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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000296

APPENDIX

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS
3
4 The State,)
5 vs.) TRANSCRIPT OF RECORD
6 John Willie Mack,) 2006-GS-42-1166;1167
7 Defendant.) September 12, 2008
8) Spartanburg, South Carolina
9

10 B E F O R E:
11
12 HONORABLE CLIFTON NEWMAN, JUDGE
13

14 A P P E A R A N C E S:
15
16 ANTHONY C. LEIBERT, ESQUIRE
17 Attorney for the State
18
19 WILLIAM MCPHERSON, ESQUIRE
20 Attorney for the Defendant
21

22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

INDEX

Motion -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 MR. LEIBERT: Your Honor, this is John Willie Mack.
2 It's my bond motion, Your Honor, for D.N.A. testing. May I
3 hand up the motion?

4 THE COURT: Yes.

5 MR. LEIBERT: I think it's the last item typed up on
6 the -- on that list.

7 Your Honor, I'd like to hand this up as well.

8 This is an '06 case, Your Honor, where a lady by the
9 name of Ms. Moss had her home broken into on Victoria Lane
10 when she had been gone at work -- Victoria around

11 Spartanburg. And when she came home the front door was
12 open and there was some blood in certain places, and her
13 television was missing, and her laptop and some jewelry.

14 She called the police and they collected the blood,
15 and there was some blood on a light switch, I believe, and
16 there was some blood, I believe, near the entertainment
17 center where the television was taken.

18 They -- this defendant has an extensive record
19 including a burglary first conviction, two burglary second
20 convictions.

21 They interviewed him and did a match under the codist.
22 As you know, he was in the system because he was a
23 convicted felon, and therefore they went and interviewed
24 him.

25 He said he had never been to [REDACTED] Victoria Avenue and

1 had no reason to be there, but that there was a match from
2 his blood sample with SLED through the code system. And
3 they're requesting that we do a confirmatory match
4 essentially. And that's why we're here today.

5 THE COURT: All right. What says the defense?

6 MR. MCPHERSON: Judge, of course we're opposed to them
7 taking any further D.N.A.

8 When he was in prison they took his -- they drew blood
9 and took his D.N.A., so they already have it on file. And
10 we would be opposed to any further intrusions into his body
11 for D.N.A. purposes.

12 THE COURT: The only thing he would have to do is spit
13 in a cup, right?

14 MR. LEIBERT: Yes, sir. How they do it now -- I saw
15 it done a year ago -- they actually take a big Q-tip and
16 wipe on both sides of your mouth.

17 MR. MCPHERSON: We'd still be opposed to that because
18 they already have it on file.

19 THE COURT: All right.

20 MR. LEIBERT: If they'll stipulate that that's a
21 match, we don't need it, but for some reason the way they
22 set it up with codist system they like to have it a
23 confirmatory test from the sample.

24 THE COURT: So he's in jail charged with doing a
25 burglary, or doing a what?

1 MR. LEIBERT: A burglary first degree and grand
2 larceny. He's got other pending charges since then as
3 well.

4 THE COURT: And you have -- give me your speech again.
5 You have evidence recovered from the scene -- what?

6 MR. LEIBERT: Yes, sir. There was blood taken from
7 the light switch in the bedroom and then light -- and then
8 blood taken from the entertainment center where the T.V.
9 was missing and his -- and somebody collected that blood.
10 And I know his match is --

11 THE COURT: And you want to see whether it's his
12 blood.

13 MR. LEIBERT: Well, codist -- his blood sample was on
14 the database.

15 THE COURT: Correct.

16 MR. LEIBERT: And the way I understand it from the
17 indictment or the evidence I handed up, shows that they
18 have a hit. But they're saying -- they're recommending
19 that we do a confirmatory test. So whatever sample they
20 keep on -- in the database --

21 THE COURT: Right.

22 MR. LEIBERT: -- they like it confirmed.

23 THE COURT: All right. Yes, sir.

24 MR. McPHERSON: Your Honor, our position is they
25 already have his sample and they don't need another one.

1 THE COURT: Well, they --

2 MR. MCPHERSON: They just don't want to go through the
3 hoop of proving up the chain on that first.

4 THE COURT: He's raising his hand next to you there.

5 THE DEFENDANT: When I got arrested, I got arrested on
6 the 1st of Sep -- Sep -- January of '06 -- 31st. But I
7 went --

8 THE COURT: Why are you sweating so much?

9 THE DEFENDANT: I take medication.

10 THE COURT: All right.

11 THE DEFENDANT: I'm on medication at the jail make me
12 sweat.

13 But anyway I got arrested and went to the hospital
14 because I got -- I got a report over there in my folder
15 right there when I -- when I went to the hospital and
16 everything, right, for I was driving a vehicle. That's
17 what I went to jail for originally, driving a vehicle.

18 They tried to pull me over and I ran. So when I ran
19 and hid they found me and they, you know, took me to jail.
20 So when I got there, I got to jail and everything, you
21 know, I was beaten and stuff. I went to the hospital and
22 the lady gave me some medication when I got to the -- when
23 I got to the jail I was -- I woke up and they were
24 fingerprinting me.

25 THE COURT: All right.

1 THE DEFENDANT: So when I got fingerprinted I went to
2 the back.

3 THE COURT: What does any of this have to do with
4 whether or not your blood is in the light switch -- where
5 was it -- on the light switch in this person's house?

6 THE DEFENDANT: Because they came. When got -- they
7 got -- I went to the hospital. I was in jail. I wasn't in
8 jail for that. They brung it to me while I was in jail.

9 THE COURT: Well, they're trying to clean up all of
10 the crimes in town or in the county.

11 THE DEFENDANT: Na. See, what I'm trying to make you
12 understand --

13 THE COURT: All right. Go ahead. I don't mind
14 listening. I just want to stay on point. Seems like
15 you're off to another crime or some place.

16 THE DEFENDANT: What I'm saying I'm trying to relate
17 this together because when I went to the hospital I didn't
18 have this charge. See, I went to the hospital after, you
19 know, I had a force, a use-of-force warrant.

20 THE COURT: You think they already have your D.N.A.

21 THE DEFENDANT: I thought they -- I don't think, you
22 know --

23 MR. MCPHERSON: Yes, sir. They do have his D.N.A.
24 They took it while he was in prison.

25 THE DEFENDANT: They took it while I was in prison.

1 THE COURT: But isn't a D.N.A. sample -- is not that
2 intrusive. It's not like taking his blood or anything like
3 that, you know.

4 So the standards now, it's not like it used to be. I
5 mean, technology is such that, as I said, you can spit in a
6 cup and they can figure out whether it's your D.N.A.

7 I've had cases where the police bring in a suspect and
8 they ask him whether he's thirsty and he says yeah and they
9 give him a Mountain Dew and after he drinks and throws the
10 can in the trash can they get that and get the D.N.A. off
11 of it. So it's not a -- it's not such an imposition.

12 If that's what they want to do, I don't see anything
13 wrong with it, so I'm going to grant the motion.

14 MR. LEIBERT: Thank you, Your Honor.

15 THE COURT: Yes, sir. I can't hear your whole case.
16 I'm just hearing about whether or not --

17 THE DEFENDANT: Said arrested in '06. They said this
18 happened in '05, this, this, this --

19 THE COURT: When did this crime happen, the burglary?

20 THE DEFENDANT: I got, I got -- can I get my work?

21 THE COURT: Yes, sir. All right. I mean, yes, sir.

22 THE DEFENDANT: This happened in '0 (sic) -- he said
23 it happened in '06.

24 THE COURT: All right. Well, let's hear him again.
25 Let's give him another shot at it.

1 MR. LEIBERT: This crime occurred September the 6th of
2 2005.

3 THE COURT: Okay.

4 MR. LEIBERT: He also has another burglary second
5 pending from September 28th of 2005, as well as a burglary
6 from December 15th of 2005.

7 He additionally has possession of stolen vehicle in
8 2006, and failure to stop. So all three of his pending
9 burglaries are 2005, about three weeks apart for three
10 burglaries.

11 THE COURT: All right. Do you disagree with what he
12 just said?

13 THE DEFENDANT: Well, yeah. They brought me warrants
14 for, for I was in for, for driving a stolen vehicle. They
15 brought me warrants after that. They know that I --

16 THE COURT: What is it you're disagreeing about?

17 THE DEFENDANT: I'm saying they, they feel that I had
18 a record so they feel, you know, just say that I did this,
19 know what I'm saying, when I had nothing to do with it.

20 THE COURT: Well, they have got to prove it. That's
21 what the trial is all about, and you have your lawyer.

22 They -- you know, whatever your defense is to the
23 case, that's your defense to the case. I'm not dealing
24 with that. I'm just dealing with whether or not they can
25 get some D.N.A., because that's what SLED wants to get

1 to --

2 THE DEFENDANT: Well, what if they got that D.N.A.
3 from blood when I got arrested and got forced on, on the
4 6th and --

5 THE COURT: Well, they may check into everything that
6 you all are saying today to decide that they'll get it.

7 THE DEFENDANT: I got a record over here where --

8 THE COURT: But they may check into all of that and
9 say, fine, we're not going to bother you about more D.N.A.
10 But if they decide to bother you about more D.N.A., I'm
11 granting the motion. But I'm going to tell them to first
12 check into everything you all are saying to see if they
13 already have it. How about that?

14 MR. MCPHERSON: You'll put that in the order, if they
15 already have D.N.A. not to take it again?

16 MR. LEIBERT: Yes, sir. That will be fine with us.

17 THE COURT: All right. We'll put that in the order.

18 END OF REQUESTED TRANSCRIPT OF RECORD

19

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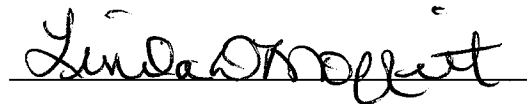
25

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh 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 trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 12th day of September 2008.

