25 YOUR PRESENCE. BUT GENERALLY I CAN DO IT ON THE SPOT.

1 AND IF I SUSTAIN THE OBJECTION THAT SIMPLY MEANS THE
2 EVIDENCE IS IMPROPER AND YOU CAN'T CONSIDER IT. IF I
3 OVERRULE THE OBJECTION THAT MEANS THE EVIDENCE IS PROPER
4 AND YOU CAN CONSIDER IT. THE SECOND ROLE IS I HAVE TO BE
5 THE JUDGE OF THE LAW AND I WILL GIVE YOU THE LAW THAT YOU
6 HAVE TO APPLY TO THE FACTS OF THIS CASE AT THE END OF THE
7 TRIAL. I WILL INSTRUCT YOU ON WHAT THE LAW IS. YOUR JOB
8 IS MORE DIFFICULT BECAUSE YOU ARE THE JUDGE OF THE FACTS.
9 AS I SAID THIS MORNING, OUR SYSTEM OF JUSTICE REQUIRES
10 THAT THERE ALWAYS BE TWO JUDGES IN THE CASE AND I AM THE
11 JUDGE OF THE LAW, YOU ARE THE JUDGE OF THE FACTS. AND YOU
12 ARE THE SOLE AND EXCLUSIVE JUDGE OF THE FACTS. AND BY THAT
13 I MEAN THAT I CAN'T COMMENT ON THE FACTS OF THIS CASE AND
14 I CAN'T SUGGEST TO YOU WHAT I THINK YOUR VERDICT SHOULD BE
15 BECAUSE THAT IS ENTIRELY YOUR PREROGATIVE UNDER OUR SYSTEM
16 OF JUSTICE. NOW, HOW DO YOU DECIDE WHAT THE FACTS ARE.
17 YOU DO THAT BY EVALUATING THE WEIGHT AND THE EVIDENCE YOU
18 ARE GOING TO HEAR DURING THE COURSE OF THIS TRIAL. THE
19 EVIDENCE CONSISTS OF TWO SOURCES. THE FIRST IS THE ONE
20 THAT YOU ARE MOST FAMILIAR WITH AND THAT IS SWORN WITNESS
21 TESTIMONY. I KNOW VERY LITTLE ABOUT THIS CASE BUT I
22 ANTICIPATE THAT WE WILL HAVE WITNESSES TO COME IN WHO ARE
23 SWORN AND WHO WILL GIVE YOU THEIR KNOWLEDGE ABOUT THE CASE
24 AND OTHER INFORMATION THAT IS RELEVANT TO THE CASE. THAT
25 IS ONE SOURCE YOU CAN DETERMINE WHAT THE FACTS ARE IN THE

1 CASE. THE SECOND SOURCE IS AN EXHIBIT. WE HAVE IN THIS
2 CASE EXHIBITS, AN EXHIBIT IS A PHYSICAL, TANGIBLE OBJECT.
3 IT MIGHT BE SOMETHING LIKE A PHOTOGRAPH OR MAP OR SOME
4 OTHER CONCRETE ITEM. BUT IT WILL BE AN EXHIBIT, IT WILL
5 BE EVIDENCE IN THE CASE THAT YOU CAN USE TO DETERMINE THE
6 FACTS OF THE CASE. AND YOU WILL KNOW THAT BECAUSE IT WILL
7 BE BACK IN THE JURY ROOM WITH YOU AT THE END OF THE TRIAL
8 AND HAVE A STICKER ON IT THAT SAYS EXHIBIT NUMBER SO AND
9 SO. THOSE ARE THE ONLY TWO THINGS THAT YOU CAN USE IN
10 DETERMINING WHAT THE FACTS ARE IN THIS CASE, WITNESS
11 TESTIMONY AND EXHIBITS. EVERYTHING ELSE IS NOT EVIDENCE.
12 AS I MENTIONED TO YOU, THE INDICTMENT IN THIS CASE IS NOT
13 EVIDENCE. IT CERTAINLY IS NOT A WITNESS AND IT CERTAINLY
14 IS NOT AN EXHIBIT SO IT IS NOT SOMETHING THAT YOU CAN USE
15 TO DETERMINE WHAT THE FACTS ARE. LIKEWISE WHAT THE
16 LAWYERS SAY, THEY ARE VERY IMPORTANT, YOU SHOULD BE PAYING
17 ATTENTION TO WHAT THEY SAY BECAUSE THEY ARE TRYING TO HELP
18 YOU UNDERSTAND THE EVIDENCE. WHAT THE LAWYERS SAY IS NOT
19 IN AND OF ITSELF EVIDENCE, AGAIN THEY ARE NOT WITNESSES.
20 SO BEAR IN MIND WHAT YOU CAN AND CANNOT USE IN DETERMINING
21 WHAT THE FACTS ARE. THE ONLY THING THAT YOU CAN USE IS
22 WITNESS TESTIMONY AND THE EXHIBITS. NOW, A CRIMINAL CASE
23 HAS CERTAIN PRINCIPLES THAT APPLY. I TOLD YOU THAT THE
24 INDICTMENT IS NOT EVIDENCE, IT IS SIMPLY AN ALLEGATION.
25 IT IS SIMPLY THE WAY THE CASE STARTS, IT IS A PIECE OF

1 PAPER. THAT IS ALL IT IS, IT IS SIMPLY THE TICKET THAT
2 ALLOWS THE PROSECUTION TO COME INTO THIS COURTROOM AND
3 START A CASE AGAINST A CITIZEN AND LET A CITIZEN KNOW WHAT
4 HE IS CHARGED WITH. LIKEWISE MR. MITCHELL HAS PLEAD NOT
5 GUILTY TO THE INDICTMENT AND THAT PUTS THE BURDEN OF PROOF
6 ON THE STATE AND YOU MUST DETERMINE WHETHER THE STATE HAS
7 MET ITS BURDEN OF PROOF. MR. MITCHELL IS PRESUMED
8 INNOCENT AND THAT PRESUMPTION OF INNOCENCE CAN ONLY BE
9 REMOVED IF YOU FIND UNANIMOUSLY THE STATE HAS MET ITS
10 BURDEN OF PROVING EACH ELEMENT OF EACH CRIME BEYOND A
11 REASONABLE DOUBT. I ALSO TOLD YOU AND I WILL REMIND YOU
12 NOW AND AGAIN AT THE END OF THE TRIAL THAT THERE ARE THREE
13 CHARGES IN THIS CASE AND YOU WILL HAVE TO WEIGH THE
14 EVIDENCE AS TO EACH CHARGE INDEPENDENTLY AND NOT LET YOUR
15 DECISION ON ONE AFFECT YOUR DECISION ON THE OTHER. NOW,
16 IN DETERMINING THE FACTS OF THE CASE YOU WILL HAVE TO BY
17 NECESSITY DETERMINE THE CREDIBILITY OR BELIEVABILITY OF
18 THE EVIDENCE. SO THAT MEANS FOR EVERY WITNESS WHO WAS
19 CALLED AND EVERY EXHIBIT THAT MAY BE ADMITTED YOU WILL
20 HAVE TO DETERMINE WHETHER IT IS WORTHY OF BELIEF. YOU
21 WILL HAVE TO GAUGE THE CREDIBILITY OF EACH WITNESS AND
22 DOING THAT YOU CAN USE CERTAIN TOOLS INCLUDING WHETHER THE
23 WITNESS IS HESITANT OR FORTHRIGHT IN THEIR TESTIMONY, IN
24 OTHER WORDS, THEIR DEemeanOR ON THE STAND. YOU MAY
25 CONSIDER WHETHER THE WITNESS HAS AN INTEREST IN THE

1 OUTCOME OF THE CASE, WHETHER THEY HAD ANY BIASED OR
2 PREJUDICE ABOUT SOME ISSUE IN THE CASE. WHETHER OR NOT
3 THEIR TESTIMONY STACKS UP OR HOW IT STACKS UP AGAINST THE
4 OTHER EVIDENCE IN THE CASE. AND YOU MAY CERTAINLY USE
5 ANYTHING IN YOUR DAY TO DAY LIFE IN DETERMINING WHETHER
6 SOMEONE IS TELLING YOU THE TRUTH OR NOT BECAUSE YOUR
7 COMMON SENSE DID NOT SUDDENLY EVAPORATE WHEN YOU STEPPED
8 INTO NEWBERRY COUNTY COURT HOUSE. SO, YOU WILL BE THE
9 JUDGE OF THE FACTS AND BY DOING THAT YOU WILL HAVE TO BY
10 NECESSITY DETERMINE THE CREDIBILITY OR BELIEVABILITY OF
11 ALL OF THE EVIDENCE. YOU ARE CERTAINLY NOT GOING TO DO
12 THAT ARBITRARILY, IT IS A VERY HEAVY RESPONSIBILITY YOU
13 HAVE BEFORE YOU AND I KNOW YOU WILL DO IT FAIRLY AND
14 IMPARTIALLY AND WITH SOUND REASON. HOW MANY OF YOU HAVE
15 SET ON A JURY CASE IN CRIMINAL COURT BEFORE. YOU MAY KNOW
16 FROM YOUR EXPERIENCE THAT A CRIMINAL TRIAL HAS A CERTAIN
17 STRUCTURE TO IT AND I AM GOING TO TELL YOU A LITTLE BIT
18 ABOUT HOW THAT STRUCTURE IS SO YOU WILL KNOW WHAT TO
19 EXPECT. FIRST OF ALL, I DON'T KNOW HOW LONG THIS CASE
20 WILL TAKE, IT MAY WELL GO INTO TOMORROW OR THE NEXT DAY.
21 BUT REGARDLESS OF HOW LONG OR SHORT THIS TRIAL IS BEEN IN
22 MIND THAT IT IS AN IMPORTANT TRIAL. IT IS A DAY IN COURT
23 FOR MR. MITCHELL AND FOR THE STATE. SO, IT IS IMPORTANT
24 THAT YOU FAIRLY AND IMPARTIALLY TRY THE CASE. BUT A
25 CRIMINAL TRIAL HAS A DEFINITE STRUCTURE TO IT AND IN JUST

1 A MOMENT YOU ARE GOING TO HEAR WHAT IS CALLED THE OPENING
2 STATEMENTS OF THE SOLICITOR. THE STATE BEARS THE BURDEN
3 OF PROOF, THE SOLICITOR WILL GO FIRST. IN THEIR OPENING
4 STATEMENT A LAWYER WILL SIMPLY TELL YOU WHAT THEY THINK
5 THE EVIDENCE IS GOING TO SHOW AND GIVE YOU A ROADMAP SO TO
6 SPEAK ABOUT WHAT THE CASE IS GOING TO BE ABOUT. MR.
7 MITCHELL, HIS ATTORNEY, MR. CHAPLIN WILL HAVE THE
8 OPPORTUNITY BUT NOT THE OBLIGATION TO PRESENT AN OPENING
9 STATEMENT AS WELL. THE DEFENSE DOESN'T HAVE THE BURDEN OF
10 PROOF, THE DON'T HAVE TO OFFER ANY EVIDENCE OR EXPLANATION
11 OR DO ANYTHING DURING THIS TRIAL. ONCE YOU HAVE HEARD THE
12 OPENING STATEMENT OR STATEMENTS WE WILL THEN GO INTO THE
13 EVIDENCE PORTION OF THE TRIAL. AND THE STATE WILL BEGIN,
14 BECAUSE THEY HAVE THE BURDEN OF PROOF, PRESENT THEIR
15 WITNESSES. MR. MITCHELL WILL HAVE THE OPPORTUNITY TO
16 CONFRONT THAT EVIDENCE. ONCE THE STATE COMPLETES IT
17 PRESENTATION OF THE EVIDENCE THE DEFENSE WILL HAVE THE
18 OPPORTUNITY BUT NOT THE OBLIGATION TO PRESENT ANY
19 EVIDENCE. AND ONCE YOU HEARD ALL THE EVIDENCE WE WILL
20 THEN HAVE THE CLOSING ARGUMENTS OF THE LAWYERS AND THEN I
21 WILL INSTRUCT YOU ON THE LAW AND THEN THE CASE WILL BE IN
22 YOUR HANDS FOR A DECISION AND FOR A VERDICT. NOW, IT IS
23 VERY IMPORTANT UNTIL WE REACH THAT POINT THAT YOU NOT
24 DISCUSS THIS CASE WITH ANYONE, AND YOU NOT MAKE UP YOUR
25 MIND PREMATURELY. WE WENT TO A GREAT DEAL OF TROUBLE AND

1 SO DID YOU TRYING TO FIND A JURY THAT COULD BE FAIR AND
2 IMPARTIAL AND HAVE AN OPEN MIND AND CERTAINLY WANT TO KEEP
3 YOU THAT WAY SO DON'T START TALKING ABOUT THE CASE UNTIL
4 YOU HAVE HEARD ALL THE EVIDENCE, UNTIL YOU HAVE HEARD THE
5 CLOSING ARGUMENTS AND UNTIL I HAVE GIVEN YOU THE LAW.
6 THEN YOU CAN HAVE THE TOOLS THAT YOU WILL NEED TO DO YOUR
7 JOB IN THIS MATTER. SO, DON'T TALK ABOUT THE CASE, KEEP
8 AN OPEN MIND AND REMEMBER THE PROCESS THAT YOU AND I ARE
9 SUPPOSE TO BE NEUTRAL AND FAIR AND IMPARTIAL. WE DON'T
10 HAVE ANY FRIENDS TO REWARD OR ENEMIES TO PUNISH AND YOUR
11 SOLE JOB IS TO DETERMINE THE TRUE FACTS OF THE CASE AND
12 WHETHER THE STATE HAS MET ITS BURDEN OF PROOF. SO, WITH
13 THAT WE WILL HAVE THE OPENING STATEMENT OF MR. MCDANIEL.
14 MR. MCDANIEL: THANK YOU, YOUR HONOR, MAY IT PLEASE
15 THE COURT. LADIES AND GENTLEMEN, THIS IS MY CHANCE TO
16 KIND OF GIVE YOU A ROADMAP OF HOW THE STATE IS GOING TO
17 PRESENT THE EVIDENCE. AND THIS IS A VERY SOUTHERN CASE I
18 WOULD SAY, OR MAYBE SPECIFICALLY NEWBERRY COUNTY BECAUSE
19 WHAT WE HAVE HERE IS A BURGLARY FIRST DEGREE. AND THE WAY
20 THAT WE FIGURED OUT SOMEBODY CAME IN THE HOUSE WAS, THE
21 VICTIM, MR. POTTS BOUGHT A DEER CAMERA AND PUT IT ON TOP
22 OF THE REFRIGERATOR TO CATCH SOMEBODY COMING IN. HE COMES
23 HOME OCTOBER 27TH, 28TH, HE WORKS AT THE BLUE MOON AND HE
24 GOES TO WORK AND COMES HOME IN THE EARLY MORNING HOURS ON
25 THE 28TH AND REALIZES SOMEONE HAS BEEN IN HIS HOME, CHECKS

1 THE CAMERA AND THERE IS AN IMAGE OF SOMEBODY ON THE
2 CAMERA. THE NEXT MORNING HE CALLS THE POLICE, THEY SHOW
3 UP, THEY ARE NOT SURE WHO IT IS. THEY FINALLY GET IT DOWN
4 TO THE POLICE DEPARTMENT AND THEY ARE ABLE TO IDENTIFY MR.
5 MITCHELL, THE PERSON INSIDE AND HE WAS ARRESTED FOR THAT
6 CHARGE. NOW, I HAVE A NUMBER OF WITNESSES I AM GOING TO
7 CALL THAT THE JUDGE TOLD YOU WOULD BE EVIDENCE IN THIS
8 CASE. I WANT YOU TO PAY CLOSE ATTENTION TO THE WITNESSES
9 AND HOW THEY ARE INVOLVED IN THIS CASE, WHAT THEY SAW,
10 WHAT THEY DID, THEIR EXPERIENCE. THAT IS THE STATE'S
11 EVIDENCE. WHAT I HAVE TO PROVE TO YOU BEYOND A REASONABLE
12 DOUBT IS THAT BENNIE MITCHELL IS GUILTY OF BURGLARY FIRST
13 DEGREE. HE ENTERED MR. POTTS HOME WITHOUT CONSENT,
14 WITHOUT PERMISSION AT NIGHT WITH THE INTENT TO COMMIT A
15 CRIME THEREIN BEYOND A REASONABLE DOUBT. I HAVE TO PROVE
16 THAT TO YOU, I PLAN ON DOING THAT THROUGH MY WITNESSES,
17 PETTY LARCENY, THAT HE STOLE SOME ITEMS UNDER THE VALUE OF
18 \$1,000.00 DOLLARS, THE SAME WAY, BEYOND A REASONABLE
19 DOUBT. AND FINALLY POSSESSION OF BURGLARY TOOLS. THAT HE
20 HAD SOME TYPE OF TOOLS, THE SAME WAY, THE WITNESSES WILL
21 TESTIFY. AND I WANT YOU TO, THE STATE NEEDS YOU TO PAY
22 CLOSE ATTENTION TO THE WITNESSES. AND YOU WILL WEIGH THAT
23 AND I WILL STAND UP BEFORE YOU AGAIN AND ASK YOU TO FIND
24 MR. MITCHELL GUILTY BEYOND A REASONABLE DOUBT OF THOSE
25 THREE CHARGES. THANK YOU.

