

STATE OF SOUTH CAROLINA
IN THE 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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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] [REDACTED] [REDACTED]. 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] 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]

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 [REDACTED]

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 WOULDND'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 MY REPRESENTATION. MR. MITCHELL IS A GOOD GUY, I THINK
2 HIS RECORD CLEARLY, THERE MAY BE CONCERNS WITH THAT AND
3 MR. MITCHELL HAS NOT GOTTEN INTO ANY SERIOUS TROUBLE FOR
4 SOME TIME. MR. MITCHELL IS SOMEONE THAT WOULD BENEFIT
5 FROM ANY TYPE OF REHABILITATION OR WHATEVER THE CASE YOUR
6 HONOR MIGHT SUGGEST. AND MR. MITCHELL HAS AN ELDERLY
7 MOTHER, SHE IS 80 SOMETHING YEARS OLD AND SHE WOULD
8 BENEFIT FROM HIM BEING AROUND TO ASSIST HER. SHE IS NOT
9 VERY AMBULATORY. AND WE JUST ASK THE COURT FOR MERCY WITH
10 REGARDS TO SENTENCING IN THIS MATTER.

11 THE COURT: THANK YOU. OKAY. HOW LONG HAS HE BEEN
12 IN CUSTODY?

13 MR. CHAPLIN: GOING ON 19 MONTHS, YOUR HONOR.

14 MR. MITCHELL: YOUR HONOR?

15 THE COURT: YES SIR, MR. MITCHELL.

16 MR. MITCHELL: I HAVE -- HAVE MERCY. (INAUDIBLE, THE
17 DEFENDANT IS CRYING.)

18 THE COURT: OKAY, THE OFFENSE OF BURGLARY FIRST IS
19 CLASSIFIED AS A VIOLENT OFFENSE AND A MOST SERIOUS OFFENSE
20 UNDER STATE LAW, IT CARRIES A POTENTIAL SENTENCE OF 15 TO
21 LIFE. POSSESSION OF BURGLARY TOOLS CARRIES A MAXIMUM
22 SENTENCE OF 5 YEARS. THE SENTENCE OF THE COURT ON
23 BURGLARY FIRST IS YOU BE COMMITTED TO THE DEPARTMENT OF
24 CORRECTIONS FOR A PERIOD OF 20 YEARS. THE SENTENCE ON THE
25 BURGLARY TOOLS IS YOU BE COMMITTED TO THE DEPARTMENT OF

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MR. CHAPLIN: THANK YOU, YOUR HONOR.

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*** 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

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of NEWBERRY)Bennie D. Mitchell #278318)

Full name and prison number (if any) of Applicant)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Corr. Inst. 386 Redemption
Way McCormick SC 29899
2. Name and location of Court which imposed sentence Gen. Sessions /
Nby Co.
3. Name(s) of co-defendant(s) (if any) N /
A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

I, Jackie S. Bowers, Clerk of Court, do hereby certify that this is a true copy of the original on file in this office. MAR 17 2014 <u>Jackie S. Bowers</u> Clerk of Court	<u>2008-CP-36-39 / Burglary 1st degree</u> <u>39 / Possession of Burglary Tools</u>
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CLERK OF COURT

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April 21, 2010 / 20 years
- (b) 1. 1. 1. / 5 years concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. July 25, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Op. No. 5009
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N
- (b) A

- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of trial counsel
- (b) " " " Appellate "
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See attached sheets 1-3
- (b) " " " 3-6
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? YES
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Motion to reconsider sentence / motion for new trial
- ii. Appeal
- iii. Rehearing
- iv. Petition for writ of Certiorari
- (b) the name and location of the Court in which each was filed:
- i. Gen. Sessions
- ii. S.C. Court of Appeals
- iii. " " " " "
- iv. S.C. Supreme Ct.

(c) the disposition thereof:

i. Denied

ii. Affirmed

iii. Affirmed

iv. Affirmed

(d) the date of each such disposition:

i. May 7, 2010

ii. July 25, 2012

iii. Oct 25, 2012

iv. March 6, 2014

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. Op. No # 5004

iii. Order/case No # 2010-159286

iv. Order/case No # 2012-23463

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

N

ii. _____

iii. _____

A

(b) the proceedings in which each ground was raised:

i. _____

N

ii. _____

iii. _____

A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) See 10 (a) first time presenting ground
 (b) u u (b) u u u u
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Mathias G. Chaplin 4511 North Main St.
Colo SC 29203
 ii. L2 Nelle C. DuRant - App Defense
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. motion to reconsider sentence / new trial
Trial & Sentencing
 ii. Appeal
 iii. _____

19. State clearly the relief you seek in filing this application:

New trial - appeal issues / a new appeal and any other
relief I may be entitled to upon all issues and
the court deems just and fair

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of McCormick)

VERIFICATION

I, Bennie D. Mitchell, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Bennie Mitchell

SWORN to and subscribed before me this 12
 day of march, 2014.

J. Franklin (L.S.)
 Notary Public

My Commission Expires: 12-16-2019

11(2) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

(1) Per the Bill of Rights to the Federal Constitution I was denied the right to effective assistance of counsel.

Thereby, my conviction(s) and sentence(s) violates the Constitutions and laws of the United States, as guaranteed by the 6th and 14th Amendments and South Carolina Const. Article I sec 3 and Sec 14
Also see Strickland v Washington 104 S. Ct. 2052.

Here, Counsel Mathias Chaplin acts and or omissions including but not limited to **PREJUDICED** me, when

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he failed to object and motion for the State to move the alleged victim like Potts girlfriend "Neicy Politrone" who was a ~~none~~ witness from sitting at the State's table, whom was crying and holding onto the alleged victim like a child. thereby raising / causing sympathy and passion from the jury

Where solicitor McDaniel himself stated that the girlfriend "Neicy Politrone" did not have anything to do with the case, she was there for support SEE: Ex. A¹ original trial Transcript page 54 L1 - L5; Also see Ex. A² amended trial transcript page 54 L1 - L7 and pending motion to reconstruct.

(2) Counsel prejudiced my whole trial, where

during his cross. upon greeting Lt. McGurkin Counsel stated that Lt. McGurkin was a good officer.

This statement only bolstered Lt McGurkin's testimony - I - D. of me. Where Lt. McGurkin was the only state witness who I - D me
SEE: Ex. B¹ original trial transcript pages 166
L 25 - page 167 Ex. B² and pending motion to
reconstruct.

11 (b) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

(1) Per the Bill of Rights to the Federal Constitution I was denied the right to effective assistance of appellate counsel thereby, my appeal violated the Constitutions and laws of the United States, as
guaranteed by the 6th and 14th Amendments.

and South Carolina Const. Art. I sec 3
and Sec 14 Also see: Exitt's v Lucey
 105 S.Ct. 830.

Although, I understand that an Appellate counsel does not have a const. duty to raise every non-frivolous issue.

- But an Appellate counsel do have a const. duty to make sure the State/Respondent do not misstate the facts argued in their brief(s)

Here, the State argued that a jury could have inferred that I intended to commit a crime while in Potts home and due to a "multitude" of scenarios was unable or decided not to carry out the intended crime
 "Noise from the camera or outside the home could have

made Mitchell leave before he took anything

SEE: Ex. C¹ Initial brief of Respondent - pages
Cover: (i) 13 - 15; Ex. C² the Court of Appeals
ruled upon Appellate counsel's rehearing -
pages 10 - 11; Ex. C³ Respondent's petition
for writ of Certiorari, pages 14 - 15.

Here, Appellate counsel failed to argue
 against the "multitude of scenarios"

• SEE: Ex. C⁴ Appellate counsel's petition
for reconsideration pages 10 - 11. and Ex
C⁵ Appellate counsel's petition for writ of
Certiorari, 15 - 17.

Where there was no multitude of scenarios
 ever stated or mention during my trial
 Or any reason(s) the jury found me not
 guilty on/for the petit larceny.

Nor was any stated in the trial Judge's
 ruling when he denied my trial counsel
 motion for a new trial SEE: Ex. D

Here, this misstatement prejudiced me where this was not an issue at nor during my trial. Which the courts could only see this misstatement as I abandoned my intent to commit a crime therein.

If it was not for Appellate counsel's errors... including but not limited to the above, there is a reasonable probability the results of my appeal would have been different Evitts Ind.

I further argue, that with the aid of effective assistance of PCR counsel. I will prove my claims by the preponderance of evidence SEE: Martinez v Ryan 132 S Ct. 1309; S.C.R. Civil P. Rule 71.1(d) and Rule

407 S.C.R. - Rule of Professional Conduct.

And: That any grounds set out in this original PCR application: expressly or not argued, will be subject to amendment. per S.C. Code Ann § 17-27-90. Also see S.C.R. Civ. P. Rule 71. (c).

Thus, I am entitled to a FULL and FAIR evidentiary, as well as a ruling upon "all" my issues

SEE: Odom v State 523 SE2d 753;

Sharper v State 305 SE2d 247; S.C.

Code Ann § 17-27-80; Marlar v

State 653 SE2d 266 Also see Bostick

v Stevenson 589 F3d 164

Date: 3-12-19

Sincerely & Respectfully submitted
Bernie Titcher

Exc!

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.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

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Solicitor, Eighth Judicial Circuit

P. O. Box 516
Greenwood, S. C. 29649-0516
(864) 942-8800

ATTORNEYS FOR RESPONDENT

JACKIE S. BOWERS
CLERK OF COURT

2019 MAR 14 AM 10 43

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NEWBERRY COUNTY

Ex. C'

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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. ____).

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.

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).

Exc 2

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

②

10

(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.

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.

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:

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EMERY COUNTY
JACOB S. BOWERS
CLERK OF COURT
MAY 14 AM 10 43
2010

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

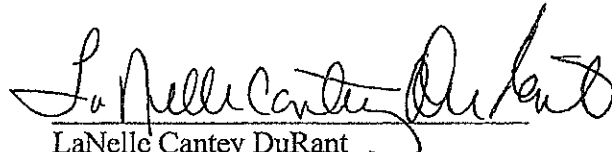
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Exc 4

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.

(Att'y)

EXCS

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

Exc 5

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.

Rtly

CONCLUSION

Based on the above, certiorari should be granted, the convictions and sentences reversed,
and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 28th day of January, 2013

626
STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

Ex D
IN THE COURT OF GENERAL SESSIONS

State of South Carolina,

Plaintiff,

v.

Bennie Mitchell,

Defendant.

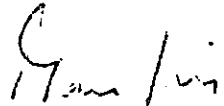
C.A. Nos: 2009-GS-36-0037, 0038, 0039
2010-GS-36-0087

**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

JACKIE S. BOWERS
CLERK OF COURT

FILED
MAY 14 2010 10 43

NEWBERRY COUNTY

PROOF OF SERVICE

I, Bennie Mitchell certify that I have served the following matters upon the below Hon. Clerk of Ct.

- (1) Notice/motion of recuse
- (2) Notice/motion to reconstruct Trial Tr. & Ex. ^s
- (3) Notice/motion for costs/fees
- (4) Form 5 (CCR)/grounds & Ex. ^s - cover sheet

By placing the above said into the U.S. Corr. Inst. mail room on this 12 day of MARCH 2014 to be placed in the U.S. mail with postage prepaid.

The Hon. Jackie S. Bowers
Clerk of Ct., Nvy Co.
P.O. Drawer #10
Nvy SC 29108

SUBORN to before me
this 12 day of MARCH 2014

Bennie Mitchell

J. Franklin
Notary Public

My Commission Expires
12-16-2019

cc: B. M.

FILED
NEWBERRY COUNTY
2014 MAR 14 AM 10 43
JACKIE S. BOWERS
CLERK OF COURT

~~Miss~~
 Mrs. Jackie Bowers, Clerk of Ct.
 P.O. Box #10
 Nky, SC 29108

Date 3-12-14

Dear Hon. Clerk Bowers

Please find enclosed for filing the mention
 matters upon my attached proof of service.

Would you be so kind as to return me
 back a filed copy of each enclosed.

Thanking you in advance, I remain

Sincerely

cc: M

Bennie White

JACKIE S. BOWERS
 CLERK OF COURT

FILED
 NEWBERRY COUNTY
 2014 MAR 14 AM 10 42

✓
WITNESSES

Roy McClurkin
Newberry Police Department

WARRANT NUMBER

I008490

Les W. Brannan
Foreman of the Grand Jury

Date: 1-20-09

VERDICT

TRUE BILL

Guilty April 21, 2010

Terry E. Melling
Foreman

SCANNED

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

January Term, 2009

Indictment # 09GS36- 39

THE STATE

vs.

Bennie Darron Mitchell

INDICTMENT FOR

Possession of Burglary Tools
16-11-0020

630

COUNTY OF Newberry
STATE VS. **Bennie Darron Mitchell**

INDICTMENT/CASE#: 09GS36-39

AKA:
Race: BLK Sex: M Age:

A/W#: I008490

Date of Offense: 2008-10-27

S.C. Code §: 16-11-20

CDR Code #

0124

DOB: 1961- SS#:

Address:

City, State Zip Newberry, SC

DL# SC SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☒ PLEADSTO: Poss of Burglary tools (0-5 years)in violation of § 16-11-20 of the S.C. Code of Laws, bearing CDR Code # 0124

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ 17-25-45

(CSC w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant Initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 5 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of \$_____; provided that upon the service of _____ days/months/years and/or payment of \$_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 09 GS 36-37☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 19 months. (GHS)☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to SC Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms:

☐ set by SCDPPPSObtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%) \$ _____

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§14-1-211(A)(2) (DUI Surcharge) \$100 \$

§56-5-2995 (DUI Assessment) \$12 \$

§56-1-286 (DUI Breath Test) \$25 \$

§35.13 (Public Def/Prob) \$500 \$

§73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§33.7, 1B TP (Drug Court Surcharge) \$100 \$

§50-21-114(BUI Breath Test Fee) \$50 \$

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$

§90.11 TP (SCCJA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.90☐ Appointed PD or appointed other counsel, §35.13 TP☐ Requires \$500 be paid to Clerk during probation.Court Reporter: Jay HolstonSentence Date: 4/24/10PRESIDING JUDGE ThaminiJudge Code: 2111318

Clerk of Court/ Deputy Clerk

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF NEWBERRY)

) 2009-GS-36-39, 37

) 2010-GS-36-87

The State of South Carolina,
Plaintiff,

v.

VERDICT FORM

Bennie Darron Mitchell,
Defendant.

1. As to the charge of burglary, (Indictment No. 2009-GS-36-37), we the jury unanimously find the Defendant,

X 12 GUILTY

____ NOT GUILTY

2. As to the charge of possession of burglary tools, (Indictment No. 2009-GS-36-39), we the jury unanimously find the Defendant,

X 12 GUILTY

____ NOT GUILTY

3. As to the charge of petty larceny, (Indictment No: 2010-GS-36-87), we the jury unanimously find the Defendant,

____ GUILTY

X 12 NOT GUILTY

April 21, 2010
Newberry, South Carolina

Terry E. Mellinger
Foreperson

GS Docket Sheet

Indictment Number 2008GS36

Defendant Section

Defendant Name / Address

MITCHELL, BENNIE DARREN

NEWBERRY, SC 29108

Defendant SSN 2

Defendant Gender M

Defendant Race B

Birth Date 1961

Marital Status Unknown

Drivers License State / Number SC :

Warrant Section

Warrant Number I008490

Counts 1

Warrant Issued True

Arrest Date 10/29/2008

Offense Code 124

Offense Description

Tools / Possession, making implements capable of being used in crime

Judge Name

Court Reporter

Date Received By Clerk 11/10/2008

Summary Judge

Defense Attorney

Plaintiff Attorney

Disposition Section

Disposition Date

Disposition Type

Convicted of 0 counts.

Sentence

5 yrs. concurrent

ARREST WARRANT

I-008490

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

NEWBERRY

THE STATE

against

ENNIE DARREN MITCHELL

Address: [REDACTED]

NEWBERRY SC 29108

SSN: [REDACTED]

Sex: M Race: B Height: 5-8 Weight: 125

State: SC DL#: [REDACTED]

DOB: [REDACTED] 1961 Agency ORI#: SC0360100

Prosecuting Agency: CITY OF NEWBERRY

Prosecuting Officer: ANY LAWFUL OFFICER

Offense: POSSESSION OF BURGLARY TOOLS

Offense Code: 0124

Ordinance Sec. 16-11-0020

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused
to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(L.S.)

Date:

RETURN

Copy of this arrest warrant was delivered to
defendant BENNIE DARREN MITCHELL

Signature of Constable/Law Enforcement Officer

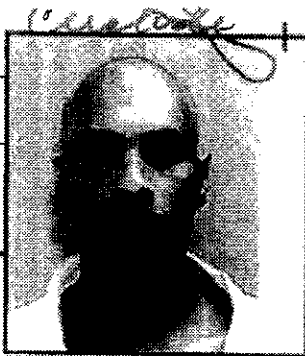
RETURN WARRANT TO:

NEWBERRY MUNICIPAL COURT

1507 NANCE STREET

NEWBERRY, SC 29108

(803) 321-1010



STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

NEWBERRY

AFFIDAVIT

Form Approved by
S.C. Attorney General
July 28, 1990
SCCA 518

Personally appeared before me the affiant LT. ROY H. MCCLURKIN who
being duly sworn deposes and says that defendant BENNIE DARREN MITCHELL
did within this county and state on 10/27/2008 to 10/28/2008 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of NEWBERRY)
in the following particulars:

DESCRIPTION OF OFFENSE: 16-11-0020 / POSSESSION OF BURGLARY TOOLS

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

THAT ON OR BETWEEN 10-27-2008 AND 10-28-2008 THE DEFENDANT, BENNIE DARREN MITCHELL DID COMMIT THE
OFFENSE OF POSSESSION OF BURGLARY TOOLS IN THAT HE DID MAKE, MEND, CAUSE TO BE MENDED, OR DID POSSESS
ANY INSTRUMENT, IMPLEMENT OR OTHER THING AND HAVE IN HIS POSSESSION AND CONTROL TOOLS COMMONLY USED
IN THE COMMISSION OF BURGLARY WITH THE INTENT TO USE THE SAID TOOLS IN THE COMMISSION OF A CRIME. BENNIE
DARREN MITCHELL HAS BEEN POSITIVELY IDENTIFIED ON VIDEO SURVEILLANCE AS THE CULPRIT WHO COMMITTED THIS
CRIME. THIS OFFENSE OCCURRED AT [REDACTED] PAULINE STREET IN THE CITY OF NEWBERRY, NEWBERRY COUNTY, SOUTH
CAROLINA. THIS BEING IN VIOLATION OF THE SC CODE OF LAWS 1976, AS AMENDED.