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

September 14, 2011

A handwritten signature in cursive script, reading "Linda D. Moffitt", written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

3 The State,)
4 vs.) TRANSCRIPT OF RECORD
5) 2006-GS-42-1166;1167
6 John Willie Mack,)
7 Defendant.) February 22 - 23, 2011
8) Spartanburg, South Carolina
9

10 B E F O R E:

11 HONORABLE J. DERHAM COLE, JUDGE; and a jury
12
13

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

15 BARRY J. BARNETTE, ESQUIRE
16 ANTHONY C. LEIBERT, ESQUIRE
17 Attorneys for the State

18 ROGER POOLE, ESQUIRE
19 Attorney for the Defendant
20
21

22
23 Linda D. Moffitt
24 Circuit Court Reporter
25

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
S-1.1	Swab	32	91
S-1.2	Swab	32	91
S-1.3	Swab	63	91
S-2	Swabs	65	91
S-3	SLED report	65	91
S-4	Copy of Indictment No. 89-GS-42-2367		115
S-5	Copy of Indictment No. 99-GS-42-0698		115
S-6	Copy of Indictment No. 88-GS-42-1248		115
S-7	Copy of Indictment No. 89-GS-42-879		
S-7	Bag		80
S-8	Bag		84

1		<u>EXHIBITS</u>		
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
3	C-1	Bag previously S-7		159
4	C-2	Bag previously S-8		159
5	C-3	Affidavit; affidavit and notice		159
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Motion

1 (Proceedings February 22, 2011)

2 THE COURT: Do we have any matters we need to address
3 before the -- well, this is in the matter of the State vs.
4 John Mack.

5 I understand that we're going to select a jury in this
6 case. Are there any matters we need to address before the
7 jury panel is brought around?

8 MR. POOLE: Yes, sir, Your Honor.

9 Roger Poole on behalf of Mr. Mack, John Mack, in this
10 case.

11 At this point I would move to quash the burglary
12 charge, the burglary indictment, which is No. 1167 -- 08 --
13 06, rather. Within the burglary indictment it states that
14 the defendant did in Spartanburg County between September 1
15 of 2005 and September 6th of 2006 commit the act of
16 burglary. And then it goes on within the contents of the
17 indictment to set forth the elements on which the state
18 relies.

19 I'm focusing on the period of time of September 1 of
20 2005 and September 6th of 2006. That is a year and five
21 days, give or take, that the state is alleging this
22 defendant committed this crime. That is too vague and too
23 large of a period of time to be contained in the
24 indictment.

25 By contrast, the grand larceny indictment states

Motion

1 between September 1 of 2005 and September 6th of 2005 -- is
2 a different indictment.

3 So based upon what I've stated to the Court we would
4 move that this indictment on the burglary first degree be
5 quashed and dismissed.

6 THE COURT: All right. I'm going to deny your motion
7 based upon the rationale of the State vs. Wingo and other
8 cases that say that's not too large of a time.

9 Now, are you at a disadvantage, you don't know what
10 dates they actually contend the offense --

11 MR. POOLE: Your Honor, we have been given the
12 discovery and focused on a period of time in September of
13 2005.

14 THE COURT: Okay. All right.

15 MR. BARNETTE: Your Honor, we'd -- that's a
16 scrivener's error, Your Honor. We'd ask to amend the
17 indictment from 2006 to -- be September 1st of 2005 to
18 September, I think, 6th of 2005, Your Honor.

19 THE COURT: All right. So it's simply a typographical
20 error, and the dates in the burglary indictment should be
21 reflected as those that are in the grand larceny
22 indictment?

23 MR. BARNETTE: Yes, sir.

24 THE COURT: Because the offense is alleged to have
25 occurred at the same time?

Motion

1 MR. BARNETTE: Yes, sir. That's correct.

2 THE COURT: All right. Mr. Poole.

3 MR. POOLE: Your Honor, as long as our objection is
4 noted.

5 THE COURT: Well, you're objecting to, to the
6 amendment?

7 MR. POOLE: Yes, sir. I'm just making a motion. My
8 motion has been overruled.

9 THE COURT: Well, your motion to quash. I'm just
10 denying your motion to quash based upon the grounds as
11 stated, because the period is not too, not too large under
12 the number of cases that have addressed that issue. But
13 now the question is do you have an objection to their
14 amendment.

15 MR. POOLE: No, sir.

16 THE COURT: Okay.

17 MR. POOLE: As long as my motion to quash is on the
18 record.

19 THE COURT: Well, those are two different issues, now.
20 Your motion to quash and motion to amend is two different
21 issues altogether.

22 MR. POOLE: Yes, sir.

23 THE COURT: The motion to quash is denied.

24 MR. POOLE: Yes, sir.

25 THE COURT: You don't object to the motion to amend?

Jury qualification

1 MR. POOLE: That's right.

2 THE COURT: Okay. All right. Any other matters we
3 need to address before the jury panel is brought?

4 MR. LEIBERT: Your Honor, do you have the witness
5 list?

6 THE COURT: No, sir.

7 MR. LEIBERT: May I approach, Your Honor?

8 (Bench conference held off the record.)

9 THE COURT: All right. Bring the panel around,
10 please.

11 (The following takes place in the presence of the jury
12 venire.)

13 THE COURT: Ladies and gentlemen, we are ready to
14 begin with jury selection in the first case that's going to
15 require some of your participation. The title of that case
16 is the State vs. John Willie Mack.

17 Mr. Mack has been accused by the prosecutor of having
18 committed the crimes of burglary in the first degree and
19 grand larceny. And the state alleges that each of those
20 offenses occurred on one particular day during an event or
21 a course of events which the state alleges occurred between
22 the dates of September the 1st of 2005 and September the
23 6th of 2005.

24 And the state alleges that between those dates that
25 Mr. Mack did here in Spartanburg County wilfully enter a

Jury qualification

1 dwelling that belonged to LaRhonda Moss which was located
2 on Victoria Road here in the city of Spartanburg, that he
3 entered that dwelling without her consent and with the
4 intent to commit a crime therein; and they further allege
5 that that burglary occurred in the nighttime, or the
6 defendant was armed with a deadly weapon, or caused
7 physical injury to some other person, or threatened the use
8 of a dangerous instrument, or displayed a firearm or a
9 knife, or has a record of two or more convictions for
10 burglary or housebreaking.

11 They also allege that he did take, steal and carry
12 away from LaRhonda Moss certain personal property being
13 described as a computer and some jewelry and other items,
14 that those items were valued at more than \$1,000 but less
15 than \$5,000. And they claim that he took those items with
16 the intention of permanently depriving the owner of use and
17 possession of her property and converting that property to
18 his own use.

19 Now, as to those allegations and as to each of those
20 charges contained in each of those indictments the
21 defendant has entered a plea of not guilty. And a plea of
22 not guilty places upon the state the burden of proving the
23 allegations that they have set forth in those indictments,
24 the burden of proving each of the essential elements that
25 make up the crimes of burglary in the first degree, as well

Jury qualification

1 as grand larceny; and therefore the burden is upon the
2 state to establish the defendant's guilt to the
3 satisfaction of 12 jurors beyond a reasonable doubt before
4 any verdict of guilty could be returned as to either of the
5 indictments.

6 And therefore we're going to be selecting 13 of you
7 jurors. There'll be 12 primary jurors and then one
8 additional juror to serve as an alternate so that if one of
9 the primary jurors cannot continue to serve during the
10 trial, then the alternate takes that juror's place.

11 But by way of your participation you're going to be
12 called upon to listen to testimony and to consider any
13 other evidence introduced during the trial.

14 At the trial's conclusion you'll be called upon to
15 evaluate the witness testimony, consider all the evidence,
16 decide the facts. In other words, you'll determine what
17 you believe occurred, if anything, back in September of
18 2005 as it relates to these allegations against this
19 particular defendant.

20 Then once you decide the facts you will apply the law
21 that I will have provided you, and you will determine
22 whether or not the defendant has been proven guilty of the
23 crimes beyond a reasonable doubt.

24 And if he has been proven guilty of either of the
25 crimes beyond a reasonable doubt, then your verdict would

Jury qualification

1 be guilty as to that charge. And if he has not been proven
2 guilty of a particular crime beyond a reasonable doubt,
3 then your verdict must be not guilty as to that particular
4 charge.

5 Now, we're going to select those 13 to participate.
6 Before we do that I've got some questions that I'm going to
7 ask you as a group.

8 The purpose of the questions is to determine whether
9 or not there is a reason why any one of you jurors should
10 not be selected to participate in the trial of this
11 particular case.

12 So as these questions are asked should you need to
13 respond to them or you have some reason why you think you
14 could not be fair to one side or the other in the case,
15 I'll need you to let me know during the course of this
16 process.

17 Now, the first thing I'm going to do is to introduce
18 some people to you. And those people will include the
19 defendant, the person who is alleged to have been the
20 victim, the lawyers who are representing the parties in the
21 case, each of the potential witnesses that might be called
22 during the trial of the case.

23 The purpose of these introductions is to find out if
24 you have any connection with anybody involved in the case,
25 in other words, are you related by blood or marriage, do

Jury qualification

1 you go to church with any, do you go to work with any, do
2 you socialize with any, do you just happen to know any of
3 these people in any form or fashion.

4 Should you know a person or you have some connection
5 with them, as their name is called I'm going to ask that
6 you please stand. I'll address that connection and
7 determine whether or not it would affect your judgment in
8 the case.

9 Now, first of all, as I told you, the defendant, the
10 person who is accused of having committed these offenses,
11 is John Willie Mack.

12 Mr. Mack, if you will, please stand and face the jury
13 panel.

14 (Whereupon, the defendant stood.)

15 THE COURT: All right. Thank you. You may be seated.

16 Seated with Mr. Mack at the defense table is Roger
17 Poole. He is Mr. Mack's lawyer. He'll be assisting him in
18 the trial of the case.

19 Presenting the case on behalf of the state are Barry
20 Barnette, the Solicitor for the 7th Judicial Circuit, and
21 Tony Leibert, an Assistant Solicitor for the 7th Judicial
22 Circuit.

23 The person who is alleged to have been the victim of
24 these offenses is LaRhonda Moss.

25 Other persons who might be called to testify as

Jury qualification

1 witnesses in the case include John David Burgess with the
2 Spartanburg Public Safety Department, David Reeves with the
3 Spartanburg Public Safety Department, Mylnor Beach with the
4 Spartanburg Public Safety Department, Manuel Ortuno with
5 the state law enforcement division. He is not present, but
6 he'll be here after lunch.

7 Doris Yarborough of the state law enforcement
8 division. She's also not here at the present time. Nikki
9 Perry with the state law enforcement division. They're
10 coming from Columbia. And Sheree Brown also with the state
11 law enforcement division.

12 In addition to those we have Walter Max Ballard, Jr.
13 who is a resident of Spartanburg, and Gail Moffitt or one
14 of the deputy clerks employed in the Spartanburg County
15 Clerk of Court's Office.