1 THE COURT: MR. CHAPLIN.

2 MR. CHAPLIN: GOOD AFTERNOON, LADIES AND GENTLEMEN.

3 AS I STATED EARLIER, MY NAME IS MATHIAS CHAPLIN AND I AM
4 THE DEFENSE ATTORNEY IN THIS MATTER AND I REPRESENT MR.
5 BENNIE MITCHELL. THIS IS A MISTAKEN IDENTITY CASE. ONE,
6 TWO, THREE, FOUR, FIVE, SIX, SEVEN, EIGHT, NINE, TEN,
7 ELEVEN, TWELVE AND AN ALTERNATE. WE HAVE SELECTED TWELVE
8 BRIGHT, INTELLIGENT PEOPLE TO ASSIST US IN THIS MATTER AND
9 AN ALTERNATE. THAT IS NOT BY CHANCE. WE DID THAT BECAUSE
10 THE ODDS OF ONE PERSON BEING WRONG ON AN IDENTIFICATION IS
11 WAY TO HIGH TO BASE SOMETHING AS SERIOUS AS GUILT OR
12 INNOCENCE. SO, WE HAVE CHOSEN TWELVE JURORS AND LIKE I
13 SAID, AN ALTERNATE. AND IN ADVANCE WE THANK YOU FOR YOUR
14 SERVICE BECAUSE THE DECISION YOU ARE ABOUT TO MAKE IS VERY
15 IMPORTANT. HAVE YOU EVER THOUGHT THAT YOU SAW SOMETHING
16 AND THEN LATER ON YOU FIGURED OUT THAT THAT IS NOT REALLY
17 WHAT YOU SAW. MAYBE YOU THOUGHT YOU SAW A FRIEND AND THEN
18 WHEN YOU GOT CLOSE THAT WASN'T REALLY YOUR FRIEND.
19 SEVERAL MONTHS AGO I THOUGHT I SAW A FRIEND OF MINE NAMED
20 JOHN. NOW, WE WERE AT A FUNCTION AND THE ROOM WAS FAIRLY
21 DARK AND HIS FACE WAS A LITTLE BLURRY BECAUSE HE WAS FAR
22 OFF SO I DECIDED I WOULD WAIT UNTIL WE GOT INTO THE LOBBY
23 DURING INTERMISSION AND SAY HI TO JOHN. WELL, YOU KNOW
24 WHAT HAPPENED, I GOT TO THE LOBBY AND IT TURNED OUT THE
25 PERSON I THOUGHT WAS JOHN WAS NOT JOHN. THE LIGHTS CAME

1 ON, THE IMAGE WAS CLEAR AND I REALIZED THAT I HAD MADE A
2 MISTAKE, WE ALL DO IT. AND I BET YOU HAVE SEEN THINGS
3 UNDER POOR LIGHT AND UNDER STRAINED CONDITIONS AND WHEN
4 THE LIGHTS GOT TURNED ON YOU REALIZED IT WAS SOMETHING
5 ELSE. LOOK AT ME, I AM BALDHEADED, FAIRLY LARGE EYES AND
6 THEY SAY I WEAR SOME FUNKY GLASSES. WELL, PEOPLE ALWAYS
7 TELL ME I LOOK LIKE SOMEONE ELSE, I HAVE EVEN HEARD I LOOK
8 LIKE SOME THINGS. WELL, AND THEN WHAT ABOUT THE LADY ON
9 SATURDAY NIGHT LIVE, I THINK TINA FEY, SHE LOOKS LIKE
10 SARAH PALIN. I PERSONALLY CAN'T TELL THE DIFFERENCE. AND
11 THEN YOU HAVE THESE PEOPLE THAT PERSONATE ELVIS, THEY LOOK
12 A GREAT DEAL LIKE THE LATE ELVIS PRESSLEY AS WELL. THE
13 TRUTH IS OUR EYES OFTEN PLAY TRICKS ON US. AND WE ARE NOT
14 LYING WHEN YOU SAY YOU SAW SOMETHING YOU DID NOT. THE
15 FACT IS WE ARE HUMAN AND WE MAKE MISTAKES. NORMALLY OUR
16 MISTAKES ARE PRETTY HARMLESS, WE CAN SAY I AM SORRY AND GO
17 ON ABOUT OUR BUSINESS. BUT NOT IN THIS CASE. IN THE CASE
18 BEFORE YOU TODAY SOMEONE HAS MISTAKENLY IDENTIFIED MY
19 CLIENT AND MY CLIENT WAS ARRESTED. WE NEED YOU TO HELP US
20 GET TO THE BOTTOM OF THIS ISSUE. THE STATE IS SAYING THAT
21 THEY ARRESTED THE RIGHT PERSON AND THE DEFENSE, WE ARE
22 SAYING THEY HAVE ARRESTED THE WRONG PERSON. NOW LEGAL
23 CASES INVOLVING MISTAKEN IDENTITY ARE FAR TOO COMMON, YOU
24 PROBABLY HEARD ABOUT THEM. AND THAT IS WHY THERE ARE
25 SAFEGUARDS IN THE SYSTEM TO PREVENT THIS. WE CALL THIS

1 CORROBORATING EVIDENCE. THINGS SUCH AS FINGERPRINTS,
2 WITNESS STATEMENTS THAT WERE AT THE SCENE WHEN IT ACTUALLY
3 OCCURRED, SOMETIMES A CONFESSION AND ITEMS FROM THE SCENE
4 THAT WERE ACTUALLY FOUND ON THE PERSON THAT IS ARRESTED.
5 ALL OF THOSE THINGS TEND TO LEND CREDIBILITY TO SOMEONE
6 SAYING I THINK THAT IS THE PERSON. SO I CHALLENGE YOU IN
7 THIS CASE FOR THAT TYPE OF EVIDENCE. I SUGGEST THAT YOU
8 WON'T FIND ANY. NOW, THE JUDGE STATED AND THE SOLICITOR
9 STATED, THE BURDEN OF PROOF IN THIS MATTER IS ON THE
10 STATE. IT IS NOT UP TO MR. MITCHELL. REMEMBER YOU LIVE
11 IN AMERICA AND WE ARE INNOCENT UNTIL PROVEN GUILTY BY A
12 PANEL OF OUR PEERS. NOW TO ASSIST YOU IN THIS PARTICULAR
13 MATTER I TOO WILL BE BRINGING FORTH SOME WITNESSES. AND
14 MY WITNESSES ARE GOING TO BE EXPERTS IN SEVERAL AREAS AND
15 THEY ARE GOING TO ANSWER SOME QUESTIONS AND HOPEFULLY
16 THEIR RESPONSES WILL ASSIST YOU IN YOUR DELIBERATIONS. I
17 WILL TELL YOU MORE ABOUT THAT LATER. NOW, YOU WILL BE
18 ASKED AT THE CONCLUSION TO DECIDE WHETHER OR NOT YOU
19 BELIEVE MY CLIENT IS GUILTY OR NOT, WHETHER YOU SUSPECT OR
20 WHETHER YOU HAVE A HUNCH OR WHATEVER THE CASE MIGHT BE, IT
21 IS BEYOND A REASONABLE DOUBT. WHAT IS A REASONABLE DOUBT,
22 THAT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF MY
23 CLIENT'S GUILT. THAT IS NOT A SUSPICION OR A HUNCH,
24 SOMEONE FROM THE STATE MAY GIVE YOU THEIR OPINION
25 REGARDING MY CLIENT AND SAY THAT MR. MITCHELL IS GUILTY.

1 YOU KNOW WHAT, THAT IS THEIR RIGHT BUT THAT IS ALL IT IS,
2 IT IS AN OPINION. WE ALL HAVE THEM. YOU ARE THE FINAL
3 DECISION MAKER IN THIS MATTER AND AT THE CONCLUSION OF THE
4 MATTER WE WILL GIVE YOU THE EVIDENCE AND ASK YOU TO
5 DECIDE. NOW JUST BECAUSE A WITNESS IS CONVINCED BEYOND A
6 REASONABLE DOUBT DOESN'T MEAN THAT YOU ARE GOING TO BE
7 CONVINCED BEYOND A REASONABLE DOUBT. I WANT YOU TO APPLY
8 YOUR GOOD SENSE, TAKE A LOOK AT THE EVIDENCE AND YOU
9 DECIDE WHAT YOU THINK. NOW, EVIDENCE IN A LEGAL TRIAL
10 DEFINITELY NEEDS TO BE RELIED ON. NOW, JUST BECAUSE SOME
11 EVIDENCE IS BEFORE YOU IT DOES NOT MEAN THAT IT IS
12 RELIABLE. YOU HAVE TO MAKE THAT DECISION. RELIABLE
13 EVIDENCE IS CLEAR, IT IS CONCISE AND IT IS CONVINCING.
14 WHEN EACH OF YOU ARE SELECTED THE MAIN THING THAT MY
15 CLIENT AND I CONSIDER IS YOUR ABILITY TO GET, TO NOT GET
16 LOST IN ALL OF THE OTHER ISSUES REGARDING THIS TRIAL AND
17 KEEP YOUR EYES ON THE BALL. THE BALL HERE IS WHETHER OR
18 NOT THE STATE IS MISTAKEN IN THEIR ID OF BENNIE. THAT IS
19 THE ULTIMATE ISSUE THAT YOU ARE GOING TO BE DECIDING. I
20 WANT YOU TO USE YOUR COMMON SENSE AND I KNOW ALL OF YOU
21 WILL BE ABLE TO MAKE A GOOD DECISION. ASK YOURSELF, HAS
22 THE STATE PROVEN BEYOND A REASONABLE DOUBT THAT BENNIE IS
23 GUILTY. LOOK AT THE MATTER IN WHICH THE POLICE IN THIS
24 MATTER HANDLED THE CASE. NOW, IF THEIR WORK LOOKS SLOPPY
25 CHANCES ARE THE RESULTS ARE GOING TO BE SLOPPY AND THE

1 DECISION THEY MADE ARE GOING TO BE BASED ON THAT SLOPPY
2 WORK AND THOSE SLOPPY RESULTS. I SUGGEST THAT YOU ARE
3 GOING TO SEE SOME OF THAT TODAY. DID THEY REALLY
4 INVESTIGATE THIS MATTER IN A PROFESSIONAL MATTER IN THE
5 WAY YOU WOULD EXPECT LAW ENFORCEMENT TO DO SO. DID THEY
6 DO EVERYTHING IN THEIR POWER TO MAKE SURE THAT THE RIGHT
7 PERSON WAS ARRESTED, SOMETHING THAT WE ALL AS CITIZENS
8 EXPECT LAW ENFORCEMENT TO DO. AT THE END OF THE DAY IF
9 YOU ARE IN DOUBT YOU HAVE TO RULE IT OUT. IF YOU BELIEVE
10 THAT THE STATE COULD BE WRONG THAT IS WHAT WE CALL
11 REASONABLE DOUBT. IN THIS COUNTRY ONE PERSON ACCUSING YOU
12 OF SOMETHING IS ONLY AN OPINION. THAT OPINION HAS TO BE
13 SUPPORTED BY SOLID EVIDENCE TO SUPPORT THIS OPINION. NOW,
14 I WILL DO MY BEST TO STAY FOCUSED AND GIVE YOU AS MUCH
15 INFORMATION AS POSSIBLE TO HELP YOU DECIDE THE ULTIMATE
16 ISSUE IN THIS MATTER. I WANT YOU TO SIT BACK AND RELAX
17 AND LISTEN TO THE TESTIMONY. REMEMBER THE ISSUE TODAY IS
18 WHO DID IT, IF THE PERSON IN THAT PICTURE IS BENNIE. IT
19 IS THE STATE'S JOB TO CONVINCE YOU BEYOND A REASONABLE
20 DOUBT THAT THEY HAVE ARRESTED THE RIGHT PERSON. BENNIE
21 AND I ARE CERTAIN THAT YOU WILL DECIDE HE DID NOT DO THAT
22 AND THAT THE STATE'S CASE AGAINST HIM IS SERIOUSLY FLAWED.
23 WE HAVE SELECTED YOU TO HELP US TO MAKE THIS DECISION. WE
24 DID NOT SELECT ONE PERSON TO MAKE THIS DECISION BECAUSE
25 THE ODDS THAT ONE PERSON IS WRONG IS FAR TOO GREAT TO RELY

1 UPON IN A SITUATION OF THIS MAGNITUDE. WE ARE TALKING
2 ABOUT BENNIE'S FREEDOM. AND LIKE I SAID, IF YOU ARE IN
3 DOUBT YOU NEED TO RULE IT OUT. I THANK YOU AND MOST OF
4 ALL BENNIE MITCHELL THANKS YOU.

5 THE COURT: THANK YOU, MR. CHAPLIN. LADIES AND
6 GENTLEMEN, WE ARE GOING TO BREAK FOR LUNCH AND BE BACK IN
7 THE JURY ROOM AT 1:30 AND WE WILL RESUME THE CASE AT THAT
8 TIME. DON'T TALK ABOUT THE CASE AND CONTINUE TO KEEP AN
9 OPEN MIND, WE WILL SEE YOU BACK AT 1:30.

10 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
11 A LUNCH BREAK.)

12 THE COURT: ANYTHING BEFORE WE BREAK FOR LUNCH.

13 MR. MCDANIEL: BRIEFLY JUDGE, I WOULD LIKE A MOTION
14 ON THIRD PARTY GUILT. I WILL HAND YOU A CASE. AND I
15 UNDERSTAND THE DEFENSE, I JUST WANT TO MAKE, THIS CASE
16 BASICALLY STATES THAT THE OFFENSE IS BARRED FROM OFFERING
17 THIRD PARTY GUILT, EVIDENCE OFFERED BY THE ACCUSED AS TO
18 ANOTHER COMMISSION OF A CRIME CHARGED MUST BE LEANING TO
19 THE FACTS INCONSISTENT WITH THE ACCUSED GUILT AND RAISING
20 REASONABLE INFERENCE, PRESUMPTION OF HIS INNOCENCE AND
21 EVIDENCE MERELY CASTING MERE SUSPICION ON ANOTHER OR
22 RAISING CONJECTURAL INFERENCE AS TO THE COMMISSION OF THE
23 CRIME IS INADMISSIBLE. I DON'T THINK RIGHT NOW, I MEAN I
24 UNDERSTAND HIS DEFENSE NOW AND I GUESS AS LONG AS IT IS A
25 GENERAL, YOU CAN MISIDENTIFY PEOPLE, I THINK THAT WOULD BE

1 OKAY. BUT I WOULD THINK THAT IF HE SPECIFICALLY BRINGS UP
2 SOMEBODY, ANYBODY ELSE WITHIN THE COMMUNITY THAT HAS BEEN
3 CHARGED WITH A CRIME THAT LOOKS LIKE HIM I THINK HE WOULD
4 BE BARRED UNLESS HE PROVIDED MORE EVIDENCE THAT HIS
5 CLIENT, INTEND TO SHOW THAT HIS CLIENT IS NOT GUILTY OF
6 THE CHARGES.

7 THE COURT: MR. CHAPLIN.

8 MR. CHAPLIN: THANK YOU, YOUR HONOR. ASSISTANT
9 SOLICITOR MCDANIEL AND I HAVE DISCUSSED THIS MATTER. AND
10 I THINK WHAT HE IS REFERRING TO IS THE FACT THAT I AM
11 PREPARED TO ASK QUESTIONS ABOUT CRIMES IN THIS PARTICULAR
12 AREA OF ONE OF HIS WITNESSES. AND I DON'T THINK THAT I AM
13 TRYING TO SUGGEST THAT SOMEONE ELSE IS THE PARTY IN THIS
14 CASE. I SIMPLY INTEND TO SHOW THAT THIS OFFICER HAS
15 INVESTIGATED SIMILAR CRIMES IN THIS PARTICULAR AREA BEFORE
16 AND AFTER THE ARREST OF MR. MITCHELL.

17 THE COURT: ARE YOU GOING TO ASK ABOUT SPECIFIC
18 SUSPECTS?

19 MR. CHAPLIN: NO, I AM NOT, YOUR HONOR. HOWEVER,
20 YOUR HONOR, IF THE RESPONSE I RECEIVE IS NOT ACCURATE I DO
21 HAVE INFORMATION ON SPECIFIC PEOPLE TO IMPEACH THAT
22 TESTIMONY.

23 THE COURT: WELL, BASED ON WHAT YOU ARE TELLING ME,
24 HOW DOES IT RISE TO THE LEVEL OF EVIDENCE THAT CLEARLY
25 POINTS OUT ANOTHER PERSON IS THE GUILTY PARTY THAT IS

1 INCONSISTENT WITH MR. MITCHELL'S GUILT. I MEAN, JUST
2 BECAUSE OTHER CRIMES OCCURRED SIMILAR IN THE AREA, I AM
3 HAVING DIFFICULTY UNDERSTANDING HOW IS THAT ANYTHING BUT
4 CASTING SUSPICION ON SOMEONE, ANOTHER PERSON. IN ANY
5 CASE, ALWAYS TRYING A SIMILAR CRIME, GENERIC CRIME, I MEAN
6 IN THE VICINITY. HOW IS THIS EVIDENCE SUFFICIENT TO MEET,
7 HOW DOES IT DO ANYTHING THAN CAST A MERE SUSPICION ON
8 ANOTHER PERSON?

9 MR. CHAPLIN: WELL, I THINK, YOUR HONOR, THE
10 INFORMATION THAT I PRESENT CAST SUSPICION ON A SPECIFIC
11 INDIVIDUAL, STATED THAT THEY ARE THE PERSON THAT DID THIS
12 AND NOT MY CLIENT THEN I WILL BE IN VIOLATION OF THIS
13 RULING. AND I DON'T INTEND TO DO THAT. I SIMPLY INTEND
14 TO SHOW THAT THIS IS A CRIME IN THE AREA AND THAT IT IS
15 VERY POSSIBLE THAT ONE OF THE WITNESSES IS VERY WELL AWARE
16 OF THAT AND I WILL TRY TO EXAMINE HIM BASED ON HIS
17 KNOWLEDGE OF THE CRIME LEVELS IN THIS AREA.

18 THE COURT: WELL, I MEAN, IF YOU ARE ASKING WHAT MY
19 QUESTION IS, HOW ARE THOSE FACTS INCONSISTENT WITH MR.
20 MITCHELL'S GUILT. JUST BECAUSE OTHER CRIMES OCCURRED
21 DOESN'T MEAN THAT THE DEFENDANT IS INNOCENT OF THE CRIME
22 HE IS CHARGED WITH.

23 MR. CHAPLIN: AND I AM NOT SUGGESTING THAT, YOUR
24 HONOR, I AM SIMPLY, I THINK WE HAVE A RIGHT TO, IN OUR
25 DEFENSE, TO POINT OUT THE CONDITIONS OF THAT PARTICULAR

1 AREA.

2 THE COURT: THIRD PARTY GUILT REALLY COMES DOWN TO
3 THE RULE OF RELEVANCE. HOW IS THAT RELEVANT.

4 MR. CHAPLIN: I THINK THIS IS RELEVANT. IF SOMEONE
5 IS AT YOUR HOUSE, THEY DON'T KNOW WHO IT IS. AND I THINK
6 THAT OTHER HOUSES ARE BEING BROKEN INTO AND THAT THIS AREA
7 IS IN A HIGH CRIME AREA IN THE CITY OF NEWBERRY I THINK IS
8 VERY RELEVANT. THEIR ARE SAYING THAT ONLY ONE PERSON AND
9 ONE PERSON COULD POSSIBLY BE THE PERSON IN THAT PICTURE.
10 BASED ON THE CONDITIONS IN THAT AREA, ONE OF THE WITNESSES
11 WILL HAVE KNOWLEDGE OF, THAT IS NOT THE CASE.