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

NEWBERRY

Affiant's Address 1507 NANCE STREET

NEWBERRY SC 29108

Affiant's Telephone 321-1010

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 10/27/2008 defendant BENNIE DARREN MITCHELL

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of NEWBERRY) as set forth below:DESCRIPTION OF OFFENSE: TOOLS / POSSESSION, MAKING IMPLEMENTS CAPABLE OF BEING USED
IN CRIME

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 10/28/2008

(L.S.)

BARRY S. KOON

Judge Code: 231

Judge's Address 1507 NANCE STREET

NEWBERRY SC 29108

Judge's Telephone 803-321-1010

Issuing Court: ☐ Magistrate ☐ Municipal ☒ Circuit

Case: 2008-10581

ORIGINAL

633

The Supreme Court of South Carolina

The State, Respondent,

I 008487

v.

Bennie Mitchell, Petitioner.

Appellate Case No. 2012-213463
Lower Court Case No's. 2009GS3600037;
2009GS3600036; 2009GS3600038 and
2009GS3900039

JACKIE S. BOWERS
CLERK OF COURT

2014 MAR 7 AM 11 41

NEWBERRY COUNTY

FILED

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.J. Shupe, Esquire
Salley W. Elliott, Esquire
LaNelle Cantey DuRant, Esquire
The Honorable Jackie S. Bowers
The Honorable Harold P. Welborn, Jr.

SCANNED

✓
WITNESSES

Roy McClurkin
Newberry Police Department

WARRANT NUMBER

1008487

Lois M. Brannon
Foreman of the Grand Jury
Date: 1-26-09

VERDICT
TRUE BILL

Guilty April 21, 2010

Terry E. Mellinger
Foreman

SCANNED

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

January Term, 2009

Indictment # 09GS36-

31

THE STATE

vs.

Bennie Darron Mitchell

INDICTMENT FOR

Burglary 1st Degree
16-11-0311

636

COUNTY OF Newberry
STATE VS. **Bennie Darron Mitchell**

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 09GS36-37

AKA:
Race: BLK Sex: M Age:

A/W#: 1008487

Date of Offense: 2008-10-27

S.C. Code §: 16-11-311

CDR Code # 0079

DOB: 1961- SS#:
Address:
City, State Zip Newberry, SC
DL# SC SID#

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was X CONVICTED OF or _____ PLEADS TO: Burglary 1st (15-life)

in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0079

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ 17-25-45

(CSC w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant Initial)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to SC Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine: \$
§14-1-206 (Assessments 107.5%) \$
§14-1-211(A)(1) (Conv. Surcharge) \$100 \$
§14-1-211(A)(2) (DUI Surcharge) \$100 \$
§56-5-2995 (DUI Assessment) \$12 \$
§56-1-286 (DUI Breath Test) \$25 \$
§35.13 (Public Def/Prob) \$500 \$
§73.3, 1B TP (Law Enforce. Funding) \$25 \$
§33.7, 1B TP (Drug Court Surcharge) \$100 \$
§50-21-114(BUI Breath Test Fee) \$50 \$
§56-5-2942(J) (Vehicle Assessment) \$40/ea \$
§90.11 TP (SCCJA Surcharge) \$5 \$
3% to County (if paid in installments) \$
TOTAL \$

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP

☐ Requires \$500 be paid to Clerk during probation.

Court Reporter: Joy HolstonSentence Date: 11/21/10PRESIDING JUDGE Tham TinJudge Code: 2111318

Elizabeth O'Fallon
Clerk of Court/ Deputy Clerk

GS Docket Sheet

Indictment Number 2008GS36

Defendant Section

Defendant Name / Address

MITCHELL, BENNIE DARREN

NEWBERRY, SC 29108

Defendant SSN [REDACTED]

Defendant Gender M

Defendant Race B

Birth Date [REDACTED] 1961

Marital Status Unknown

Drivers License State / Number SC : [REDACTED]

Warrant Section

Warrant Number I008487

Counts 1

Warrant Issued True

Arrest Date 10/29/2008

Offense Code 79

Offense Description

Burglary / Burglary (After June 20, 1985) - First degree

Judge Name

Jarrison Hill

Court Reporter

Jay Holston

Date Received By Clerk 11/10/2008

Summary Judge

Defense Attorney

Plaintiff Attorney

Matthews Chaplin

Disposition Section

Disposition Date

Disposition Type :

Convicted of 0 counts.

guilty - trial
4/21/00

Sentence

20 yrs

ARREST WARRANT

I-008487

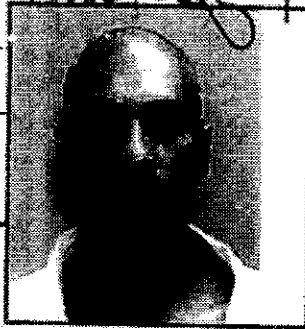
STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

NEWBERRY

THE STATE

against



STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
NEWBERRY

AFFIDAVIT

Form Approved by
S.C. Attorney General
July 28, 1980
SCGA 518Personally appeared before me the affiant LT. ROY H. MCCLURKINbeing duly sworn deposes and says that defendant BENNIE DARREN MITCHELLdid within this county and state on 10/27/2008 to 10/28/2008State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of NEWBERRY)

in the following particulars:

DESCRIPTION OF OFFENSE: 16-11-0311 / BURGLARY (FIRST DEGREE)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THAT ON OR BETWEEN 10-27-2008 AND 10-28-2008 THE DEFENDANT, BENNIE DARREN MITCHELL DID COMMIT THE CRIME OF BURGLARY IN THE 1ST DEGREE. TO WIT: BENNIE DARREN MITCHELL DID UNLAWFULLY ENTER THE RESIDENCE OF VICTIMS STEPHEN LEE POTTS IN THE NIGHTTIME WITHOUT THE CONSENT OF THE OWNERS WITH THE INTENT TO COMMIT A CRIME. ONCE INSIDE BENNIE DARREN MITCHELL DID TAKE, STEAL AND CARRY AWAY BEER VALUED AT (UNDER \$1,000.00). BENNIE DARREN MITCHELL HAS BEEN POSITIVELY IDENTIFIED ON VIDEO SURVEILLANCE AS THE CULPRIT WHO COMMITTED THIS CRIME. THIS OFFENSE OCCURRED AT PAULINE STREET IN THE CITY OF NEWBERRY. THIS BEING IN VIOLATION OF THE SC CODE OF LAWS, 1976 AS AMENDED.

BENNIE DARREN MITCHELL

Address: NEWBERRY SC 29108Phone: SSN: Sex: M Race: B Height: 5-8 Weight: 125IL State: SC DL#: Date of Birth: 1961 Agency ORI#: SC0360100Prosecuting Agency: CITY OF NEWBERRYProsecuting Officer: ANY LAWFUL OFFICEROffense: BURGLARY (FIRST DEGREE)Offense Code: 0079Code/Ordinance Sec. 16-11-0311

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused
to be arrested and brought before me to be
satisfied with according to law.

Signature of Judge

(L.S.)

Date:

RETURN

copy of this arrest warrant was delivered to
defendant BENNIE DARREN MITCHELL

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

NEWBERRY MUNICIPAL COURT

1507 NANCE STREET

NEWBERRY, SC 29108

(303) 321-1010

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
NEWBERRYAffiant's Address 1507 NANCE STREETNEWBERRY SC 29108Affiant's Telephone 321-1010

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 10/27/2008 defendant BENNIE DARREN MITCHELL

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of NEWBERRY)

as set forth below:

DESCRIPTION OF OFFENSE: BURGLARY / BURGLARY (AFTER JUNE 20, 1985) - FIRST DEGREE

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 10/29/2008

BARRY S. KOON

Judge Code: 231Judge's Address 1507 NANCE STREETNEWBERRY SC 29108Judge's Telephone 803-321-1010Issuing Court: ☐ Magistrate☐ Municipal☒ Circuit

ORIGINAL

Case: 2008-10581

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

Bernice D. Mitchell
#278318
vs. Applicant

The State
Respondent

IN THE COURT OF COMMON PLEAS
Civil # 2014. CP-36-00141

NOTICE AND MOTION
TO RECONSTRUCT
TRIAL TRANSCRIPT

FILED
NEWBERRY COUNTY
2014 MAR 14 PM 1:04 PM
JACQUELINE S. FORTSON
CLERK OF COURT

NOW COMES the above named Applicant, by and through his court appointed counsel who move this Hon. Court in the above entitled matter per. the 1st, 5th and 14th Amendment of the Federal /U.S. and S.C. Constitution.

This motion will be based upon the following:

On April 19-20, 2010 I proceeded to trial before the Honorable D Garrison Hill and a jury in the Newberry Court of General Sessions. The State was represented by assistant solicitor, Austin McDaniel. The official Court reporter (C/R) was Joy E. Holston. The jury returned a verdict of guilty on Burglary first degree, possession of burglary tools, and a not guilty verdict on petty larceny. Judge Hill sentenced me to 20 years on the Burglary charge and to 5 years concurrent on the poss. of burglary tools. Which my trial counsel, Mathias Chylin filed a timely notice of appeal

On Sept. 15, 2010 I received my trial transcript of the above said trial from my Appellate counsel, LaNelle DuRant.

Upon reviewing my transcript I notice the following substantial and significant omissions and or inaccuracies from and of my trial transcript, (THAT IS RELEVANT TO MY PENDING P.C.R.) which I have challenged through the official C/R Holston. See letter dated Dec 13, 2010.

- (1) See original challenged trial transcript pages: 54, 166, 167 and 240
- (2) letter from App. Defender, Ms. DuRant
- (3) letter from C/R Holston dated Dec 30, 2010 and amended challenged trial transcript pages: 54 and 240
- (4) letter to C/R Holston from me dated Jan 4, 2011
- (5) letter from C/R Holston dated Jan 7, 2011 and
- (6) letter from C/R Holston dated Feb. 2, 2011

And, upon review of the above matters shows that there is no alternative. And, despite C/R Holston efforts, still the incomplete nature of the omissions and inaccuracies will prejudice me upon my P.C.R. claim(s). (See P.C.R. issues) Which no meaningful review of my claim(s) can be had, or appeal upon said claim(s) without reconstructing the above matters,

trial records.

And since there is no alternative, "No C/R notes or tape" that will reflect a complete, accurate and true trial transcript of the above said pages. Also see: C/R letters dated Jan 7, 2011 and letter dated Feb 2, 2011

This court has the authority to reconstruct the portion(s) argued in this motion,

See Whitehead v State 574 SE2d 200.

Because without my 2010 trial transcript pages as argued in this motion, and claims in my pending P.C.R., no meaningful review can be had. As well as any appeal review upon said P.C.R. issues. Also see: Whitehead Id., China v Parrott 162 SE2d 276, and State v Ladson 644 SE2d 271

WHEREFORE: due to the highly unusual circumstances of my case, reconstruction of my trial transcript pages 54; 166; 167 and 240 is appropriate in order to allow a meaningful P.C.R. review, as well as any appellate reviews(s).

Date: 3-12-14

Sincerely and Respectfully Submitted
 Bennie Mitchell

Court Reporter
Joy E. Holston
118 Sandy Beach Dr.
Prosperity, SC 29127

Date 12/13/10

Dear Ms. Holston

Please be advised, that I am aware that you was the court reporter during my trial held April 19-21, 2010 / case #09-GS-36-37 and 38 before the Hon. Judge D. Garrison Hill in Newberry. Court of Gen Sessions.

Thus, I am compelled to write you regarding a few inaccuracies in my tr. transcript.

With all due respect, per S.C.A.C.R. Rule 607(1) since I am a party to this matter, I am respectfully objecting to the following inaccuracies:

MISPRINT: see Tr.p 43 L22 it should read "an officer could not identif," not could identify.

MISSING from Tr. where the court asked Mr. Potts to stand, it only shows where I stood see Tr.p 48 L14 - Tr.p 52 - L25 Also see Tr.p 54 L1 - L5 "you have met Mr. Potts" but its not shown in the Tr. transcript.

Court Reporter. Holston
pg. (2)

Date 12/13/10

where the jury met Mr. Potts.

Also within this area the tr. transcript omitted to show where the solicitor introduced Potts girlfriend See Tr. p 53 L23 - Tr. p. 54 - L14.

Which she was allowed to sit with the alleged victim (Potts)/prosecution table.

Nor does my tr. transcript shows where Lt. McClarkin was introduced to the jury See Tr. p 53 L23 - Tr. p 54 - L14., again, my tr. transcript only shows me being introduced to the jury.

MISSING from Tr. where my atty. Mr. Chaplin first greeted Lt. McClarkin on cross-ex. - counsel is to be believed to have made an improper bolstering statement. See Tr. p 166 - Tr. p 167.

Further, missing from my tr. transcript what I really said just before sentencing See Tr. p. 240 L14 "I have -- have mercy," is not what "I" said.

Thereby, my tr. transcript is not a true, accurate or complete tr. transcript as you certified it was, and as the judge stated to the court see

644 Court Reporter, Holston

pg (3)

Date 12/13/10

Tr. p 63 621 - 23

As a layman in this matter, looking at Rule 609(c) it doesn't seem to require the inaccuracies to have any merits, before they can be changed to show a true copy...

But if so, how will "any" court be able to determine any claims that I may have if these matters are omitted from my tr. transcript.

Would you be so kind as to look into this matter per S.C.A.C.R. - Rule 609(c) and any other applicable rules or laws. I look forward to hearing from you soon

With kind regards, I am

cc: B.M.

Sincerely
Bernie Mitchell

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 MATTHIAS
8 CHAPLIN AND I AM AN ATTORNEY HERE IN SOUTH CAROLINA.
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

FILED
NEWBERRY COUNTY
2019 MAR 14 AM 10:44
JACQUELINE S. BOWEN
CLERK OF COURT

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

FILED
NEWBERRY COUNTY
CLERK OF COURT
JACK S. BOWERS
APR 14 AM 10 44

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.

FILED
NEWBERRY COUNTY
2019 MAR 14 AM 10:10
JACK S. BOWERS
CLERK OF COURT

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.



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

December 30, 2010

Ms. Joy E. Holston
118 Sandy Beach Drive
Prosperity, SC 29127

Re: Bennie Mitchell

Dear Ms. Holston:

As a follow-up to our telephone conversation today, you were the court reporter for the trial of Mr. Bennie Mitchell on April 19, 2010 before the Honorable D. Garrison Hill in Newberry. I am handling his direct appeal from that trial.

As we discussed today, you agreed to preserve the tapes of Mr. Mitchell's trial for any future post-conviction relief (PCR) issues. As you reported to me, there were a few omissions to the transcript and you will send those corrected pages to Mr. Mitchell and me. Based on what he told me, these could be significant PCR issues.

Thank you for your assistance in this matter.

Sincerely,

LaNelle C. Durant
Appellate Defender

LCD:pds

cc: Mr. Bennie Mitchell

December 30, 2010

Bennie Mitchell
MC C.I./Unit 3-A-Side 187-13
386 Redemption Way
McCormick, S.C. 29899

The State of South Carolina vs. Bennie Mitchell
Case number -2009-GS-36-37, 38, 39

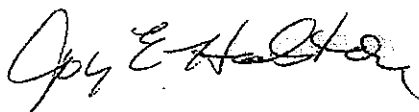
Dear Mr. Mitchell,

I have received your letter dated 12/13/2010. After reviewing the transcript and digital recording the following changes have been made to your transcript and are attached.

1. Page 43, "an officer could not identify" has been changed to "an officer couldn't identify."
2. Page 54, Mr. McDaniel is introducing individuals at his table. Added to the transcript is Lieutenant McClurkin, the investigator in the case. Also added is Neiry Polifrone.
3. In your letter you stated, "Missing from the transcript where the Court asked Mr. Potts to stand, it only shows where I stood." I do not have a record of Mr. Potts standing.
4. In your letter you stated, "Missing from the transcript where my attorney, Mr. Chaplin first greeted Lieutenant McClurkin on cross-examination. Counsel is to believed to have made an improper bolstering statement." I do not have the words, "believed to have made an improper bolstering statement in the record.
5. Page 240, you state that "I have mercy – mercy" is not what you said. I have added a parenthetical, (Inaudible, Defendant is crying).

Joy E. Holston
Circuit Court Reporter

CC: Lanelle Durant



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 MATTHIAS
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.)

FILED
NEWBERRY COUNTY
2014 MAR 14 AM 10:45
JACKIE S. BOWERS
CLERK OF COURT

1 MY REPRESENTATION. MR. MITCHELL IS A GOOD GUY, I THINK
2 HIS RECORD CLEARLY, THERE MAY BE CONCERNS WITH THAT AND
3 MR. MITCHELL HAS NOT GOTTEN INTO ANY SERIOUS TROUBLE FOR
4 SOME TIME. MR. MITCHELL IS SOMEONE THAT WOULD BENEFIT
5 FROM ANY TYPE OF REHABILITATION OR WHATEVER THE CASE YOUR
6 HONOR MIGHT SUGGEST. AND MR. MITCHELL HAS AN ELDERLY
7 MOTHER, SHE IS 80 SOMETHING YEARS OLD AND SHE WOULD
8 BENEFIT FROM HIM BEING AROUND TO ASSIST HER. SHE IS NOT
9 VERY AMBULATORY. AND WE JUST ASK THE COURT FOR MERCY WITH
10 REGARDS TO SENTENCING IN THIS MATTER.

11 THE COURT: THANK YOU. OKAY. HOW LONG HAS HE BEEN
12 IN CUSTODY?

13 MR. CHAPLIN: GOING ON 19 MONTHS, YOUR HONOR.

14 MR. MITCHELL: YOUR HONOR?

15 THE COURT: YES SIR, MR. MITCHELL.

16 MR. MITCHELL: I HAVE -- HAVE MERCY. (INAUDIBLE, THE
17 DEFENDANT IS CRYING.)

18 THE COURT: OKAY, THE OFFENSE OF BURGLARY FIRST IS
19 CLASSIFIED AS A VIOLENT OFFENSE AND A MOST SERIOUS OFFENSE
20 UNDER STATE LAW, IT CARRIES A POTENTIAL SENTENCE OF 15 TO
21 LIFE. POSSESSION OF BURGLARY TOOLS CARRIES A MAXIMUM
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23 BURGLARY FIRST IS YOU BE COMMITTED TO THE DEPARTMENT OF
24 CORRECTIONS FOR A PERIOD OF 20 YEARS. THE SENTENCE ON THE
25 BURGLARY TOOLS IS YOU BE COMMITTED TO THE DEPARTMENT OF

Court Reporter
Joy E. Helston
118 Sandy Beach Dr.
Prosperity, SC 29127

Date: Jan 4, 11

Dear Ms. Helston

I am responding to your letter of Dec 30, 10 regarding your changes to my tr. and the tr. pages of said changes. which I rec'd Jan 4, 11.