16 Does any juror know any person who has just been
17 identified for your benefit? Have any connection
18 whatsoever with any of those people? If so, please stand.

19 All right. I have two.

20 Ma'am, I'll start with you if you'll give me your name
21 and your juror number, please. And then tell me the
22 question relates to you.

23 JUROR NO. 161: Karen Tucker, 161. And I know
24 Mr. Burgess. He is a security officer sometimes with the
25 bank I work at.

Jury qualification

1 THE COURT: All right. Would that have any bearing
2 upon your decision in this case if you were called upon to
3 serve?

4 JUROR NO. 161: No, sir.

5 THE COURT: Thank you. Be seated.

6 Yes, sir.

7 JUROR NO. 119: My name is Finley Pollard. I'm
8 Juror 119. I used to work at the Spartanburg County Jail
9 about 13 and a half years. I think I know Mr. Mack, and I
10 know the attorneys, and I know the city officers.

11 THE COURT: What was your number?

12 JUROR NO. 119: 119.

13 THE COURT: 119. Would any of those connections have
14 any bearing upon your decision in the case?

15 JUROR NO. 119: No, sir.

16 THE COURT: Okay. Thank you. You may be seated.

17 Anyone else know anybody in the case?

18 (No responses.)

19 THE COURT: Let me ask this too.

20 Is there any juror who knows anybody who is employed
21 in the 7th Judicial Circuit Solicitor's Office or, and/or,
22 the 7th Judicial Circuit Public Defender's Office? Do you
23 know any juror (sic) employed in either of those offices?
24 If so, please stand.

25 All right. Your name and number, please, sir.

Jury qualification

1 JUROR NO. 98: Charles McClure, No. 98. Mr. Robert
2 Hall is my stepfather. He used to be chief magistrate with
3 Spartanburg County. He is currently with the public
4 defender's office.

5 THE COURT: All right. Would that have any bearing
6 upon your decision in this case if you were called upon to
7 serve as a juror?

8 JUROR NO. 98: I don't know anybody in this case.

9 THE COURT: Okay. So it wouldn't affect your
10 judgment?

11 JUROR NO. 98: No, sir.

12 THE COURT: All right. Thank you.

13 This is an event, as I have stated, that the state
14 alleges occurred back between September the 1st of 2005 and
15 September the 6th of 2005. They allege that it occurred at
16 a residence in the possession of LaRhonda Moss at that time
17 located on Victoria Road here in the city of Spartanburg.

18 Is there any member of the jury panel that thinks you
19 might have heard, seen or read something that relates to
20 this case? Do you think you've been exposed to any type of
21 information or circumstances that relate to this particular
22 event? If so, please stand.

23 (No response.)

24 THE COURT: Is there any member of the jury panel or
25 any members of your immediate family -- and let me define

Jury qualification

1 an immediate family member as a parent, a spouse, a child
2 or a sibling -- a parent, a spouse, a child or a sibling --
3 have you or any members of your immediate family as I just
4 defined it ever been the victim or have you ever been
5 accused of having committed the crimes of burglary,
6 robbery, larceny or any similar type of an offense?

7 I need to know if you or a family member has been the
8 victim of such an offense or you or a family member has
9 been accused of having committed such an offense. If so, I
10 would ask that you please stand.

11 I have several standing. Now, as you respond to the
12 question you can respond to the question where you're
13 standing. If you prefer not to and you'd rather step down
14 where I am, feel free to do so. So if you want to step
15 down here, do that. And if you don't, I'll just assume you
16 want to answer the question where you are.

17 I'll start with you, sir, if you'll please give me
18 your name and your juror number and tell me how that
19 question relates to you.

20 JUROR NO. 36: I'm Ryan Edwards, Juror 36. And I have
21 been a victim. And I would like to approach the bench.

22 THE COURT: Okay.

23 (Bench conference held off the record with the juror
24 and counsel.)

25 THE COURT: All right. Next. I'll start with the

Jury qualification

1 gentleman in the blue shirt. Okay.

2 JUROR NO. 54: Jeffrey Gary, Juror 54. My brother is
3 a convicted bank robber.

4 THE COURT: Would it have any bearing upon your
5 decision in this case?

6 JUROR NO. 54: Not at all.

7 THE COURT: All right. Thank you. Be seated.

8 Yes, sir.

9 JUROR NO. 98: Charles McClure, No. 98. I've been the
10 victim of a robbery.

11 THE COURT: Would it have any bearing upon your
12 decision in this case?

13 JUROR NO. 98: No, sir.

14 THE COURT: Thank you. Be seated.

15 Yes, sir.

16 JUROR NO. 19: Donald Clark, Juror 19. I have been
17 (inaudible) --

18 THE COURT: Would it have any bearing upon your
19 decision?

20 JUROR NO. 19: Not at all.

21 THE COURT: Thank you. Be seated.

22 Yes, ma'am.

23 JUROR NO. 71: Karen Hollifield, Juror No. 71. Can I
24 approach the bench?

25 THE COURT: Yes, ma'am.

Jury qualification

1 (Bench conference held off the record with juror and
2 counsel.)

3 THE COURT: Juror 71 is excused from serving in this
4 case.

5 Next, ma'am.

6 JUROR NO. 18: Virginia Ceva, Juror No. 18. I've been
7 the victim of three pharmacy robberies and a burglary at my
8 home.

9 THE COURT: And would any of those experiences have
10 any bearing upon your decision in this case?

11 JUROR NO. 18: No, sir.

12 THE COURT: All right. Thank you. Be seated.

13 Yes, ma'am.

14 JUROR NO. 93: I'm Wanda Littlefield, Juror No. 93.
15 My home has been broken into twice, and they've just
16 destroyed my home.

17 THE COURT: And would that personal experience that
18 you had have any bearing upon your decision in this case?

19 JUROR NO. 93: I have been very bitter about this.

20 THE COURT: Do you think it might affect your
21 judgment?

22 JUROR NO. 93: It might.

23 THE COURT: All right. We'll excuse Juror No. 93.

24 Don't leave yet.

25 Yes, sir.

Jury qualification

1 JUROR NO. 127: Justin Richards, No. 127. My parents'
2 home, which was my house at the time, was broken into about
3 three years ago.

4 THE COURT: And would that have any bearing upon your
5 decision in this case?

6 JUROR NO. 127: No, sir.

7 THE COURT: All right. Thank you. Be seated.

8 Anyone else need to respond to that question?

9 (No response.)

10 THE COURT: Next question. Has any member of the jury
11 panel or any members of your immediate family as I
12 described, defined that for you earlier, have you or those
13 family members ever been employed as a law enforcement
14 officer? Ever been, now or ever been, employed as a law
15 enforcement officer of any kind, civilian or military? If
16 so, please stand.

17 Yes, ma'am.

18 JUROR NO. 67: Juror No. 67. My stepson is presently
19 a law enforcement officer.

20 THE COURT: Where?

21 JUROR NO. 67: Lyman.

22 THE COURT: Okay. Would that have any bearing upon
23 your decision?

24 JUROR NO. 67: No.

25 THE COURT: Thank you. Be seated.

Jury qualification

1 Yes, sir.

2 JUROR NO. 38: Joel Eidson, No. 38. My father is a
3 retired major for Greenville County.

4 THE COURT: Would that affect your judgment?

5 JUROR NO. 38: No.

6 THE COURT: Thank you. Be seated.

7 Yes, sir.

8 JUROR NO. 107: Tommy Norris, 107. Both of my parents
9 and my brother are retired law enforcement officers.

10 THE COURT: Would it have any bearing upon your
11 decision?

12 JUROR NO. 38: No, sir.

13 THE COURT: Thank you. Be seated.

14 Yes, ma'am.

15 JUROR NO. 143: Monica Shock, 143. And my hus -- my
16 first one was a military police and he was -- worked for
17 Spartanburg city before he joined the military.

18 THE COURT: And would that have any bearing upon your
19 decision?

20 JUROR NO. 143: No, sir.

21 THE COURT: Okay. Thank you. Be seated.

22 Has any member of the jury panel ever been called upon
23 to testify in the trial of a criminal case, whether it be
24 you were called by the state or by a defendant? Anybody --
25 has anybody ever been called to testify as a witness in the

Jury qualification

1 trial of a case? If so, please stand.

2 Your name, please, sir.

3 JUROR NO. 92: Wesley Lawter.

4 THE COURT: Your number?

5 JUROR NO. 92: Ninety -- I'm sorry -- ninety-three.

6 THE COURT: Ninety-three. No. Are you sure it's 93?

7 MR. POOLE: Ninety-two.

8 JUROR NO. 92: Ninety-two.

9 THE COURT: Okay. And you were called to testify in a
10 case?

11 JUROR NO. 92: Yes, sir.

12 THE COURT: Did you testify for the state or the
13 defendant?

14 JUROR NO. 92: The state.

15 THE COURT: How long ago was it about?

16 JUROR NO. 92: Probably within the last -- one was
17 five years ago.

18 THE COURT: Okay. Would it have any bearing upon your
19 decision?

20 JUROR NO. 92: No, sir.

21 THE COURT: Thank you. Be seated.

22 Yes, ma'am.

23 JUROR NO. 18: Virginia Ceva, No. 18. I've been
24 called as a witness in, I think, two.

25 THE COURT: How long ago?

Jury qualification

1 JUROR NO. 18: One of them was recent, three months
2 ago, and one of them was years ago.

3 THE COURT: And were you called by the state or a
4 defendant?

5 JUROR NO. 18: One was the state and one was the
6 defendant.

7 THE COURT: Okay. And would either of those
8 experiences have any bearing upon your decision?

9 JUROR NO. 18: No, sir.

10 THE COURT: Thank you. Be seated.

11 Does any member of the jury panel know of any reason
12 whatsoever why you think you could not be fair in this case
13 if you were called upon to serve based upon what you know,
14 based upon the nature of the case, based upon who is
15 involved in the case, based upon who the witnesses are, who
16 the lawyers are? Is there anything about this particular
17 case that would prevent any juror from being able to be
18 fair and impartial if you were called upon to serve? If
19 so, please stand.

20 JUROR NO. 49: Yes. I have one.

21 THE COURT: And tell me your name and number, please,
22 ma'am.

23 JUROR NO. 49: Brigetda Foster, No. 49.

24 THE COURT: And you have some reason why you think you
25 could not be fair in this case?

Jury qualification

1 JUROR NO. 49: Yes.

2 THE COURT: All right. We'll excuse --

3 JUROR NO. 49: Uh --

4 THE COURT: We'll excuse you from service in the case.
5 Thank you.

6 JUROR NO. 49: Okay.

7 THE COURT: Don't leave yet.

8 Anyone else?

9 (No response.)