12 THE COURT: IF YOU HAD A SO CALLED SIGNATURE CRIME
13 THAT WAS OCCURRING, THE NOTICE OPERANDI OF THE PERPETRATOR
14 WAS SUCH THAT THEY WERE LEAVING THEIR SIGNATURE AT THE
15 SCENE, SO TO SPEAK. AND THE DEFENDANT HAD BEEN ARRESTED
16 FOR ONE OF THOSE CRIMES AND YET AFTER HE IS INCARCERATED
17 THE CRIMES STILL OCCUR I CAN SEE YOUR POINT. AND I
18 UNDERSTAND THE RELEVANCE OF THAT. BUT JUST GENERALLY BY
19 SAYING OTHER BURGLARIES OCCURRED IN THIS NEIGHBORHOOD, I
20 MEAN, I HAVE TO HAVE MORE DETAIL, MORE SPECIFIC FACTS TO
21 REALLY MAKE A JUDGMENT ON WHETHER OR NOT THIS WOULD MEET
22 THE THIRD PARTY GUILT. YOU ARE GOING TO HAVE TO ISOLATE A
23 LITTLE MORE FOR ME. CAN YOU DO THAT.

24 MR. CHAPLIN: I CAN, YOUR HONOR.

25 THE COURT: OKAY.

1 MR. CHAPLIN: YOUR HONOR, I DO NOT INTEND, LET ME
2 JUST GO FROM THE, IT SAYS AT ANY RATE THE EVIDENCE OFFERED
3 BY ACCUSED AS TO THE COMMISSION OF THE CRIME BY ANOTHER
4 PERSON IT MUST BE LIMITED TO SUCH FACTS AS ARE
5 INCONSISTENT WITH HIS OWN GUILT. AND TO SUCH FACTS HAS
6 RAISED A REASONABLE INFERENCE OR PRESUMPTION AS TO HIS OWN
7 INNOCENCE. AND THAT IS NOT WHAT I AM TRYING TO DO, YOUR
8 HONOR. I AM SIMPLY SUGGESTING THAT THIS IS A VERY HIGH
9 CRIME AREA AND WE WOULD LIKE TO HAVE THAT INFORMATION
10 SHARED WITH THE JURY AND I PLAN TO DO THAT THROUGH ONE OF
11 THE WITNESSES THAT THE STATE PLANS TO CALL.

12 THE COURT: WHAT IS IT ABOUT THE OTHER CRIMES THAT
13 WOULD BE RELEVANT TO THESE, JUST BECAUSE THEY OCCURRED, I
14 AM NOT SURE IF THAT IS ENOUGH. THAT IS WHAT I AM TRYING
15 TO GET AT. LET'S PUT IT ANOTHER WAY. IF MR. MITCHELL WAS
16 ON TRIAL FOR STEALING A CAR, THE FACT THAT OTHER CARS WERE
17 STOLEN AFTER HE WAS ARRESTED NEXT DOOR OR ACROSS THE
18 STREET FROM THE SCENE OF THE ALLEGED CAR BREAKING, HOW
19 WOULD THAT BE RELEVANT TO SHOW THAT HE IS NOT THE PERSON
20 THAT STOLE THE CAR.

21 MR. CHAPLIN: SIR, I THINK ONE OF THE THINGS THERE
22 THAT SUGGEST IS THAT THERE IS A GREAT DEAL OF CRIME GOING
23 ON IN THAT AREA AND WHAT THE STATE IS CONTENDING IS IS
24 THAT ONLY ONE PERSON AND ONE PERSON ONLY COULD OF DONE
25 THIS PARTICULAR INCIDENT. AND WHAT I AM SAYING IS THAT

1 THERE IS A POSSIBILITY THAT IT COULD OF BEEN SOMEONE ELSE.

2 THE COURT: SEE, THAT IS THE KEY, YOU HAVE TO HAVE
3 MORE THAN A POSSIBILITY. I MEAN THAT IS WHAT THE CASE IS,
4 IT HAS TO BE MORE THAN JUST SPECULATION, IT HAS TO BE
5 SOMETHING THAT RISES TO THE LEVEL OF BEING INCONSISTENT
6 WITH THE DEFENDANT'S GUILT. AND I UNDERSTAND THAT IS A
7 LITTLE DIFFICULT TO BEAT YOUR BRAIN AROUND, MY BRAIN
8 AROUND, ANYBODIES BRAIN AROUND BECAUSE IT IS A LITTLE BIT
9 OF A CIRCULAR STATEMENT. BUT I THINK WHAT THEY MEAN THERE
10 IS THAT THE EVIDENCE JUST CAST A MERE SUSPICION ON ANOTHER
11 PERSON IS NOT ENOUGH. SO, IF THERE IS SOMETHING SPECIFIC
12 ABOUT WHAT YOU ARE TRYING TO ELICIT THAT WOULD BRING IT
13 ABOVE JUST MERE SUSPICION I DON'T SEE HOW IT IS RELEVANT
14 AND ADMISSIBLE UNDER THE THIRD PARTY GUILT.

15 MR. CHAPLIN: I UNDERSTAND, YOUR HONOR, AND I WILL
16 RESPECT WHATEVER RULING YOU HAVE.

17 THE COURT: I WILL BE GLAD TO PROFFER, LET YOU
18 PROFFER THE TESTIMONY OUTSIDE THE PRESENCE OF THE JURY SO
19 WE CAN GET A BETTER IDEA OF THE CONTEXT OF IT IF YOU WISH.

20 MR. CHAPLIN: WE ARE FINE.

21 THE COURT: THANK YOU, WE WILL SEE YOU BACK AT 1:30.

22 (WHEREUPON, A LUNCH BREAK WAS TAKEN.)

23 THE COURT: ANYTHING BEFORE WE BRING THE JURY IN?

24 MR. MCDANIEL: NO, SIR.

25 MR. CHAPLIN: NO, YOUR HONOR.

1 THE COURT: BRING THE JURY IN, PLEASE.

2 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
3 APPROXIMATELY 1:45 P.M.)

4 THE COURT: MR. MCDANIEL, YOU MAY CALL YOUR FIRST
5 WITNESS.

6 MR. MCDANIEL: THE STATE CALLS STEPHEN LEE POTTS.

7 STEPHEN LEE POTTS, AFTER BEING DULY SWORN,
8 TESTIFIED AS FOLLOWS:

9 DIRECT EXAMINATION

10 BY MR. MCDANIEL:

11 Q MR. POTTS, WHERE DO YOU WORK?

12 A A THE BLUE MOON.

13 Q HOW LONG HAVE YOU WORKED THERE?

14 A I AM WORKING ON SEVEN YEARS NOW.

15 Q HOW OLD ARE YOU?

16 A I AM 39.

17 Q HOW LONG HAVE YOU LIVED IN NEWBERRY?

18 A 16 YEARS, 14 YEARS, EXCUSE ME.

19 Q AND WHERE DO YOU LIVE?

20 A ON PAULINE STREET.

21 Q IS THAT LOCATED IN NEWBERRY COUNTY?

22 A YES, IT IS.

23 Q AND HOW LONG HAVE YOU LIVED THERE?

24 A ALMOST 10 YEARS.

25 Q YOU SAID YOU WORK AT THE BLUE MOON, WHAT KIND OF

1 HOURS DO YOU WORK THERE?

2 A THEY VARY, BUT USUALLY I GO IN LATE MORNING AND LEAVE
3 SOMETIME EARLY THE FOLLOWING MORNING, SAY ABOUT LUNCH TIME
4 TO MAY 12:00 TO MAYBE 2:00 O'CLOCK IN THE MORNING.

5 Q NOW, I WANT TO GO BACK TO THE NIGHT OF OCTOBER 27TH,
6 MAYBE JUST THE DAY OF OCTOBER 27TH. DID YOU WORK THAT
7 DAY?

8 A I DID.

9 Q WHAT TIME DID YOU GO TO WORK?

10 A I HAD GONE IN EARLY AND THEN I HAD GONE BACK HOME AND
11 THEN I LEFT AGAIN AFTER 7:00 O'CLOCK OR SOMETHING LIKE
12 THAT TO GO BACK IN FOR THE NIGHT.

13 Q WHAT DO YOU DO THERE?

14 A ALL DIFFERENT THINGS. WE DO STOCKING, INVENTORY, I
15 ALSO DO SOME BARTENDING, WORK THE DOOR SOMETIMES, JUST
16 GENERAL MANAGER DUTIES.

17 Q WHAT IS YOUR TITLE THERE?

18 A I AM ONE OF THE OWNERS.

19 Q SO, YOU HAD GONE BACK AROUND 7:00 O'CLOCK AT NIGHT?

20 A YES.

21 Q WHAT TIME DID YOU GET OFF?

22 A I BELIEVE IT WAS IN THE BALLPARK OF 1:00 OR 1:30,
23 SOMEWHERE IN THAT BALLPARK.

24 Q THAT WOULD BE OCTOBER 28TH?

25 A YES, EARLY IN THE MORNING.

1 Q AND DO YOU REMEMBER ABOUT WHAT TIME YOU GOT HOME?

2 A I ONLY LIVE ABOUT A MILE AWAY, IT WAS SOON AFTER
3 THAT.

4 Q SO, 1:00 IN THE MORNING?

5 A YES, SOMETHING LIKE THAT.

6 Q AND WERE YOU ALONE?

7 A MY GIRLFRIEND WAS WITH ME THAT NIGHT.

8 Q SO, WHAT DID YOU DO WHEN YOU GOT HOME?

9 A WHEN I WALKED UP TO THE BACKDOOR I NOTICED THAT THE
10 WINDOW BESIDE THE BACKDOOR HAD BEEN DUG AT WITH A TOOL OF
11 SOME SORT, IT WAS A WINDOW THAT HAD BEEN MESSED WITH
12 BEFORE SO I LOOK AT THAT WINDOW FREQUENTLY NOW.

13 Q SO, DID YOU ENTER THE HOUSE, DID YOU CALL THE POLICE
14 THERE?

15 A I TOLD MY GIRLFRIEND TO WAIT OUTSIDE AND THEN I
16 WALKED THROUGH THE HOUSE TO MAKE SURE NOBODY WAS STILL
17 THERE.

18 Q WAS THERE ANYBODY THERE?

19 A NO.

20 Q WERE YOU ABLE TO FIGURE OUT WHAT HAPPENED?

21 A SOMEBODY HAD BEEN IN THE HOUSE, I COULD SEE THAT. I
22 HAD SET UP A CAMERA IN THE KITCHEN.

23 Q WHERE WAS IT?

24 A IT WAS ON TOP OF THE REFRIGERATOR IN THE KITCHEN. SO
25 I IMMEDIATELY WENT AND CHECKED THAT AND SAW SOME

1 PHOTOGRAPHS OF SOMEONE IN MY KITCHEN.

2 Q DID YOU KNOW WHO THEY WERE?

3 A I HAD NEVER SEEN THEM BEFORE, NO.

4 Q WHY DID YOU HAVE A DEER CAMERA ON THE REFRIGERATOR?

5 A ABOUT TEN DAYS PRIOR TO THAT I HAD HAD A, THERE HAD
6 BEEN SOME ACTIVITY IN MY HOUSE BEFORE. AND I HAD WENT AND
7 PURCHASED A CAMERA.

8 Q DID YOU PURCHASE IT BEFORE THAT SPECIFIC--

9 A PRETTY MUCH.

10 Q NOW, DID YOU CALL THE POLICE THAT NIGHT OR EARLY IN
11 THE MORNING?

12 A I DID NOT, WE WENT AHEAD AND WENT TO BED AND I CALLED
13 THEM THE NEXT MORNING.

14 Q WHAT TIME DID YOU GET UP?

15 A IT WAS 10:00 OR 10:30 WHEN I GOT UP.

16 Q AND WHAT DID YOU DO WHEN YOU GOT UP THAT MORNING?

17 A I TOOK A SHOWER AND THEN I CALLED THE POLICE PRETTY
18 MUCH AND JUST TOLD THEM WHAT I HAD FOUND.

19 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED STATE'S
20 IDENTIFICATION, STATE'S EXHIBIT 1 FOR IDENTIFICATION.

21 MR. CHAPLIN: YOUR HONOR.

22 THE COURT: YES, SIR.

23 MR. CHAPLIN: THE DEFENSE HAS AN OBJECTION TO THIS
24 EVIDENCE AND WE WOULD LIKE TO HAVE THAT MATTER HEARD
25 OUTSIDE THE PRESENCE OF THE JURY.

1 THE COURT: OKAY. LADIES AND GENTLEMEN, I ASK YOU TO
2 GO BACK TO THE JURY ROOM AND DON'T TALK ABOUT THE CASE AND
3 WE WILL RESUME MOMENTARILY. THANK YOU.

4 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

5 THE COURT: MR. CHAPLIN.

6 MR. CHAPLIN: YOUR HONOR, THIS MOTION IS BEING MADE
7 PURSUANT TO THE VIDEO OR CD THAT THE STATE HAS SHOWN ME
8 AND I AM MAKING THIS OBJECTION TO THE ADMISSION OF THAT CD
9 BASED ON RULES 1002 OF THE SOUTH CAROLINA RULES OF
10 EVIDENCE OR 1003, SOUTH CAROLINA RULES OF EVIDENCE AND
11 RULE 1004. FIRST AND FOREMOST, YOUR HONOR, RULE 1002 SAYS
12 THAT THERE IS A REQUIREMENT OF AN ORIGINAL. I THINK THE
13 TESTIMONY WE ARE ABOUT TO HEAR IS THAT THAT IS NOT AN
14 ORIGINAL. RULE 1002, EXCUSE ME, 1002, THAT SAYS THAT
15 EXCEPT AS OTHERWISE PROVIDED IN THE RULES BY STATUTE.
16 THEN I MOVE OVER TO 1003, YOUR HONOR, THAT THESE ARE
17 DUPLICATES. AND IT SAYS A DUPLICATE IS ADMISSIBLE
18 PROVIDED THERE IS NOT A GENUINE QUESTION AS TO THE
19 AUTHENTICITY OF THE ORIGINAL. GOES ON TO SAY THAT DUE TO
20 CIRCUMSTANCES THAT IT WOULD BE UNFAIR TO ADMIT THE
21 DUPLICATE OF THE ORIGINAL. YOUR HONOR, THESE IS A GENUINE
22 ISSUE AS TO THE AUTHENTICITY OF THE ORIGINAL OF THIS
23 DOCUMENT. THEN I MOVE ON TO RULE 1004, YOUR HONOR. AND
24 IT SAYS, IF THE ORIGINALS ARE LOST OR DESTROYED DUPLICATES
25 CAN BE ADMITTED UNLESS THE PROPONENT LOST OR DESTROYED IN

1 BAD FAITH. AND WE ARE SUGGESTING THAT THAT IS THE CASE IN
2 THIS SITUATION. THEREFORE WE ARE ASKING THAT THE VIDEO
3 NOT BE ADMITTED INTO EVIDENCE, IT CAN'T BE PROPERLY
4 AUTHENTICATED AND I THINK IT VIOLATES SEVERAL RULES OF
5 SOUTH CAROLINA RULES OF EVIDENCE.

6 THE COURT: MR. MCDANIEL.

7 MR. MCDANIEL: YOUR HONOR, I JUST WANT TO MAKE SURE,
8 HE IS ALLEGING BAD FAITH THAT THE ORIGINALS WERE, IS THAT
9 WHAT YOU ARE AND I AM SORRY. YOU ARE SAYING THAT THESE
10 CAN'T COME IN BECAUSE THEY HAVE BEEN LOST OR DESTROYED IN
11 BAD FAITH. I JUST WANT A CLARIFICATION.

12 MR. CHAPLIN: WELL, I AM SAYING THAT WHAT YOU HAVE IS
13 NOT AN ORIGINAL, I AM SAYING THAT IT IS ACCEPTABLE, A
14 DUPLICATE IS ACCEPTABLE PROVIDED THERE IS NOT A GENUINE
15 QUESTION RAISED AS TO THE AUTHENTICITY OF THE ORIGINAL
16 WHICH I AM RAISING THAT QUESTION. AND THE CIRCUMSTANCES,
17 UNDER THESE CIRCUMSTANCES TO BE UNFAIR TO ADMIT THE
18 DUPLICATE IN LIEU OF THE ORIGINAL. I AM FURTHER ALLEGING
19 AND ARGUING THAT THE ADMISSIBILITY OF OTHER EVIDENCE OR
20 CONTENTS OR EVEN SECOND, THIRD OR FORTH DOWNLOAD OF WHAT
21 YOU HAVE, IF IT FALLS UNDER THE FACT THAT THE ORIGINAL HAS
22 BEEN LOST OR DESTROYED I THEN SAY THE ORIGINAL WAS
23 DESTROYED IN BAD FAITH.

24 MR. MCDANIEL: YOUR HONOR, THERE HAS BEEN NO EVIDENCE
25 OF BAD FAITH. I MEAN, I HAVEN'T EVEN, HE HASN'T, THE

1 AUTHENTICITY HASN'T BEEN ESTABLISHED HERE. TO CALL THIS A
2 COPY OF THE ORIGINAL IS A STRETCH, BECAUSE THESE CAMERAS
3 WERE MEANT TO DOWNLOAD, PRINT THEM OUT. THAT IS THE SAME
4 AS SAYING THAT YOUR OLD REGULAR FILM CAMERAS, WHEN YOU
5 TAKE THAT PICTURE, THAT THE ORIGINALS IS ACTUALLY WHAT IS
6 ON THE FILM. AND THEN WHEN YOU GET THEM DEVELOPED THAT IS
7 A COPY OF WHAT CAME FROM THE ORIGINAL. THAT IS THE WAY I
8 SEE THAT. NOW, I ALSO THINK THAT UNDER, IF YOUR HONOR WAS
9 TO FIND THAT THE ORIGINAL HAS BEEN LOST OR DESTROYED WE
10 WOULD ASK THAT AND WE ARE NOT CONTENDING THAT THESE ARE
11 COPIES. AND I WOULD SAY THAT THESE ARE THE ORIGINALS THAT
12 CAME FROM THAT VIDEO, THAT THOSE ORIGINALS CAN'T BE
13 OBTAINED. AND THAT A COPY, ASSUMING THAT THE PROPER
14 FOUNDATION AND AUTHENTICITY HAS BEEN ESTABLISHED WILL
15 SERVE THE SAME PURPOSE AS THE ORIGINAL. NOW, MY POSITION
16 IS THAT THESE ARE THE ORIGINALS AND I THINK WE ESTABLISHED
17 IN PRETRIAL MOTIONS YESTERDAY THAT ALTHOUGH THIS CAMERA
18 DID NOT NEED A CHAIN OF CUSTODY THAT THE CAMERA WAS NEVER
19 OUT OF HIS POSSESSION, THAT HE DOWNLOADED THOSE IMAGES AND
20 BURNED THEM ONTO A CD WHICH HE PRESENTED TO THE POLICE. I
21 DO NOT SEE HOW THAT IS ANY DIFFERENT THAN THE POLICE
22 TAKING, EVERY LAW ENFORCEMENT OFFICER HAS A DIGITAL CAMERA
23 IN THEIR CAR AND HOW THEY SNAP PICTURES OF CRIME SCENES OR
24 WHATEVER, THEY DOWNLOAD THOSE AND THOSE ARE THE ORIGINALS.
25 ONE OF THESE ARE ORIGINALS. TWO, IF YOUR HONOR DOES NOT

1 FEEL THAT THEY ARE ORIGINALS THAT THE ORIGINALS HAVE BEEN
2 DESTROYED, I GUESS, THE MEMORY IN THE CAMERA WOULD HOLD SO
3 MANY PICTURES. SO, I KNOW THEY ARE NOT ACTUALLY ON A HARD
4 DRIVE. BUT THEY WERE DOWNLOADED AND THOSE COPIES WITH
5 BARRING MR. MATHIAS' ACCUSATION THAT THIS WAS DONE IN BAD
6 FAITH, WE WOULD ASK THAT THEY COME IN UNDER RULE 1004(2).
7 STATING THAT THE ORIGINAL IS NOT REQUIRED AND OTHER
8 EVIDENCE OF THE CONTENTS OF A WRITING OR RECORDING OR
9 PHOTOGRAPH IS ADMISSIBLE. AND NO ORIGINAL CAN BE OBTAINED
10 BY ANY JUDICIAL PROCESS. AND I AM SORRY, I THINK IT
11 REQUIRES THERE BE AN ISSUE OF AUTHENTICITY AND I THINK HE
12 JUST, I THINK THE DEFENSE IS SAYING WE DON'T AGREE THAT
13 THEY ARE AUTHENTIC WITH THE FOUNDATION LAID.