First, thank you for your time and professional attention to this most important matter.

Unfortunately, there are still some inaccuracies — regarding number 2 of your letter and Tr. pg 54

It still does not show where solicitor McDaniel said "that Ms. Mercy Politrone did not have anything to do with the case, she was there for support" (Still she was allowed to set w/ the state)

Regarding number 3 of your letter.

Why wouldn't the record show Mr. Potts... standing for the jurors to see?

Ms. Holston

pg. (2)

Date: Jan 4, 11

But more importantly - regarding number 4 of your letter.

I was not saying that my atty: Mr. Chaplin used the words "believed to have made an improper bolstering statement..."

What I was saying that if you notice on cross-ex of Lt. M^E Clurkin, it does not show Mr. Chaplin greeting Lt. M^E Clurkin as my atty: did "all" other witnesses. And, in this area of cross "I heard Mr. Chaplin state that Lt. M^E Clurkin was a good officer"

(I was saying that was bolstering - not that Mr. Chaplin said those words)

And, number 5 of your letter. If you notice on pg 239 L17 - L20 I was crying, that is where my atty: told the court that I was a little overwhelmed.

But on pg 240 L12 "I" asked to address the court
(so the below should be audible as well)

Which I told Mr. Potts that I would offer him an apology, but I can't because I did not commit

DM

Ms. Holston

655

copy

pg (3)

Date Jan 4, 11

The crime, and I told Lt. M^E Clarkin that he had the wrong man.

Ms. Holston, would you be so kind as to please, please recheck your records again. Because these matters are very highly material and substantial to my due process

Thanking you in advance, I remain Sincerely
B. M. Holston

P.S. Can this tape be purchased from you, certified by you.

(Receipt requested, please)

cc: Lanelle Durant

(B.M.)

(B.M.)

January 7, 2011

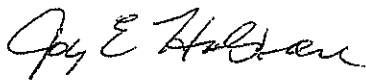
Bennie Mitchell
MC C.I./Unit 3-A-Side 187-13
386 Redemption Way
McCormick, S.C. 29899

The State of South Carolina vs. Bennie Mitchell
Case number -2009-GS-36-37, 38, 39

Dear Mr. Mitchell,

Attached is your letter dated January 4, 2011. I cannot make any changes to what you are asking of your transcript. You have challenged the transcript and I have made the appropriate changes in a letter to you dated December 30th, 2010.

Thank you,



Joy E. Holston
Circuit Court Reporter



February 2, 2011

Bennie Mitchell
MC C.I./Unit 3-A-Side 187-13
386 Redemption Way
McCormick, S.C. 29899

The State of South Carolina vs. Bennie Mitchell
Case number -2009-GS-36-37, 38, 39

Dear Mr. Mitchell,

I have received your letter dated January 14th and your letter dated February 1, 2011. I apologize for any confusion with the issue of your transcript.

Your letter dated January 14th 2011 asked me to further review my records of the court proceedings to make changes. After reviewing my records I do not see any further changes that should be made to your transcript.

Thank you,

A handwritten signature in black ink, appearing to read "Joy E. Holston". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Joy E. Holston
Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

Bennie D. Mitchell
Applicant
vs.

The State
Respondent

IN THE COURT OF COMMON PLEAS
2014-CP-36-00141

NOTICE AND MOTION
OF
RECUSE

FILED
NEWBERRY COUNTY
2014 MAR 14 PM 10 46
JACKIE S. BOWERS
CLERK OF COURT

NOW COMES the above named Applicant pro se and or and by and through his court appointed counsel who move this Hon. Court in the above entitled matter per. the DUE PROCESS - 14th Amend. of the U.S. and S.C. Const.; Canon 3 E. (1) of Rule 501 SCACR and any other applicable rules, laws

This motion will be based upon the following:

- (1) On Jan 12, 2010 in the court of General Sessions I appeared before the Hon. Judge Eugene Griffith upon the charges of burglary first-degree; enhancement of larceny offense and possession of burglary tools. The official court reporter was Hollie M. Jenkins. The State was represented by assistant solicitor, Austin McDaniel, and I was represented by Mathias

Chaplin. After the jury was picked my counsel made a motion for Judge Griffith to remove himself from my case, based upon the facts that Judge Griffith had represented me before and had also prosecuted upon the charge of 2008-GS-3600412

Which Judge Griffith did find that it was a conflict of interest due to the charge of 2008-GS-3600412 and respectfully removed himself. NOTE: Will need transcript from C/R Jenkins

(2) On Sept 7, 2012 The Hon. Judge, Frank R. Addy, Jr refused to file my Declaratory Judgment upon the transcript matters mention in my pending motion to reconstruct my trial "pages" transcript, and PCR issue 11 (2).

Although, Judge, Addy refuse to file my Declaratory Judgment, he did make a ruling upon the issues SEE: attached 1-3 pgs dated Sept 24, 2012 of Judge's ruling and pgs 2 of 9-3 of 9 of my Declaratory Judgment

(3) And based upon the highly unusual circumstances

I am also requesting Joy E. Holston to remove herself from taking any part in my PCR hearing, other than reconstructing my prior trial transcript- per. pending motion for reconstruct.

WHEREFORE: based on the foregoing reasons, I find that there would be a conflict of interest for Judge Griffith, Judge Addy Jr to take part in any part of my PCR.

Date: 3-12-14

Respectfully Submitted
Bennie Mitchell

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Bennie D. Mitchell,

Plaintiff,

vs.

Joy E. Holston and Desiree Allen ,

Defendants.

THE COURT OF COMMON PLEAS

CASE NO. _____-CP-36-_____

ORDER DENYING MOTION TO
PROCEED WITHOUT COSTS AND
ORDER OF DISMISSAL

FILED
NEWBERRY COUNTY
SEP 27 A 11:42
CLERK'S OFFICE

This matter comes before the Court on Plaintiff's motion to proceed *in forma pauperis* with a Declaratory Judgment action. In denying Plaintiff's motion and dismissing the action, I find as follows:

1. In essence, Plaintiff seeks a declaration that Defendants were negligent in preparing a transcript of his trial for first degree burglary and possession of burglary tools. See State v. Mitchell, Op. No. 5009 (S.C. Ct. App. filed July 25, 2012) (Shearouse Adv. Sh. No. 25 at 69) (upholding conviction). Plaintiff's cause of action allegedly arises from "substantial and significant omissions and inaccuracies" in the transcript in his possession. (Plaintiff's Complaint at 2). In reality, Plaintiff bases his claim on differences between his recollection of the trial and the verbatim record produced by defendant Holston. The Court has reviewed Plaintiff's three (3) alleged omissions or inaccuracies. Even assuming, *arguendo*, that the record should read as Plaintiff desires, the discrepancies he highlights are neither substantial nor significant.
2. Defendants in this action are entitled to absolute judicial immunity for their actions relating to the preparation of a transcript. Defendants are employees of the courts of

South Carolina. S.C. Code Ann. § 14-15-15 (Supp. 2011). As such, they have absolute immunity under the Tort Claims Act and under the common law. See S.C. Code Ann. § 15-78-60(1) (2005); accord O'Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (Cl. App. 1998).

3. Defendants are also afforded judicial immunity based on their status as court representatives who perform at the court's discretion. Our Supreme Court stated this principle in Fleming v. Asbill, a case granting immunity for Guardians *ad litem*:

"Because one of the guardian's roles is to act as a representative of the court, and because this role can only be fulfilled if the guardian is not exposed to a constant threat of lawsuits from disgruntled parties, a finding of quasi-judicial immunity is necessary. Such a grant of immunity is crucial in order for guardians to properly discharge their duties. The immunity to which guardians *ad litem* are entitled is an absolute quasi-judicial immunity. See Hartline v. Clary, 141 F.Supp. 151 (E.D.S.C.1956) (Judicial officers, quasi-judicial officers, judges, prosecuting attorneys, executive and ministerial officials of the government are immune from civil suit for acts committed by them in the performance of their official duties.)"

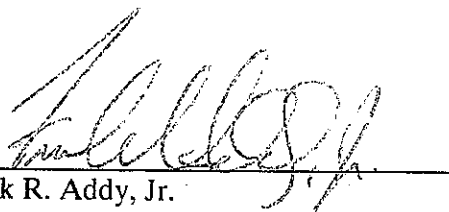
326 S.C. 49, 57, 483 S.E.2d 751, 755-56 (1997). If Guardians *ad litem*, who are more akin to advocates, enjoy absolute immunity, then so should court reporters, who likewise serve at the pleasure of the court.

4. Even if Plaintiff had filed a viable suit, he would not be entitled to proceed *in forma pauperis*. Plaintiff has failed to show his suit is "specifically authorized by statute or required by constitutional provisions." Martin v. State, 321 S.C. 533, 536, 471 S.E.2d 134, 135 (1995). No statute allows waiver of filing fees for negligence actions such as Plaintiff's. Likewise, Plaintiff has not shown a deprivation of a constitutional or fundamental right. See Sullivan v. S.C. Dept. of Corr., 355 S.C. 437, 586 S.E.2d 124 (2003).
5. Finally, the Court notes that none of the discrepancies Plaintiff alleges would affect the outcome of his trial, his appeal, or his post-conviction applications. He complains that the transcript does not accurately reflect the seating arrangements in the court room, the

congeniality of his attorney, or his behavior during sentencing. As far as the Court can discern, none of these alleged discrepancies hinder Plaintiff from challenging his conviction or sentence. See Gunter v. State, 267 S.C. 486, 489, 229 S.E.2d 723, 725 (1976). (indigent need only be afforded "an adequate opportunity to present (one's) claim fairly" and are not entitled to a transcript merely to comb the record in the hope of discovering some flaw). Furthermore, Defendant Holston prepared her transcript in the manner prescribed by the Court Reporters Manual. See Rule 607(c), SCACR. Because Defendants complied with state law, Plaintiff's suit is without merit. Cf. Richardson v. Stewart, 386 S.C. 282, 688 S.E.2d 124 (2010) (waiver of costs denied based on frivolous and abusive nature of petitioner's filings).

WHEREFORE, Bennie D. Mitchell's motion to proceed *in forma pauperis* is DENIED and Plaintiff's action is DISMISSED.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Circuit Court Judge
Eighth Judicial Circuit

September 24, 2012
Greenwood, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

Bennie D. Mitchell

Plaintiff

vs

Joy E. Hoiston, (C.R.),
Court Reporter for the
8th Judicial Circuit, and
Desiree R. Allen, (C.R.),
Court Reporter Manager
for South Carolina Court
Administration

Defendants

IN THE COURT OF COMMON PLEAS

NOTICE
AND

COMPLAINT

Declaratory Judgment

(Jury Trial Demanded)

NOW COMES the above named Plaintiff who moves this Hon. Court in the above entitled matter pursuant to S.C. Code Ann § 15-53-10 et. seq., and S.C.R. Civil. P. - Rule 57, to declare his legal relations involved herein, and the justiciable controversy between the parties involved.

JURISDICTION

This Hon. court has jurisdiction of the subject-matters of the parties hereto, and over all things pertaining hereto, pursuant to the above laws, Rule and below arguments.

The Plaintiff is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Newberry County.

I proceeded to trial before the Hon. D. Garrison Hill, the official Court reporter (C/R) was Jay E. Holston, where the jury returned a verdict of guilty on burglary first degree, possession of burglary tools, and a not guilty verdict on petty larceny. Judge Hill sentenced me to 20 years on the burglary charge and to 5 years concurrent on the poss. of burglary tools, which my trial attorney filed a timely notice of appeal.

ARGUMENT (1)

Defendant, Jay E. Holston, as the official C/R for my trial, and the C/R for the 8th judicial circuit had /has the legal responsibility for, including but not limited to, taken true, accurate and **FULLY** complete notes, taping and transcribing my trial, and trial transcript. **SEE: Exhibit A**. Or fraud was committed upon the Court. Also see 14-15-30.

ARGUMENT (2)

On Dec 13 2010 I challenged the substantial and significant omissions and inaccuracies of and from

my trial transcript SEE: Exhibit B - (letter to
Defendant, Holston dated Dec 13, 2000)

Challenges are: SEE: Exhibits C, D, and E.

- (1) Original Tr. p 54 - missing, where solicitor, Mr. Daniel introduced persons at the State's table, where the State allowed the victim's girlfriend, (without object) Heir Pol. Trone to sit at the State's table. Which the Solicitor stated that Ms. Pol. Trone did not have anything to do with the case, she was there for support.

Crying and holding onto the alleged victim (Mr. Potts)
Thus, raising/causing sympathy and passion from the jury.

SEE: Ex. C

- (2) Original Tr. pgs 166 - p 167 - missing where my atty: Mr. Chaplin first greeted Lt. McElurkin on cross-ex. and stated, "that Lt. McElurkin was a good officer"

This statement by counsel is believe to be a bolstering statement because Lt. McElurkin was the only State witness who allegedly I.D.'d me during trial.

SEE: Ex D

- (3) Original Tr. p 240 - missing where I told Mr. Potts that I would offer him an apology but I could not because I was not the one who committed the crime. And I told Lt. McElurkin that he had the wrong man.

Here, I maintain my innocence

I have mercy... mercy is not what I said,
Here, "I" asked to address the court, so what I

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS
2014-CR 36-00141

Bernie D. Mitchell
Applicant
vs

NOTICE AND MOTION
FOR
COSTS / FEES

The State

FILED
NEWBERRY COUNTY
2014 MAR 14 AM 10:46
JACKIE S. BOWERS
CLERK OF COURT

Now comes the above named indigent Applicant who moves this Hon. court in the above entitled matter(s) per. S.C. Code Ann § 17-3-50; 17-27-60 Also see: State Appropriations Act H. 3710 Part I B. § 61.1, 120th Gen Ass. (SC 2013); Finklea v State 255 S.E.2d 447 (1979); DUE PROCESS & EQUAL PROTECTION of the laws of the U.S. & S.C. Const. Which is owed to every person seeking collateral review

I will further show upon this Hon. court that:

- (1) During my trial, my identification was essential, thus, I am respectfully requesting an expert in the area of identification - specifically face recognition and perception
- (2) And, also during my trial, the alleged victim, Mr. Pott's testified that he had put a deer camera on top

of his refrigerator to catch anyone burglarizing his home. There was also further testimony that the police Dept. never had the camera or disk in their possession, only the disk after Potts had burned the photographs onto a disk. There was further testimony of missing photographs and the time and date stamp being wrong. Thus, I am respectfully requesting a qualified expert in digital photography, manipulation and changing of time - date - stamp / regarding digital photograph cameras and equipments.

(3) Also, and Investigator to aid appointed PCR counsel and I to found and interview my witnesses Also see: Easter v Estelle 609 F.2d 756; Bassette v Thompson 915 F2d 932; Underwood v State 425 SE2d 20; Glover v State 458 SE2d 538; and Bannister v State 509 SE2d 807. Here, without such said costs/fees I will be denied DUE PROCESS

CONCLUSION

According, based on the foregoing I am entitled to costs/fees for the above services of an investigator and experts.

Date 3-12-14

Respectfully Submitted
Bunnie Mitchell

COUNTY OF NEWBERRY

Bennie D. Mitchell

Plaintiff(s)

vs.

the State

Defendant(s)

IN THE COURT OF COMMON PLEAS

669

CIVIL ACTION COVERSHEET

2014 -CP-36 - 00141

(Please Print)

Submitted By: Bennie D. MitchellAddress: 386 Redemption Way
McComick SC 29999

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|--|--|
| <p>Contracts</p> <p>☐ Constructions (100)
 ☐ Debt Collection (110)
 ☐ Employment (120)
 ☐ General (130)
 ☐ Breach of Contract (140)
 ☐ Other (199)</p> | <p>Torts - Professional Malpractice</p> <p>☐ Dental Malpractice (200)
 ☐ Legal Malpractice (210)
 ☐ Medical Malpractice (220)
 Previous Notice of Intent Case #
 20-CP-_____
 ☐ Notice/ File Med Mal (230)
 ☐ Other (299)</p> | <p>Torts - Personal Injury</p> <p>☐ Assault/Slander/Libel (300)
 ☐ Conversion (310)
 ☐ Motor Vehicle Accident (320)
 ☐ Premises Liability (330)
 ☐ Products Liability (340)
 ☐ Personal Injury (350)
 ☐ Wrongful Death (360)
 ☐ Other (399)</p> | <p>Real Property</p> <p>☐ Claim & Delivery (400)
 ☐ Condemnation (410)
 ☐ Foreclosure (420)
 ☐ Mechanic's Lien (430)
 ☐ Partition (440)
 ☐ Possession (450)
 ☐ Building Code Violation (460)
 ☐ Other (499)</p> |
| <p>Inmate Petitions</p> <p>☒ PCR (500)
 ☐ Mandamus (520)
 ☐ Habeas Corpus (530)
 ☐ Other (599)</p> | <p>Judgments/Settlements</p> <p>☐ Death Settlement (700)
 ☐ Foreign Judgment (710)
 ☐ Magistrate's Judgment (720)
 ☐ Minor Settlement (730)
 ☐ Transcript Judgment (740)
 ☐ Lis Pendens (750)
 ☐ Transfer of Structured Settlement Payment Rights Application (760)
 ☐ Other (799)</p> | <p>Administrative Law/Relief</p> <p>☐ Reinstate Driver's License (800)
 ☐ Judicial Review (810)
 ☐ Relief (820)
 ☐ Permanent Injunction (830)
 ☐ Forfeiture-Petition (840)
 ☐ Forfeiture-Consent Order (850)
 ☐ Other (899)</p> | <p>Appeals</p> <p>☐ Arbitration (900)
 ☐ Magistrate-Civil (910)
 ☐ Magistrate-Criminal (920)
 ☐ Municipal (930)
 ☐ Probate Court (940)
 ☐ SCDOT (950)
 ☐ Worker's Comp (960)
 ☐ Zoning Board (970)
 ☐ Public Service Commission (990)
 ☐ Employment Security Comm (991)
 ☐ Other (999)</p> |
| <p>Special/Complex /Other</p> <p>☐ Environmental (600)
 ☐ Automobile Arb. (610)
 ☐ Medical (620)
 ☐ Other (699)</p> <p>☐ Pharmaceuticals (630)
 ☐ Unfair Trade Practices (640)
 ☐ Out-of State Depositions (650)
 ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
 ☐ Sexual Predator (510)</p> | | | |

Submitting Party Signature: Bennie D. MitchellDate: 3-12-14

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

) IN THE COURT OF COMMON PLEAS
) EIGHTH JUDICIAL CIRCUIT
)
)
)
)

Bennie D. Mitchell, #278318,

) 2014-CP-24-0141
)
)

Applicant,

v.