10 THE COURT: All right. Any other questions requested
11 by the state?

12 MR. LEIBERT: No, sir, Your Honor.

13 THE COURT: By the defendant?

14 MR. POOLE: No, sir.

15 THE COURT: All right. Draw us a jury, please, ma'am.

16 Please come forward as your name is called. You see a
17 microphone hanging down from the ceiling between the desks
18 where the lawyers are seated.

19 If you'll come toward me about two steps from that
20 microphone, turn and face your fellow jurors. Each side
21 has an opportunity to have you excused from service in the
22 case. They both may agree to have you seated for service
23 in the case.

24 If either side asks that you be excused simply go back
25 and have a seat on the back row where the bailiff is. And

Jury qualification

1 if both agree to have you seated for serving in the case
2 you'll have a seat in the jury box to your right and to my
3 left.

4 So if you'll simply come forward as your name is
5 called you'll be instructed if you're to be seated for
6 service or excused from service in the case.

7 (Pause.)

8 THE COURT: Ladies and gentlemen, there used to be a
9 time back in the olden days, which hasn't been that long
10 ago by the way, when we drew a jury your names were typed
11 on a slip of paper and they were in the juror drum. You
12 might have seen that somewhere. And they'd twirl it around
13 and reach in and pull a name out, and that juror comes up.

14 Well, see, we've advanced beyond all of that simple
15 kind of stuff. We have computers now that do everything.
16 Unfortunately, oftentimes computers don't work, so and
17 people can't do it. We don't have the slips any more.

18 So what we're going to have to do is we're going to
19 have to get the computer up and operational and get it to
20 work so that it can select a jury.

21 So what we're going to do right now is we'll excuse
22 you for lunch. You'll be asked to come back at 2:30. At
23 2:30 report to the jury assembly room. And hopefully by
24 that time we'll have the computer operational or at least
25 in a position to be able to provide us with the information

Jury qualification

1 we need, which is all of your names.

2 So as you leave you're going to be asked to go with
3 the bailiff back to the juror assembly room. They'll scan
4 your tags again, I guess. I'm fairly certain they will.
5 And they'll scan them when you come back. So it's a little
6 bit inconvenient, but we're going to break for lunch
7 anyway.

8 So in the meantime I've provided you with information
9 about this case. And all of you are subject -- except for
10 those who were excused -- all of you are subject to being
11 called to serve as a juror in the case.

12 So during the lunch recess don't talk about the case
13 with any person at all. Don't talk to your family or
14 friends. Don't talk among yourselves. Do not discuss this
15 case in any fashion whatsoever with any person whatsoever.

16 Don't conduct any research or do your own
17 investigation to try to find out anything about the case.
18 In any case that you're going to participate in this week
19 you've got to base your decision upon what you see and hear
20 during the trial of the case.

21 You're never permitted to supplement that knowledge by
22 conducting outside research or discussing it with other
23 people. So don't discuss the case.

24 She fixed it. Okay. Well, since she fixed it we'll
25 go ahead and pick our jury. Well, forget about lunch. We

Jury qualification

1 will break for lunch as soon as we get this jury selected.

2 And I understand that Judge Couch across the hall is
3 going to be selecting a jury this afternoon in another
4 case. So if you're selected in this case you'll be coming
5 back after lunch. But even if you're not you'll still be
6 coming back for potential selection in Judge Couch's
7 courtroom.

8 THE CLERK: Juror No. 19, Donald Clark.

9 What say the state?

10 MR. LEIBERT: Please present Mr. Clark.

11 THE CLERK: What say the defense?

12 MR. POOLE: Please seat Mr. Clark.

13 THE CLERK: Juror No. 109, Kenneth Owens.

14 What say the state?

15 MR. LEIBERT: Please present Mr. Owens.

16 THE CLERK: What say the defense?

17 MR. POOLE: Please seat Mr. Owens.

18 THE CLERK: Juror No. 36, Ryon Edwards.

19 What say the state?

20 MR. LEIBERT: Please present Mr. Edwards.

21 THE CLERK: What say the defense?

22 MR. POOLE: Please excuse Mr. Edwards.

23 THE CLERK: No. 38, Joel Eidson.

24 What say the state?

25 MR. LEIBERT: Please present Mr. Eidson.

Jury qualification

1 THE CLERK: What say the defense?
2 MR. POOLE: Please excuse Mr. Eidson.
3 THE CLERK: Juror No. 129, Carol Robinson.
4 What say the state?
5 MR. LEIBERT: Please present Ms. Robinson.
6 THE CLERK: What say the defense?
7 MR. POOLE: Please seat Ms. Robinson.
8 THE CLERK: Juror No. 52, Daniel Gamble.
9 What say the state?
10 MR. LEIBERT: Please present Mr. Gamble.
11 THE CLERK: What say the defense?
12 MR. POOLE: Please seat Mr. Gamble.
13 THE CLERK: Juror No. 119, Finley Pollard.
14 What say the state?
15 MR. LEIBERT: Please present Mr. Pollard.
16 THE CLERK: What say the defense?
17 MR. POOLE: Please excuse Mr. Pollard.
18 THE CLERK: Juror No. 169, Joyce Winning.
19 What say the state?
20 MR. LEIBERT: Please present Ms. Winning.
21 THE CLERK: What say the defense?
22 MR. POOLE: Please seat Ms. Winning.
23 THE CLERK: Juror No. 100, Edna Moore.
24 What say the state?
25 MR. LEIBERT: Please present Ms. Moore.

Jury qualification

1 THE CLERK: What say the defense?
2 MR. POOLE: Please seat Ms. Moore.
3 THE CLERK: Juror No. 172, Brianna Woodsby.
4 What say the state?
5 MR. LEIBERT: Please present Ms. Woodsby.
6 THE CLERK: What say the defense?
7 MR. POOLE: Please seat Ms. Woodsby.
8 THE CLERK: Juror No. 7, Gregg Biltoft.
9 What say the state?
10 MR. LEIBERT: Please present Mr. Biltoft.
11 THE CLERK: What say the defense?
12 MR. POOLE: Please excuse Mr. Biltoft.
13 THE CLERK: Juror No. 8, Kimbrell Bishop.
14 What say the state?
15 MR. LEIBERT: Please present Ms. Bishop.
16 THE CLERK: What say the defense?
17 MR. POOLE: Please seat Ms. Bishop.
18 THE CLERK: Juror No. 3, Eric Anderson.
19 What say the state?
20 MR. LEIBERT: Please present Mr. Anderson.
21 THE CLERK: What say the defense?
22 MR. POOLE: Please seat Mr. Anderson.
23 THE CLERK: Juror No. 144, Ifekan Simon.
24 What say the state?
25 MR. LEIBERT: Please present the juror.

Jury qualification

1 THE CLERK: What say the defense?

2 MR. POOLE: Please seat Dr. Simon.

3 THE CLERK: Juror No. 55, Christopher Gideon.
4 What say the state?

5 MR. LEIBERT: Please present Mr. Gideon.

6 THE CLERK: What say the defense?

7 MR. POOLE: Please seat Mr. Gideon.

8 THE CLERK: Juror No. 81, Natarsha Arthur.
9 What say the state?

10 MR. LEIBERT: Please excuse Ms. Arthur.

11 THE CLERK: Juror No. 46, Brian Fortenberry.
12 What say the state?

13 MR. LEIBERT: Please present Mr. Fortenberry.

14 THE CLERK: What say the defense?

15 MR. POOLE: Please excuse Mr. Fortenberry.

16 THE CLERK: Juror No. 12, Teresa Brown.
17 What say the state?

18 MR. LEIBERT: Please present Ms. Brown.

19 THE CLERK: What say the defense?

20 MR. POOLE: Please seat Ms. Brown.

21 THE COURT: All right. This will be for the
22 alternate.

23 THE CLERK: Juror No. 29, Alicia Davis.

24 What say the state?

25 MR. LEIBERT: Please present Ms. Davis.

Jury qualification

1 THE CLERK: What say the defense?

2 MR. POOLE: Please seat Ms. Davis.

3 (Whereupon, a jury was impaneled.)

4 THE COURT: All right. Those who have been selected,
5 I'll ask you to please go with a bailiff to a jury room,
6 and I'll bring you back in just a few minutes to excuse you
7 for lunch.

8 (The following takes place outside the presence of the
9 jury.)

10 THE COURT: Are there any matters that need to be
11 addressed regarding jury selection by the state?

12 MR. LEIBERT: No, sir, Your Honor.

13 THE COURT: By the defendant?

14 MR. POOLE: No, sir.

15 (Whereupon, the remaining members of the jury venire
16 were excused.)

17 (The following takes place in the presence of the
18 jury.)

19 THE COURT: Ladies and gentlemen of the jury, as I
20 said, we're going to break for lunch. We'll start back
21 with the trial this afternoon at 2:30, at 2:30 this
22 afternoon.

23 So you're excused right now for lunch. Please report
24 to that room that you've just been introduced to. That's
25 the room you'll be occupying during the course of this

1 trial.

2 Please report to that this afternoon at 2:30 -- 2:30
3 this afternoon. If you're not sure how to get back there
4 talk with the bailiff. He'll assist you with those
5 directions. Have a good lunch. We'll see you at 2:30.

6 (The following takes place outside the presence of the
7 jury.)

8 THE COURT: All right. Court is in recess until 2:30.

9 (Whereupon, a recess was taken.)

10 (Swab marked State's Exhibit No. 1.1 for
11 Identification; swab marked State's Exhibit No. 1.2 for
12 Identification.)

13 THE COURT: All right. Any matters we need to address
14 before the jury is brought in?

15 MR. LEIBERT: No, sir, Your Honor.

16 MR. POOLE: No, sir.

17 THE COURT: All right. Bring them in. Ask Dr. Shango
18 to take the foreperson's seat.

19 (The following takes place in the presence of the
20 jury.)

21 THE COURT: Let me ask the foreperson or who's going
22 to be the foreperson, is your last name Simon or is your
23 last name Shango?

24 THE FOREPERSON: My last name is Simon.

25 THE COURT: Simon. Okay. All right. Dr. Simon, I'm

1 going to ask you to serve as the foreperson of this jury.