14 THE COURT: OKAY. ANY FURTHER ARGUMENT, MR. CHAPLIN.

15 MR. CHAPLIN: YOUR HONOR, OUTSIDE THE PRESENCE OF THE
16 JURY I WOULD LIKE TO ASK THE COURT TO INSTRUCT THAT WE
17 HAVE A PROFFER, HOW THIS WAS AUTHENTICATED. I MAY HAVE
18 CONCERNS WITH THAT PROCESS.

19 THE COURT: WHY DON'T YOU GO AHEAD AND PROFFER THE
20 TESTIMONY.

21 PROFFER DIRECT EXAMINATION

22 BY MR. MCDANIEL:

23 Q MR. POTTS, I AM GOING TO HAND YOU WHAT HAS BEEN
24 MARKED AS STATE'S EXHIBIT 1 FOR PURPOSES OF
25 IDENTIFICATION. HAVE YOU EVER SEEN THAT?

- 1 A YES.
- 2 Q WHAT IS THAT?
- 3 A THIS IS THE DVD THAT I PROVIDED TO THE POLICE.
- 4 Q CAN YOU DESCRIBE TO US HOW THAT DVD WAS MADE?
- 5 A I TOOK THAT CAMERA ON TOP OF THE REFRIGERATOR THAT
- 6 HAD TAKEN THE PHOTOS OF THE PERSON IN MY KITCHEN.
- 7 Q HOW MANY PHOTOS WERE THERE?
- 8 A THERE WAS NINE PHOTOS THAT WAS IN THAT LITTLE BLOCK.
- 9 WE TOOK IT TO THE LAPTOP, DOWNLOADED THEM ON THE LAPTOP
- 10 AND BURNED THEM STRAIGHT ONTO THE CD.
- 11 Q AND WHERE WAS THAT LAPTOP?
- 12 A INSIDE THE BLUE MOON.
- 13 Q AT ANY TIME WAS THE CAMERA OUT OF YOUR POSSESSION?
- 14 A NO.
- 15 Q DID YOU TRY TO LET ANYBODY ELSE TRY TO DOWNLOAD IT?
- 16 A NO.
- 17 Q AND YOU DOWNLOADED THE IMAGES?
- 18 A YES, I PUT THEM ON THE COMPUTER.
- 19 Q AND YOU BURNED THEM TO THAT DISK?
- 20 A MY GIRLFRIEND BURNED THEM WITH ME PRESENT.
- 21 Q AND YOU HAVE SEEN THE IMAGES THAT IS ON HERE?
- 22 A YES, SIR.
- 23 Q AND HOW MANY IMAGES ARE THERE?
- 24 A THERE IS NINE.
- 25 Q AND DO THOSE IMAGES FAIRLY AND ACCURATELY REPRESENT

1 THE EVENTS THAT TOOK PLACE THAT NIGHT?

2 A YES.

3 Q NO ALTERATIONS OR DELETIONS HAVE BEEN MADE?

4 A NO.

5 Q BY YOU?

6 A NO.

7 Q BY ANYBODY?

8 A NO.

9 Q AND YOU PROVIDED THIS TO THE POLICE, CORRECT?

10 A CORRECT.

11 Q WHO TOOK IT TO THE POLICE?

12 A I DID.

13 Q AND WHO DID YOU GIVE IT TO?

14 A OFFICER MCCLURKIN.

15 Q SO, UNTIL THEN WAS THIS DISK EVER OUT OF YOUR
16 POSSESSION?

17 A NO.

18 Q THANK YOU.

19 PROFFER CROSS-EXAMINATION

20 BY MR. CHAPLIN:

21 Q GOOD AFTERNOON, MR. POTTS. MR. POTTS, SO IT IS YOUR
22 TESTIMONY THAT YOU CAME HOME, I AM SORRY, THAT YOU WENT TO
23 WORK EARLIER THAT DAY?

24 A YES.

25 Q CAME HOME AND YOU WENT BACK TO WORK AT 7:00 O'CLOCK.

1 THE COURT: NOW, YOU ARE GOING TO HAVE TO CONFINE
2 YOUR QUESTIONS TO THE AUTHENTICITY, THIS ISN'T A DISCOVERY
3 FORM.

4 Q MR. POTTS, SO WHEN YOU CAME HOME YOU NOTICED THAT
5 THERE WAS A PICTURE IN THE CAMERA?

6 A YES.

7 Q HOW DID YOU NOTICE THAT?

8 A BECAUSE I WENT, THERE IS A VIEWER ON THE CAMERA.

9 Q SO, YOU WENT TO THE CAMERA?

10 A AND I COULD SEE A SMALL PICTURE ON IT, YES.

11 Q IS THE CAMERA MOTION ACTIVATED?

12 A YES.

13 Q WHEN YOU CHECKED THE CAMERA DID IT TAKE A PICTURE OF
14 YOU?

15 A YES, I AM SURE IT DID.

16 Q YOU PROVIDED THE POLICE DEPARTMENT WITH NINE
17 PICTURES?

18 A YES.

19 Q AND YOUR CAMERA HOLDS HOW MANY PICTURES?

20 A I DON'T KNOW THAT.

21 Q DOES IT HOLD MORE THAN NINE?

22 A YES.

23 Q SO, YOU DOWNLOADED THE PICTURES TO A COMPUTER AT THE
24 BLUE MOON, IS THAT WHAT YOU SAY?

25 A RIGHT.

1 Q WHO SELECTED WHICH PICTURES WERE DOWNLOADED?

2 A THE CAMERA PUT ALL OF THEM ON THERE ONTO THE
3 COMPUTER.

4 Q YOU SAID THE CAMERA HOLDS MORE THAN NINE?

5 A YES.

6 Q AND THAT IS ALSO TOOK A PICTURE OF YOU?

7 A THERE WERE SEVERAL PICTURES OF ME DURING SEVERAL
8 DIFFERENT DAYS, I CAN GO BACK AND CHECK IT.

9 Q BUT YOU DIDN'T PROVIDE THOSE PICTURES TO THE DOWNLOAD
10 THAT YOU MADE AT THE BLUE MOON?

11 A NO.

12 Q WHY NOT?

13 A BECAUSE THEY DIDN'T HAVE ANY BEARING FOR THIS. ME
14 WALKING THROUGH THE HOUSE TWO DAYS EARLIER DOESN'T HAVE
15 ANY BEARING ON THIS.

16 Q WHAT ABOUT THE PICTURE OF YOU CHECKING THE CAMERA ON
17 THE NIGHT OF THE 27TH?

18 A IT IS NOT ON THAT DISK.

19 Q WHY NOT?

20 A BECAUSE I DON'T NEED A PICTURE OF ME.

21 Q SO, YOU DETERMINE WHAT PICTURES YOU ARE GOING TO
22 PROVIDE THE POLICE?

23 A YES.

24 Q FROM THE ORIGINALS?

25 A YES.

1 Q NOW, WHEN YOU LOOKED AT THE PICTURES DID YOU, YOU SAY
2 YOU CAME HOME AT--

3 A 1:00 OR 1:30, AROUND THAT BALLPARK.

4 Q BUT THE PICTURES YOU PROVIDED THE POLICE HAVE A DATE
5 TIMESTAMP OF 3:00 O'CLOCK IN THE MORNING?

6 A YES.

7 Q SO, WERE YOU HOME WHEN THOSE PICTURES WERE TAKEN?

8 A NO, THE CLOCK WAS WRONG ON THE CAMERA. THAT IS
9 SOMETHING THAT I HAD JUST SET UP AND I HADN'T SET THAT UP
10 YET. THAT DOESN'T HAVE TO BE SET UP TO TAKE PICTURES.

11 Q NOW, THE PICTURES THAT YOU PROVIDED LAW ENFORCEMENT,
12 A NUMBER 187 THROUGH 195.

13 A OKAY.

14 Q WHERE ARE PICTURES 1 THROUGH 186?

15 A THEY WERE ON THE COMPUTER.

16 Q I BEG YOUR PARDON?

17 A THEY WERE ON THE COMPUTER.

18 Q AND WHERE ARE THEY NOW?

19 A THEY MAY STILL BE ON THERE, I HAVEN'T LOOKED IN A
20 WHILE. THEY WERE NOT OF THIS DAY.

21 Q SO, WHEN THE OFFICER CAME TO YOUR HOME ON THE MORNING
22 OF THE 28TH--

23 MR. MCDANIEL: JUDGE, THIS HAS NOTHING TO DO WITH THE
24 AUTHENTICITY OF THE PICTURES. HE IS GOING--

25 MR. CHAPLIN: YOUR HONOR, MY ISSUE HERE IS GOING BACK

1 TO THE QUESTION IN RULE 103, WITH REGARDS TO UNLESS IT IS
2 A GENUINE QUESTION OF AUTHENTICITY. AND I CAN STOP NOW
3 BUT, YOUR HONOR, I OFFER THAT AS THERE IS A GENUINE
4 QUESTION AS TO AUTHENTICITY OF WHAT, THAT THESE ARE
5 DUPLICATES BASED ON HIS TESTIMONY, THESE ARE DUPLICATES,
6 NOT ORIGINALS. HE SAID HE MAY HAVE THE ORIGINALS
7 SOMEWHERE AT HIS HOUSE OR SOMETHING LIKE THAT BUT WE DON'T
8 HAVE ORIGINALS. SO, NOW WE ARE OVER TO THE ADMISSIBILITY
9 OF DUPLICATES AND IF WE ARE IN THE ADMISSIBILITY OF
10 DUPLICATES WE DON'T EVEN HAVE ALL THE DUPLICATES.

11 THE COURT: WELL, HELP ME OUT. MY RECOLLECTION IS
12 THAT MR. POTTS SAID HE DOWNLOADED THE DEER CAMERA DATA TO
13 HIS COMPUTER, FROM THAT HE BURNED THIS DISK THAT IS NOW
14 SEEKING TO BE INTRODUCED, IS THAT RIGHT?

15 MR. MCDANIEL: THAT IS CORRECT, JUDGE.

16 THE COURT: IS THAT RIGHT?

17 MR. CHAPLIN: THAT IS WHAT I UNDERSTAND AS WELL, YOUR
18 HONOR.

19 THE COURT: YOUR OBJECTION IS UNDER THE BEST EVIDENCE
20 RULE CODIFIED BY RULES 1001 THROUGH 1004 WHICH REQUIRES IN
21 ORDER TO PROVE THE CONTENTS OF THE PHOTOGRAPHS THE
22 ORIGINAL IS REQUIRED. THE DEFINITION OF ORIGINAL UNDER
23 RULE 1001 SAYS, AN ORIGINAL OF A PHOTOGRAPH INCLUDES THE
24 NEGATIVE OR ANY PRINT THEREFROM. IF DATA ARE STORED IN A
25 COMPUTER OR SIMILAR DEVICE, ANY PRINTOUT OR OTHER OUTPUT

1 READABLE BY SIGHT SHOWN TO REFLECT THE DATA ACCURATELY IS
2 AN ORIGINAL. SO, HOW COULD THAT NOT BE AN ORIGINAL BASED
3 ON THE TESTIMONY WE HAVE BEFORE US BECAUSE IT IS DATA
4 STORED IN A COMPUTER THAT WILL BE OUTPUT READABLE BY
5 SIGHT. IT IS THE SAME PICTURE THAT WAS ON THE DEER CAMERA
6 BASED ON THE FOUNDATION MADE BY THE STATE. I THINK THE
7 BEST EVIDENCE RULE WAS DESIGNED TO KEEP TESTIMONY AND
8 EVIDENCE COMING IN ABOUT A LETTER, FOR INSTANCE, WITHOUT
9 PUTTING IN THE ORIGINAL LETTER ITSELF BECAUSE THE LETTER
10 WOULD BE, "THE BEST EVIDENCE OF THE CONTENTS." THAT IS
11 WHAT THE RULE IS DESIGNED TO DO. AND HERE THOSE PURPOSES
12 AREN'T SERVED BY SOME RULE THAT WOULD REQUIRE THE ORIGINAL
13 IMAGE OF WHATEVER REALITY THAT WAS CAPTURED BY THE
14 PHOTOGRAPH WHEN IT WAS TAKEN. IT COULD GET INTO CERATIN
15 SITUATIONS WHERE THE ORIGINAL WOULD BE FOUND THAT WAS AN
16 IMAGE THAT WAS SEEN THROUGH THE VIEWFINDER AT THE TIME THE
17 SHUTTER CLOSED OR SOMETHING OF THAT NATURE. BUT THAT IS
18 NOT WHAT THE RULE SAYS. THE RULE SAYS, IT DEFINES THE
19 ORIGINAL THE WAY I QUOTED IT AND I THINK BASED ON THE
20 TESTIMONY THAT THE CONTENTS ON THAT CD WOULD QUALIFY AS AN
21 ORIGINAL UNDER THAT DEFINITION. SO, I RESPECTFULLY
22 OVERRULE YOUR OBJECTION.

23 MR. CHAPLIN: THANK YOU, YOUR HONOR.

24 THE COURT: ANYTHING BEFORE WE BRING THE JURY BACK
25 IN?

1 MR. CHAPLIN: NO, SIR.

2 MR. MCDANIEL: NO, SIR.

3 THE COURT: BRING THE JURY IN.

4 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
5 APPROXIMATELY 2:10 P.M.)

6 DIRECT EXAMINATION

7 BY MR. MCDANIEL:

8 Q YOU HAD TALKED ABOUT PUTTING THE CAMERA ON THE
9 REFRIGERATOR?

10 A RIGHT.

11 Q TO CAPTURE AN IMAGE OF SOMEBODY?

12 A RIGHT.

13 Q I AM GOING TO HAND YOU, WHAT IS THAT?

14 A THIS IS THE CAMERA THAT I USED TO PUT ON THE
15 REFRIGERATOR.

16 Q AND THAT IS YOUR CAMERA, RIGHT?

17 A YES.

18 Q CAN YOU EXPLAIN TO US HOW THAT WORKS?

19 A OKAY. BASICALLY YOU SET IT UP AND CUT IT ON TO TAKE
20 PHOTOGRAPHS AND IT IS--

21 Q CAN YOU TAKE PICTURES DURING THE DAY?

22 A YES, I CAN. I HAD TO SET IT UP FOR A BURST OF THREE
23 DIFFERENT PICTURES. AND DURING THE DAY IT CAN TAKE MORE
24 PICTURES WITHOUT A FLASH AND AT NIGHT IT HAS A RED SENSOR
25 AND IT DOES AN INFRARED FLASH AND IT TAKES PICTURES THEN.

1 BUT THAT ONLY HAPPENS AT NIGHT.

2 Q WHEN YOU SAY FLASH?

3 A IT IS A LITTLE RED PULSE ACROSS THIS BAR RIGHT HERE,
4 THAT IS RED.

5 Q BUT IT IS NOT LIKE WHEN WE--

6 A IT IS NOT A CAMERA FLASH, IT IS KIND OF A LITTLE GLOW
7 ON IT.

8 Q AND WHAT ACTIVATES THAT CAMERA?

9 A IT HAS A MOTION SENSOR ON THE FRONT HERE AND THEN
10 WHATEVER GOES IN FRONT OF IT WHETHER IT IS ME OR THE CAT
11 OR SOMEONE ELSE IN THE HOUSE, IT ACTIVATES AND THEN IT
12 STARTS TAKING PICTURES.

13 Q AND YOU SAID SOMETHING ABOUT LIKE THREE PICTURE
14 BURST. HOW DID YOU HAVE THAT SET UP?

15 A I HAD IT SET FOR THREE AND AS SOON AS IT IS ACTIVATED
16 IT WILL TAKE ONE PICTURE AND THERE IS A DELAY OF TEN TO
17 TWELVE OR THIRTEEN SECONDS, SOMETHING LIKE THAT. AND THEN
18 IT TAKES ANOTHER PICTURE AND ANOTHER DELAY AND THEN IT
19 TAKES ANOTHER PICTURE.

20 Q AND THAT IS A SETTING, RIGHT?

21 A I CAN SET IT UP TO DO ONE PICTURE AND THEN RESET SO I
22 CAN SET IT TO DO TWO OR THREE AND IT CAN DO VIDEO ALSO BUT
23 I DIDN'T HAVE IT ON THAT.

24 Q SO, IT IS UP TO THREE AND YOU HAD IT SET ON THE
25 THREE?

1 A THE THREE PICTURE BURST, YES.

2 Q AND JUST WANT TO MAKE SURE I AM CLEAR. SO, WHEN IT
3 DETECTS MOTION IT TAKES A PICTURE?

4 A CORRECT.

5 Q AND THEN THERE IS A DELAY AND IT TAKES ANOTHER
6 PICTURE AND THEN THE DELAY AND THEN IT TAKES ANOTHER
7 PICTURE AND THEN THAT IS THE END OF THAT CYCLE?