) **RETURN**
)
)

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed March 14, 2014, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Newberry County Clerk of Court. The Applicant was indicted at the January 2009 term of the Newberry County Grand Jury for Burglary, 1st degree (2009-GS-36-0037) and Possession of Burglary tools (2009-GS-36-0039)¹. Mathias Chaplin, Esquire, represented the Applicant. On April 19, 2010, the Applicant proceeded to trial before a jury and was found guilty of Burglary, 1st degree and Possession of Burglary tools. The Honorable D. Garrison Hill sentenced him to confinement for twenty (20) years for Burglary, 1st degree and five (5) years, concurrent, for Possession of Burglary tools.

A timely notice of appeal was filed on the Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction by written Order. State

¹ Applicant was also indicted and tried for Petit Larceny (2010-GS-36-0087). He was found not guilty of this charge.

v. Mitchell, Op. No. 5009 (S.C. Ct. App. Filed July 25, 2012). The Applicant then appealed to the South Carolina Supreme Court seeking a writ of certiorari. The South Carolina Supreme Court denied certiorari on March 6, 2104. The Remittitur was issued on March 10, 2014.

Attached herewith and incorporated herein are the records of the Newberry County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, the application, the trial transcript, the appellate orders and Remittitur. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
2. "Ineffective Assistance of Appellate Counsel"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCF.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent

requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. The Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir.

1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

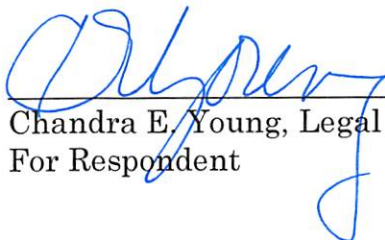
July 30, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	
	)	
	)	2014-CP-36-0141
	)	
BENNIE D. MITCHELL, #278318	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Carson M. Henderson
 109-B Oak Avenue
 Greenwood, SC 29646

DATED this 30TH day of July, 2014.


 Chandra E. Young, Legal Assistant
 For Respondent

McMAHAN & TAYLOR

ATTORNEYS LLC

October 4, 2021

Elizabeth P. Folk
Newberry County Clerk of Court
PO Drawer 10
Newberry, SC 29108

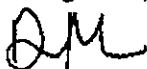
Re: Bennie D. Mitchell, # 278318 v. State of South Carolina
2014-CP-36-00141

Dear Ms. Folk:

Please find enclosed an Order for the above referenced matter. Kindly file this document and return a clocked copy to me in the enclosed envelope. Please note that because this is a PCR matter, it cannot be filed electronically.

Should you have any questions, I can be reached at the number listed below or at ashley@mcmahantaylor.com

Best regards,



Danielle Miller
Law clerk for
ASHLEY A. McMAHAN
ATTORNEY AT LAW

AAM/dsm
Enclosure

cc: Bennie D. Mitchell, # 278318
AAG Michael Neubauer
AAG Lindsey McCallister

FILED
NEWBERRY COUNTY
2021 OCT -6 PM 11:29
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOR THE 11 th JUDICIAL CIRCUIT
COUNTY OF NEWBERRY	)	Case No.: 2014-CP-36-00141
Bennie D. Mitchell, #278318,	)	
	)	
Applicant,	)	AMENDED POST-CONVICTION
	)	RELIEF APPLICATION
v.	)	
	)	
State of South Carolina.	)	
_____	)	

The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on or about March 12, 2014, to add the following:

Furthermore, the Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,

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ATTORNEY FOR APPLICANT

October 6, 2021

FILED
NEWBERRY COUNTY
2021 OCT -6 PM 11:29
CLERK OF COURT

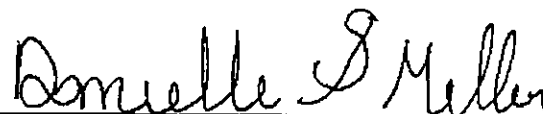
CERTIFICATE OF SERVICE

I certify that I have served this document via email to:

Michael J. Neubauer
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This 6th Day of October, 2021.



DANIELLE S. MILLER
Law Clerk

FILED
NEWPORT COUNTY
2021 OCT -6 PM 11:29
CLERK OF COURT

State of South Carolina)	In the Court of Common Pleas
)	Eighth Judicial Circuit
County of Newberry)	2014-CP-36-00141

Bennie D. Mitchell,	)	
	)	
Applicant,	)	
	)	
vs.	)	Transcript of Record
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
_____	)	

October 26, 2021
 HEARING CONDUCTED REMOTELY
 VIA WEBEX VIDEOCONFERENCE

B E F O R E:

The Honorable R. Kirk Griffin, Judge

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

Ashley A. McMahan, Esquire
 Attorney for Applicant

Michael J. Neubauer, Assistant Attorney General
 Attorney for Respondent

Maryann S. Nevers, CVR-M-CM, RVR, RVR-M
 Circuit Court Reporter
 Certified Verbatim Reporter - Master
 Certificate of Merit
 Realtime Verbatim Reporter - Master

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>
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No exhibits were offered during proceeding.

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 9:33 a.m.)

THE COURT: All right. Mr. Neubauer, before I have you give me the procedural history, I do have a couple questions I need to go over with Mr. Mitchell.

Mr. Mitchell?

THE APPLICANT: Yes, sir.

THE COURT: I'm Judge Griffin. I'll be presiding over your hearing this morning. The first thing I need you to do for me is raise your right hand.

THE APPLICANT: (Complied.)

BENNIE MITCHELL, having been first duly sworn, testified and stated as follows:

THE COURT: Mr. Mitchell, as you can see, we are proposing to conduct your postconviction-relief hearing via videoconference. Do you specifically consent to having your hearing heard via videoconference instead of appearing before the Court in person?

THE APPLICANT: Will it be a difficult if -- for me to put my exhibits through -- in through this way? Because I have several exhibits to go in.

THE COURT: Well, hold -- hold on one second, Mr. -- Mr. Mitchell. Let me -- let me talk with your lawyer about that issue before you say anything further.

Ms. McMahan?

1 THE APPLICANT: Yes, sir.

2 MS. MCMAHAN: I just wanted to clarify with Mr.

3 Mitchell: The exhibits that you want to enter, those are
4 the ones that you've already attached to the application,
5 right?

6 THE APPLICANT: No. I have -- basically, it's the
7 trial transcript itself. I just sectioned it off for
8 exhibits for the Court. That's all I did.

9 THE COURT: Mr. Mitchell ---

10 MS. MCMAHAN: Oh, you can just point out the page and
11 line numbers for that. Because we already have the
12 transcript in the record.

13 THE APPLICANT: Okay.

14 THE COURT: Yes, sir.

15 THE APPLICANT: All right.

16 THE COURT: Mr. Mitchell, I have -- I have a copy of
17 your trial transcript, which I have already read prior to
18 this hearing. So ---

19 THE APPLICANT: Okay.

20 THE COURT: --- any references to the trial
21 transcript, I will be able to -- to review after I take
22 this matter under advisement to -- to make a decision. So
23 as ---

24 THE APPLICANT: Yes, sir.

25 THE COURT: --- as long as the exhibits are -- are

1 trial-transcript references, we should ---

2 THE APPLICANT: Yes, sir.

3 THE COURT: --- be fine. So ---

4 THE APPLICANT: Yes, sir.

5 THE COURT: --- I -- knowing that, do you consent to
6 have this hearing held via videoconference?

7 THE APPLICANT: Yes, sir, I do.

8 THE COURT: All right. And do you likewise
9 specifically consent to having any other interested party,
10 whether it is your lawyer, the attorney general, or any
11 witnesses in this case likewise appear via videoconference?

12 THE APPLICANT: We -- we straight. We all right.

13 THE COURT: Okay. And nobody has forced you to do
14 this or threatened you in any way?

15 THE APPLICANT: No, sir.

16 THE COURT: All right. I find that the applicant, Mr.
17 Bennie D. Mitchell, has made a knowing, intelligent, and
18 voluntary waiver of his right to in-person court
19 appearances; specifically consented to having this hearing
20 held via videoconference. So we can go forward.

21 Mr. Neubauer, now if you would give me the procedural
22 history.

23 MR. NEUBAUER: Yes, Your Honor. This case is *Bennie*
24 *Mitchell v. State of South Carolina*, Docket No. 2014-CP-24-
25 0141 [sic]. Mr. Mitchell was indicted in January of 2009

1 by the Newberry -- Newberry County Grand Jury for burglary
2 first-degree. It's Indictment No. 2009-GS-36-0037; and
3 possession of burglary tools, 2009-GS-36-0039.

4 Mathias Chaplin represented the applicant. And
5 Solicitor Austin McDaniels [sic] of the Eighth Circuit
6 Solicitor's Office prosecuted this case.

7 On April 19th, 2010, applicant proceeded to trial
8 before a jury and was found guilty of burglary first-degree
9 and possession of burglary tools. The Honorable D.
10 Garrison Hill sentenced applicant to confinement for 20
11 years for burglary first-degree and 5 years concurrent for
12 possession of burglary tools.

13 A timely notice of appeal was filed on applicant's
14 behalf, and an appeal was perfected. South Carolina Court
15 of Appeals affirmed applicant's conviction by written order
16 in *State v. Mitchell*, Opinion No. 5009, filed in July 25th,
17 2012.

18 Applicant then appealed to the South Carolina Supreme
19 Court, seeking a writ of *certiorari*. South Carolina
20 Supreme Court denied *certiorari* on March 6th, 2014. The
21 remittitur was issued March 10th, 2014.

22 Applicant proceeded to file his applicant for
23 postconviction relief on March 14th, 2014, alleging
24 ineffective assistance of trial counsel, claiming counsel
25 failed to object to the victim's girlfriend sitting at the

DIRECT EXAMINATION BY MS. MCMAHAN - BENNIE MITCHELL 8

1 state's table during jury selection and, presumably, during
2 trial; and, during cross-examination, counsel greeted Lt.
3 McClurkin by stating he was a good officer, and alleges
4 counsel bolstered the credibility of this witness; and
5 ineffective assistance of appellate counsel, claiming that
6 -- or claiming appellate counsel failed to clarify the
7 facts in appellant's brief, arguing a -- or where the state
8 argued a jury could infer the applicant intended to commit
9 a crime while in the victim's home due to a multitude of --
10 and due to a multitude of scenarios, wasn't able to or
11 decided not to carry out the intended crime.

12 THE COURT: All right. Thank you, Mr. Neubauer.

13 Ms. McMahan, you may call your first witness.

14 MS. MCMAHAN: Thank you, Your Honor. One of -- I just
15 wanted to apologize for anybody who saw me just kill the
16 spider and give a really weird facial expression. So I
17 apologize for that.

18 And then, I believe Mr. Mitchell has narrowed down his
19 issues a little bit further.

20 DIRECT EXAMINATION

21 BY MS. MCMAHAN:

22 Q So, Mr. Mitchell, what are the three -- what are the
23 issues that you want to go forward on today?

24 A 11(a), which is Mr. Chaplin failed to object to the
25 girlfriend sitting at the table during trial; and

1 bolstering the credibility of Lt. McClurkin. Appellate
2 counsel, I was just going to dismiss that one. I don't want
3 to go forward with that issue.

4 Q On which issue?

5 A On the appellate counsel.

6 Q So you don't -- you don't need Ms. DuRant here
7 anymore?

8 A No. No. She did a wonderful job on my case, far as
9 she can do.

10 THE COURT: All right.

11 MS. MCMAHAN: Your Honor, at this time I would ---

12 THE COURT: Yes, ma'am. Go ahead.

13 MS. MCMAHAN: --- consent to having Ms. DuRant
14 excused. I -- at this time I would consent to having Ms.
15 DuRant excused.

16 THE COURT: All right. So, Mr. Mitchell, let's just
17 make sure that the record is -- is clear. The ground which
18 you raise for ineffective assistance of appellate counsel,
19 you are -- based upon what I've heard here today, you're
20 voluntarily withdrawing that ground for postconviction
21 relief?

22 THE APPLICANT: Absolutely, sir. Yes, sir.

23 THE COURT: All right. And because you've -- you've
24 abandoned that ground, I am going to excuse Ms. DuRant from
25 participation in this matter, unless I hear any objection

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1 from anybody else.

2 MR. NEUBAUER: No objection from the state, Your
3 Honor.

4 THE COURT: All right. Ms. DuRant, thank you for
5 being with us here this morning. Based upon the
6 applicant's withdrawal of that ground for postconviction
7 relief, you are free to go. Thank you for being here.

8 MS. DURANT: Thank you, Your Honor.

9 THE COURT: Yes, ma'am.

10 Q And so, Mr. Mitchell, you said 11(a), Mr. Chaplin
11 didn't object to the girlfriend sitting at the table at the
12 trial.

13 A During trial.

14 Q And what was the next one?

15 A Bolstering the credibility when he -- Lt. Clurkin --
16 when he greeted Lt. McClurkin, he stated that he was a good
17 officer. And that kind of throwed me for a loop. I didn't
18 understand why he was calling the -- the -- the guy that
19 we're supposed to be going against, called him a good
20 officer. That just bolstered the credibility, to me.

21 Q Okay. Well, let's briefly go over them. And then,
22 we'll go back and I'll talk about each one of them with
23 you.

24 A Okay.

25 Q So ---

1 THE COURT: (Audio loss) ---

2 Q --- what was the other one?

3 THE COURT: And -- oh, I'm sorry, Ms. McMahan, for --
4 for cutting across you there.

5 Q What was the other one, Mr. Mitchell, besides ---

6 A Okay.

7 Q --- those two?

8 A The other one is the plea agreement. There are three
9 issues I got there: the -- the bolstering the credibility;
10 I got he failed to object to the girlfriend sitting at the
11 table; and that plea agreement.

12 Q Okay. All right. So let's go back and start from the
13 -- of the first one that you mentioned. And that was ---

14 A Okay.

15 Q --- I believe you referenced 11(a), correct?

16 A Yes, ma'am.

17 Q Okay. So tell me about Mr. Chaplin and not objecting
18 to the girlfriend sitting at the table.

19 A Well, during trial the judge asked all to introduce
20 who was at the table. Mr. Chaplin, he introduced me. The
21 state introduced who was at the table. Mr. McDonald [sic]
22 stated that the girlfriend was there for moral support.
23 She didn't have anything to do with the case, but she was
24 allowed to sit at the table.

25 And she's over there, wiping her face, holding on the

DIRECT EXAMINATION BY MS. MCMAHAN - BENNIE MITCHELL 12

1 victim like a child. And I looked at the jury looking at
2 her, looking over at me.

3 I told Mr. Chaplin -- I said: "She need to be moved
4 from the table."

5 He -- Mr. Chaplin said ---

6 Q So let's back ---

7 A --- (audio loss) ---

8 Q --- up for a second. So let's back up for a second,
9 Mr. Mitchell.

10 A Okay.

11 Q So when the judge asked everybody to stand up and
12 introduce themselves, this was in front of the jury?

13 A Yes, ma'am.

14 Q Okay. And it was at the very beginning, just before
15 opening statements? Was it during jury selection? When
16 was it?

17 A It was opening statements.

18 Q Okay. And the ---

19 A But I think I got the ---

20 Q --- the victim ---

21 A --- trial transcript ---

22 Q --- in this case

23 A --- (audio loss) -- I -- I got the trial transcript
24 page.

25 Q But the ---

1 A It's 54.

2 Q It's page 54?

3 A Yes, ma'am. And the -- I challenged the trial
4 transcript after I got it, because I didn't see that in
5 there. She made a amendment to it, the court reporter, Ms.
6 Holstein [sic]. And it's Exhibit (a)(2), which the
7 amendment trial transcript, same page, 54, line 1 through
8 line 5.

9 And the amended trial transcript is through line 7 --
10 54 -- page -- line 1 through line 7. And you can see he --
11 she went ---

12 Q Okay.

13 A --- back and added the name of Nancy Pofoyo
14 (phonetic), but not all of what Mr. McDonald had said in
15 reference to why she was at the table.

16 Q Okay. And so how long was the girlfriend allowed to
17 sit with him at the -- were they sitting actually at the
18 table with the attorneys, or were they sitting right behind
19 them? Were ---

20 A Oh, he -- she was at the table.

21 Q Describe where they were sitting.

22 A She was at the -- (audio loss) ---

23 Q With the attorney?

24 A Yeah. She was sitting right beside the victim.

25 Q With Mr. McDaniel?

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1 A Yeah. Sitting at the table. Yes.

2 Q Okay. And it was like that the whole trial?

3 A Yes, ma'am.

4 Q Okay. And how many days was your trial?

5 A I believe it was two days -- 2 1/2 days, something
6 like that.

7 Q And so you were alluding earlier that the girlfriend
8 was sort of grabbing on the victim? Was this during the
9 whole trial? during parts of it?

10 A Just parts of the trial. She was holding -- like, you
11 know, you in a movie, holding -- holding your arm -- (audio
12 loss) -- the arms are locked each other like -- like they
13 was on a date.

14 Q Okay. So she was holding onto his arm?

15 A Yes, ma'am.

16 Q Okay. Was it most of the trial? all of the trial?

17 A Most ---

18 Q Do you remember?

19 A --- of the trial. Just -- most of the trial. I think
20 it was that -- most of that first day. And ---

21 Q Okay.

22 A --- I asked Mr. Chaplin -- I said: "Well, can't you
23 have her removed from the table?"

24 And -- and he stated that: "Didn't you just hear what
25 the -- Solicitor McDaniel said? She's not a witness from

1 the state, so I can't have her sequestered; I can't have
2 her moved from the" -- I left -- I let it alone.

3 Q Okay. So you had requested that Mr. Chaplin make a
4 motion regarding that; he did not.

5 A Yes, I did.

6 Q Is that correct?

7 Okay. All right. So your second issue about the
8 credibility of McClurkin: I know you -- you sort of got
9 into that a little bit. But tell me about that. Tell the
10 judge and everything about what happened with that issue.

11 A Well, during trial, if you noticed through the trial
12 transcript, you'll see my attorney greet all witnesses he
13 was going to cross: "Good morning" or "good evening."