2 As the foreperson you're going to have three specific
3 duties that none of the other jurors will have.

4 No. 1, you're to be -- to serve as the spokesperson
5 for the jury. And so if during the trial something needs
6 to be brought to my attention -- you or one of your fellow
7 jurors has some difficulty or problem or question -- you
8 let me know directly or through the bailiff, and I'll
9 address those issues.

10 Secondly, you're going to be called upon to preside
11 over the jury deliberations in the jury room when that time
12 comes. That of course won't be until the end of the trial
13 after all of the evidence has been received and I've
14 instructed you on the law that's applicable in this case.
15 But when that time comes you are to preside over that
16 process in the jury room simply to ensure that those
17 deliberations are carried out in some orderly fashion.

18 And, thirdly, you'll be asked to actually write the
19 decisions of the jury. You'll do that on a verdict form
20 that I'll provide you at the trial's conclusion on which
21 you will indicate the jury's unanimous decision as it
22 relates to each of the separate charges.

23 Now, the foreperson has those specific duties that
24 I've just indicated. That does not however mean that he is
25 any more important than any of you other jurors, and that's

1 because the decision of a jury panel is the unanimous
2 consensus opinion of all 12 jurors. And therefore each of
3 you will have an equal say and equal voice in what the
4 ultimate decisions in this case will be.

5 Someone simply has to be delegated those
6 responsibilities that I have just indicated, and I have
7 delegated those to Dr. Simon in appointing him as the
8 foreperson. But all of you jurors are equally important so
9 far as the ultimate decisions in this case are concerned,
10 because, as I've stated, the verdicts have to be unanimous.
11 All 12 jurors must be in agreement.

12 Now, Ms. Davis, you've been selected as an alternate
13 juror. And the function of an alternate juror is to take
14 the place of one of the original 12 jurors if during this
15 trial one of these 12 cannot continue to serve for some
16 reason. And should that occur, then you would take that
17 person's place. In that event you would become the
18 12th juror. And in that event you would participate
19 throughout the trial including the jury deliberations at
20 the trial's conclusion.

21 When the time does come for jury deliberations if the
22 original 12 are able to participate, then your service
23 ends, and you don't participate any further because a
24 decision of a jury is the unanimous consensus opinion of
25 12. But no more than 12 can participate in that process.

Jury sworn

1 But it is important that you pay just as careful
2 attention as we ask of all of the jurors selected in this
3 case because it does occur from time to time for one reason
4 or another one of those original 12 may be called away. In
5 that event you become the 12th.

6 So we do appreciate your participation as an alternate
7 juror, just as we appreciate the participation of each of
8 you jurors who have been selected for the purpose of
9 deciding the verdicts in this particular case.

10 You may swear the panel.

11 (Whereupon, the jury was duly sworn.)

12 THE COURT: All right. Ladies and gentlemen, as you
13 know, you have been selected to decide the verdicts in the
14 case of the State vs. John Mack.

15 Mr. Mack has been accused, as I have told you, by the
16 state through the prosecutor with having committed the
17 crimes of burglary in the first degree and grand larceny.

18 The state alleges by way of these indictments which I
19 read from prior to your selection -- the state alleges that
20 Mr. Mack did commit the crime of burglary in the first
21 degree. And in a separate indictment they allege he
22 committed the crime of grand larceny. The allegations
23 setting forth those charges are set forth in each of those
24 separate indictments.

25 Now, as to those charges the defendant has entered a

1 plea of not guilty. And as I have told you, a plea of not
2 guilty places upon the state because they have brought
3 these charges to establish a defendant's guilt beyond a
4 reasonable doubt.

5 The state has the burden of proving the allegations
6 that they have set forth in those indictments. The state
7 has the burden of proving each of the essential elements of
8 the crimes of burglary in the first degree and grand
9 larceny. And therefore the state has the burden of proving
10 the defendant's guilt to your satisfaction beyond a
11 reasonable doubt before a verdict of guilty could be
12 returned as to a particular indictment.

13 Every person who is accused of a crime, and it doesn't
14 matter how serious the offense might be for which that
15 person stands charged -- every person accused of a crime is
16 presumed to be innocent. And that presumption of innocence
17 remains with any defendant, as it does with this defendant,
18 from the time that he is placed under arrest and throughout
19 the course of the criminal process and even throughout the
20 course of the actual trial in the case.

21 That presumption of innocence will be with Mr. Mack
22 even as you go back at this trial's conclusion to begin
23 with your deliberations in this case. That presumption of
24 innocence will be with him in that jury room, and it'll be
25 with him forever unless you 12 jurors unanimously determine

1 that he's no longer entitled to the presumption of
2 innocence.

3 In other words, after you've considered all the
4 evidence in the case, and from that evidence you have
5 determined what you believe to be the true facts as they
6 relate to these allegations, and after deciding those facts
7 you apply the law that I will have provided you, if you 12
8 jurors unanimously determine that his guilt as to a
9 particular crime has been proven beyond a reasonable doubt,
10 then he's no longer entitled to that presumption of
11 innocence. But it's only if, unless and until you are
12 satisfied of his guilt beyond a reasonable doubt that the
13 presumption of innocence would no longer be applicable.

14 Now, the way the trial will proceed is that in a
15 moment the lawyers are going to address you in what are
16 called opening statements. There are occasions in the
17 trial of a case where lawyers are permitted to address the
18 jury, and that is at the beginning of the trial before any
19 evidence has been introduced and then again at the
20 conclusion of the trial after all of the evidence has been
21 received.

22 Keep in mind however that the evidence comes in
23 between the opening and the closing statements of the
24 lawyers; and therefore what the lawyers tell you in their
25 statements is not to be considered by you as any evidence

1 upon which you will base your decision in this case.

2 That's because the lawyers aren't witnesses to
3 anything. They don't know anything about this case of
4 their own personal knowledge or perception like a witness
5 may testify to.

6 They're not going to take the witness stand like
7 witnesses will. They're not going to testify under oath.
8 They're not going to be subjected to direct and
9 cross-examination like witnesses will be. So what the
10 lawyers tell you in their statements is not to be construed
11 by you as being evidence in the case. But even though the
12 lawyers' statements are not evidence they do serve a
13 purpose, and therefore you should listen to what they have
14 to say.

15 The opening statements will serve to provide you with
16 a basic understanding as to what this case is about from
17 both the perspective of the state and of the defendant so
18 that you'll have some context in which to place the
19 evidence that we will be receiving shortly thereafter.

20 The closing statements occur after all of the evidence
21 has been received. And, again, while those statements are
22 not evidence it does afford the lawyers an opportunity to
23 discuss with you the evidence that you have seen and heard
24 during the trial of the case. And through that discussion
25 each will have an opportunity to try to persuade you or to

1 convince you that that evidence does or does not support a
2 particular decision. And, as I say, it's in between those
3 statements that we will actually receive the evidence.

4 The state has brought these charges against the
5 defendant, and therefore they have the burden of proving
6 his guilt beyond a reasonable doubt. And therefore the
7 state will go forward first in its presentation of
8 evidence.

9 Once the state has concluded with its presentation a
10 defendant in a criminal trial has the same opportunity to
11 testify and to call witnesses or present evidence. But a
12 defendant is under no obligation to take the witness stand
13 and testify or to call any witnesses or to produce any
14 evidence. And that's because there is no burden upon a
15 person charged to prove that they are not guilty or to
16 prove that they are innocent because in some cases that
17 might not even be possible.

18 The state has the burden of proof, and therefore they
19 have to present evidence, because that evidence has to
20 convince you of the defendant's guilt beyond a reasonable
21 doubt. But there is no corresponding burden upon a
22 defendant to put forth any type of evidence.

23 And where a defendant in a criminal trial does not
24 take the witness stand and testify or call any witnesses or
25 produce any evidence, that's not a circumstance that a jury

1 may consider in any way whatsoever in your deliberations or
2 in your determination as to whether or not his guilt has
3 been proven beyond a reasonable doubt.

4 And, as I say, that's because the defendant has no
5 burden. And therefore should a defendant not testify or
6 present evidence, you can't hold that against him or her.
7 You can't consider it in any way whatsoever in your
8 decision.

9 You must base your decision upon the evidence
10 presented during the trial of the case, or the lack thereof
11 for that matter, but you cannot hold that against the
12 defendant where he or she does not testify or produce
13 evidence. But, as I say, defendants are afforded an
14 opportunity to present evidence in the event they wish to
15 do so.

16 So after all of the evidence has been received and
17 after the lawyers give you their final summations I will
18 then instruct you fully on the law that's applicable in
19 this case. I'll instruct on the criminal law generally,
20 and I'll also instruct you on the law specifically as it
21 relates to the crimes of burglary in the first degree and
22 grand larceny, after which you'll be asked to go back and
23 begin with your deliberations.

24 Through that process you'll examine all of the
25 evidence, you will assess the credibility of witness

1 testimony. You will decide what you believe to be the true
2 and credible facts that relate to these allegations.

3 Once you decide those facts you'll then apply the law
4 that I will have provided you, and you will determine
5 whether or not the defendant has been proven guilty beyond
6 a reasonable doubt as it relates to a particular charge.
7 And if he has, then your verdict is guilty as to that
8 charge. And if he has not been, then your verdict is not
9 guilty as to that particular charge.

10 Now, all that we ask for you to do is to pay careful
11 attention throughout the course of the trial. There are
12 several witnesses that likely will testify. And I don't
13 know if there's going to be any conflicts in testimony.
14 But sometimes or oftentimes there are some conflicts. And
15 if those conflicts in testimony need to be resolved in
16 order for you to arrive at a decision in the case it's your
17 prerogative to resolve the conflicts.

18 In other words, it's your prerogative to determine
19 what is the most credible testimony and what is the most
20 believable testimony.

21 And so you can accept everything that a witness
22 testifies to, or you may reject it. You may accept some
23 portion of it and reject some other portion of it.

24 But you need to pay attention to every witness as they
25 testify so that when you go back to begin your

Opening statements

1 deliberations you'll be in a proper position to be able to
2 fairly evaluate and assess a witness' credibility after
3 consideration of not just that particular witness'
4 testimony but in light of all of the testimony and all of
5 the evidence received during the trial.

6 And of course it's important that you keep an open
7 mind throughout the course of the trial. And that just
8 simply means that you are not to begin making up your mind
9 or formulating your opinions as to what you think the
10 ultimate decisions in this case ought to be until all of
11 the evidence has been received, until I have instructed you
12 on the law that's applicable in the case and until you've
13 been asked to go back and begin with your deliberations.
14 That is the process that is designed for you 12 jurors to
15 arrive at a fair and just decision in the case.