8 A RIGHT.

9 Q AND THAT IS HOW YOU HAD IT SET UP THAT NIGHT?

10 A RIGHT.

11 Q THANK YOU.

12 MR. CHAPLIN: I RENEW THE OBJECTION I MADE EARLIER,
13 YOUR HONOR.

14 THE COURT: OKAY.

15 MR. CHAPLIN: ABOUT THE ADMISSIBILITY OF THE CD.

16 THE COURT: THANK YOU, MR. CHAPLIN.

17 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED STATE'S
18 EXHIBIT 1 FOR IDENTIFICATION PURPOSES.

19 A OKAY.

20 Q DO YOU KNOW WHAT THAT IS?

21 A THIS IS THE DVD THAT I PROVIDED TO THE POLICE OF THE
22 PICTURES ON THAT CAMERA.

23 Q DID YOU DOWNLOAD?

24 A YES.

25 Q HOW DID YOU OBTAIN THESE PICTURES?

1 A WE TOOK IT BACK TO A LAPTOP AND DOWNLOADED ON THE
2 LAPTOP AND THEN PRINTED IT ON A DVD.

3 Q HAVE YOU SEEN THE PICTURES ON THERE?

4 A YES.

5 Q HOW MANY PICTURES ARE ON THERE?

6 A THERE ARE NINE PICTURES ON THERE.

7 Q AND DO THEY FAIRLY AND ACCURATELY REPRESENT THE
8 OFFENSE THAT TOOK PLACE THAT NIGHT?

9 A YES.

10 Q ANY ALTERATIONS OR DELETIONS MADE?

11 A NO.

12 Q THANK YOU.

13 MR. MCDANIEL: YOUR HONOR, I WOULD ASK THAT STATE'S
14 EXHIBIT 1 BE MOVED INTO EVIDENCE IN THIS CASE.

15 THE COURT: IT IS IN EVIDENCE SUBJECT TO THE DEFENSE
16 OBJECTION.

17 (WHEREUPON, STATE'S EXHIBIT NO. 1 WAS ADMITTED INTO
18 EVIDENCE.)

19 MR. MCDANIEL: YOUR HONOR, PERMISSION TO PUBLISH
20 STATE'S 1 TO THE JURY.

21 THE COURT: YES, SIR.

22 MR. MCDANIEL: THANK YOU.

23 (WHEREUPON, THE DVD WAS PLAYED FOR THE JURY.)

24 Q MR. POTTS, I WILL ASK YOU TO GET DOWN FROM THE STAND
25 AND SHOW ME THESE PICTURES AND SPEAK UP SO EVERYBODY CAN

1 HEAR YOU. WHAT IS THAT PICTURE OF?

2 A THAT IS A PICTURE OF THE DOORWAY COMING INTO MY

3 KITCHEN, THE REFRIGERATOR WOULD BE ABOUT THERE.

4 Q BEFORE WE GET STARTED, ON THE BOTTOM THERE, WHAT ARE

5 THOSE?

6 A HERE?

7 Q YES.

8 A THAT IS LITTLE -- DATE AND TIME IS OFF.

9 Q HAD YOU SET THAT TIME?

10 A I DON'T THINK THAT I SET THE TIME, I SET THE DATE ON

11 IT.

12 Q SO THE TIME IS OFF A COUPLE OF HOURS?

13 A RIGHT.

14 Q I AM GOING TO GO TO THE NEXT PICTURE. THAT IS

15 PICTURE NUMBER TWO, THE SAME?

16 A YES.

17 Q AND I WILL GO TO THE NEXT ONE.

18 A ANY MOTION WILL SET THAT CAMERA OFF, THE DOOR, IF YOU

19 WALK PAST THE DOORWAY IT WILL SET IT OFF.

20 Q OKAY. THAT WOULD BE THE THIRD?

21 A THE THIRD IN THE SERIES.

22 Q AND WHAT IS THE DELAY BETWEEN THOSE AGAIN?

23 A APPROXIMATELY THIRTEEN SECONDS, SOMEWHERE IN THAT.

24 Q IS THAT THE IMAGE THAT YOU SAW THAT NIGHT?

25 A YES.

1 Q SO, THAT IS IMAGE FOUR, CORRECT?

2 A YES.

3 Q SO, THAT IS THE FIFTH IMAGE?

4 A RIGHT.

5 Q THERE IS A DELAY, RIGHT?

6 A RIGHT.

7 Q SO, WHAT IS THE CAMERA DOING IN THOSE THIRTEEN
8 SECONDS?

9 A IT IS JUST TAKING A PICTURE OF THE SAME SPOT.

10 Q WHY DOES IT WAIT, WHAT IS THE PURPOSE OF THE THIRTEEN
11 SECONDS?

12 A SO IT WON'T TAKE THE SAME PICTURE THREE TIMES. IT IS
13 SET UP FOR DEER, SO YOU DON'T TAKE A PICTURE OF THE SAME
14 DEER MOVING AROUND, MULTIPLE PICTURES.

15 Q SO, THAT WOULD BE, THAT IS THE SIXTH PICTURE?

16 A THAT IS THE THIRD ONE IN THE SECOND SERIES. AND THEN
17 THERE IS ANOTHER DELAY.

18 Q AND THIS WOULD START?

19 A IT WOULD SET UP AGAIN AND START ANOTHER SERIES.

20 Q THIS IS NUMBER TWO?

21 A THERE IS A LIGHT, THIS IS THE DOOR BEING OPENED RIGHT
22 THERE.

23 Q AND THIS IS THE LAST PICTURE AND THOSE ARE THE NINE
24 PICTURES?

25 A THOSE ARE THE NINE PICTURE.

1 Q THANK YOU, YOU CAN HAVE A SEAT. YOU DIDN'T KNOW WHO
2 WAS ON THAT CAMERA, RIGHT?

3 A NO, I HAD NEVER SEEN THAT PERSON BEFORE.

4 Q ANYBODY HAVE PERMISSION TO GO INTO YOUR HOUSE?

5 A ONLY MY GIRLFRIEND.

6 Q WHOEVER IS ON THERE DID NOT HAVE PERMISSION?

7 A NO.

8 Q DO YOU KEEP YOUR HOUSE LOCKED?

9 A YES.

10 Q ARE YOU ABLE TO TELL HOW THE PERSON GOT IN THE HOUSE
11 THAT NIGHT?

12 A IT APPEARED THEY CAME THROUGH THE BEDROOM WINDOW
13 WHERE I HAD A WINDOW UNIT.

14 Q WHAT IS A WINDOW UNIT?

15 A AIR-CONDITIONING UNIT, STUCK IN THE WINDOW THERE.
16 THAT WINDOW WASN'T LOCKED BECAUSE IT WAS SITTING IN THERE.

17 Q WAS THE AIR-CONDITIONING UNIT THERE THAT MORNING?

18 A IT WAS BACK IN PLACE, YES, THERE WAS, OUTSIDE OF THE
19 WINDOW YOU CAN SEE WHERE SOMEBODY HAD BEEN WALKING AROUND
20 AND A CHAIR HAD BEEN MOVED OVER NEAR THE WINDOW. AND
21 THERE WAS SOME OLD WINDOW FRAMES AND HAD BEEN STEPPED ON
22 AND BROKEN TO GET INTO THE WINDOW.

23 Q BUT THE WINDOW UNIT WAS PUT BACK?

24 A THE WINDOW WAS PUT BACK THE WAY IT WAS.

25 Q WHO PUT THE WINDOW UNIT IN?

1 A I DID. IT IS A SMALL UNIT THAT YOU CAN BUY JUST FOR
2 ONE ROOM.

3 Q SO, YOU CAN MOVE THESE?

4 A YES.

5 Q DO YOU REMEMBER ABOUT WHAT TIME YOU CALLED THE
6 POLICE?

7 A IT WAS LATE IN THE MORNING, 10:00 TO 11:00, SOMEWHERE
8 IN THAT BALLPARK.

9 Q AND ABOUT HOW LONG YOU THINK IT TOOK THE POLICE TO
10 SHOW UP?

11 A NOT TOO LONG, TWENTY MINUTES MAYBE.

12 Q WHO WAS THERE AT THE HOUSE WHEN THEY CAME?

13 A JUST MYSELF.

14 Q WERE YOU ABLE TO DOWNLOAD THE PICTURES THERE?

15 A I VIEWED THEM, MY COMPUTER WASN'T CAPABLE TO DO THAT.
16 THAT IS WHY I TOOK IT TO ONE THAT COULD DO THAT ON.

17 Q AND I KNOW YOU ALREADY TOLD THE, WHERE DID YOU
18 DOWNLOAD THE PICTURES?

19 A ONTO A LAPTOP AT WORK WE HAD AT THE BLUE MOON.

20 Q NOW, DO YOU KNOW THE DEFENDANT?

21 A NO.

22 Q MR. POTTS, WHAT WAS TAKEN FROM YOUR HOME?

23 A IT WAS ABOUT \$100.00 DOLLARS WORTH OF QUARTERS I HAD
24 IN A BOX.

25 Q WHERE WAS THAT?

1 A IT WAS ON MY CHESTER DRAWERS IN THE BEDROOM. AND A
2 FEW ARTICLES OF CLOTHING INCLUDING SOME SOCKS AND A HAT,
3 STUFF LIKE THAT.

4 MR. CHAPLIN: OBJECTION, YOUR HONOR. YOUR HONOR,
5 PURSUANT TO THE MOTION THAT WAS HEARD YESTERDAY I THINK WE
6 DISCUSSED THIS ISSUE. AND I AM CONCERNED WITH YOUR RULING
7 IN THAT SITUATION.

8 THE COURT: I OVERRULE THE OBJECTION, GO AHEAD.

9 Q ANYTHING ELSE TAKEN?

10 A AND THEN THERE WAS SOME BEER TAKEN OUT OF THE
11 REFRIGERATOR.

12 Q HOW MANY?

13 A FOUR OR FIVE CANS OF BEER.

14 Q HOW MUCH WAS THE BEER WORTH?

15 A SIX DOLLARS, IT WAS CHEAP BEER.

16 Q UNDER \$1,000.00 DOLLARS?

17 A YES, UNDER \$1,000.00 DOLLARS.

18 Q AND NOBODY HAD PERMISSION TO COME TO YOUR HOUSE?

19 A NO.

20 Q TO TAKE ANYTHING?

21 A NO.

22 Q ANYBODY HAVE A KEY?

23 A ONLY MY GIRLFRIEND HAS A KEY.

24 Q NO FURTHER QUESTIONS.

25 THE COURT: MR. CHAPLIN.

CROSS-EXAMINATION

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BY MR. CHAPLIN:

Q GOOD AFTERNOON AGAIN, MR. POTTS. I THINK THAT YOU
STATED THAT YOU LIVE AT [REDACTED]

A THAT IS CORRECT.

Q AND YOU LIVE THERE ALONE?

A I DO.

Q AND ON OCTOBER 27TH OR THE MORNING OF OCTOBER 28TH
YOU REPORTED TO NEWBERRY POLICE THAT THERE WAS A BURGLARY
AT YOUR HOME?

A ON THAT NEXT MORNING, YES.

Q MR. POTTS, LET'S JUST TALK ABOUT YOUR HOME FOR A
SECOND. DO YOU HAVE TELEVISIONS IN THE HOUSE?

A YES.

Q DO YOU HAVE STEREOS?

A NO.

Q DO YOU HAVE COMPUTERS?

A YES.

Q DO YOU HAVE CD'S?

A A FEW.

Q WHAT ABOUT VIDEO GAMES?

A NO.

Q YOU HAVE CAMERAS?

A OTHER THAN THIS ONE I DIDN'T AT THE TIME, NO.

Q BUT YOU DID HAVE A CAMERA?

1 A THE ONE THAT I USED TO TAKE THESE PICTURES, YES.

2 Q YOU HAVE FURNITURE?

3 A YES.

4 Q WHAT ABOUT LAWNMOWERS AND LAWN EQUIPMENT, SOMEWHERE
5 NEAR THE HOUSE ON YOUR PROPERTY?

6 A THAT HAS ALREADY BEEN TAKEN TO BE HONEST WITH YOU.

7 Q YOU HAVE A BAR IN THE HOUSE?

8 A I HAVE ALCOHOL IN THE HOUSE, YES. I DON'T HAVE A
9 BAR, NO.

10 Q ARE ANY OF THOSE THINGS TAKEN TO YOUR KNOWLEDGE ON
11 THE MORNING OF 10/28?

12 A THE BEER WAS TAKEN.

13 Q BEER?

14 A YES.

15 Q AND I THINK YOU INDICATED THAT AROUND \$100.00 DOLLARS
16 IN COINS?

17 A YES.

18 Q TAKEN?

19 A YES.

20 Q MR. POTTS, DO YOU REMEMBER CALLING THE POLICE THE
21 FOLLOWING MORNING REGARDING, TO REPORT THIS BREAK-IN?

22 A YES.

23 Q AND DO YOU REMEMBER SPEAKING WITH AN OFFICER BY THE
24 NAME OF OFFICER MOORE?

25 A I DON'T REMEMBER THE NAME.

1 Q DO YOU REMEMBER SPEAKING WITH AN OFFICER?

2 A YES. AT LEAST DISPATCH.

3 Q AND DID YOU PROVIDE THE OFFICER WITH INFORMATION AT
4 THAT TIME?

5 A I BELIEVE I JUST SAID THAT SOMEONE HAD BROKEN INTO MY
6 HOUSE AND I NEEDED SOMEONE TO COME AND INVESTIGATE.

7 Q AND DID SOMEBODY INVESTIGATE?

8 A YES.

9 Q AT THAT TIME WHEN THEY INVESTIGATED DID YOU TELL THEM
10 THAT YOU WERE MISSING \$100.00 DOLLARS OR \$70.00 DOLLARS?

11 A \$100.00.

12 Q MR. POTTS, ISN'T IT TRUE THAT IT WASN'T UNTIL THE
13 30TH, MAYBE TWO OR THREE DAYS LATER THAT YOU CALLED BACK
14 AND SAID YOU WERE MISSING \$70.00 DOLLARS.

15 A I ADDED TO THE LIST, ONCE I HAD DONE A FULL INVENTORY
16 OF EVERYTHING IN THE HOUSE.

17 Q SO, YOU DIDN'T TELL THEM THAT ON THE, THE MORNING OF
18 THE 28TH?

19 A I AM NOT SURE WHICH ITEM I TOLD THEM THAT MORNING AND
20 WHICH ITEMS I TOLD LATER.

21 Q BUT YOU ARE CERTAIN THAT YOU SAID \$100.00 DOLLARS AND
22 NOT \$70.00?

23 A IT WAS APPROXIMATELY \$100.00 DOLLARS BECAUSE I WAS
24 COLLECTING THE STATE COINS AND I WAS TRYING TO KEEP A
25 DOLLAR OF EACH STATE AND THEY WERE ALL GONE.

1 Q MY QUESTION IS, WHAT DID YOU TELL THE OFFICER WHEN
2 YOU REPORTED THE BURGLARY, \$70.00 OR \$100.00?

3 A I BELIEVE I TOLD THEM \$100.00.

4 Q NOW, YOU SAID YOU CAME IN AND YOU NOTICED THERE WAS A
5 PICTURE ON YOUR DEER CAMERA?

6 A YES.

7 Q LET ME JUST BACK UP FOR A SECOND. YOU SAID YOU HAD
8 SOME OTHER PROBLEMS AT THAT LOCATION SO YOU BOUGHT A DEER
9 CAMERA?

10 A YES.

11 Q DID YOU EVER USE THE DEER CAMERA BEFORE?

12 A I HADN'T USED THAT ONE BECAUSE I HADN'T GOTTEN ONE
13 BUT I HAD USED ONE BEFORE, YES.

14 Q YOU HAVE?

15 A YES.

16 Q SO YOU HAVE SET THEM UP?

17 A YES. AND I HAD USED THAT ONE THAT FULL WEEK TESTING
18 SO I HAD PICTURES OF MYSELF JUST TO SEE IT WORK.

19 Q SO, YOU TOOK PICTURES OF YOURSELF THE WHOLE WEEK?

20 A EVERYTHING THAT MADE A MOTION IN THAT KITCHEN GOT A
21 PICTURE TAKEN OF IT THAT WAS IN THE VIEW OF THE CAMERA.
22 SO, IF IT WAS MY CAT JUMPING ON THE COUNTER OR ME WALKING
23 THROUGH THE HALLWAY, THAT IS WHAT IT GOT A PICTURE OF.
24 Q SO, WHEN YOU CAME HOME YOU CHECKED THE CAMERA BECAUSE
25 YOU THOUGHT SOMEBODY HAD BEEN IN THE HOUSE?

1 A CORRECT.

2 Q AND THEN YOU, I THINK YOU SAID YOU HAD YOUR
3 GIRLFRIEND WITH YOU?

4 A YES.

5 Q SO, YOU THEN WALKED THROUGH THE HOUSE TO MAKE SURE IT
6 WAS CLEAR?

7 A I WALKED THROUGH THE HOUSE FIRST.

8 Q WHAT DO YOU MEAN BY FIRST?

9 A WHEN WE FIRST GOT THERE I COULD TELL SOMEBODY TRIED
10 TO BREAK INTO THE HOUSE SO I TOLD HER TO WAIT OUTSIDE AND
11 I WALKED THROUGH.

12 Q RIGHT.

13 A AND THEN I CHECKED THE CAMERA WHILE I WAS IN THERE.

14 Q AND THEN AFTER YOU CHECKED THE CAMERA WHAT DID YOU
15 DO?

16 A WE WENT TO BED.

17 Q YOU SAW THERE WAS A PICTURE OF A PERSON ON THE
18 CAMERA?

19 A YES.

20 Q YOU WEREN'T CONCERNED THAT MAYBE YOU MIGHT OF MISSED
21 IT AND THE PERSON WAS STILL THERE?

22 A I CAN'T SAY IT WAS A CONCERN BUT I DIDN'T SEE
23 ANYBODY.

24 Q AT THAT TIME YOU CALLED YOUR GIRLFRIEND AND THEN
25 Y'ALL WENT TO BED?

1 A YES, SHE WAS RIGHT OUTSIDE.

2 Q AND THEN THE NEXT MORNING YOU CALLED THE POLICE?

3 A CORRECT.

4 Q WHEN WAS THAT?

5 A SOMEWHERE BETWEEN 10:00 AND 11:00 I THINK IT WAS, I
6 AM NOT EXACTLY SURE WHAT TIME IT WAS.

7 Q AND YOU SAID THAT YOU THOUGHT SOMEONE HAD ENTERED
8 YOUR HOME BECAUSE IT LOOKED LIKE A WINDOW HAD BEEN
9 TAMPERED WITH?