14 Get to Lt. McClurkin. He said: "Good evening, Lt.
15 McClurkin. You're a good officer, aren't you?"

16 Get the trial transcript; I'm looking for that,
17 because I'm taking notes during trial myself. It's removed
18 from the trial transcript. I challenged it.

19 Court reporter says she didn't see where that was
20 being alleged in the -- in the -- in the trial transcript.
21 And I brought that up to appellate counsel, and she
22 contacted her and I got a letter in reference to that in
23 the evidence. I think it's in the motion for a
24 reconstruction of the trial transcript.

25 And anyway, he said: "You're a good officer, aren't

1 you?"

2 And it -- it kind of like shocked me. I said: "Man,
3 why are you saying that? You're going against the
4 officer." Well, he saying he a good officer.

5 And I asked Mr. Chaplin why he said that. He said:
6 "Man, I -- I'm saying it because I'm being sarcastic,
7 because they did a poor job on your -- on your case."

8 And I said -- and he said -- also, if you look at Cpl.
9 Allison Moore, he also stated that to Cpl Allison Moore in
10 the trial transcript in reference to -- she -- she did a
11 good job, and he was questioning her on her ethics in
12 reference to education and forensic findings or -- or
13 whatever she did during the -- the -- the investigation.

14 Q Okay. Did you want to -- did you have specific pages
15 or anything you wanted to reference with that so you could
16 pinpoint to ---

17 A Well ---

18 Q --- Judge Griffin ---

19 A --- that's -- that's on 166 in reference to where he's
20 greeting Lt. McClurkin. But it doesn't show ---

21 Q Uh-huh.

22 A --- him greeting or nor does it show he said he was a
23 good officer. And I had concerns with that, because it
24 should've showed that. It shows all other witnesses that
25 he -- "good morning," "good evening" -- he had greeted and

1 goes into the question. But Lt. McClurklin [sic], it just
2 goes into straight questioning; no greeting ---

3 Q And so ---

4 A --- no ---

5 Q And so why -- what was the issue with this? Did --
6 how did you feel that Mr. Chaplin was ineffective in
7 relation to that?

8 A Well, this was the only individual that allegedly
9 identified me or was a -- a -- able to identify me. And
10 he's -- by saying that, you know, that -- to me, that
11 bolstered his testimony in reference to the ID.

12 Q And by -- you mean McClurkin, correct?

13 A Yes, ma'am.

14 Q Okay. And so earlier you stated something about you
15 felt like when he was saying that, it was making Mr.
16 McClurklin look like a stronger witness in front of the
17 jury; is that correct?

18 A Absolutely. If I -- if I say you're a good person and
19 it -- it's somebody standing around watching, they going
20 think you a good person, especially a police officer.

21 Q Okay. And then, the third issue was about the plea
22 agreement. Tell me about the plea agreement.

23 A Well, from my Sixth and Fourteenth Amendment and upon
24 the United States and South Carolina Constitution, Mr.
25 Chaplin pressured me about calling me to reject Solicitor

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1 McDaniel plea offer to 15 years when I was guilty and would
2 have accepted the plea. I was guilty of the crime. From
3 day one I told him, yeah, that -- I'm -- that's me in the
4 picture. But counsel stated that he had a Supreme Court
5 case, the *Herring* case, that said the police cannot even
6 give an opinion who they think is in the image.

7 Also, he was going to raise mistaken identity that
8 third-party guilt, which was going -- was -- (audio loss)
9 -- and also ---

10 Q Okay. Wait. Let's back up -- (audio loss) -- let's
11 back up for a second, Mr. Mitchell. We couldn't hear you
12 earlier.

13 A Okay. I'm sorry. I'm -- (audio loss) ---

14 Q So you said the plea ---

15 A --- (audio loss) ---

16 Q --- was -- you said the plea offer, sir, was -- the
17 plea offer was for 15 years, right?

18 A Yes, ma'am.

19 Q And what did your attorney tell you about that?

20 A He -- he told me he had a Supreme Court case, the
21 *Herring* case, stating that the police cannot give opinion
22 on who they think is in the image. He was also going to
23 raise mistaken ---

24 Q Okay.

25 A --- identity, third-party guilt. He was going to get

1 experts to do an overlay and with the booking photo and the
2 -- (audio loss) -- and since the image was so blurred, once
3 the expert can't say who was in the image, nor would a jury
4 be able to say who was in the image.

5 But unbeknownst to me at the time, the solicitor plea
6 offer for 15 years was more favorable than Mr. Chaplin's
7 prejudice defense and strategy, which all was misplaced.
8 The *Neil v. Biggers* hearing, you can look at the pretrial
9 page 5 through 48; Rule 403, 701, 704; the *Herring* case;
10 page -- on the mistaken identity, page 72 through 73, 75;
11 third-party guilt ---

12 Q Okay -- (audio loss) ---

13 A --- page 77 ---

14 Q And so ---

15 A Ma'am?

16 Q Okay. So you said that -- let's talk about the plea
17 offer, though.

18 A Okay.

19 Q You said that Mr. Chaplin told you that Mr. McDaniel
20 had given you an offer of 15 years?

21 A Yes.

22 Q Okay. What was the conversation you had with Mr.
23 Chaplin about the 15-year offer?

24 A He said he had a Supreme Court case -- told me don't
25 take the plea because he got a Supreme Court case that

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1 states that they cannot give an opinion -- he's going do
2 the overlay with the -- get the experts to do the overlay.
3 He got a -- a -- a -- was he going to raise mistaken
4 identity and a third-party guilt.

5 I'm guilty of the crime.

6 Q So your ---

7 A My -- (audio loss) ---

8 Q --- issue is ---

9 A --- he -- he seemed -- I told him, that's me in the
10 picture, from day one. I didn't try to hide, sugar-coat
11 it. He knew; I told him, that's me.

12 He said: "I thought you was going to deny."

13 I said: "No. For what? That's me."

14 It would be ludicrous for me to -- to say that's not
15 me and I know that's me. That's me. You can look at the
16 picture.

17 Q So the issue is had you known that Mr. Chaplin hadn't
18 done all these things or wasn't going to do them
19 adequately, that you would've taken the plea offer?

20 A Absolutely. Absolutely. I wouldn't have went ---

21 Q Okay.

22 A --- to trial, facing a life sentence -- facing a life
23 sentence, thinking I had a valid defensive strategy. I
24 could've easily -- the judge could've easily -- "Mr.
25 Mitchell, you got a life sentence." And I'd been sitting

1 here with a life sentence, not 20 years.

2 And when I did get found guilty, he said: "Well, you
3 didn't get but 5 -- 5 more years extra than -- than -- than
4 -- than -- than -- than -- than the offers. It's no game.
5 This is no game.

6 Q Okay. So had you known he wasn't going to adequately
7 -- so wait. Let's back up for a second. You said he was
8 going to do an overlay. Explain to the Court how he did
9 the overlay.

10 A The -- he explained to me, the overlay he was going to
11 get a ghostly picture of my booking photo, put it over the
12 image, or vice-versa, to look at the nose, eyes, ears,
13 etc., to measure.

14 Okay. I said okay; that sound -- he said: "Because
15 the picture's so blurry, they can't tell who's in that
16 picture. If they can't -- if -- if -- if -- if -- if -- if
17 -- if -- if -- if my expert say they can't tell, so the
18 jury's not going be able to tell."

19 So I said: "Okay. All right. Okay. We'll go with
20 the *Neil v. Biggers*, the *Herring* case, the rule -- (audio
21 loss) -- he would explain to me mistaken identity, third-
22 party guilt." I said: "Okay. He's mounting a defense."

23 And I didn't understand what he meant by a factual --
24 you factually innocent. You're factually -- and factually
25 innocent to me was that the state didn't have enough

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1 evidence -- not that I was innocent of the crime; they just
2 didn't have enough evidence.

3 So I'm going along with counsel. And from day one ---

4 Q Okay.

5 A --- like I say, but if I'd know this -- he -- his --
6 his arguments is going be unsupported by facts, rules, and
7 law, even the judge gave him two cases for guidance. And
8 it's on page 47 through 48, two federal cases. And looking
9 at these cases after I come to prison, ain't no way --
10 ain't no way I would've won in no trial, by looking at
11 these federal cases.

12 Then -- and it goes on further. And then, actually
13 after pretrial, after the judge made his ruling on
14 pretrial, actually, I said: "Man, shouldn't I take the
15 plea?"

16 He said: "No. It's too late, Mitchell. We in the
17 start of the second trial. Besides, if I don't win, I'm
18 going preserve the issue for appellate review -- (audio
19 loss) -- issue."

20 But you can see what the Courts of Appeal [sic] rule
21 went on. Everything counsel done, it undermined his
22 experts and the plea offer I had, which Solicitor McDaniel
23 pointed out in his closing remarks on page 215 to 220 --
24 217, line 8. And you can look at the testimony in
25 reference to Dr. Allen and Mr. Neeson -- (audio loss) --

1 and counsel ain't never agree as to how -- (audio loss) --
2 Lt. McClurkin could say that the person in the image was
3 me; that he's known me for -- for -- from -- from living in
4 the Newberry community for 20 years -- and that's on page
5 19 to 20 -- 29 -- which wasn't the truth.

6 You can look on page 19. Mr. Chaplin brought it up.
7 He said: "Your Honor, you know, this is not the truth;
8 that they don't stay in the same community." But in the
9 end of the day we still allowed to -- you know, he
10 testified to the fact that we knowing each other for 20
11 years.

12 Counsel went on ---

13 Q Okay. So ---

14 A --- (audio loss) ---

15 Q --- all of the -- (audio loss) -- so all of that taken
16 together is the reason why, had you known he was going to
17 do all this and you feel he didn't really have his
18 strategy, had you known that going forward for your trial,
19 you would have taken the 15-year offer?

20 A Absolutely. I would take that one in a heartbeat.

21 Q Okay.

22 A That ---

23 Q Okay.

24 A --- would've been -- (audio loss) ---

25 Q Is there anything else ---

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1 A Counsel went on and -- (audio loss) ---

2 Q Is there anything else you want to Judge -- (audio
3 loss) ---

4 A Yes, ma'am. Counsel went on and credit me when he
5 went against the trial judge ruling hisself when Potts was
6 limited to say only that he had prior burglary --
7 burglaries in -- what's the reason he bought ---

8 THE COURT: Mr. ---

9 Q Mr. Mitchell ---

10 THE COURT: Mr. Mitchell ---

11 Q Mr. Mitchell ---

12 A Okay. Okay.

13 (Indistinguishable cross-talk)

14 THE COURT: Hold on one second. Let -- let me talk,
15 okay? I'll be happy to hear anything ---

16 THE APPLICANT: Okay.

17 THE COURT: --- you want to say. But we can't talk
18 over each other. We're having a little bit of trouble.
19 The Court is having a little bit of trouble hearing you. I
20 think you're kind of talking down into your chest a little
21 bit. If you could -- you could ---

22 (Indistinguishable cross-talk)

23 THE COURT: --- speak a little -- a little louder and
24 a little bit slower ---

25 THE APPLICANT: Okay.

1 THE COURT: --- I -- I think we'll have a -- a -- a
2 better record ---

3 THE APPLICANT: Okay.

4 THE COURT: --- in this case. All right?

5 THE APPLICANT: Yes, sir.

6 THE COURT: All right.

7 THE APPLICANT: I'm trying -- I'm -- I'm trying not to
8 strain too much. I just had a heart attack. I'm -- I'm on
9 the ---

10 THE COURT: All right.

11 THE APPLICANT: --- recovery from a heart attack and I
12 got this monitor on.

13 THE COURT: Okay. Well, just -- just go slowly and --
14 and speak as loudly as you can.

15 THE APPLICANT: Okay. You want me to start back over?

16 THE COURT: Yes, sir. If you ---

17 THE APPLICANT: Okay.

18 THE COURT: --- would, please.

19 (Indistinguishable cross-talk)

20 THE COURT: Hold on ---

21 (Indistinguishable cross-talk)

22

23 Q Let's start ---

24 THE COURT: --- Mr. Mitchell.

25 Q --- over from -- let's start over from where Ms.

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1 Nevers, the court reporter, indicated that she couldn't
2 hear you anymore, which was sort of towards the end of what
3 you were talking about.

4 So you had gone through the cases and then you
5 referenced page 217, line 8. So don't talk very fast and
6 -- and talk a little bit louder and explain what -- that
7 issue forward for us about Mr. Chaplin.

8 A Well, that's -- that's -- Solicitor McDaniel's closing
9 remarks, page 215 to 217, where he stated -- pointed out
10 that -- (audio loss) -- paraphrasing -- Mr. Chaplin only
11 had a smokescreen; he had experts in the court to say that
12 the image wasn't me but didn't even test the issue. And
13 therefore, the ---

14 Q Okay.

15 A And -- and ---

16 Q Okay. So what -- so ---

17 (Indistinguishable cross-talk)

18 Q --- your issue, then, is Mr. McDaniel's closing sort
19 of bolsters your issue, your PCR issue, in that Mr.
20 McDaniel referred to Mr. Chaplin's entire trial argument as
21 a smokescreen; is ---

22 A Absolutely.

23 Q --- that correct?

24 A Absolutely. I mean, you can look at the Courts of ---

25 Q Okay.

1 A --- Appeal ruling. Everything Mr. Chaplin put up, it
2 undermined our own expert. And it undermined the plea
3 offer I had. Not only my trial; it undermined everything.
4 I was just like a -- a duck out there in the water.
5 Looking back on 20/20 hindsight -- then, at the end of the
6 day, counsel agreed as to how to -- how Lt. McClurkin could
7 say the person in the image was me; that he knew me living
8 -- (audio loss) ---

9 Q Okay. Wait. Hold up. Hold up. You just went out
10 there.

11 A Okay.

12 Q You said Mr. Chaplin agreed ---

13 A Uh-huh.

14 Q --- about what with Mr. -- with Lt. McClurkin?

15 A As Lt. McClurkin could say that the person in the
16 image was me.

17 Q Okay. Okay. Is there -- what else did you want the
18 judge to know today about your PCR?

19 A Well, that's -- that's basically -- that's basically
20 the issue. I mean ---

21 Q Okay. Well ---

22 A --- that's ---

23 Q --- okay. So answer any questions Mr. Neubauer has.
24 All right?

25 THE COURT: Mr. Neubauer, cross-examination.

CROSS-EXAMINATION BY MR. NEUBAUER - BENNIE MITCHELL 28

1 MR. NEUBAUER: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. NEUBAUER:

4 Q Good afternoon, Mr. Mitchell. How you doing today?

5 A Fine.

6 Q Or good ---

7 A And yourself?

8 Q --- morning. I'm doing all right.

9 So you claim that there was a 15-year plea offer that
10 was presented to you by Mr. Chaplin, correct?

11 A Yes, sir.

12 Q And he -- you're saying he advised you not to take it?

13 A Yes, sir.

14 Q Did he tell you that you could not plead guilty and
15 you had to go to trial?

16 A He said the state did not have a case because the
17 image was too blurry for identification and he was going to
18 get experts to do a overlay to show that the image was too
19 blurry for identification. Also, he was going to raise up
20 a third-party guilt and mistaken identity. So I'm saying,
21 if the state can't have -- don't have evidence, it's no
22 case. I didn't ---

23 Q I -- (audio loss) ---

24 A --- I didn't know he was going go to court and put a
25 piece head over the image and agree to Lt. McClurkin could

1 say that the -- the image was -- the -- the person in the
2 image was me. I didn't know that. I didn't understand
3 that. If I had knew that I didn't have a -- a -- a valid
4 strategy going to trial, I would not have went to trial.
5 No, sir.

6 Q But ultimately, it was your decision to go to trial
7 instead of pleading guilty; he didn't force you to go to
8 trial, did he?

9 A Yes, he did. Pretty much so. Because he had got in
10 my head, stating that he was going do this overlay. He was
11 going do misidentification defense and, which, if you look
12 at the image, you can't tell who it is. They can't tell
13 who is -- even Ms. McHan (phonetic) is saying she don't
14 know who is in the image. And I'm going on that.

15 Q All right. And pretrial Mr. Chaplin did challenge Lt.
16 McClurkin being able to testify that you were the person in
17 that photo, correct? There was ---

18 A Yes. But ---

19 Q --- a whole pretrial motion for it?

20 A Yes. But all his arguments was misplaced, and it was
21 confirmed by the Courts of Appeal. And I asked him during
22 pretrial after the -- the motions got denied. I asked him:
23 "Man, you think I should go ahead and plead?"

24 He said: "No. It's too late, because we in our
25 second trial."

1 See, we had a first trial; picked the jury. But they
2 dismiss it because of conflict of interest. And we got in
3 the second trial. He said it was too late.

4 Q All right.

5 A Because we already ---

6 Q And then ---

7 A --- in the trial.

8 Q All right. And then, as far as the victim's
9 girlfriend sitting at the state's table, I see where, on
10 page 54, she's introduced prior to jury selection. There
11 is no other reference to her in the trial transcript.

12 Would you agree to that?

13 A Yeah, I'll agree to that. But she was allowed -- I'm
14 looking -- I'm -- I'm -- I'm -- the -- the transcript --
15 the trial transcript shows one thing. But in court shows
16 another thing where she's sitting at the table. And just
17 like I say, I missed the point where they first initially
18 gave me the trial transcript if -- she didn't -- it didn't
19 appear.

20 So I challenge it. And she did go back and put her
21 name in there. But she didn't put everything Solicitor
22 McDaniel said; said she was just there for moral support;
23 she didn't have anything to do with the case.

24 Q And you -- you'd raised issues with the trial
25 transcript initially. Before this PCR started, you had a

1 -- the court reporter go back and re -- or check the audio
2 recording again and update the transcript; is that correct?

3 A Yes.

4 Q And then, you reached out again, telling here that
5 there was other things that you wanted to add, and the
6 court reporter said she replayed the tape and what you were
7 asking her to include was not in the audio recording; is
8 that correct?

9 A Yes. That's why my appellate counsel asked her to
10 preserve the tape for my PCR. And it's supposed to be
11 preserved. I -- I have a letter here from appellate
12 counsel in reference to -- to the court reporter, and she's
13 supposed to preserve the tape.

14 Because I can't understand, if you can hear something,
15 then you don't hear the rest of it, it's -- it's baffling
16 to me. You can just hear one piece of a -- an argument and
17 then you don't hear the rest. Just like if I wouldn't have
18 caught it, Ms. -- the girlfriend, Nancy, her name would not
19 be in the -- in the record, period.

20 Q So just to confirm, the court reporter went through
21 the audio recording of the trial two times and did not hear
22 and could not write down the -- Mr. Chaplin referring to
23 Officer McClurkin as a good officer. Would that be a
24 correct statement?