16 So I do want to thank you in advance for your
17 participation, as well as for your careful attention. I
18 would ask that you please give the lawyers your attention
19 now as they give you their opening statements.

20 Mr. Leibert.

21 MR. LEIBERT: May it please the Court. Mr. Poole.
22 Solicitor Barnette.

23 Good afternoon. Between September 1st and
24 September 6th of 2005 -- that was the Labor Day Weekend --
25 the residence of Ms. LaRhonda Moss who you'll hear from in

Opening statements

1 a few minutes was broken into. And that's at [REDACTED] West
2 Victoria Road or lane in Spartanburg.

3 When she came home that morning she pulled into the
4 carport, and she went in her back door, and immediately she
5 knew her home had been broken into. She could see her
6 front door from her back door. And her front door was
7 open. And her items and her personal property was all over
8 the place. And evidence is going to show that the
9 defendant is the one that committed that burglary.

10 She immediately called the police. The police came,
11 and one of the officers, a detective or investigator, John
12 Burgess, and he processed the scene. And he found blood.
13 And they did D.N.A. analysis. And you'll hear about that
14 later. We have a forensic scientist here today from
15 SLED -- Mr. Ortuno. He is seated in the back. And he will
16 give you his findings on the D.N.A.

17 The defendant has been charged with burglary first
18 degree for breaking into her home and grand larceny for the
19 items that he stole. She'll tell you about the items that
20 he stole and what the values were.

21 The evidence will show, ladies and gentlemen, that he
22 is guilty as charged. Thank you.

23 MR. POOLE: May it please the Court.

24 THE COURT: Mr. Poole.

25 MR. POOLE: Mr. Leibert.

Opening statements

1 Good afternoon, Mr. Foreman, ladies and gentlemen.
2 I'm Roger Poole. Again, I represent Mr. John Mack in this
3 case or these two cases.

4 He is charged, as you've already heard, with burglary
5 in the first degree and grand larceny. Burglary is a
6 breaking and entering, in essence. And grand larceny is
7 the taking and carrying away of property that belongs to
8 another.

9 The case that the state has in our opinion is not a
10 case that rises to being proveable beyond a reasonable
11 doubt. That is what your job is set forth as jurors.

12 You have to listen to the evidence, take the law that
13 Judge Cole will tell you about at the end of this case and
14 make a decision as to whether or not the state has proved
15 that this man right over here during a 5-day period was the
16 one who broke and entered and took and carried away
17 property that belonged to another.

18 This case is not going to last very long. It
19 nevertheless is very important to Mr. John Mack. It's
20 important to the victim. It's important to the state of
21 South Carolina.

22 But my job is not to paint a picture for the state.
23 The state's job is to prove their case beyond a reasonable
24 doubt.

25 The only evidence in this case that you will hear

LaRhonda Moss

Direct examination by Mr. Leibert

1 connecting Mr. Mack is this D.N.A. testimony that you're
2 going to hear about. But that's all.

3 This is Spartanburg County on February 23 -- 22nd,
4 2011. We're talking about something that occurred in 2005.
5 And this is not N.C.I.S. That is not whatever you can
6 watch on C.B.S., the cable channel or anything like that.
7 This is not one of those things where you run up to the
8 microscope and say, ah-ha, we got our defendant. This is
9 now and here.

10 This case won't go through tomorrow because it'll be
11 ended probably tomorrow. I mean by that the state's
12 presentation. But I want you to know right off the bat
13 that it's our position that the state cannot prove their
14 case beyond a reasonable doubt.

15 And I thank you for your time. I thank you for your
16 attention. And I thank you for the fact that you're here,
17 although I know that you probably wish you weren't.

18 MR. LEIBERT: May it please the Court. The state
19 would all LaRhonda Moss.

20 LA RHONDA MOSS, having been
21 first duly sworn, testified as follows:

22 DIRECT EXAMINATION BY MR. LEIBERT

23 MR. LEIBERT: May it please the Court, Your Honor.

24 Q Please tell the jury your name.

25 A LaRhonda Moss.

LaRhonda Moss
Direct examination by Mr. Leibert

1 Q Where do you currently reside?

2 A In Coldstream, Canada.

3 Q Did the state of South Carolina through the
4 solicitor's office fly you in here today for this trial?

5 A Yes, sir.

6 Q And did you previously reside in Spartanburg?

7 A I did.

8 Q And where did you reside in September 1st through
9 September 6th of 2005?

10 A [REDACTED] West Victoria Lane.

11 Q And that's in the city of Spartanburg?

12 A Yes, sir.

13 Q And the county of Spartanburg?

14 A Yes, sir.

15 Q What type of structure was that?

16 A It's a, a brick home.

17 Q And were you renting or buying that house?

18 A Renting.

19 Q What was your occupation in September of 2005?

20 A I'm a nurse, and I was working at Laurens County
21 hospital.

22 Q And between September 1st and September 5th were you
23 out of town?

24 A Yes, sir.

25 Q And where were you at?

LaRhonda Moss

Direct examination by Mr. Leibert

1 A I was in Boone, North Carolina.

2 Q And what were you doing?

3 A We have a family and friend event, camping event,
4 there every day Labor Day Weekend.

5 Q Did you return to your residence on September 6th?

6 A That Tuesday morning. I'm not sure, was it the 6th.

7 Q And what -- explain to the jury how you entered your
8 residence on that day.

9 A I came home from work that morning. I was a
10 night-shift worker. And I park -- I have a carport around
11 on this side of the house and then a sidewalk that comes to
12 the back. I always went in the back door.

13 And when I opened the back door -- right here beside
14 the back door is my kitchen. And I have a big upright
15 freezer that's my grandmother's. And it's one of those
16 old-time ones that don't defrost itself. And the door was
17 open on the refrigerator -- the freezer. And there was water
18 all in the floor.

19 And my front door was open, because you can see
20 straight in through the front door. And there was just
21 stuff scattered everywhere all in my house. He, whoever
22 did it, had to get out luggage bags and backpacks and
23 things and had them laid all over like you -- thinking he
24 was going to come back and get more stuff. And, and there
25 was just stuff everywhere. And it just scared me to death.

LaRhonda Moss

Direct examination by Mr. Leibert

1 THE COURT: That's a microphone, so let's be careful
2 of it. Be sure we hear what you have to say.

3 THE WITNESS: I'm sorry.

4 A I was just scared to death. I knew, I knew
5 immediately when I opened the door, that somebody had
6 broken in my house.

7 Q Who resided with you?

8 A I was by myself.

9 Q What did you do?

10 A I called 9-1-1.

11 Q Were you able to determine if anything was missing?

12 A There was missing -- there was my T.V. right away I
13 noticed missing. And then my C.D. changer was missing.
14 The V.C.R. was missing. The cable box was missing. That's
15 what I noticed at first because all of that was right there
16 in the living room.

17 Q Where was your T.V. setting?

18 A On the entertainment center.

19 Q Did you notice anything on the entertainment center
20 around where the T.V. should have been?

21 A There was no T.V. where the T.V. should have been.

22 Q Right. And then what -- what did you pay for your
23 T.V.?

24 A Oh, about 200 something dollars. It was from
25 Wal-Mart.

LaRhonda Moss

Direct examination by Mr. Leibert

1 Q All right. And what type of computer did you have?

2 A An I.B.M.

3 Q Was it a laptop or a desktop?

4 A It was a laptop.

5 Q And how much did you pay for that?

6 A \$900.

7 Q And when you say a C.D. changer, was that part of a
8 bigger system?

9 A That was a Sony. It was a -- we bought the whole Sony
10 outfit with the speakers and the receiver, you know, and
11 the whole kit. But the receiver didn't get stolen, but the
12 C.D. changer did.

13 Q How much did you pay for the entire system?

14 A The whole system was seven something.

15 Q Were you able to put an approximate value on the C.D.
16 changer?

17 A I don't know how to just -- I don't know how to divide
18 it up like that. I would guess now if I bought one, I
19 don't know, like \$200. It was a five --

20 Q Were you able to replace it?

21 A No. I still don't have one.

22 Q What were you saying was a five?

23 A C.D. changer, my C.D. changer.

24 Q Also jewelry. Did you determine at some point whether
25 jewelry was missing?

LaRhonda Moss

Direct examination by Mr. Leibert

1 A Well, I didn't know right away because there was
2 jewelry scattered all over my bed, you know, and I just
3 called the police officer right away, and he came. But
4 then later on when I started looking there was some jewelry
5 missing.

6 Q All right. When you left your house on September 1st,
7 what was the condition of it then?

8 A My house was spotless.

9 Q Let's start now with some of the jewelry. What items
10 did you have -- a locket your husband gave you?

11 A The main thing that I hate that disappeared, my
12 husband had given me a heart locket, and it had love you
13 engraved on the back. And my granddaughter when she was
14 born, from the very first time I ever held her she would
15 play with that locket. And so that was going to be her
16 inheritance, you know, an heirloom for her to pass on. And
17 that's the thing mostly that I hate.

18 Q Do you know what your husband had paid for that?

19 A That was a gift. I don't know.

20 Q How about any other items? Was there a tennis
21 bracelet?

22 A I had a -- it was a watch. It was like a tennis
23 bracelet, but it was a watch. I bought that myself. That
24 was over \$200. It was cubic zirconia. It's not real
25 diamonds. And I had 10-carat gold cubic zirconia rings

LaRhonda Moss

Direct examination by Mr. Leibert

1 that were missing. Anything that was of value -- I have
2 rings that had little tiny diamonds. They weren't gone. I
3 had a ruby ring, a sapphire ring. I had a lot of different
4 pendants that I kept in a little thing in my jewelry box.
5 Some were gifts from my children and some I bought myself.

6 Q Do you know what the cost of the ruby ring was?

7 A The ruby ring was probably around \$150.

8 Q And what was the cost of your sapphire ring?

9 A About the same.

10 Q And how many pendants did you say were missing?

11 A I -- the -- what I can remember is about seven.

12 Q Do you know the approximate cost of each one of those?

13 A I don't know the price of all of them because some
14 were my children -- you know, gifts from my children and
15 from friends. But I just estimated about \$600 because they
16 were all gold, all real gold.