10 A THERE WAS A WINDOW BESIDE THE BACKDOOR WHERE I ALWAYS
11 ENTER AND IT HAD BEEN BROKEN INTO BEFORE, SOMEBODY JUST
12 SLID IT OPEN BECAUSE IT WASN'T LOCKED. AND I HAD PUT A
13 BOARD ON THE WINDOW SO IT COULDN'T BE SLID UP ANYMORE BUT
14 OBVIOUSLY YOU COULD SEE WHERE SOMEONE HAD DUG INTO THE
15 WINDOW WITH A TOOL OF SOME SORT TO TRY TO GET IN.

16 Q SO HOW DO YOU THINK THE PERSON GOT IN IF THEY DIDN'T
17 GET IN THERE?

18 A THEY MOVED OVER TO THE NEXT WINDOW AND CRAWLED IN, I
19 AM ASSUMING TO THAT WINDOW.

20 Q THROUGH THE NEXT WINDOW?

21 A RIGHT.

22 Q AND THAT WINDOW CONTAINS AN AIR-CONDITIONING UNIT?

23 A YES.

24 Q SO, WHEN YOU GOT HOME WAS THE AIR-CONDITIONING UNIT
25 SITTING ON THE GROUND?

1 A NO.

2 Q IT WAS IN THE WINDOW?

3 A CORRECT.

4 Q SO, YOU ARE SAYING THAT THE PERSON TOOK THE UNIT OUT
5 AND WENT IN AND TOOK FOUR OR FIVE CANS OF BEER AND SOME
6 COINS. LEFT THE HOUSE, PUT THE UNIT BACK?

7 A I DIDN'T SAY IT LIKE THAT. I SAID IT WAS EVIDENCE
8 THAT SOMEBODY HAD TRIED TO GO IN THROUGH THAT WINDOW, THEY
9 HAD BROKEN A WINDOW PANE, MOVED A CHAIR AROUND, THAT IS
10 WHERE IT APPEARS THE WAY THEY WENT IN. I KNEW THEY HAD
11 BEEN IN WHEN I FOUND THE PICTURE. THEY MAY OF TRIED TO GO
12 IN THAT WINDOW BUT WENT IN A DIFFERENT WINDOW BUT I
13 COULDN'T TELL. I JUST NOTICED THAT THERE WAS EVIDENCE
14 THAT SOMEONE HAD TRIED TO GO THROUGH THAT WINDOW.

15 Q SO, DID YOU EVER DETERMINE HOW THE PERSON IN THE
16 PICTURE ENTERED YOUR HOME?

17 A I CAN'T FOR SURE DETERMINE HOW HE GOT IN THERE, I
18 JUST KNOW THAT HE WAS IN THERE ACCORDING TO THE PICTURE.

19 Q WERE YOUR DOORS LOCKED WHEN YOU CAME HOME?

20 A YES.

21 Q WERE ANY WINDOWS BROKEN?

22 A THERE WAS DAMAGE TO ONE, IT WASN'T BROKEN.

23 Q WAS ANY GLASS BROKEN IN THE WINDOWS?

24 A NO.

25 Q WHEN YOU CAME IN THE HOME WAS IT IN SHAMBLES,

1 DISTURBED?

2 A NOT REALLY, NO.

3 Q SO, LET'S TALK ABOUT THE CAMERA THAT YOU SAY YOU PUT
4 IN THE HOUSE. YOU INDICATED THAT YOU HAD SOME PROBLEMS AT
5 THAT LOCATION IN THE PAST?

6 A YES.

7 Q SO, YOUR RESPONSE TO THAT WAS TO BUY A DEER CAMERA?

8 A YES.

9 Q AND INSTALL IT IN YOUR KITCHEN?

10 A CORRECT.

11 Q WAS IT FACING ANY ENTRY DOORS TO THE HOUSE?

12 A NO.

13 Q DO YOU HAVE A LOT OF VALUABLES IN YOUR KITCHEN?

14 A NOT REALLY, NO.

15 Q IS THERE A REASON WHY YOU PUT IT IN THE KITCHEN?

16 A BECAUSE THERE WAS ALMOST AN IDENTICAL BURGLARY ABOUT
17 A WEEK BEFORE, ABOUT TEN DAYS BEFORE. SOMEBODY HAD GONE
18 THROUGH MY HOUSE THROUGH THAT SAME WINDOW THAT HAD BEEN
19 DAMAGED.

20 Q WAS THE CAMERA FACING THAT WINDOW?

21 A NO. AND THEY HAD GONE INTO THE REFRIGERATOR AND
22 STOLE SOME OTHER BEER AND SOME LIQUOR AND STUFF IN THE
23 HOUSE. SO, I HAD JUST NATURALLY ASSUMED THEY MAY COME
24 BACK BECAUSE THEY GOT AWAY WITH IT THE FIRST TIME.

25 Q SO, WHEN SOMEBODY MOVES AROUND IN YOUR KITCHEN IT

1 TAKES A PICTURE OF THAT PERSON, RIGHT?

2 A AS LONG AS THEY ARE IN FRONT OF THE CAMERA, YES.

3 Q WHEN SOMEONE ENTERS THE KITCHEN IT TAKES A PICTURE?

4 A THROUGH THAT PARTICULAR DOOR, THERE IS ANOTHER DOOR.

5 Q IF SOMEONE LEAVES THE KITCHEN IT WOULD TAKE A
6 PICTURE?

7 A AS LONG AS IT WASN'T IN THE MIDDLE OF A CYCLE OR
8 SOMETHING LIKE THAT, YES.

9 Q AND SOMEBODY MOVES AROUND IN THE KITCHEN IT WOULD
10 TAKE A PICTURE ALSO?

11 A IT WILL TAKE PICTURES AS LONG AS SOMEBODY IS MOVING
12 WITH THOSE DELAYS IN BETWEEN, AS LONG AS IT IS IN FRONT OF
13 THAT MOTION SENSOR.

14 Q I THINK YOU TESTIFIED THAT YOU HAD BEEN IN AND OUT OF
15 THE KITCHEN THAT ENTIRE DAY TESTING THE CAMERA?

16 A I DIDN'T SAY THAT, NO.

17 Q HAD YOU BEEN IN THE KITCHEN THAT DAY?

18 A PROBABLY, YES.

19 Q WAS THE CAMERA INSTALLED?

20 A YES.

21 Q NOW, THE PICTURES THAT WE SAW A SECOND AGO WAS A
22 TOTAL OF NINE?

23 A YES.

24 Q DOES THE CAMERA HOLD MORE THAN NINE PICTURES?

25 A YES.

1 Q BUT WE ONLY SAW NINE?

2 A CORRECT.

3 Q AND WHO DECIDED WHICH NINE YOU COULD SEE?

4 A I DID.

5 Q SO, YOU ARE SAYING THAT ALL THE PICTURES, WE HAVEN'T
6 SEEN ALL THE PICTURES?

7 A YOU HAVE SEEN ALL THE PICTURES THAT WERE IN THIS
8 TIMEFRAME. THERE IS NO REASON TO SHOW A PICTURE OF ME
9 WALKING AROUND IN A TOWEL.

10 Q WE ARE NOT SURE WHAT TIMEFRAME THERE IS BECAUSE YOU
11 SAY IT HAPPENED AT ONE TIME AND THE CAMERA SAYS IT IS A
12 DIFFERENT TIME. SO, YOU MADE THAT DECISION AS WELL?

13 A WHAT DO YOU MEAN?

14 Q JUST TO SHOW US A CERTAIN NUMBER OF PICTURES?

15 A THAT WAS THE ONLY ONES WHILE I WAS GONE THAT NIGHT,
16 YES.

17 Q BUT YOU CAME HOME AND YOU CHECKED THE CAMERA THAT
18 NIGHT AS WELL, RIGHT?

19 A YES.

20 Q AND IT TOOK A PICTURE OF YOU AT THAT TIME?

21 A I ASSUME IT DID, I DON'T REMEMBER EXACTLY.

22 Q AND YOU SAID THE CAMERA HAD BEEN INSTALLED DURING THE
23 DAY IN YOUR KITCHEN?

24 A YES.

25 Q AND IT TOOK PICTURES OF YOU, IT IS MOTION ACTIVATED

1 SO IT TOOK PICTURES OF YOU DURING THE DAY?

2 A CORRECT.

3 Q SO, IT IS POSSIBLE THERE ARE PICTURES TAKEN BY THAT
4 CAMERA THAT WE MIGHT THINK IS HELPFUL THAT WE HAVEN'T
5 SEEN. IS THAT POSSIBLE?

6 A I DON'T THINK SO.

7 Q WHY NOT?

8 A BECAUSE THERE IS NOTHING ELSE ON THOSE PICTURES OTHER
9 THAN MYSELF WALKING DURING THE DAY.

10 Q WELL, THE CAMERA, I THINK YOU STATED THAT THE CAMERA
11 HOLDS MORE THAN NINE PICTURES?

12 A YES.

13 Q BUT THE ONLY ONES THAT YOU PROVIDED US ARE THE ONES
14 YOU THOUGHT WERE THE IMPORTANT ONES?

15 A THEY WERE THE ONLY ONES THAT SHOWED THE OCCURRENCE
16 THAT NIGHT.

17 Q BASED ON YOUR OPINION?

18 A THAT IS WHAT IS ON THE CAMERA.

19 Q WHERE ARE THE OTHER PICTURES?

20 A THEY ARE PROBABLY STILL ON THE COMPUTER.

21 Q NOW, WHEN THE POLICE OFFICER CAME TO YOUR HOME THAT
22 MORNING DID YOU SHOW THAT PERSON THE PICTURES?

23 A I SHOWED HIM THESE NINE PICTURES, YES.

24 Q YOU SHOWED HIM ONLY NINE. SO, SOMETIME BETWEEN, SO
25 WHEN DID YOU SELECT THE NINE, BEFORE YOU CALLED THE

1 POLICE?

2 A I LOOKED AT THEM BEFORE I CALLED THE POLICE. THAT IS
3 HOW I KNEW SOMEBODY WAS IN MY HOUSE.

4 Q SO, YOU PICKED OUT NINE AND THAT IS WHAT YOU SHOWED
5 THE POLICE?

6 A THERE WERE SOME DIFFERENT DAYS ON THERE SO THERE WAS
7 NO REASON, THEY WERE NOT IMPORTANT TO THIS CASE.

8 Q DID THE OFFICER SAY THAT OR DID YOU SAY THAT?

9 A I SAID THAT.

10 Q I THINK A LITTLE EARLIER YOU AND THE SOLICITOR WERE
11 KIND OF CHUCKLING OVER THE BEER IN THERE. YOU SAID FOUR
12 CANS OF BEER WERE TAKEN?

13 A I JUST KNOW THAT THE BEERS IN THERE WERE GONE, THERE
14 WERE FOUR OR FIVE CANS. I DON'T KNOW THE EXACT COUNT.

15 Q WHEN DID YOU BUY THE BEER?

16 A I DON'T RECALL THAT. I WOULD PROBABLY SAY THE WEEK
17 BEFORE.

18 Q BUT YOU ARE NOT CERTAIN?

19 A NOT CERTAIN.

20 Q DO YOU EVER HAVE ANY GUESTS IN YOUR HOME?

21 A OTHER THAN MY GIRLFRIEND IT IS VERY RARE.

22 Q DOES IT EVER OCCUR?

23 A IT HAS, YES.

24 Q NOW, YOU SAID YOU LOOKED AT THE PHOTO ON THE CAMERA?

25 A YES.

1 Q AND I THINK IT IS YOUR TESTIMONY THAT YOU HAVE NO
2 CLUE WHO THAT INDIVIDUAL MIGHT BE?

3 A I HAVE NEVER SEEN HIM BEFORE, NO.

4 Q AND THEN YOU, YOU SAID YOU DOWNLOADED THE PICTURES
5 ONTO A LAPTOP AT THE BLUE MOON THE NEXT MORNING?

6 A CORRECT.

7 Q IS THAT BEFORE YOU CALLED THE POLICE?

8 A THAT WAS AFTER.

9 Q AFTER. SO, DID THE POLICE LOOK AT ANY PICTURES THAT
10 WERE MADE OUT THERE?

11 A THEY COULD VIEW IT ON MY LAPTOP BUT I COULDN'T PRINT
12 THEM OFF.

13 Q SO, YOU ACTUALLY DOWNLOADED IT ONTO YOUR LAPTOP?

14 A IT IS NOT DOWNLOADED ON THERE, YOU CAN VIEW THEM ON
15 THERE.

16 Q YOU JUST VIEWED IT FROM YOUR LAPTOP?

17 A RIGHT.

18 Q WHEN THE POLICE WERE THERE?

19 A I SHOWED THEM THAT PICTURE THAT YOU SAW THERE.

20 Q THE NINE?

21 A YES.

22 Q DID THE POLICE ASK TO SEE ANY OTHER PICTURES?

23 A I DON'T RECALL.

24 Q DID YOU TELL THEM THERE WERE OTHERS?

25 A I DON'T RECALL.

1 Q SO, THEN AFTER YOU TOOK THE CAMERA YOU, THE POLICE
2 VIEWED THE PICTURES ON YOUR LAPTOP. YOU THEN, THE POLICE
3 LEFT, IS THAT CORRECT?

4 A YES.

5 Q AND DID THEY GIVE YOU INSTRUCTIONS AS TO WHAT TO DO?

6 A THEY TOLD ME TO BRING IT DOWN THERE OR TO, SO THEY
7 COULD MAKE A COPY OF IT.

8 Q BRING WHAT DOWN?

9 A THE CAMERA.

10 Q AND DID YOU TAKE THE CAMERA TO THE POLICE?

11 A I TOOK IT UP THERE EARLIER AND WE COULDN'T MAKE A
12 COPY OF IT SO I TOOK IT TO MY COMPUTER.

13 Q SO, YOU TOOK THE CAMERA TO THE POLICE STATION?

14 A SURE.

15 Q YOU KNOW WHAT TIME THAT WAS?

16 A I DON'T RECALL EXACTLY, IT WAS EARLY.

17 Q BEFORE DARK THAT DAY?

18 A YES.

19 Q OKAY. AND WHO DID YOU TALK TO AT THE POLICE STATION?

20 A I DON'T REMEMBER THAT PART. I REMEMBER WHO I TALKED
21 TO WHEN I BROUGHT THE COPY DOWN THERE.

22 Q WHEN YOU TOOK THE CAMERA TO THE POLICE DEPARTMENT YOU
23 DON'T KNOW WHO YOU SPOKE TO?

24 A I DON'T RECALL.

25 Q BUT THAT PERSON TOLD YOU TO LEAVE WITH THE CAMERA AND

1 DO WHAT?

2 A I TOLD THEM WE COULD MAKE A COPY OF IT ON OUR LAPTOP
3 AND BRING IT TO THEM.

4 Q WHO IS WE?

5 A ME AND MY GIRLFRIEND.

6 Q SHE OBVIOUSLY CAME BACK TO YOUR HOUSE?

7 A NO, SHE WAS AT WORK AND THAT WAS THE COMPUTER WE USED
8 AT WORK.

9 Q I SEE. SO, THEN YOU LEFT THE POLICE STATION AND THEN
10 YOU WENT TO THE BLUE MOON TO DOWNLOAD?

11 A CORRECT.

12 Q NOW, WAS YOUR GIRLFRIEND WITH YOU THE FIRST TIME YOU
13 WENT TO POLICE STATION?

14 A NO.

15 Q BUT WHEN YOU WENT TO THE BLUE MOON AND YOU MADE THE
16 DISK THEN YOU AND YOUR GIRLFRIEND CAME BACK AND BROUGHT
17 THE CD TO THE POLICE?

18 A NO, I CAME ALONE AGAIN.

19 Q NOW, I THOUGHT YOU SAID WE A SECOND AGO. YOU CAME
20 BACK ALONE AND YOU GAVE THE CAMERA TO, THE DISK TO WHOM?

21 A I GAVE THE DISK TO OFFICER MCCLURKIN.

22 Q AND THEN YOU LEFT?

23 A THEY MADE AN IDENTIFICATION AS TO WHO WAS ON THAT.

24 Q THEN YOU LEFT?

25 A THEN I LEFT, YES.

1 Q MR. POTTS, YOU CALLED THE POLICE PROBABLY AROUND
2 11:00 O'CLOCK OR SO THE MORNING OF THE 28TH?

3 A IN THAT BALLPARK, I DON'T REMEMBER EXACTLY WHAT TIME.

4 Q NOW, MR. POTTS, THE INCIDENT REPORT WAS WRITTEN UP AS
5 A RESULT OF A CALL BEING MADE FROM YOUR HOUSE. DID YOU
6 EVER SEE THAT REPORT?

7 A I DON'T THINK SO.

8 Q NO. WAS IT OFFERED TO YOU FOR REVIEW?

9 A I DON'T THINK SO.

10 Q NO. NOW, WHEN THE POLICE GOT THERE THAT MORNING WERE
11 YOU WITH THE POLICE THE ENTIRE TIME?

12 A I THINK SO, YES.

13 Q WERE ANY FINGERPRINTS OBTAINED?

14 A I AM NOT SURE ABOUT THAT.

15 Q DID YOU SEE ANYBODY DUST FOR FINGERPRINTS?

16 A THEY DID ATTEMPT TO, YES.

17 Q WERE ANY PICTURES TAKEN AT THAT TIME?

18 A I DON'T KNOW.

19 Q YOU INDICATED THAT THERE WERE FOOTPRINTS OUTSIDE NEAR
20 CHAIRS. WERE ANY PICTURES TAKEN OF THAT?

21 A I DON'T KNOW.

22 Q DID YOU EVER SEE ANY PICTURES OF THAT?

23 A I DON'T THINK SO, NO.

24 Q NOW, THE INCIDENT REPORT SAID THAT YOU SAID THAT THE
25 PERSON ENTERED THROUGH A WINDOW THAT HOLDS AN

1 AIR-CONDITIONER. DID YOU SAY THAT?

2 MR. MCDANIEL: YOUR HONOR, THAT IS HEARSAY, I OBJECT.

3 THE COURT: SUSTAINED.

4 Q HOW DID YOU SAY THE PERSON ENTERED?

5 A I ACTUALLY DON'T RECALL EXACTLY WHAT I SAID THAT DAY,
6 SIR.

7 Q DO YOU RECALL CALLING THE POLICE?

8 A YES.

9 Q DO YOU RECALL CALLING BACK AND TELLING THEM ABOUT
10 SOME COINS MISSING?

11 A YES.

12 Q BUT YOU DON'T RECALL WHAT YOU SAID WHEN THEY CAME TO
13 YOUR HOUSE ON THE 28TH?

14 A I DON'T REMEMBER EXACTLY WHAT I SAID, NO.

15 Q I DON'T HAVE ANY FURTHER QUESTION AT THIS TIME.

16 THE COURT: REDIRECT?

17 MR. MCDANIEL: YES, SIR.

18 REDIRECT EXAMINATION

19 BY MR. MCDANIEL:

20 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED FOR--

21 MR. CHAPLIN: YOUR HONOR, I HAVE AN OBJECTION, THE
22 PHOTOS THAT THE STATE IS TRYING TO PRESENT AT THIS TIME.

23 MR. MCDANIEL: JUDGE, CAN WE DO THIS OUTSIDE THE
24 PRESENCE OF THE JURY, PLEASE.

25 THE COURT: LADIES AND GENTLEMEN, LET'S TAKE A BREAK

1 AND DON'T TALK ABOUT THE CASE AND LET'S KEEP AN OPEN MIND.

2 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
3 A BREAK.)