25 A Absolutely, sir. You're right.

CROSS-EXAMINATION BY MR. NEUBAUER - BENNIE MITCHELL 32

1 Q All right.

2 MR. NEUBAUER: I have no further questions at this
3 point.

4 THE COURT: Any redirect, Ms. McMahan?

5 MS. MCMAHAN: None, Your Honor. At this point the
6 applicant -- oh, wait a minute. I believe Mr. Mitchell ---

7 THE APPLICANT: That -- is that ---

8 MS. MCMAHAN: Yes.

9 THE APPLICANT: --- is that -- is that tape available?
10 Because I have a letter from the court -- appellate
11 counsels to the court reporter. She said she'll preserve
12 that tape for my PCR, if that tape is available?

13 MS. MCMAHAN: Mr. Mitchell, we did not request the
14 tape from the court reporter. And -- and technically, the
15 court reporter only has to keep it for five years.

16 THE APPLICANT: I understand ---

17 MS. MCMAHAN: Your hearing ---

18 THE APPLICANT: --- that.

19 MS. MCMAHAN: --- your trial ---

20 THE APPLICANT: But ---

21 MS. MCMAHAN: --- was ---

22 THE APPLICANT: I understand that. But she
23 specifically has -- I specifically have a letter right
24 here, stating that she's going preserve the tape. Is -- is
25 any way possible you can leave the record open till we can

1 get the tape?

2 MS. MCMAHAN: Your Honor, if you would allow, I'm --
3 I'm happy to contact court administration, just to see if
4 the tape is -- if it's available.

5 THE COURT: I'll be happy to allow you to -- to see if
6 you can access to the -- the actual recordings. So, Ms.
7 McMahan, after -- after this hearing concludes ---

8 And, Mr. Mitchell, I -- I'm -- I have reviewed your
9 file. I -- I believe that -- what you're saying. So I'm
10 going to let your lawyer explore that avenue with regard to
11 the actual audio tapes. I don't know whether they've been
12 preserved or not. But I'm going to -- I'm going to allow
13 her to -- to -- to see if she can locate it. And even if
14 we were to have to reconvene this matter based upon what
15 she finds out, I don't ---

16 THE APPLICANT: Okay.

17 THE COURT: --- have any issue with that. I -- I want
18 to make ---

19 THE APPLICANT: Well ---

20 THE COURT: --- sure that your -- that your rights are
21 preserved, because you do only get one bite at the PCR
22 apple.

23 THE APPLICANT: And I thank you, sir.

24 THE COURT: Yes, sir.

25 THE APPLICANT: But you can -- but you can look in my

1 motion to reconstruct the trial transcript. The letter is
2 in there, dated December 30 from my appellate counsel in
3 reference to talking to Ms. Holstein, the court reporter.
4 And she said she will preserve the tape. And now, I can
5 read it into the record, if you'd like, too. "As a follow-
6 up to our" ---

7 THE COURT: It -- it -- it -- sir, it was part of the
8 -- I believe it was part of the -- the packet that was
9 provided to me.

10 THE APPLICANT: Okay.

11 THE COURT: Like I said, I -- I believe -- I -- I
12 don't believe that you are trying to perpetrate any fraud
13 on the Court. So I'm going to allow your attorney to -- to
14 -- to explore that issue. So your ---

15 THE APPLICANT: Okay.

16 THE COURT: --- request, as far as seeking the
17 production of the actual tapes, is preserved.

18 THE APPLICANT: Thank you, sir.

19 THE COURT: All right. Ms. McMahan, anything else?

20 MS. MCMAHAN: Your Honor, the applicant would like to
21 call Mathias Chaplin.

22 THE COURT: All right. Mr. Chaplin ---

23 MS. MCMAHAN: Mr. Chaplin ---

24 THE COURT: Let me put him under oath, Ms. McMahan.

25 Can you raise your right hand for me, sir?

1 MR. CHAPLIN: Yes.

2 MATHIAS CHAPLIN, having been first duly sworn,
3 testified as follows:

4 THE COURT: All right. Thank you, sir. You can put
5 your hand down.

6 Ms. McMahan?

7 MR. CHAPLIN: Thank you.

8 DIRECT EXAMINATION

9 BY MS. MCMAHAN:

10 Q Mr. -- Mr. Chaplin, have you heard the issues that Mr.
11 Mitchell has raised as his PCR allegations?

12 A Yes, I have.

13 Q Okay. And so let's just go over the first one, that
14 -- about the girlfriend sitting -- no, wait -- yeah --
15 about the girlfriend sitting at the table with Mr.

16 McDaniel. Can you explain to us what that issue is?

17 A I can't. I'm not aware of a girlfriend sitting at the
18 table. I'm not aware of Mr. Mitchell bringing that to my
19 attention. So I'm -- I'm at a loss on that one.

20 I -- I don't think I ever looked over there for that
21 purpose. So, I mean, I can't say if she was there or not.
22 But I can tell you, I was never on notice of that. If Mr.
23 Mitchell saw it, you know, I -- I don't -- I -- and I don't
24 recall him ever saying to me anything about that at any
25 point during ---

1 Q Okay.

2 A --- during the case, during the trial, or at any time
3 did he say anything to me. Every objection that Mr.

4 Mitchell mentioned to me, I made. The biggest one was to
5 have the judge recuse himself. And, you know -- and I ---

6 Q Okay.

7 A --- made that -- I made that motion.

8 So if he had made some -- if he had said something to
9 me about that, I know I would have addressed the issue.

10 But -- because that's my -- that's how I practice. But I
11 don't recall that issue or him mentioning it.

12 Q Have you -- did you remember at all throughout the
13 trial if the girlfriend and the victim were sitting at the
14 table with Mr. McDaniel?

15 A That's what I just -- I'm sorry if I wasn't clear.
16 No, I don't remember that.

17 Q Okay. All right. And then, regarding the second
18 issue about your greeting Officer McClurklin -- McClurkin
19 and calling him a good officer, what -- tell me what was
20 going on with that.

21 A Again, I do not recall saying that. I don't think the
22 transcript alleges that I said it. And I know that I spent
23 most of the trial trying to show that this officer was not
24 a good witness. I made motions in pretrial, and I brought
25 in an expert to demonstrate the -- the inaccuracy of a --

1 of a deer camera, how easily it can be manipulated and
2 things on that order.

3 And we -- we addressed that issue to -- to -- to
4 attack his identification. And we spent a lot of money and
5 whole lot of time doing that. So I don't know why I would
6 stand up there and then say: "You're a great officer." So
7 -- anyway, if Mr. Mitchell ---

8 Q Okay.

9 A --- (audio loss) -- I can't say that he didn't. But I
10 know I don't recall saying it. And I don't think it's in
11 the transcript.

12 Q Do you also remember saying it to -- I believe it was
13 Officer Moore who testified?

14 A Well, I think you'd have to put it in context if I
15 did. And you'd have to look at the entire cross-examine.
16 But I think Mr. Mitchell's issue is that I said it to
17 someone to -- to the -- Officer McClurkin. And my position
18 is that I did not, and -- and I think that's the issue he
19 raised.

20 Q Okay. And then, the third issue, the -- can you
21 discuss the plea offer for 15 years and whether or not Mr.
22 Mitchell indicated that he would've accepted that?

23 A You know, I -- the reason I remember this case so well
24 is I spent copious hours -- on the weekends, after work,
25 whatever it required -- meeting with Mr. Mitchell at -- in

1 Newberry and spent a whole lot of time trying to get this
2 straight and trying to present a defense for him.

3 Mr. Mitchell at no time ever said that he wanted to
4 just plead guilty and take 15. Mr. Mitchell's statements
5 to me, you know, outside of privilege -- because I don't
6 think that exists at this point -- is that make them prove
7 it. Mr. Mitchell went up and down the hallway, asking
8 different cellmates and different guards with a picture
9 from the -- his evidence and said: "Do you think this
10 looks like me? Do you think this looks like me?"

11 And then, when I would get there, he would then give
12 me the results of his survey. And I begged him. I said:
13 "Mr. Mitchell, you gotta stop doing that."

14 We did look at his mug shot video and some other
15 things like that in -- in his -- at the jail. And we
16 looked at all of that. And we saw that, you know, there
17 were some -- some big differences between the two. And
18 that's when we agreed that we would bring in an expert to
19 try to -- to contradict anybody's statement that that was
20 him in the video.

21 Unfortunately, I -- I think the jury looked at the
22 picture -- because they -- they've spent long and hard
23 looking at the picture. And as they were viewing the
24 picture, they kept looking at him, looking at the picture,
25 looking at him. So I don't even think they really based it

1 on McClurkin as much as what they felt, what they saw in
2 that courtroom. And they came back with the verdict of
3 guilty.

4 Q No further questions. Answer any questions Mr.
5 Neubauer may have.

6 A Thanks.

7 THE COURT: Mr. Neubauer?

8 MR. NEUBAUER: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. NEUBAUER:

11 Q Good morning, Mr. Chaplin. Just briefly to introduce:
12 How long have you been practicing law?

13 A Oh, over 20 years.

14 Q And what percentage of that would you say was
15 criminal?

16 A Gosh. I'd say around 70 percent.

17 Q All right. And were you appointed or retained by Mr.

18 ---

19 A I ---

20 Q --- Mitchell?

21 A --- I was appointed.

22 Q All right.

23 A Appointed. Uh-huh.

24 Q Yes, sir. And you said you met with -- or you spent
25 copious amounts of time discussing this case with Mr.

1 Mitchell. Do you know about how many times you met with
2 him?

3 A Fifteen to twenty.

4 Q All right. And during your meetings, I assume that
5 you initiated plea negotiations with the state in this
6 case?

7 A An offer was made, and I presented it to my client.

8 Q You -- and you said Mr. Mitchell indicated that he did
9 not want to plead guilty?

10 A That's exactly right. At no point did he say: "I --
11 I don't want to take the plea." And I think he testified
12 today that at no point did he say: "I don't want to take
13 the plea."

14 What he said today was that he believed that -- what
15 he said today is that had he known that -- and I think the
16 -- the real sentence is I think he -- I think what he -- I
17 heard him say is that had he known that he would've been
18 found guilty, he would've taken the plea offer. But I
19 don't think that's the way it works.

20 And I -- I can understand the fact that he wishes that
21 he had at this point and if the state can give him the 15
22 and -- and, you know, at this time, hey, let's do it. I
23 don't -- I don't have any objection to any of that. But
24 the problem is -- is that he never wanted to do the plea
25 offer when I represented him in this matter.

1 And because if he -- he had said that at any point --
2 I mean, the state appoints you for a case. They pay you a
3 flat -- a certain amount or whatever the case might be. I
4 -- I spent way more time than any time that I would ever be
5 compensated for, because I really believed in Mr. Mitchell
6 and I wanted to help him. I thought we had a great
7 relationship.

8 Mr. Mitchell would come in with his little glasses on
9 and his legal pad and we would laugh and talk about it and
10 -- and get -- get a lot of good work done, lot of good work
11 done. So I think that's why I met with him so much, is
12 because my meetings with him were pleasant, except when I
13 needed him to kind of pull back and quit trying to, you
14 know, be the lawyer and showing pictures to people and --
15 and saying things that may not have been appropriate.

16 But -- but we spent a -- a great deal of time going
17 over that. And at no point did he ever tell me: "No, I
18 don't want to -- I -- I -- yes, I want to take the plea
19 offer."

20 Q Yes, sir. At any point would you say that you tried
21 to talk Mr. Mitchell out of pleading guilty and convince
22 him that it was better for him to try this case?

23 A No, I did not.

24 Q Thank you.

25 A I didn't.

1 Q Now, regarding the victim's girlfriend in this case,
2 she was introduced by Solicitor McDaniels [sic] during --
3 or prior to jury selection. Do you at any point remember
4 her, I believe as Mr. Mitchell characterized it, hanging
5 onto the victim and crying and sort of causing a scene in
6 the courtroom?

7 A Oh. I think I would've noticed a scene. I certainly
8 didn't notice that. And -- and I gotta tell you: I was
9 really focused on what the judge had to say, the witness in
10 the box. I was trying to keep eye talk -- eye contact with
11 the jury.

12 And -- and I think -- I think that -- I'm sure that at
13 some points or whatever, I might've looked over at Austin
14 to see what he was doing or something like that. And I
15 think I would've noticed if there was somebody over there
16 being dramatic with the victim. And I -- I didn't see
17 that. I didn't see it. I don't recall that.

18 And I think that, had Mr. Mitchell said to me, "Hey,
19 she's over there, boohooing and hanging onto him and
20 rubbing his face and stuff like that," I know I would've
21 said something about that. I know I ---

22 Q So you ---

23 A --- would have.

24 Q Okay.

25 A Just based on all the other issues that I raised that

1 we -- that -- at no point did Mr. Mitchell say: "Hey, I
2 want you to do this," and I looked at him and said: "No.
3 We can't do that."

4 That's never been how we communicated or how we got
5 along. That's unfortunate that that's how he's
6 representing it now. And I can -- you know, I feel -- I
7 feel badly that he got the sentence that he got. And --
8 and I understand that he would like to not have that
9 sentence.

10 And again, I told him early on that if I made a
11 mistake or whatever the case might be, to: "Go ahead and,
12 you know, file an action and you can do a appeal; you can
13 do a PCR or whatever. But don't come to court and lie."

14 And I would tell you that that's what's happening
15 right now, is that Mr. Mitchell, either purposely or -- or
16 unpurposely or intentionally or unintentionally, is lying.

17 Q Yes, sir. So just briefly, if Mr. Mitchell had
18 brought up an issue with the victim's girlfriend, you
19 would've objected, correct?

20 A Yes, I would.

21 Q And if you would've noticed the victim's girlfriend
22 crying and being emotional in the courtroom, you would've
23 objected yourself, correct?

24 A Of course. Yes, I would.

25 Q All right. Now, we'll briefly touch on the issue of

1 your greeting of Lt. McClurkin. We can all agree at this
2 point that your supposed introduction is not included in
3 the transcript of Mr. Mitchell's trial, correct?

4 A That's correct.

5 Q And do you recall ever referring to Mr. McClurkin as a
6 good officer?

7 A No, I don't.

8 Q And do you feel at any point that your cross-
9 examination of Mr. McClurkin bolstered his testimony or
10 made him appear as a favorable witness in this case?

11 A I mean, just look at the questions I asked. I mean,
12 nothing I asked him would suggest that he's a good officer.
13 So, I mean, nothing -- everything that I asked him
14 suggested that he did not have -- he did -- he -- he could
15 not say beyond a reasonable doubt that that was Mr.
16 Mitchell in that video. And he just kept insisting that:
17 "Yes, I can. Yes, I can."

18 You know, and we had to -- we had to draw the line at
19 some point because, you know, I didn't want to open the
20 door -- "Well -- well, how can you do -- know that?"

21 Because then, he would've said: "Because of all of
22 Mr. Mitchell's prior arrests or whatever."

23 So, you know, I had to -- I had to move around that
24 issue somewhat delicately. But I -- I certainly challenged
25 his -- his belief that he saw Mr. Mitchell in that one

1 picture. But when I met with him prior to that, you know,
2 and I said, "I -- how can you tell me that this is my
3 client?"

4 He said: "Well, your client is -- is well known
5 around these parts."

6 So and that's not what he said on the record. But
7 that's what he shared with me. And I -- I -- you know, I
8 made sure that we didn't go that route. And I told Mr.
9 Mitchell I wasn't going to do that because I think that
10 would've been -- that would've been extremely prejudicial.

11 So we didn't -- I didn't -- I didn't ask him: "Well,
12 how do you know the guy?" or whatever. But I -- to my
13 knowledge. But I did ask him questions that would
14 contradict the fact that he's saying that's definitely Mr.
15 Mitchell.

16 Q Yes, sir. Now, after Mr. Mitchell -- I believe you
17 said that he wanted to take this case to trial and have the
18 state prove that it was him. I believe your trial strategy
19 at that point was to challenge the authenticity of the
20 photograph and challenge the identification of Mr.
21 Mitchell. Would you state that that's correct?

22 A That is correct.

23 Q And you -- did you convey -- or you conveyed that to
24 Mr. Mitchell prior to trial, that that was ---

25 A Sure.

REDIRECT EXAMINATION BY MS. MCMAHAN - MATHIAS CHAPLIN 46

1 Q --- your attempt -- did you ever indicate that you
2 wanted to overlay a SCDC photo or a mug shot of him over
3 the deer-camera footage?

4 A No.

5 Q And do you feel that, I guess, the course of defense
6 that you pursued was the best viable option once Mr.
7 Mitchell indicated that he did not want to plead guilty?

8 A That's correct. Yeah.

9 Q At this point, I have no further questions.

10 MS. MCMAHAN: I just have a few follow-ups.

11 THE COURT: Yes, ma'am.

12 REDIRECT EXAMINATION

13 BY MS. MCMAHAN:

14 Q Mr. Mitchell indicated that the plea offer was 15
15 years. Do you dispute that that was the plea offer?

16 A I -- no, I don't dispute that.

17 Q Okay. So it's your understanding that the plea offer
18 was for 15?

19 A Well, I -- again, I'm going to say that's my
20 understanding. And I'm -- I -- I would probably need to
21 refer back to my notes for that one. I have no reason to
22 doubt what Mr. Mitchell's saying, if he says it's 15. I --
23 I'd -- I -- that's my understanding at this point.

24 Q And Mr. Neubauer may have already kind of touched base
25 on this. But Mr. Mitchell indicated earlier that he felt

1 that you had forced him to go to trial because of the way
2 you had presented your defense to him. Did any -- at any
3 point did he indicate to you that he felt like he had no
4 other decision, other than to go to trial?

5 A At any point did he say to me he had no other defense
6 than to go to trial? I don't -- I don't know the answer to
7 that ---

8 Q No. Did he ever ---

9 A I -- go ahead.

10 Q Okay. Did he ever indicate to you he felt like he was
11 being forced to go to trial?

12 A No, never, ever.

13 Q And was his position always that he wanted to go to
14 trial to make them prove it?

15 A Yeah. Yeah. Well, I don't know about always. But I
16 know we sat down and we met. And by the time I got to him
17 -- I don't know if I was the first lawyer or -- with him or
18 not. But by the time I sat down with him, he had a lot of
19 different, you know, case -- case law and briefs and other
20 things and things that he wanted to bring to my attention.
21 And -- and -- and I thought he did a fine job on a lot of
22 that stuff. He -- he really knows how to do legal
23 research.