17 Q \$650 total.

18 A For the total, yes, sir.

19 Q Were any other items taken? I believe you had some
20 gold rings taken.

21 A Yeah. We talked about the rings already.

22 Q And those were the value of how much?

23 A The three probably maybe \$600, for those three cubic
24 zirconias. They were real gold, but they were cubic
25 zirconia rings. They weren't real diamonds.

LaRhonda Moss

Direct examination by Mr. Leibert

1 Q Do you know John Mack?

2 A I've never seen him before in my life until this
3 morning.

4 Q Did you give him consent to come into your house --

5 A No, sir.

6 Q -- on September 1st --

7 A No, sir.

8 Q -- and steal from you?

9 A No, sir.

10 Q Did you give him or anybody else permission to go in
11 your house?

12 A Never, nobody. I didn't even tell -- there was very
13 few people who even knew where I lived because I was
14 recently divorced and single, and I was scared. So I
15 didn't even tell too many people where I lived.

16 Q And how long had you lived there as of September of
17 '05?

18 A It would have been -- it was almost two years.

19 Q Did you ever stay there again?

20 A Not one single night.

21 Q Why not?

22 A Because I was scared. I'm still scared to stay by
23 myself. I lock my bedroom door every night.

24 Q Did you notice any blood anywhere?

25 A Yes, sir.

LaRhonda Moss
Cross-examination by Mr. Poole

1 Q Where?

2 A There was blood on the -- they came in the back
3 bedroom, and there was blood on the wall in the back
4 bedroom where the light switch was.

5 And then as you come out of the bedroom there's a
6 little square hallway, just a tiny little thing, but I had
7 a white bookcase setting there with all my C.D.s on it.
8 And there was blood on that white bookcase too.

9 Q How about the entertainment center?

10 A I think there was blood on -- I think he found blood
11 on the entertainment center too.

12 Q Thank you. Answer any questions Mr. Poole may have.

13 CROSS-EXAMINATION

14 BY MR. POOLE

15 Q Just a couple of questions, Ms. Moss. You say you
16 live in Canada now?

17 A I do.

18 Q Okay. Where? You say Coldstream?

19 A Coldstream. It's right outside of Vernon about four
20 and a half hours east of Vancouver in British Columbia.

21 Q Okay. That's out the western --

22 A Uh-huh, like northwest.

23 Q Northwest. Okay. And how long have you lived there?

24 A Since May 18th. I got married May the 1st, and we
25 moved, went back on the 18th after our honeymoon.

LaRhonda Moss
Cross-examination by Mr. Poole

- 1 Q Congratulations.
- 2 A Thank you.
- 3 Q You lived in this house about two years.
- 4 A Uh-huh.
- 5 Q And so you had lived in it for about -- I guess you
- 6 moved out when, in October of that year?
- 7 A That same day when I came home and the house was
- 8 broken into. I never went back.
- 9 Q Who was the landlord?
- 10 A Max Ballard.
- 11 Q Okay. And of course you had a key to your house,
- 12 didn't you?
- 13 A Uh-huh.
- 14 Q And, and did anybody else have a key?
- 15 A My best -- yes. My best friend Janice.
- 16 Q Okay. And anybody else that you know of?
- 17 A Uh-uh.
- 18 Q Did the landlord have a key?
- 19 A Oh, I'm sure he did. He probably did.
- 20 Q Okay. So there were keys. There are at least two
- 21 keys that were not in your possession, is that right?
- 22 A Uh-huh.
- 23 Q Okay. And had this house been rented prior to you
- 24 moving in?
- 25 A Oh, yes, sir.

LaRhonda Moss
Cross-examination by Mr. Poole

1 Q Do you know how many times it may have been?

2 A No. I have no idea. I know Mr. Ballard used to live
3 in it hisself. And then when he sold it -- I mean, when he
4 moved out and bought the other house he just started
5 renting it.

6 Q Okay. All right. And do you know how long it had
7 been a rental property?

8 A No, sir, I don't.

9 Q You testified there was some jewelry that was -- well,
10 let me back up. You never did recover your property, did
11 you?

12 A I never have gotten anything. I mean, I don't even --
13 material things don't mean a thing to me any more because
14 of -- because of that.

15 Q The jewelry, where was it located in your home?

16 A I had a big tall -- one of those that sat on the
17 floor, you know, it's about this tall from the floor --
18 jewelry boxes. And it was in my bedroom.

19 Q Okay. And when did you report the missing jewelry to
20 the law enforcement?

21 A Well, I didn't know I had any missing. He -- because
22 all the jewelry was spread out on the bed, because I had
23 tons of costume jewelry, you know, and different stuff.
24 And it was all spread out on the bed.

25 And I didn't even look to see. I looked to see was my

LaRhonda Moss
Cross-examination by Mr. Poole

1 grandmother's wedding ring still there, and it was.

2 Q Uh-huh.

3 A So that was, you know, my concern right then. And
4 then it was later on after the policeman came and then all
5 the fingerprinting and all of that, was when I went through
6 all my jewelry.

7 Q So you had a lot that you had to go through.

8 A Oh, yeah.

9 Q And that was when you discovered the --

10 A Different things that was missing.

11 Q So --

12 A And there was sometime later I would even remember
13 things that somebody had given me and it was gone.

14 Q Right. Okay. And so it appeared that it had been
15 picked through, is that a fair statement?

16 A No, it didn't look like really it had been picked
17 through. From what I -- when I went through there it was
18 just threw'd out all over the bed. It wasn't even in the
19 jewelry box. It was just on the bed.

20 Q Okay. Was any damage done to the exterior of the home
21 to get into the home?

22 A Yes, sir. The -- my bedroom was on this side facing
23 the road, and on the back side was where I had my computer
24 room and like a library. And that back bedroom window
25 there was broken and pushed up. And that window is about

LaRhonda Moss
Cross-examination by Mr. Poole

1 ten or more feet off the ground.

2 Q Okay.

3 A And there's a heat pump-air conditioning thing
4 underneath it.

5 Q Okay. Then you testified as to the certain values of
6 the computer and other electronic devices. You said that
7 the laptop cost you about \$900. Do you know when it was
8 bought?

9 A It was bought right before me and my husband broke up,
10 so that would have probably been -- it would have been in
11 2003 because we broke up October of 2003. And it was maybe
12 a couple of months old then.

13 Q And you have to forgive me about my lack of electronic
14 jazz knowledge, but you said there was a Sony outfit that
15 you --

16 A Stereo, receiver and the C.D. changer. And we had a
17 V.C.R. And it was like the surround-sound speakers and all
18 of that.

19 Q Okay. And out of that system what was taken?

20 A The C.D. changer and the V.C.R.

21 Q Okay.

22 A And a tape deck. There was a double tape deck.

23 Q You said a table -- a cable box was taken also.

24 A The cable, the Charter cable.

25 Q And was that the property of Charter?

LaRhonda Moss

Redirect examination by Mr. Leibert

1 A Yes, sir.

2 Q Okay. And I believe all of this, these items, were in
3 the living room, is that correct?

4 A Yes, sir.

5 Q And on the television, you paid \$200 for it?

6 A Yeah. It was, it was a Wal-Mart T.V. It wasn't that
7 expensive.

8 Q Okay. How long had you owned it?

9 A I got it right before we left -- before I left my
10 husband too, because lightening had run in on the one we
11 had. And I still don't have a T.V. I never replaced the
12 T.V. either.

13 Q Okay. That's all the questions I have.

14 REDIRECT EXAMINATION

15 BY MR. LEIBERT

16 Q Is it possible that the blood was on the wall by the
17 light switch before you moved in?

18 A No.

19 MR. POOLE: Objection, Your Honor. That calls for --

20 A That, that house --

21 THE COURT: Sustained.

22 MR. LEIBERT: Nothing further. Thank you.

23 THE COURT: Okay. You may step down.

24 MR. BARNETTE: Your Honor, I would like to call
25 Investigator Burgess to the stand, please.

John David Burgess
Direct examination by Mr. Barnette

1 JOHN DAVID BURGESS, having
2 been first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MR. BARNETTE

4 Q If you would, sir, please state your full name for the
5 record.

6 A John David Burgess.

7 Q And where do you work at, sir?

8 A Work for the City of Spartanburg Public Safety
9 Department.

10 Q And what is your position now there, sir?

11 A I work in the criminal investigation division. I'm an
12 investigator.

13 Q And back in September of 2005, did you work for the
14 department of public safety then, sir?

15 A I have worked there for over 80 -- eight years.

16 Q And what was your position then at that time, sir?

17 A On patrol, respond to calls and stuff.

18 Q And did you respond to a call at the address -- on
19 September 5th, I believe, or 6th, did you respond to [REDACTED]

20 West Victoria Road here in Spartanburg, sir?

21 A Yes, sir.

22 Q And is that in the city of Spartanburg?

23 A It is.

24 Q And is that in the county of Spartanburg?

25 A Yes, sir.

John David Burgess
Direct examination by Mr. Barnette

1 Q When you arrived there, please tell the jury what you
2 found, sir.

3 A I went there, got dispatched there, spoke with the
4 victim, Ms. Moss. She wanted to report a burglary to her
5 residence while she was out of town.

6 I spoke with Mr. -- Ms. Moss. Began to observe the
7 scene and get documentation of what was taken and then
8 began to process the scene.

9 Q When you was processing the scene did you notice her
10 items, how they were arranged or rearranged?

11 A Yes, sir, yes, in -- well, not a T.V. there. She said
12 a T.V. had been taken. So it was obvious. Window was up.
13 Signs of a break-in.

14 Q And did -- was her jewelry in the sorted -- or thrown
15 down or whatever?

16 A Yeah. There's credit cards also that was thrown
17 around too. I remember those, and the jewelry too, yes,
18 sir.

19 Q And what items did she report missing to you once she
20 got a chance to look through everything?

21 A She reported a 27-inch Magnavox T.V., a Charter cable
22 box, Sony C.D. changer, I.B.M. laptop and an unknown amount
23 of jewelry.

24 Q Had she got through -- did another officer respond
25 with you on this call, sir?

John David Burgess
Direct examination by Mr. Barnette

1 A Yes. Eric Almond.

2 Q And did you both together process the scene?

3 A We did. I had been to some schools as far as
4 processing-wise, and he hadn't. So I began to process it.
5 He attempted some fingerprints, but couldn't. None could
6 be located. Then I began to collect and look for signs of
7 blood and blood evidence-wise.