4 THE COURT: YES, SIR.

5 MR. CHAPLIN: YOUR HONOR, THERE ARE PHOTOGRAPHS THAT
6 THE STATE HAS THAT WERE TAKEN ALMOST A YEAR AFTER THIS
7 INCIDENT OCCURRED. I THINK THAT THE LOCATION HAS CHANGED
8 GREATLY OVER THAT ONE YEAR PERIOD. AND I AM ASSUMING THAT
9 THESE PHOTOGRAPHS ARE NOT RELEVANT EVIDENCE AND I AM
10 SAYING IF YOU FIND THAT THEY ARE RELEVANT THAT THEY ARE
11 PREJUDICIAL IN THAT I BELIEVE THEY SHOW CONDITIONS THAT
12 ARE NOT APPLICABLE TO THE TIME AND DATE THAT WE ARE
13 TALKING ABOUT.

14 THE COURT: MR. MCDANIEL.

15 MR. MCDANIEL: YOUR HONOR, THEY ARE RELEVANT AND I
16 WILL HAND THEM UP IF YOU WOULD LIKE SEE THEM. THEY ARE
17 WHERE HE PLACED THE DEER CAMERA ON THE REFRIGERATOR. I
18 THINK THEY WERE TAKEN ON JANUARY OF THIS YEAR BY THE
19 OFFICERS PURELY USING THEM AS DEMONSTRATIVE EVIDENCE OF
20 HOW, JUST SO THE JURY CAN SEE HOW IT WAS SET UP. I THINK
21 THEY HAVE A RIGHT TO SEE THAT, I DON'T KNOW IF IT WOULD BE
22 PREJUDICIAL OR CONFUSING BECAUSE IT WAS ALREADY
23 ESTABLISHED WHEN THOSE PICTURES WERE TAKEN ON THE DATE IN
24 QUESTION, THE INCIDENT DATE. THESE WERE PICTURES LATER
25 THAT I ASKED TO BE TAKEN SO THE JURY COULD SEE HOW IT WAS

1 SET UP. I BELIEVE THE DEFENSE WENT IN ON SOME LENGTH OF
2 HOW THE CAMERA WAS IN THE KITCHEN, I THINK THE JURY WOULD
3 HAVE A RIGHT TO SEE THAT SHOULD I LAY THE PROPER
4 FOUNDATION FOR IT. THE OTHER IS THE FACT IT WAS IN THE
5 HOME TAKEN JANUARY OF 2008. THERE WAS ON CROSS, AGAIN, A
6 LONG LINE OF QUESTIONING ABOUT WHAT WINDOWS THE ALLEGED
7 DEFENDANT WENT IN AND THE BACKDOOR. I DON'T KNOW THAT
8 CONDITIONS HAVE CHANGED ENOUGH OR AT ALL OTHER THAN THE
9 WINDOW THAT ONCE HELD THE AIR-CONDITIONING UNIT HAS BEEN
10 MOVED TO ANOTHER WINDOW. I WASN'T GETTING INTO ANY
11 TESTIMONY LIKE THAT AND I THINK THE JURY WOULD KNOW THAT
12 THIS PICTURE WAS TAKEN A FEW MONTHS AGO. THE STATE WOULD
13 LIKE TO INTRODUCE JUST SO THEY CAN SEE THE BACK OF THE
14 HOUSE, THIS IS THE WINDOW, THIS IS THIS WINDOW AND THIS IS
15 THE BACKDOOR.

16 THE COURT: I OVERRULE THE OBJECTION. LET'S TAKE
17 ABOUT A TEN MINUTE BREAK.

18 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

19 THE COURT: ARE YOU READY FOR THE JURY?

20 MR. MCDANIEL: JUDGE, WE HAVE ONE SCHEDULING ISSUE.
21 WE WOULD ASK THAT THE STATE GO THROUGH ITS SECOND WITNESS.
22 I HAVE MS. MOORE WITH THE NEWBERRY POLICE DEPARTMENT. WE
23 WOULD ASK THAT WHEN HER TESTIMONY IS COMPLETE THAT WE
24 START AGAIN IN THE MORNING AS EARLY AS POSSIBLE. THE
25 CONCERN THAT HE WILL BE THE MOST LENGTHY.

1 THE COURT: OKAY.

2 MR. CHAPLIN: HOW EARLY CAN WE START IN THE MORNING.

3 I DO HAVE A WITNESS TO BE BACK AT CLEMSON FOR A 1:00
4 O'CLOCK CLASS TOMORROW.

5 THE COURT: I CAN'T MAKE EVERYBODY HAPPY, WE CAN
6 START AT 9:30 BUT AND I KNOW YOU CAN'T GUARANTEE THEM, I
7 KNOW YOU HAVE GOT TO TRY TO ACCOMMODATE TOO. WHOEVER THE
8 WITNESS IS, JUST REMIND THAT THIS ISN'T A TEA PARTY WE ARE
9 HAVING HERE. OKAY. LET'S BRING THE JURY IN.

10 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
11 APPROXIMATELY 3:25 P.M.)

12 THE COURT: MR. MCDANIEL, YOU CAN CONTINUE WITH
13 REDIRECT.

14 REDIRECT EXAMINATION

15 BY MR. MCDANIEL:

16 Q MR. POTTS, IN CROSS YOU SAID YOU LIVED AT [REDACTED]
17 [REDACTED]

18 A CORRECT.

19 Q AND TO THE BEST OF YOUR KNOWLEDGE NO PICTURES WERE
20 TAKEN THAT DAY, CORRECT?

21 A I DON'T RECALL THAT.

22 Q I AM GOING TO HAND YOU STATE'S EXHIBITS 4, 5 AND 6
23 FOR IDENTIFICATION. TAKE A MOMENT TO LOOK AT THEM,
24 PLEASE.

25 A OKAY.

1 Q DO YOU KNOW WHAT THOSE PICTURES ARE?

2 A YES.

3 Q HAVE YOU SEEN THOSE BEFORE?

4 A I HAVEN'T SEEN THE ACTUAL PICTURES BEFORE, NO.

5 Q WHAT IS IN THE PICTURE?

6 A NUMBER 4 IS THE BACK OF MY HOUSE. LET'S SEE, NUMBER
7 5 IS THAT CAMERA ON TOP OF MY REFRIGERATOR. THEN A
8 CLOSEUP VIEW AND THEN A MORE DISTANCE VIEW IN NUMBER 6.

9 Q AND DO THOSE FAIRLY AND ACCURATELY REPRESENT THE
10 IMAGES THAT WERE TAKEN THAT DAY?

11 A YES.

12 Q AND, AGAIN, WERE THOSE TAKEN AT SOME OTHER DATE?

13 A YES.

14 Q DO YOU ROUGHLY REMEMBER WHEN THOSE PICTURES WERE
15 TAKEN?

16 A A COUPLE OF MONTHS AGO.

17 Q THEY WERE NOT TAKEN ON THE INCIDENT DATE?

18 A NO.

19 MR. MCDANIEL: YOUR HONOR, I WOULD ASK THAT STATE'S
20 EXHIBITS 4, 5 AND 6 BE MOVED INTO EVIDENCE.

21 MR. CHAPLIN: YOUR HONOR, I RENEW MY PREVIOUS
22 OBJECTION.

23 THE COURT: OKAY. SUBJECT TO PREVIOUS OBJECTION.

24 (WHEREUPON, STATE'S EXHIBIT NOS 4, 5 AND 6 WERE
25 ADMITTED INTO EVIDENCE.)

1 (WHEREUPON, STATE'S EXHIBIT NOS. 2 AND 3 WERE
2 ADMITTED INTO EVIDENCE.)

3 MR. MCDANIEL: PERMISSION TO PUBLISH TO THE JURY,
4 YOUR HONOR.

5 THE COURT: OKAY.

6 Q NOW, ON CROSS THERE WAS I GUESS A LOT OF TESTIMONY
7 WHICH WINDOWS AND DOOR, CAN YOU EXPLAIN THIS TO US?

8 A THIS IS THE BACK OF WHAT I USUALLY USE. AND THIS IS
9 THE WINDOW, THIS IS THE BOARD I ACTUALLY USE THROUGH THE
10 WINDOW TO BLOCK SOMEONE FROM COMING IN. THAT IS WHEN I
11 SAW IT HAD BEEN TAMPERED WITH AGAIN. AND THE FOOTPRINTS
12 AND THE CHAIR AND ALL--

13 Q YOU HAD MOVED THE WINDOW UNIT?

14 A YES.

15 Q OKAY. BUT THAT IS WHERE IT WAS DURING THE INCIDENT
16 DATE?

17 A THAT IS CORRECT.

18 Q WHAT HAS CHANGED JUST SO THE JURY KNOWS.

19 A THERE IS PROBABLY SOME TRASH THERE, THIS IS THE
20 WINDOW UNIT HERE AND THERE WAS SOME WINDOW PANES HERE
21 WHICH WERE STEPPED ON AND BROKEN. SO THEY HAD BEEN
22 REMOVED.

23 Q OKAY. AND THAT IS THE BACKDOOR IN THE EARLY MORNING
24 OF OCTOBER 28TH?

25 A CORRECT.

1 Q THANK YOU. STATE'S EXHIBIT 6, WHAT IS THAT?

2 A THAT IS MY REFRIGERATOR INSIDE THE KITCHEN, THIS IS
3 THE CAMERA AND IN A VERY SIMILAR POSITION AS THE NIGHT OF
4 THE INCIDENT.

5 Q AND STATE'S EXHIBIT 5?

6 A A CLOSER VIEW.

7 Q AND SIMILAR TO THE WAY IT WAS THAT NIGHT?

8 A YES.

9 Q AND YOU HAD SET THAT UP SINCE YOU PURCHASED IT, I
10 MEAN BEFORE THE INCIDENT DATE?

11 A YES, THE DAY AFTER, I PURCHASED IT PROBABLY A WEEK
12 BEFORE THE INCIDENT HAPPENED AND IT WAS SET UP PROBABLY
13 FOUR OR FIVE DAYS BEFORE THE INCIDENT HAPPENED.

14 Q NOW, YOU SAID THAT YOU WEREN'T SURE HOW SOMEBODY GOT
15 IN YOUR HOUSE THAT NIGHT?

16 A NO.

17 Q BUT YOU DO KNOW SOMEBODY WAS IN YOUR HOUSE?

18 A YES.

19 Q AND DID ANYBODY HAVE PERMISSION TO BE IN YOUR HOME?

20 A NO.

21 Q HAVE YOU AT ALL TAMPERED WITH THE IMAGES?

22 A NO.

23 Q THIS NINE PICTURES THAT YOU SELECTED TO GIVE THE
24 POLICE, CAN YOU TELL US WHAT THE OTHER IMAGES WERE?

25 A AS I SAID EARLIER, JUST EITHER THE CAT WENT INTO THE

1 ROOM OR ME WONDERING INTO THE KITCHEN TO GET SOMETHING TO
2 DRINK MYSELF, THINGS OF THAT NATURE.

3 Q AND THESE NINE THAT WERE GIVEN TO THE POLICE WERE THE
4 NINE THAT YOU THOUGHT WERE RELEVANT IN THIS CASE?

5 A YES, THEY WERE ALL IN A BLOCK OF TIME RIGHT THERE.

6 Q WAS THERE ANY OTHER PICTURES OF UNIDENTIFIED PEOPLE
7 IN YOUR HOUSE?

8 A NO.

9 Q THE CAMERA, WAS THAT EVER OUT OF YOUR POSSESSION?

10 A NO.

11 Q DIDN'T LEAVE IT WITH ANYBODY FOR ANY PERIOD?

12 A NO.

13 Q WHEN YOU DOWNLOADED IT AT THE BLUE MOON THE CAMERA
14 WAS WITH YOU?

15 A YES, I WAS THERE.

16 Q THE CAMERA WAS ALWAYS IN YOUR POSSESSION?

17 A YES.

18 Q ALWAYS HAD THE DISK ONCE IT WAS BURNED?

19 A IT WAS BRIEF, I GUESS. IT WENT STRAIGHT FROM THE
20 BLUE MOON TO THE POLICE STATION.

21 Q AND AGAIN WHO DID YOU TURN THAT OVER TO?

22 A TO OFFICER MCCLURKIN.

23 Q NO FURTHER QUESTIONS.

24 THE COURT: RECROSS?

25 MR. CHAPLIN: VERY BRIEF, YOUR HONOR.

RECROSS-EXAMINATION

BY MR. CHAPLIN:

Q MR. POTTS, THIS WINDOW YOU SAID THE NIGHT THAT YOU
CAME HOME HAD AN AIR-CONDITIONER IN IT, IS THAT CORRECT?

A CORRECT.

Q AND LATER YOU REMOVED THAT AIR-CONDITIONER YOURSELF?

A CORRECT.

Q SO, NOW IT LOOKS DIFFERENT, IT IS WITHOUT AN
AIR-CONDITIONER?

A THAT IS THE WAY IT LOOKS NOW.

Q THAT IS THE WAY IT LOOKS NOW. AND YOU ALSO SAID THAT
THESE PICTURES, YOU AGREE THAT THESE PICTURES WERE NOT
TAKEN THE DAY THAT YOU REPORTED THE INCIDENT BUT ALMOST A
YEAR LATER?

A THAT IS CORRECT.

Q HERE IS THE DEER CAMERA ON TOP OF YOUR REFRIGERATOR,
DO YOU KNOW IF IT WAS WORKING AT THIS TIME?

A YES, WE DID TEST IT, YES.

Q THAT IS ALL I HAVE.

THE COURT: THANK YOU, MR. POTTS. CALL YOUR NEXT
WITNESS.

MR. MCDANIEL: THE STATE CALLS ALLISON MOORE.

ALLISON MOORE, AFTER BEING DULY SWORN,
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

- 1 BY MR. MCDANIEL:
- 2 Q WHERE DO YOU WORK?
- 3 A NEWBERRY POLICE DEPARTMENT.
- 4 Q HOW LONG HAVE YOU WORKED THERE?
- 5 A FOUR YEARS.
- 6 Q ANY OTHER LAW ENFORCEMENT EXPERIENCE?
- 7 A YES SIR, I HAVE HAD TEN YEARS PRIOR.
- 8 Q WHERE WAS THAT AT?
- 9 A AT CLINTON POLICE DEPARTMENT.
- 10 Q WHAT IS YOUR RANK NOW?
- 11 A I AM JUST A CORPORAL.
- 12 Q WHAT IS YOUR DUTIES AS A CORPORAL?
- 13 A I AM ON ROAD PATROL.
- 14 Q WHAT DO YOU DO ON ROAD PATROL?
- 15 A ANSWER CALLS THAT ARE GIVEN, RIDE AROUND AND CHECK
- 16 PROPERTY.
- 17 Q NOW, WERE YOU WORKING ON OCTOBER 28TH OF 2008?
- 18 A YES, SIR.
- 19 Q WHAT TIME DID YOU START?
- 20 A 6:00 A.M.
- 21 Q WHAT WAS YOUR RANK THAT DAY?
- 22 A JUST PATROLMAN.
- 23 Q AND SAME DUTIES OR HAD YOUR DUTIES CHANGED?
- 24 A NO SIR, SAME DUTIES.
- 25 Q RESPOND TO CALLS?

1 A YES, SIR.

2 Q NOW, DID YOU COME INTO CONTACT WITH LEE POTTS THAT
3 DAY?

4 A YES, SIR.

5 Q ABOUT WHAT TIME?

6 A A LITTLE AFTER 11:00 A.M.

7 Q DID YOU GO TO HIS HOME?

8 A YES, SIR.

9 Q DO YOU KNOW WHERE THAT IS LOCATED?

10 A ON PAULINE STREET.

11 Q WHO WAS THERE WHEN YOU GOT THERE?

12 A MR. POTTS.

13 Q DID HE SHOW YOU A DEER CAMERA?

14 A YES, HE DID.

15 Q AND DID HE SHOW YOU THIS DEER CAMERA?

16 A YES, SIR.

17 Q WHAT WAS ON IT?

18 A AN IMAGE OF SOMEONE COMING INTO HIS KITCHEN.

19 Q WERE YOU ABLE TO IDENTIFY THAT IMAGE?

20 A NO, SIR.

21 Q I WANT TO SHOW YOU WHAT HAS BEEN MARKED AS STATE'S
22 EXHIBIT 1. AND CAN YOU TELL ME, IS THAT THE IMAGE YOU SAW
23 THAT DAY?

24 A YES, SIR.

25 Q AND YOU COULD NOT IDENTIFY THAT IMAGE?

1 A NO, SIR.

2 Q THANK YOU. SO, AFTER YOU SAW THAT IMAGE TELL ME WHAT
3 YOU DID IN THE HOUSE?

4 A AFTER I SAW THE IMAGE WE BEGAN TO CHECK THE EXTERIOR
5 OF THE HOME TO FIND OUT WHERE THE INDIVIDUAL ENTERED THE
6 HOME.

7 Q WERE YOU ABLE TO DETERMINE WHERE SOMEONE ENTERED?

8 A NO, SIR. I DUSTED FOR FINGERPRINTS ON THE
9 AIR-CONDITIONER WHERE WE ASSUMED THE SUBJECT ENTERED THE
10 HOME.

11 Q WERE YOU ABLE TO RECOVER ANY PRINTS?

12 A NO, SIR.

13 Q DID YOU CHECK THE INTERIOR OF THE HOME?

14 A THE INTERIOR, NO SIR.

15 Q DID YOU TAKE PICTURES?

16 A NO, SIR.

17 Q WHY DIDN'T YOU TAKE PICTURES?

18 A JUST AFTER SEEING THE IMAGE I THOUGHT IT WAS A PRETTY
19 GOOD IMAGE OF THE SUSPECT, THAT I KNEW THAT THE PERSON
20 COULD BE IDENTIFIED SO I JUST, I DIDN'T, I FAILED TO TAKE
21 PICTURES.