24 But -- but -- but as we sat down, I don't think we
25 ever considered pleaing. I think we always knew we were

RECROSS-EXAMINATION BY MR. NEUBAUER - MATHIAS CHAPLIN 48

1 preparing to fight and -- and challenge the allegations.

2 Q And Mr. Mitchell had referenced the fact that this was
3 his second trial. What does he mean by that?

4 A Well, I think what he meant was that we had a judge
5 that took the bench and Mr. Mitchell asked me to have the
6 judge recuse himself because he was his -- (audio loss) --
7 former public defender. And I made the motion. And I
8 think we reconvened with a new judge.

9 Q Okay.

10 MS. MCMAHAN: Court's indulgence, Your Honor.

11 THE COURT: Yes, ma'am.

12 (Off the record briefly.)

13 MS. MCMAHAN: I have no further questions.

14 THE COURT: All right. Ms. -- Mr. Neubauer, any
15 recross?

16 MR. NEUBAUER: I have just one question, if that's all
17 right with Your Honor.

18 THE COURT: Yes, sir.

19 RECROSS-EXAMINATION

20 BY MR. NEUBAUER:

21 Q Mr. Chaplin ---

22 A Yes.

23 Q --- ultimately, whose decision was it to plead guilty
24 or to go to trial in this case?

25 A Mr. Mitchell's.

RECROSS-EXAMINATION BY MR. NEUBAUER - MATHIAS CHAPLIN 49

1 Q And once Mr. Mitchell indicated that he did not want
2 to plead guilty, you prepared for trial, correct?

3 A Exactly.

4 MR. NEUBAUER: No further questions. Thank you, Your
5 Honor.

6 THE COURT: All right. Ms. McMahan ---

7 MS. MCMAHAN: Judge, Mr. ---

8 THE COURT: --- any -- yes?

9 MS. MCMAHAN: Judge, Mr. Mitchell is indicating to me
10 that there's something that needs follow-up on.

11 Mr. Mitchell, if you could, we can wait until
12 rebuttal. I can call you as a rebuttal witness and we can
13 address all these issues.

14 THE APPLICANT: Oh, okay. Thank you.

15 THE COURT: I think -- I think procedurally, that
16 would be the -- the way to go.

17 THE APPLICANT: Okay.

18 THE COURT: Ms. McMahan, as far as the case-in-chief,
19 do you have any other witnesses?

20 MS. MCMAHAN: No, Your Honor.

21 THE COURT: All right. Mr. Neubauer?

22 MR. NEUBAUER: Thank you, Your Honor. The state would
23 Austin McDaniel at this point.

24 THE COURT: All right, Mr. McDaniel. Good morning.
25 If you could raise your right hand for me, sir.

DIRECT EXAMINATION BY MR. NEUBAUER - AUSTIN MCDANIEL 50

1 MR. MCDANIEL: Good morning, Judge.

2 AUSTIN MCDANIEL, having been first duly sworn,
3 testified as follows:

4 THE COURT: All right. Thank you, sir. You can put
5 your hand down.

6 Mr. Neubauer?

7 MR. NEUBAUER: Thank you, Your Honor.

8 DIRECT EXAMINATION

9 BY MR. NEUBAUER:

10 Q Good morning, Mr. McDaniel. How are you doing today?

11 A I'm well. Good morning.

12 Q Thank you. How long have you been practicing law at
13 this point, sir?

14 A I think 14 years in November.

15 Q Thank you. And how much of that has been criminal?

16 A Almost all of it, 95 percent.

17 Q And in 2014 you were working in the Eighth Circuit
18 Solicitor's Office, correct?

19 A No. I left in 2010. So I think this trial was 2010.

20 Q I apologize.

21 A That's all right.

22 Q And you prosecuted this case against Mr. Mitchell,
23 correct?

24 A I did.

25 Q Now, during jury selection, you'd introduced the

1 victim, Mr. Potts, as well as his girlfriend, Ms. Purifoy
2 [sic], I believe is her name?

3 A That's ---

4 Q Do you ---

5 A --- correct.

6 Q --- recall if they were sitting at the state's table
7 at this point?

8 A No. They were beyond the bar, but sitting in front of
9 the table. So, you know, we'd moved our chairs around the
10 table to face the jury. And the victim's advocate, the
11 victim, and his girlfriend were beyond the bar but sitting
12 in chairs there. So I did have them stand and introduced
13 them.

14 Q Yes, sir. And during the actual course of Mr.
15 Mitchell's trial, was the victim or his girlfriend sitting
16 at the state's table?

17 A No. No. I mean, I -- I read the transcripts.
18 There's no way Judge Hill would've allowed that to occur.
19 But no, they were not. They were outside the bar with the
20 victim's advocate.

21 Q Yes, sir. And do you recall at any point Ms. Polifone
22 being emotionally distraught or crying or, I guess,
23 consoling the victim in this case?

24 A I -- I don't remember that at all.

25 Q All right. Thank you. And briefly, regarding the

CROSS-EXAMINATION BY MS. MCMAHAN - AUSTIN MCDANIEL 52

1 cross-examination of Lt. McClurkin, do you recall Mr.
2 Chaplin referring to him as a good officer in his
3 introduction?

4 A No. I mean, I read the entire transcript and did not
5 see that in there. And I just -- I don't have any
6 recollection that Mr. Chaplin did that at all. I -- I -- I
7 don't believe that he did, based on the -- the cross-
8 examination I saw. But I -- I -- I don't remember that.

9 Q Thank you.

10 MR. NEUBAUER: I think that's all we have at this
11 point, Your Honor.

12 A Okay. Thank you.

13 THE COURT: Ms. McMahan?

14 MS. MCMAHAN: Just briefly.

15 CROSS-EXAMINATION

16 BY MS. MCMAHAN:

17 Q Do you recall any conversations or anything with Mr.
18 Chaplin about plea offers to Mr. Mitchell?

19 A No. I mean, I -- I remember offering the -- the
20 minimum on the charge. But I -- I don't believe we had
21 much conversation after I had made that offer.

22 Q And the minimum was 15 years?

23 A Yes.

24 Q Okay. And at the time when you were at the
25 solicitor's office, did -- if somebody was starting a trial

1 and going to trial, would you allow them to plead to that
2 plea offer partway through the trial or generally no or it
3 depends?

4 A Well, I mean, I would say it depends. We never -- I
5 guess we had a hard and fast rule about withdrawing any
6 plea agreements once a jury was selected. You know,
7 there's always exceptions to that. But I -- I don't
8 believe we had any conversations during trial about Mr.
9 Mitchell pleading guilty.

10 Q So once a jury is selected on a trial, you guys would
11 just be, like: "Hey, just as a reminder, the plea offers
12 are -- expire once a jury is selected"?

13 A Yeah. I mean, at that point it's straight-up. Now, I
14 mean, what -- I say hard and fast rule. There's always an
15 exception. But -- but that would've been the rule in the
16 eighth circuit as I was prosecuting.

17 Q By straight-up, you mean, like, you would just plead
18 as charged and just get whatever sentence the judge gave
19 you?

20 A Right.

21 Q And the 15-year offer, would that have been negotiated
22 or recommended? Do you remember anything about that?

23 A I -- I mean, I think I would've negotiated the 15. I
24 think the offer was he can plead to a negotiated 15.

25 Q Okay.

1 A I -- and I -- I think I agreed to -- if I remember
2 correctly, I agreed to dismiss the other two charges.

3 Q Okay. And when -- and you indicated earlier that you
4 had never had any conversation about him possibly pleading
5 after you gave the 15-year offer?

6 A I do not recall there being any conversation, once the
7 trial started or jury selection started, about pleading
8 guilty.

9 Q Okay. And Mr. Mitchell alluded earlier to, you know,
10 the stills from the game camera and all that kind of stuff.
11 What do you recall from the trial about the -- the pictures
12 from the game camera and the argument about whether it was
13 or was not Mr. Mitchell in those photos?

14 A You mean, defense argument regarding -- I mean, the
15 ---

16 Q Just -- (audio loss) ---

17 A Well, they -- the -- he argued everything I think --
18 (audio loss) -- argue from chain of custody to originals,
19 it not being original; and then, had experts, both on
20 identification and -- I think it was an expert on photo
21 surveillance, doing everything they -- they could to, I
22 guess, minimize the impact of the pictures.

23 But -- is there something specific you -- you want me
24 to try to recall? I read the transcripts ---

25 (Indistinguishable cross-talk)

1 A --- week so ---

2 Q Okay. Do you recall -- let me back up.

3 A Okay.

4 Q Mr. Chaplin had indicated the jury, in his opinion,
5 probably wasn't paying attention to the testimony of
6 Officer McClurkin but really was sort of looking back and
7 forth at the defendant, Mr. Mitchell, and the photos that
8 were entered. Do you recall anything to that extent?

9 A Yes. And I would agree with that. The -- I thought
10 it -- I mean, this is my opinion, obviously, as the
11 prosecutor. I thought the picture looked just like Mr.
12 Mitchell. And as we -- as we showed that to the jury, Mr.
13 Mitchell also got out of his seat and walked around to be
14 able to better view it.

15 But I remember it looking -- it looked a lot like him
16 when he -- he got up and kind of was very close to the
17 image. So I -- I would agree with -- with -- with defense
18 counsel on -- on that point. I think that's what the jury
19 was really focused on when they made a decision.

20 Q Okay. I have no further questions.

21 THE COURT: Any redirect, Mr. Neubauer?

22 MR. NEUBAUER: No, Your Honor.

23 THE COURT: All right. Thank you, Mr. McDaniel.

24 Mr. Neubauer, any other witnesses?

25 MR. MCDANIEL: Thank you, Judge.

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1 MR. NEUBAUER: At -- (audio loss) -- the state rests,
2 Your Honor.

3 THE COURT: All right. Ms. McMahan, I believe you
4 indicated that you wanted to offer some reply testimony?

5 MS. MCMAHAN: Yes, Your Honor. I would like to call
6 Mr. Mitchell again.

7 THE COURT: All right. Mr. Mitchell, just remember,
8 you are still under oath.

9 THE APPLICANT: Yes, sir. Thank you.

10 THE COURT: All right. Ms. McMahan?

11 DIRECT EXAMINATION

12 BY MS. MCMAHAN:

13 Q Mr. -- (audio loss) -- Mr. Mitchell, what did you want
14 to indicate to the Court earlier ---

15 A Well ---

16 Q --- about ---

17 A --- I didn't ---

18 (Indistinguishable cross-talk)

19 Q --- I believe it was Mr. Chaplin's testimony?

20 A I didn't always want to go to trial. I was guilty of
21 this crime. The picture showed who I was. Until he come
22 up with this third-party guilt, misidentification, and the
23 experts he's going get the layover -- me and Mr. Chaplin
24 had a good relation. We -- I hope we still do. Me and Mr.
25 McDonald [sic] had a good relationship. It just the fact

1 that I felt, when he come up with these defenses, that was
2 it. That was it.

3 Q So once ---

4 A (Audio loss) --

5 Q --- he told you about -- so once he told you about
6 these possible defenses that he was going to bring up,
7 that's when you decided you wanted to go trial?

8 A Yeah. Because I was going to plead guilty from day
9 one. I was guilty of this crime. And it -- and -- and I'm
10 not coming back because I got 20 years. I -- four more
11 years, I be done maxed everything out. But I just want the
12 truth to come out. I want the truth.

13 I didn't -- I -- Mr. Chaplin, I'm not coming in here,
14 lying on you. This is what I -- I been living this for --
15 since 2010. You been a good ---

16 Q Okay. Is there anything else you ---

17 (Indistinguishable cross-talk)

18 A And I ---

19 Q Is there anything else you want the Court ---

20 (Indistinguishable cross-talk)

21 Q --- today?

22 A I wasn't aware, if I didn't take that plea, it was
23 going go away after a certain period of time. I wasn't
24 told that. And is it -- is there any way possible that you
25 can, at the same time, leave the record open before we can

1 get this Rule 5. Because over the period of years the
2 time, I done lost my Rule 5. And that plea agreement will
3 show what it was consist of. I didn't -- I didn't -- I
4 wasn't -- I wasn't aware it -- it was going to expire.

5 Q Mr. Mitchell, did you hear Mr. Chaplin and Mr.
6 McDaniel indicate that the plea offer was 15, which was the
7 minimum?

8 A Yeah. But I wasn't aware it was going expire. When
9 most times we have a plea offer, it has on the paperwork
10 that it will expire at a certain time if you don't take
11 this plea. (Audio loss) --

12 Q Okay.

13 A I just -- I just -- I don't -- all I can say, I would
14 have accept the 15 year instead of going to trial and
15 rejecting, facing a life sentence. I got 20 years. When I
16 got found guilty, Mr. Chaplin said: "Well, you didn't get
17 but 5 years more than they would've gone give you."

18 But that wasn't the issue. The issue is you didn't
19 ---

20 (Indistinguishable cross-talk)

21 A --- a -- there was valid strategy to go to trial.
22 Well, if you can look at the Court's ruling, the Court
23 Appeals -- Courts of Appeal ruling and the judge ruling, I
24 was a sitting duck. I didn't even have a defense.

25 Q Okay. I have ---

(Indistinguishable cross-talk)

Q --- I have no further questions.

THE COURT: All right, folks. So obviously ---

MS. MCMAHAN: Oh, wait. Let ---

THE COURT: Go ahead, Ms. McMahan.

MS. MCMAHAN: Mr. Mitchell indicated he had one more thing he wanted to indicate to the Court, I believe.

THE COURT: Okay. Well, I'll be happy to hear that.

Mr. Mitchell, just -- just remember, we don't -- we don't need to replot the same ground.

THE APPLICANT: Yeah. I'm through. I'm -- I'm through, Your Honor. Thank you. I'm through.

THE COURT: Okay. Thank you very much.

MS. MCMAHAN: Okay.

THE COURT: Folks, I'm going to take this matter under advisement. I mean, given the fact that there is this issue about the audiotape, I'm going to give Ms. McMahan some -- some time to explore that.

Ms. McMahan, I'm -- I don't know if the tape has been preserved. But I'm going to instruct you to check into that and at least update the Court and the state as to, you know, what response you have gotten within two weeks. That's November the 9th.

And then, based upon what Ms. McMahan hears about whether this tape has been preserved, you know, that will

1 -- that will kind of govern when a decision will be made on
2 this matter.

3 I certainly hope to make the decision sooner rather
4 than later. But there is a variable in this situation
5 that, you know, I -- I can't give an exact time frame when
6 a decision will be made until I hear about whether the tape
7 exists or not. So I know that's not particularly clear,
8 but I think that's as clear as I can be, given this
9 outstanding issue.

10 So the matter is taken under advisement. And, Ms.
11 McMahan, let me hear from you within two weeks from today's
12 date and give -- give myself and Mr. Neubauer -- and
13 likely, your client as well -- an update on the status of
14 this -- the existence or nonexistence of the original
15 audiotapes.

16 THE APPLICANT: Your Honor, could I ---

17 MS. MCMAHAN: Okay.

18 THE APPLICANT: --- ask you one more ---

19 MS. MCMAHAN: I've already ---

20 THE APPLICANT: --- question, please?

21 MS. MCMAHAN: --- actually ---

22 THE COURT: Okay. Hold on. Let -- Mr. -- Mr.
23 Mitchell, you can ask me a question. Just be aware that I
24 can't give you any legal advice.

25 THE APPLICANT: Right.

1 THE COURT: If it's a question that I can answer, I'll
2 be glad to. If I don't believe I can answer it, I'll tell
3 you that too.

4 THE APPLICANT: Will you -- will you be the one
5 writing the order on this matter?

6 THE COURT: My normal practice is that I instruct the
7 prevailing party to propose a -- to submit a proposed order
8 and then I will either sign the order as proposed or make
9 changes to it. But I will not -- I'll be not -- I will not
10 be drafting the order from scratch. But ultimately, it
11 will be my order, and they are always presented to me in a
12 format that I can make changes.

13 So that's ordinarily the way it works: The prevailing
14 party presents the proposed order and subject to my ability
15 to edit that order.

16 THE APPLICANT: Okay.

17 THE COURT: All right.

18 THE APPLICANT: Thank you, sir. Thank you ---

19 MS. MCMAHAN: And -- and -- (audio loss) -- Judge,
20 just to give you an update, I've actually already e-mailed
21 Ms. Holston today. So as soon as I have an answer back,
22 I'll let you know.

23 THE COURT: Okay. And like I said, my -- I'm not
24 going to sit on this matter. But there is a portion of it
25 that is, at -- at this point in time, out of my hands. So

1 I will do my best to make a prompt ruling once this issue
2 with the audiotapes is resolved.

3 THE APPLICANT: Okay.

4 THE COURT: All right.

5 MS. MCMAHAN: Thank you.

6 THE COURT: Thank y'all very much.

7 THE APPLICANT: Thank you, sir.

8 (Whereupon, the proceeding was concluded at 10:45 a.m.)

9 --- END OF TRANSCRIPT OF RECORD ---

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CERTIFICATE

I, the undersigned Maryann S. Nevers, CVR-M-CM, RVR, RVR-M, Official Court Reporter (Retired) 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 all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Circuit Court for Newberry County, South Carolina, on the 26th day of October, 2021.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.



Maryann S. Nevers, CVR-M-CM, RVR, RVR-M
Official Court Reporter

Leland, North Carolina
May 15, 2022

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)
) IN THE COURT OF COMMON PLEAS
) FOR THE EIGHTH JUDICIAL CIRCUIT

Bennie D. Mitchell, #278318)
) Case No.: 2014-CP-36-0141

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED
NEWBERRY COUNTY
2022 FEB 18 AM 10:22
ELIZABETH P. FOLK
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Bennie D. Mitchell ("Applicant") on March 14, 2014. Respondent made its return on or about July 30, 2014. The Court convened an evidentiary hearing into the matter on October 26, 2021, via the WebEx Virtual Courtroom of the Honorable R. Kirk Griffin. Applicant was present at the hearing and represented by Ashley A. McMahan, Esq. Michael J. Neubauer, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Matthias Chaplin, Esq. ("Counsel"), and Assistant Solicitor Austin McDaniel of the Eighth Circuit Solicitor's Office, also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Newberry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Newberry County Clerk of Court. In January 2009, the Newberry County

Grand Jury indicted Applicant for Burglary, First Degree (2009-GS-24-0037) and Possession of Burglary tools (2009-GS-24-0039). Matthias Chaplin, Esquire, represented Applicant, and Assistant Solicitor Austin McDaniel of the Eighth Circuit Solicitor's Office prosecuted the case. On April 19, 2010, Applicant proceeded to trial before the Honorable D. Garrison Hill and a jury. At the conclusion of Applicant's trial, the jury found Applicant guilty as indicted. Judge Hill sentenced Applicant to imprisonment for concurrent terms of twenty years for Burglary, First Degree, and five years for Possession of Burglary Tools.