22 Q HOW LONG WERE YOU AT THE HOUSE?

23 A APPROXIMATELY FORTY-FIVE MINUTES.

24 Q AND YOU BASICALLY STAYED ON THE EXTERIOR OF THE HOME?

25 A WELL, I WAS INSIDE LOOKING AT THE IMAGE FOR ABOUT TEN

1 OR FIFTEEN MINUTES AND PRETTY MUCH STAYED ON THE EXTERIOR,
2 YES.

3 Q DID YOU DO ANYTHING IN THE HOUSE, DUST FOR PRINTS?

4 A NO, SIR.

5 Q SO, WHAT DID YOU TELL HIM TO DO WITH THE IMAGE?

6 A HE WAS UNABLE TO DOWNLOAD IT ON A DISK THAT DAY FOR
7 US SO I ADVISED HIM IF HE COULD GET IT DOWNLOADED BECAUSE
8 HE SAID HE COULD AT THE BLUE MOON. AND THEN I TOLD HIM TO
9 BRING IT TO THE POLICE DEPARTMENT AND HE DID.

10 Q WERE YOU THERE WHEN HE CAME TO THE POLICE DEPARTMENT?

11 A YES, SIR.

12 Q WERE YOU THERE WHEN MR. MCCLURKIN PUT THE DISK IN?

13 A YES, SIR.

14 Q DO YOU KNOW WHAT ITEMS MR. POTTS BROUGHT TO THE
15 POLICE DEPARTMENT?

16 A THE DISK AND THE VIDEO CAMERA.

17 Q AT ANY TIME DID YOU HAVE THE DEER CAMERA IN YOUR
18 POSSESSION?

19 A NO, SIR.

20 Q THE DISK IN YOUR POSSESSION?

21 A NO, SIR.

22 Q I AM GOING TO GO BACK WHEN YOU DUSTED FOR PRINTS,
23 WHERE DID YOU DUST FOR PRINTS?

24 A I DUSTED ON THE OUTSIDE OF THE HOME ON THE DOOR
25 HANDLE AND ON THE AIR-CONDITIONER UNIT AND THE CHAIR.

1 Q YOU REMEMBER WHAT THE CHAIR LOOKED LIKE?

2 A IT WAS GREEN IN COLOR, PLASTIC CHAIR.

3 Q THAT IS THE CHAIR, STATE'S EXHIBIT 4?

4 A YES SIR, IT DOES RESEMBLE.

5 Q SHOW ME, IF YOU CAN, WHERE YOU DUSTED?

6 A THE AIR-CONDITIONING WINDOW WAS IN THIS WINDOW,
7 DUSTED FOR PRINTS ON THIS AIR-CONDITIONER. DUSTED FOR
8 PRINTS ON THIS CHAIR AND THEN ON THE DOOR HANDLE TO THE
9 DOOR.

10 Q NO PRINTS WERE LIFTED?

11 A NO PRINTS WERE LIFTED.

12 Q CAN YOU DESCRIBE THE AIR-CONDITIONER THAT WAS IN
13 THERE?

14 A IT WAS A SMALL UNIT THAT COULD BE JUST PLACED INTO
15 THE WINDOW WITH THE WINDOW CLOSING DOWN ON THE UNIT
16 ITSELF.

17 Q THANK YOU. WERE YOU SHOWN ANY SCRAPINGS ON THE
18 WINDOW?

19 A YES, SIR.

20 Q WHERE WAS THAT?

21 A IT WAS ON THE LEFT WINDOW TO THE LEFT OF THE DOOR,
22 THE WINDOW THAT I WAS TOLD THAT HAD BEEN PREVIOUSLY
23 ENTERED.

24 Q AND WHAT DID THAT LOOK LIKE?

25 A IT LOOKED LIKE SOME TYPE OF A TOOL, LIKE A

1 SCREWDRIVER, KNIFE, HAD, YOU KNOW, JUST TRIED TO LIFT IT.

2 Q YOU HAD SAID A SECOND AGO THAT YOU ASSUMED THE ENTRY
3 WAS AT, WHERE THE AIR-CONDITIONER WAS?

4 A YES, SIR.

5 Q WHY DID YOU ASSUME THAT?

6 A BECAUSE MR. POTTS ADVISED ME THAT THE CHAIR THAT WAS
7 NEAR THE AIR-CONDITIONER HAD NOT BEEN LIKE THAT
8 PREVIOUSLY.

9 Q AND THAT IS THE GREEN CHAIR THAT YOU DUSTED?

10 A YES, SIR.

11 Q ANYTHING ELSE THAT YOU SAW?

12 A NO, SIR.

13 Q SO, AFTER YOU PROCESSED, WHERE DID YOU GO WHEN YOU
14 PROCESSED THIS?

15 A I BELIEVE THAT WAS, WE ENDED THE CALL AT THAT POINT.

16 Q AND WHEN YOU END A CALL WHAT HAPPENS TO THE CASE
17 AFTER YOU RESPOND?

18 A IT IS FORWARDED TO AN INVESTIGATOR.

19 Q AND IN THIS CASE IT WAS FORWARDED TO WHO?

20 A LIEUTENANT MCCLURKIN.

21 Q AS I GUESS THE INITIAL RESPONDER, HOW DO YOU INFORM
22 MR. MCCLURKIN OF THE CASE THAT YOU HAVE?

23 A WELL, THAT VARIES. USUALLY SOMETIME THE NEXT MORNING
24 THEY ARE ASSIGNED DIFFERENT CASES BUT THIS INCIDENT, I
25 BROUGHT IT TO HIS ATTENTION BECAUSE I KNEW THAT MR. POTTS

1 WAS COMING DOWN WITH THE IMAGE.

2 Q DO YOU REMEMBER WHAT TIME MR. POTTS CAME DOWN?

3 A IT WAS LATER ON IN THE AFTERNOON.

4 Q THANK YOU.

5 THE COURT: MR. CHAPLIN.

6 CROSS-EXAMINATION

7 BY MR. CHAPLIN:

8 Q GOOD AFTERNOON, CORPORAL MOORE.

9 A GOOD AFTERNOON, SIR.

10 Q NOW, YOU TESTIFIED THAT YOU HAD BEEN A POLICE OFFICER
11 FOR 14 YEARS?

12 A YES, SIR.

13 Q AND WHERE DID YOU DO YOUR TRAINING?

14 A AT THE SOUTH CAROLINA STATE POLICE ACADEMY.

15 Q AND DURING THAT TRAINING PROCESS WERE YOU TRAINED HOW
16 TO PROCESS CRIME SCENES?

17 A NO SIR, NOT AT THE BASIC TRAINING.

18 Q WERE YOU EVER TRAINED TO PROCESS CRIME SCENES?

19 A YES, SIR.

20 Q AT WHAT TIME?

21 A IT WAS APPROXIMATELY MAYBE IN THE YEAR OF 2000.

22 Q 2000?

23 A YES.

24 Q DID YOU TAKE A PARTICULAR CLASS IN THAT AREA?

25 A YES SIR, IT WAS CALLED BASIC DETECTIVE CLASS.

1 Q BASIC DETECTIVE CLASS?

2 A YES.

3 Q AND I BET YOU DID WELL?

4 A YES, SIR.

5 Q GOOD. NOW, YOU RESPONDED TO THE SCENE IN THIS
6 MATTER. THAT IS CORRECT, RIGHT?

7 A YES, SIR.

8 Q AND I THINK IT IS YOUR TESTIMONY THAT YOU DIDN'T GET
9 ANY FINGERPRINTS FROM THIS CRIME SCENE THAT WOULD MATCH MY
10 CLIENT, MR. MITCHELL?

11 A I DID NOT GET ANY PRINTS, NO SIR.

12 Q SO, YOU DID NOT GET ANY MATCHES?

13 A I DID NOT GET ANY FINGERPRINTS.

14 Q AND AS FAR AS PICTURES OF THE CRIME SCENE YOU DIDN'T
15 GET, YOU DIDN'T TAKE ANY PICTURES?

16 A NO, SIR.

17 Q IS THAT WHAT THEY TRAINED YOU AT THE POLICE ACADEMY?

18 A I DO NOT RECALL TAKING PHOTOGRAPH CLASS DURING BASIC
19 DETECTIVE.

20 Q WHEN YOU WERE TRAINED BY THE PROCESS OF CRIME SCENE,
21 TAKING PHOTOGRAPHS WASN'T IN THAT TRAINING?

22 A I DON'T RECALL.

23 Q DID YOU ATTEMPT TO GET ANY DNA SAMPLES FROM THE CRIME
24 SCENE?

25 A NO, SIR.

1 Q I THINK EARLIER MR. POTTS TESTIFIED THAT THERE HAS
2 BEEN SOME FOOTPRINTS OUTSIDE. DID YOU SEE THOSE
3 FOOTPRINTS?

4 A I BELIEVE THERE WAS SOME MARRING OF THE GROUND BUT
5 THERE WAS NO IMPRESSION OF A FOOTPRINT.

6 Q DID YOU TAKE A PHOTOGRAPH OF THE MARRING?

7 A NO, SIR.

8 Q NOW, DID YOU CANVAS THE NEIGHBORHOOD TO SEE IF
9 ANYBODY SAW ANYBODY ENTERING MR. POTTS HOME?

10 A NO, SIR.

11 Q WHY NOT?

12 A I JUST DIDN'T SIR, I DIDN'T.

13 Q I THINK YOU SAID THAT MR. POTTS SHOWED YOU AN IMAGE?

14 A YES, SIR.

15 Q SO, HE DIDN'T SHOW YOU NINE PICTURES?

16 A I DON'T RECALL HOW MANY PICTURES HE SHOWED ME BUT I
17 DO REMEMBER THE IMAGE, THE PHOTOGRAPH IMAGE OF THE PERSON
18 IN THE KITCHEN.

19 Q DID YOU TAKE NOTES WHEN YOU WERE DOING THIS?

20 A A LITTLE BIT FROM MY REPORT.

21 Q DID YOU BRING THOSE NOTES WITH YOU TODAY?

22 A NO, SIR.

23 Q WHY NOT?

24 A WELL, THEY ARE JUST NOTES ON A PAD, LIKE HIS NAME,
25 ADDRESS, DATE OF BIRTH AND THINGS LIKE THAT FOR THE

1 INCIDENT REPORT.

2 Q BUT YOU KNEW I WAS GOING TO BE QUESTIONING YOU TODAY,
3 CORRECT?

4 A YES, SIR.

5 Q SO, YOU DIDN'T THINK THOSE NOTES WOULD HELP?

6 A WELL, THEY ARE NOT OFFICIAL CRIME SCENE NOTES, THEY
7 ARE JUST NOTES FOR THE INCIDENT REPORT.

8 Q SO, YOU ARE NOT SURE HOW MANY PICTURES YOU SAW ON
9 THIS CAMERA?

10 A I DO NOT RECALL HOW MANY, NO SIR.

11 Q BUT YOU TESTIFIED THAT YOU SAW AN IMAGE?

12 A AN IMAGE OF A PERSON, YES SIR.

13 Q DID YOU EVER ESTABLISH THAT THERE WAS ENTRY INTO THE
14 HOME, SOME ENTRY?

15 A I DIDN'T SEE AN ENTRY INTO THE HOME.

16 Q I THINK YOU SAID THAT ONCE YOU SAW THE PICTURE, DID
17 YOU SAY, ONCE I SAW THE PICTURE I STOPPED THERE?

18 A I DON'T RECALL, I DON'T UNDERSTAND YOUR QUESTION.

19 Q WHEN YOU, YOU DIDN'T ESTABLISH THERE WAS AN ENTRY
20 INTO THE HOME. AND I THINK MR. POTTS TESTIFIED THAT HE
21 HAD PRIOR BREAK-INS AT THIS LOCATION, CORRECT, DID HE TELL
22 YOU THAT?

23 A YES, SIR.

24 Q SO, YOU ARE NOT ONE-HUNDRED PERCENT SURE AS TO WHAT
25 EXACTLY WAS TAKEN AT THIS TIME, ON THIS OCCASION, ARE YOU?

- 1 A ONLY WHAT MR. POTTS TOLD ME.
- 2 Q I THINK YOU SAID THAT YOU DIDN'T WALK THROUGH THE
- 3 HOME?
- 4 A NO SIR, I DID NOT.
- 5 Q SO, YOU GOT TO THE HOUSE AND WHO ANSWERED THE DOOR?
- 6 A MR. POTTS.
- 7 Q AND THEN YOU WALKED IN AND YOU STARTED TALKING TO MR.
- 8 POTTS, CORRECT?
- 9 A YES, SIR.
- 10 Q AND MR. POTTS TOLD YOU THAT SOMEBODY HAD BROKEN IN?
- 11 A YES, SIR.
- 12 Q AT THAT TIME DID HE SHOW YOU THE IMAGE?
- 13 A YES SIR, HE WAS IN THE PROCESS OF BRINGING IT UP ON
- 14 HIS COMPUTER.
- 15 Q SO, THEN YOU LOOKED AT THE COMPUTER?
- 16 A YES, SIR.
- 17 Q BUT YOU ARE NOT SURE WHAT YOU SAW ON THE COMPUTER?
- 18 A I SAW AN IMAGE OF A SUBJECT.
- 19 Q YOU SAW AN IMAGE?
- 20 A YES SIR, ENTERING THE KITCHEN IN MR. POTTS HOME.
- 21 Q AT THAT TIME DID YOU SUSPECT THAT THAT IMAGE MIGHT BE
- 22 EVIDENCE?
- 23 A YES, SIR.
- 24 Q SO, AT THE POLICE ACADEMY WHAT DID THEY TELL YOU TO
- 25 DO WHEN YOU THINK YOU HAVE EVIDENCE?

1 A WE NEED TO COLLECT IT.

2 Q DID YOU COLLECT THIS?

3 A NO SIR, BECAUSE IT WAS HIS PERSONAL COMPUTER.

4 Q SO, IF EVIDENCE IS PERSONAL YOU DON'T COLLECT IT?

5 A I DID NOT, SIR, IN THIS CASE.

6 Q SO, YOU DID NOTHING TO PRESERVE THAT IMAGE THAT YOU
7 LOOKED AT?

8 A NO SIR, I LOOKED AT IT AND I REMEMBERED IT.

9 Q BUT AS FAR AS PRESERVING IT TO MAKE SURE IT IS
10 PRESERVED FOR THIS TRIAL, YOU DID NOT?

11 A NO, SIR.

12 Q NOW MR. POTTS, DID HE TELL YOU THAT, I THINK YOU SAID
13 WHEN YOU GOT THERE MR. POTTS WAS ALONE?

14 A YES, SIR.

15 Q I THINK EARLIER MR. POTTS TESTIFIED THAT HE CAME HOME
16 WITH HIS GIRLFRIEND, DID HE TELL YOU THAT?

17 A I DO NOT RECALL.

18 Q DID YOU ASK HIM HOW MANY PEOPLE WERE IN THE HOUSE
19 WHEN HE NOTICED THIS IMAGE?

20 A NO, SIR.

21 Q SO, YOU DIDN'T GET A WITNESS STATEMENT FROM HIS
22 GIRLFRIEND, DID YOU?

23 A NO, SIR.

24 Q YOU THINK IF HE HAD TOLD YOU THAT THERE WAS A
25 GIRLFRIEND YOU WOULD OF TRIED?

1 A NO, SIR.

2 Q WHY NOT?

3 A I DON'T SEE HOW THAT IS RELEVANT.

4 Q IT IS ANOTHER PERSON THAT MIGHT HAVE INFORMATION
5 REGARDING WHAT WAS SEEN WHEN THEY CAME HOME AND YOU DON'T
6 SEE THAT AS RELEVANT?

7 A NO SIR, BECAUSE MR. POTTS IS THE OWNER OF THE HOME
8 AND THE PERSON WHO RESIDES THERE. HE WOULD KNOW WHAT IS
9 MISSING AND WHAT IS NOT.

10 Q SO, IN YOUR REPORT YOU DIDN'T EVEN MENTION THERE WAS
11 ANOTHER POTENTIAL WITNESS?

12 A I WAS UNAWARE THAT THERE WAS ANOTHER PERSON THERE.

13 Q YOU WERE NOT AWARE?

14 A I WAS NOT AWARE.

15 Q SO, MR. POTTS NEVER TOLD YOU THAT?

16 A NO SIR, I DID NOT KNOW THERE WAS ANOTHER INDIVIDUAL
17 THERE.

18 Q WHEN YOU LOOKED AT THE IMAGE FROM THE COMPUTER DID
19 YOU NOTICE THAT THE TIMESTAMP WAS OFF?

20 A I DON'T RECALL.

21 Q DID YOU ASK MR. POTTS WHY IT SAID 3:00 O'CLOCK IF IT
22 OCCURRED AT MIDNIGHT?

23 A I DON'T RECALL US QUESTIONING ABOUT THE TIME.

24 Q DO YOU RECALL WHAT TIME, SO YOU DON'T EVEN KNOW WHAT
25 TIME IT SAID ON THE PICTURE, YOU CAN'T TESTIFY TO THAT?

1 A NO SIR, I DO NOT RECALL THAT.

2 Q SO, YOU ARE NOT EVEN CERTAIN IT SAID 3:00 O'CLOCK
3 WHEN YOU LOOKED AT THAT PICTURE OF THAT IMAGE?

4 A I DO NOT RECALL.

5 Q YOU DO NOT RECALL. SO, WHEN YOU ESTABLISHED THE TIME
6 OF THE BREAK-IN THAT WAS BASED ON THE INFORMATION YOU GOT
7 FROM MR. POTTS SOLELY, RIGHT?

8 A YES, SIR.

9 Q AND AS FAR AS WHAT WAS STOLEN, THAT IS INFORMATION
10 YOU GOT FROM MR. POTTS?

11 A YES, SIR.

12 Q SO, YOU TESTIFIED THAT YOU TRIED TO GET FINGERPRINTS
13 AND YOU COULDN'T GET ANY. AND YOU SAID YOU COULDN'T GET
14 ANY FINGERPRINTS FROM THE AIR-CONDITIONING UNIT, ISN'T
15 THAT METAL. THE AIR-CONDITIONING, WASN'T IT METAL?

16 A YES SIR, I AM ASSUMING SO.

17 Q SO WHY COULDN'T YOU GET A PRINT OFF OF THAT?

18 A IT DEPENDS, GETTING A PRINT COULD DEPEND ON MANY
19 THINGS.

20 Q YOU WERE TRAINED TO DO FINGERPRINTS?

21 A YES, SIR.

22 Q AND THAT WAS AT THE POLICE ACADEMY?

23 A DURING THAT BASIC DETECTIVE CLASS.

24 Q SO ROUGHLY 14 YEARS AGO?

25 A 10 YEARS AGO, YES.