Applicant filed a timely notice of appeal and a direct appeal was perfected by LaNelle Durant. The South Carolina Court of Appeals affirmed Applicant's convictions by written Order, dated July 25, 2021. *State v. Mitchell*, Op. No. 5009 (S.C. Ct. App. Filed July 25, 2012). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated March 6, 2014. The Remittitur was issued on March 10, 2014.

II. FACTS

On October 28, 2009, at approximately 1:00am, Mr. Stephen Potts came into his house and noticed somebody had attempted to enter his house through the window beside his back door. Tr. p. 85, l. 8-12. Mr. Potts entered the house and realized somebody had entered his house without his permission. Tr. p. 85, l. 13-22. Mr. Potts checked a deer camera which he placed on top of his refrigerator and saw an image of somebody inside his kitchen while he was not home. Tr. p. 85, l. 20- p. 86, l. 3. The following morning, Mr. Potts called the police, and showed police officers the photo from his camera. Tr. p. 86, l. 16-18. The intruder was ultimately identified by the Newberry Police Department as Applicant. Tr. p. 156, l. 1- p. 157, l. 12. Mr. Potts informed Police that Applicant had taken approximately \$100 in quarters, and four to five cans of beer from Mr. Potts house on the night of October 27, 2021. Tr. p. 105, l. 22- p. 106, l. 15.

III. PRESENT APPLICATION

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Counsel failed to object and motion for the State to move the alleged victim's girlfriend away from the State's table."
 - b. "Counsel bolstered a witness for the State, during cross examination of Lt. McClurkin, by greeted Lt. McClurkin and stating he was a good officer."
2. "Ineffective Assistance of Appellate Counsel"
 - a. "Appellate Counsel has a constitutional duty to make sure the State does not misstate the facts argued in their brief."

Applicant requests relief as follows: "New Trial—Appeal issues/ a new appeal and any other relief I may be entitled to upon all issues and the court deems just and fair."

On October 6, 2021, Applicant through Counsel, filed an amended application for post-conviction relief alleging Applicant is being held unlawfully for the following reasons:

1. "The Applicant request that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the court of the hearing that have not been specifically addressed in the Application.

See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)."

At the evidentiary hearing, Applicant proceeded forward on the following allegations:

1. "Ineffective Assistance of Counsel"
 - a. "Counsel failed to object and motion for the State to move the alleged victim's girlfriend away from the State's table."
 - b. "Counsel bolstered a witness for the State, during cross examination of Lt. McClurkin, by greeted Lt. McClurkin and stating he was a good officer."
 - c. "Counsel failed to inform Applicant of a plea offer from the State prior to Applicant's trial."

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Further, this Court

has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than

through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

1. Failure to object to Mr. Potts' girlfriend sitting at the State's table during trial

Applicant's allegation of ineffective assistance of counsel due to Counsel's failure to object to Mr. Potts' girlfriend Nancy Polifrone sitting at the State's table during the trial is without merit.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." *United States v. Nguyen*, 379 F. App'x 177, 181 (3d Cir. 2010). In regards to witnesses being seated at counsel table during any phase of a trial, the South Carolina Supreme Court has held "...The conduct of a trial is left largely to the discretion of the presiding judge and this court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." *State v. Lee*, 255 S.C. 309, 313-14, 178 S.E.2d 652, 654 (1971) (overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)).

At Applicant's evidentiary hearing, Applicant testified Judge Hall asked who was sitting at the State's table in front of the jury. Applicant testified Assistant Solicitor McDaniels introduced Mr. Potts and his girlfriend to the jury, and indicated Mr. Potts girlfriend was present for emotional support. Applicant testified he told Counsel he did not want Mr. Potts' girlfriend to be at the State's table because she was holding onto Mr. Potts throughout the trial and acting as if they were on a date. Applicant testified he asked Counsel about having her removed, and Counsel told Applicant he could not have her removed or sequestered because she was not a witness in this case.

At the evidentiary hearing, Counsel testified he does not recall Mr. Potts' girlfriend sitting at the State's table, nor does he recall Applicant bringing it to his attention. Counsel further testified he made every objection that Applicant wanted him to make, and if Applicant had addressed this

issue with Counsel, Counsel would have raised this issue during the trial. Counsel testified he does not remember Mr. Potts' girlfriend crying, hanging on to Mr. Potts, or making a scene. Counsel testified that if he had noticed this, he would have addressed this issue with the court.

At the evidentiary hearing, Assistant Solicitor McDaniels testified he introduced Mr. Potts and his girlfriend during jury selection. Assistant Solicitor McDaniels further testified Mr. Potts and his girlfriend would not have sat at the State's table during the course of the trial. Assistant Solicitor McDaniels indicated Mr. Potts and his girlfriend would have been sitting in the gallery with the victim's advocate, and Judge Hill would not have allowed Mr. Potts or his girlfriend to sit at the State's table during the trial. Assistant Solicitor McDaniels testified he does not remember Mr. Potts' girlfriend being emotionally distraught or crying during the course of the trial.

Applicant has failed to establish how Counsel was ineffective in this matter. Both Counsel and Assistant Solicitor McDaniels have credibly testified that Mr. Potts and his girlfriend were introduced during jury selection but were not allowed to sit at the State's table during the course of the trial. Further, Counsel and Assistant Solicitor McDaniels testified that they cannot recall Mr. Potts' girlfriend being emotional during the course of the trial. Counsel testified he would have objected to Mr. Potts and his girlfriend's presence at the State's table during the trial, and if Mr. Potts' girlfriend was being overly emotional during the trial he would have brought it to the Court's attention. Though Applicant asserts Mr. Potts and his girlfriend were sitting at the State's table during the trial, and that Mr. Potts' girlfriend was being emotional during the trial, Applicant has failed to present any credible evidence to support this assertion. Therefore, this Court finds Counsel was not ineffective for failing to object to the presence of Mr. Potts and his girlfriend during the trial, and this allegation is denied and dismissed with prejudice.

2. Bolstering the Credibility of State's Witness Lt. McClurkin

Applicant's allegation of ineffective assistance of counsel due to Counsel allegedly bolstering the testimony of Lt. McClurkin by referring to him as a "good officer" is without merit. Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility ... within the exclusive province of the jury." *State v. Taylor*, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (citing *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)).

At Applicant's evidentiary hearing, Applicant testified that Counsel greeted Lt. McClurkin by stating "good evening, Mr. McClurkin, you're a good officer, aren't you?" Applicant asserts he was shocked when Counsel greeted Lt. McClurkin in this manner, and claims Counsel said he was being sarcastic. Applicant testified Counsel also greeted a second witness in this manner. Applicant testified this greeting is significant because Lt. McClurkin was the only witness to identify Applicant, and Counsel's greeting bolstered Lt. McClurkin's identification and testimony because it made him look like a good person.

At Applicant's evidentiary hearing, Counsel testified he does not recall greeting Lt. McClurkin in this manner, and that this greeting does not appear in the transcript. Counsel testified he spent most of Applicant's trial trying to convince the jury that Lt. McClurkin was not a good witness. Counsel testified he attacked the identification of Applicant multiple times, including through pre-trial motions, using expert witnesses to challenge the footage obtained from Mr. Potts' camera. In regards to Applicant's claim that Counsel was trying to bolster the credibility of Lt. McClurkin's testimony and identification, Counsel stated "We spent a lot of time and money attacking the identification of Applicant, I don't know why I would then stand up there and say 'you're a great officer.'"

During cross-examination, Counsel testified he does not see the supposedly bolstering comments in the transcript, and he does not recall ever referring to Lt. McClurkin as a good officer. Counsel further testified that his cross-examination was focused on suggesting Lt. McClurkin could not say beyond a reasonable doubt that Applicant was the one photographed inside Mr. Potts' house.

Assistant Solicitor McDaniel testified that he does not recall Counsel referring to Lt. McClurkin as a good officer and does not believe it happened based on Counsel's cross-examination. Assistant Solicitor McDaniel further testified he has reviewed the transcript and he could not locate the alleged bolstering comments in the transcript of Applicant's trial.

Applicant has failed to establish any evidence to support his assertion that Counsel was ineffective for improperly bolstering the testimony of Lt. McClurkin. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. at 442, 334 S.E.2d at 814. Applicant's assertion that Counsel referred to Lt. McClurkin as a "good officer" is not supported through the record. Though Applicant claims Counsel made these comments, and improperly bolstered Lt. McClurkin's testimony, the record does not show Counsel made any such comments. In the transcript of Applicant's trial, Counsel's first comments to Lt. McClurkin on cross examination are "Officer McClurkin, do you have any training in the use of infrared illumination?" Tr. p. 167, l. 1-3. Counsel proceeds to question Lt. McClurkin regarding his identification of Applicant, without referring to him as a good officer. Additionally, both Counsel and Assistant Solicitor McDaniel credibly testified that the supposed bolstering comments do not appear in the record, and neither individual recalls Counsel making the alleged comments. Therefore, this Court finds Applicant has failed to show how Counsel was ineffective, and this allegation is denied and dismissed.

3. Failure to Inform Applicant of Plea Offer

Applicant's allegation of ineffective assistance of counsel due to Counsel failing to inform Applicant of all plea offers is without merit. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, ineffective assistance is given "[w]hen defense counsel allow the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]." *Id.* at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer." *Bell v. State*, 410 S.C.436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel", if "the plea would have been entered without prosecution canceling it or the trial court refusing to accept it", and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting *Frye*, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved to limited situations. *Bell*, 410 S.C. at 443, 765 S.E.2d at 7.

At his evidentiary hearing, Applicant testified Counsel did not relay a plea offer for fifteen years prior to Applicant's trial. Applicant testified he spoke with Counsel and Counsel convinced Applicant that a valid defense of mistaken identity, and third party guilt, would create reasonable doubt for the jury. Applicant testified he told Counsel that he was the one who was pictured inside Mr. Potts house. Applicant testified that if he knew that Counsel would not do all of the things he promised Applicant, that Applicant would have accepted a plea offer instead of proceeding to trial

and facing a possible life sentence. Applicant testified he was told to not accept a plea offer because the State did not have enough evidence to convict him. Applicant testified he asked Counsel about accepting a plea offer after pre-trial motions were heard, and Counsel told Applicant it was too late, and they had good issues for an appeal.

Counsel testified he spent copious hours on weekends and after work meeting with Applicant, in an attempt to develop a defense in Applicant's case. Counsel testified Applicant never said he wanted to plead guilty and accept the fifteen-year plea offer. Counsel testified Applicant took the photo from Mr. Potts' camera and asked different prison guards and prisoners if they thought it looked like Applicant. Counsel testified Applicant's position was that he wanted a jury trial, and he wanted to make the State prove that Applicant was the individual pictured inside Mr. Potts' house. Counsel testified a fifteen-year plea offer was presented to him, and he told Applicant about this offer. Counsel testified that Applicant told Counsel that he did not want to plead guilty. Counsel testified he never attempted to talk Applicant out of accepting a plea offer, but he told Applicant that it may be better to try this case due to possible issues with the picture from Mr. Potts' house. Counsel testified that during his representation of Applicant he does not believe they ever considered taking a plea offer and were always focused on challenging the State's evidence at trial.

Applicant has failed to demonstrate how Counsel was ineffective for conveying a fifteen-year plea offer. Applicant admitted that he was aware of the fifteen-year plea offer prior to his plea, however Applicant asserts that Counsel talked him out of accepting a plea offer by convincing Applicant that they had a high chance of success at trial. Counsel testified he spoke with Applicant at length regarding his case, and conveyed all plea offers to Applicant. Counsel testified at no point did Applicant say he wanted to plead guilty instead of proceeding to trial. Counsel testified

Applicant's focus was on making the State prove that Applicant was the individual pictured inside Mr. Potts' house. Though Applicant now claims he would have plead guilty instead of going to trial if not for Counsel's performance, this Court finds Counsel was not deficient in his representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Counsel's performance. Therefore this allegations is denied and dismissed with prejudice.

III. CONCLUSION

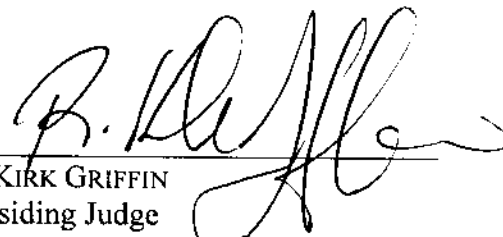
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16th day of February, 2022.



R. KIRK GRIFFIN
Presiding Judge
Eighth Judicial Circuit

Sumter, South Carolina

THE STATE OF SOUTH CAROLINA

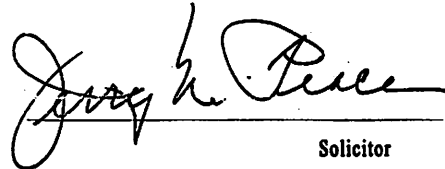
COUNTY OF NEWBERRY

INDICTMENT FOR**Burglary 1st Degree
16-11-0311**

At a Court of General Sessions, convened on the 26th day of January, 2009 the Grand Jurors of Newberry County present upon their oath:

That Bennie Darron Mitchell, did in Newberry County, state aforesaid, between the dates of 27th day of October, 2008 and the 28th day of October, 2008 willfully and unlawfully enter a dwelling without consent and with intent to commit a crime therein, when such entering or remaining occurred in the nighttime, the said dwelling being owned and/or occupied by Stephen Lee Potts, in violation of Section 16-11-311 of the South Carolina Code of Laws, 1976, as amended.

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


Solicitor

757

WITNESSES

Roy McClurkin
Newberry Police Department

WARRANT NUMBER

1008487

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

January Term, 2009

Indictment # 09GS36-

31

THE STATE

vs.

Bennie Darron Mitchell

Lain D. Brannon

Foreman of the Grand Jury

Date: 1-26-09

VERDICT
TRUE BILL

Guilty April 21, 2010

Terry E. Mellinger

Foreman

INDICTMENT FOR

Burglary 1st Degree
16-11-0311

SCANNED

STATE OF SOUTH CAROLINA
758
COUNTY OF Newberry
STATE VS. Bennie Darron Mitchell

AKA:
Race: BLK Sex: M Age:

DOB: 1961- SS#:
Address: Havird Street
City, State Zip Newberry, SC
DL# SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was X CONVICTED OF or PLEADS

TO: Burglary 1st (15-life)

in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0079

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ 17-25-45
(CSC w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant Initial)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years
and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections. 19 months. GH

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to SC Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65
(Criminal Domestic Violence) to ship, transport, possess or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine: \$

\$14-1-206 (Assessments 107.5%) \$

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$

\$56-5-2995 (DUI Assessment) \$12 \$

\$56-1-286 (DUI Breath Test) \$25 \$

\$35.13 (Public Def/Prob) \$500 \$

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$

\$50-21-114(BUI Breath Test Fee) \$50 \$

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$

\$90.11 TP (SCCJA Surcharge) \$5 \$

3% to County (if paid in installments) \$

TOTAL \$

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP

☐ Requires \$500 be paid to Clerk during probation.

Court Reporter: Joy Halston

Sentence Date: 4/21/10

PRESIDING JUDGE Hamlin

Judge Code: 211318

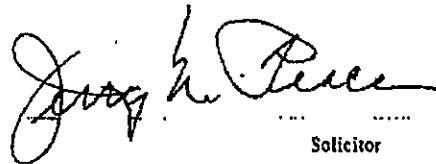
Elizabeth O'Fallon
Clerk of Court/ Deputy Clerk

THE STATE OF SOUTH CAROLINA**INDICTMENT FOR****COUNTY OF NEWBERRY****Possession of Burglary Tools
16-11-0020**

At a Court of General Sessions, convened on the 26th day of January, 2009 the Grand Jurors of Newberry County present upon their oath:

That Bennie Darron Mitchell, did in Newberry County, state aforesaid, on or about the 27th day of October, 2008 did knowingly, willfully, and unlawfully make, or cause to be made, and/or possess any implement or thing adapted, designed, or commonly used for the commission of burglary, larceny, safecracking, or other crime in violation of Section 16-11-20 of the South Carolina Code of Laws, 1976, as amended

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



.....
Solicitor

WITNESSES

Roy McClurkin
Newberry Police Department

WARRANT NUMBER

1008490

[Signature]
Foreman of the Grand Jury
Date: 1-26-09

VERDICT

Guilty April 21, 2010

[Signature]
Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

January Term, 2009

Indictment # 09GS36-

39

THE STATE

vs.

Bennie Darron Mitchell

INDICTMENT FOR

Possession of Burglary Tools
16-11-0020

STATE OF SOUTH CAROLINA

COUNTY OF Newberry
STATE VS. Bennie Darron Mitchell

AKA:
Race: BLK Sex: M Age:

DOB: 1961- SS#:
Address: Havird Street
City, State Zip Newberry, SC
DL# SC SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☒ PLEADS

TO: Poss of Burglary tools (0-5 years)
in violation of § 16-11-20 of the S.C. Code of Laws, bearing CDR Code # 0124

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ 17-25-45
(CSC w/minor 1st or Lawd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant Initial)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years
and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 09 65 36 - 37

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections. 19 months. (GHT)

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to SC Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65
(Criminal Domestic Violence) to ship, transport, possess or receive a firearm or ammunition.

SPECIAL CONDITIONS:
☐ RESTITUTION: ☐ Deferred, ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine: \$
§14-1-206 (Assessments 107.5%) \$
§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
§14-1-211(A)(2) (DUI Surcharge) \$100 \$
§56-5-2995 (DUI Assessment) \$12 \$
§56-1-286 (DUI Breath Test) \$25 \$
§35.13 (Public Def/Prob) \$500 \$
§73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00
§33.7, 1B TP (Drug Court Surcharge) \$100 \$
§50-21-114(BUI Breath Test Fee) \$50 \$
§56-5-2942(J) (Vehicle Assessment) \$40/ea \$
§90.11 TP (SCCJA Surcharge) \$5 \$ 5.00
3% to County (if paid in installments) \$ 3.90
TOTAL \$ 133.90

Obtain GED ☐
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling ☐
Random Drug/Alcohol Testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

☐ Requires \$500 be paid to Clerk during probation.

Court Reporter: Jay Holston
Sentence Date: 4/21/10

PRESIDING JUDGE

Judge Code: 211 1318

Elyse L. Dole
Clerk of Court/ Deputy Clerk