8 Q She was talking about the entertainment center. Did
9 you find some blood in that location, sir?

10 A Yes, sir. It was where the entertainment center was.
11 There was some blood there, and I swabbed that area.

12 Q Okay. When you swabbed that area, how do you swab
13 that, sir?

14 A Take two sterile cotton swabs, used sterile distilled
15 water, if it's dry. If it's wet blood you don't need to
16 add water to it, obviously. If it's dried blood, which in
17 this case it was, you add distilled water to it, a couple
18 of drops, swab the area and then put it into a, back into
19 a, envelope that's a -- that you seal up.

20 Q And did you find a blood sample located on a light
21 switch?

22 A Yes, back in the -- says that, collected that. And it
23 was in -- next to the light switch in the rear right
24 bedroom.

25 Q Okay. And where was that located? Was that located

John David Burgess
Direct examination by Mr. Barnette

1 near the window that was opened up?

2 A Yeah. If you go, if you go inside the residence
3 you've got the living room right in front of you. Take a
4 left right there at the hallway, and the bedroom's back
5 there on the, on the back right. And that's where the
6 light switch was at.

7 Q And did you find blood there, sir?

8 A Yes.

9 Q And did you swab that sample also?

10 A That's correct, using the same procedure as before.
11 Also swabbed one more area too.

12 Q And what was the third area you swabbed?

13 A It was also in the hallway, which is a bookshelf. And
14 the blood was on the, on the bookshelf itself. And I
15 swabbed that area too.

16 Q Let me let you open this package, sir, and take a look
17 at those things.

18 A Yes, sir.

19 Q Are those the three swabs you gathered, sir?

20 A Yes, sir.

21 Q And did you secure those items, sir?

22 A We secured. We put into an evidence locker, a secured
23 location.

24 Q Is this the package that you put these items in?

25 A Yes, sir. There is my name, address, date recovered,

John David Burgess
Direct examination by Mr. Barnette

1 the time, and submitted to the drop box, D.B., which is
2 drop box. It's a secure location.

3 Q Let me show you State's Exhibit 1.1. Where did that
4 swab come from, sir?

5 A This come from the right -- right rear at the light
6 switch at the -- I said -- I have it at the point of entry.
7 It would have come in through the, through the window. And
8 it would have been right there at the light switch. So I
9 have that. It was collected. And it has also the case
10 number and the date and time.

11 Q Let me show you what's been marked as 1.2. Could you
12 tell where that swab came from, sir?

13 A Yeah. Also, again, it's marked. I signed it, the
14 date and time, location, hours. And this was from, it
15 says, den from entertainment center.

16 Q And let me show you marked 1.3.

17 MR. BARNETTE: Let me premark this real quick.

18 (Swab marked State's Exhibit No. 1.3 for
19 Identification.)

20 Q Let me show you what's been marked as State's
21 Exhibit No. 1.3. Where was that swab from, sir?

22 A Also, been identified -- or this is what I've
23 collected -- case number, time and date, and it says
24 bookshelf.

25 Q So that's of the bookshelf there you was talking

John David Burgess
Direct examination by Mr. Barnette

1 about?

2 A Yeah. I have den, but 'twas right there at the rear
3 of the -- in the hallway at the den at the opening.

4 Q Okay. And those three items you placed in the
5 evidence bag there?

6 A Yes, all three of those, the swabs.

7 Q And they were turned over to the evidence room, is
8 that correct?

9 A Yes, sir.

10 Q And the evidence room took care of it from there.

11 A Yeah. I --

12 Q Go ahead. I'm sorry.

13 A Well, I do a SLED request form, and then after that my
14 part's done.

15 Q Okay. So SLED is the state law enforcement division?

16 A Yes, sir.

17 Q And these items were sent to the state law enforcement
18 division.

19 A Yes, sir.

20 Q And by your request?

21 A Yes, sir.

22 Q And are they the ones that analyze or do the D.N.A.
23 analysis?

24 A Yes.

25 Q Okay. And are these items -- this is your writing and

John David Burgess
Direct examination by Mr. Barnette

1 these items, what, the swab? I guess the swabs are inside
2 of them, is that right?

3 A Yes, sir.

4 Q Okay.

5 MR. BARNETTE: Your Honor, I'd like to mark these at
6 this time, like to move them into evidence at this time.

7 Your Honor, I would like to mark for I.D. at this
8 time. When the D.N.A. person testifies, then I'd like to
9 move it into evidence at this time.

10 THE COURT: All right. Mark them for identification.

11 (Two swabs marked State's Exhibit No. 2 for
12 Identification; SLED report marked State's Exhibit No. 3
13 for Identification.)

14 Q After you -- did you keep on trying to investigate
15 this case, sir?

16 A I did.

17 Q And obviously you through the work and everything, did
18 you develop a suspect?

19 A I did.

20 Q And did you receive a court order to obtain a buccal
21 swab from the defendant, John Willie Mack?

22 A I did.

23 Q Let me show you this item, sir. On what day did you
24 obtain that sample, sir? Let me let you look there. Let
25 me give you State's Exhibit No. 2 and let you take a look

John David Burgess
Direct examination by Mr. Barnette

1 at that, sir.

2 A This was done on April the 1st of 2009.

3 Q Okay. So through your investigation you developed
4 Mr. Mack as a suspect?

5 A That's correct.

6 Q And did you meet -- is this the gentleman that you
7 collected the buccal swab from, sir?

8 A Yes, sir.

9 Q And is this buccal swab that you collected from him?

10 A Yes, yes, sir. It's got my name, date and time, and
11 has his basic information on there.

12 Q Okay.

13 MR. BARNETTE: Your Honor, I'd like to mark State's
14 Exhibit No. 2 at this time as evidence or as I.D. purposes
15 until the D.N.A. person testifies.

16 MR. POOLE: No objection for identification.

17 Q And once you secured this, sir -- let me make sure I
18 hand this to you -- did you place it into evidence, sir?

19 A Yes, sir. It's the same procedure. It's got the date
20 and time and my name, what it -- what it is, the case
21 number. It has my name. Has D.B., which is drop box, and
22 it's secured into evidence.

23 Q Okay. So the drop box is secured into evidence, and
24 the state picks it up then, is that --

25 A Yeah. That's the only person has custody or control

John David Burgess
Direct examination by Mr. Barnette

1 over it.

2 Q Okay. And you asked this to be tested by SLED also?

3 A That's correct.

4 Q And the swab, I think, it's still in there.

5 A Yes, sir.

6 Q And did you ask SLED or state law enforcement division
7 to compare that to the two samples or the samples that was
8 found at the residence?

9 A Yes, sir.

10 Q And traditionally does SLED just look at two, usually
11 two, items from a burglary in cases, whatever, or samples?

12 A They changed their procedure. They used to test it
13 however many was submitted. However the last year or two
14 they've only, they only take a couple of items from each
15 case.

16 Q And is that because of the budget crunch?

17 A Yes, sir.

18 Q Budget money?

19 A Yes, sir.

20 Q And later on did you receive a report in this case?

21 A I received a report, yes.

22 Q And who, who did the swabs belong to?

23 A John Willie Mack.

24 Q And is that the gentleman right over here?

25 A Yes. I've already spoken to him.

John David Burgess
Cross-examination by Mr. Poole

1 Q Okay. Can you describe what he's wearing and where
2 he's sitting, sir?

3 A He's sitting beside Mr. Poole. He's wearing a gray
4 shirt, long-sleeve, multicolored tie and dark slacks with
5 glasses.

6 MR. BARNETTE: Your Honor, I'd ask that the witness
7 has identified the defendant.

8 THE COURT: It shall.

9 MR. BARNETTE: Excuse me one second, Your Honor.

10 (Pause.)

11 Q Please answer any questions Mr. Poole has for you,
12 sir.

13 A Sure.

14 CROSS-EXAMINATION

15 BY MR. POOLE

16 Q Were you the lead investigator into this case,
17 Investigator Burgess?

18 A It was my case that was assigned back to me. I
19 responded. I did all the followups. There was nobody
20 actually ever other assigned -- there was nobody else
21 assigned to the case.

22 Q So you were the chief person in charge?

23 A I followed up on it.

24 Q Okay.

25 A There was nobody else.

John David Burgess
Cross-examination by Mr. Poole

1 Q Okay. Did you test for fingerprints, you yourself?

2 A Me, no, I did not. I was doing the, the blood
3 swabbing.

4 Q Okay. Did someone check for fingerprints?

5 A Yes, yes.

6 Q And did they check in these areas where the blood
7 samples were taken?

8 A You're going to check around the blood sample. You're
9 not going to check near the blood sample. You're going to
10 check at the point of entry and the point that they leave
11 and areas where something's missing from. But you're not
12 going to do both. You're not going to check for
13 fingerprints and collect blood.

14 Q Well, so the residence was checked --

15 A Yes.

16 Q -- for fingerprints.

17 A Yes, sir.

18 Q And was thoroughly checked.

19 A Yes.

20 Q And by that I mean it was dusted for fingerprints.

21 A That's correct.

22 Q And did -- I guess did you do that or someone else do
23 that.

24 A Officer Gallman actually fingerprinted, but we were
25 there processing it.

John David Burgess
Cross-examination by Mr. Poole

- 1 Q Okay. And no, no fingerprints were found, were there?
- 2 A That's correct. None.
- 3 Q All right. And did you take any photographs?
- 4 A It's standard that we take photographs, however in
- 5 this, this case, cannot locate them.
- 6 Q Okay. So photographs were taken.
- 7 A Yes.
- 8 Q Okay. And why is it standard procedure to have
- 9 photographs taken?
- 10 A You're going to photograph the area that she says
- 11 something's missing from so you can go back and look later.
- 12 You just, you know. Obviously it has happened several
- 13 years ago. Just can't locate them.
- 14 Q I see. Well, the purpose the photographs were taken
- 15 is for your own, for law enforcement's investigation
- 16 purposes, is that correct, failure to take them and --
- 17 A And for court purposes, yes, sir.
- 18 Q And for court purposes.
- 19 A Yes.
- 20 Q And we're in court today --
- 21 A Yes.
- 22 Q -- and we don't have those photographs.
- 23 A That's correct.
- 24 Q And they're gone.
- 25 A They're -- cannot be found.

John David Burgess
Cross-examination by Mr. Poole

1 Q We do not know where they are.

2 A You know, back then kind of one computer takes care of
3 everybody on patrol. You simply upload and, and -- upload,
4 take them back as far as photo-wise.

5 Over a course of time, I mean, I can say probably
6 might accidentally got erased from a case file. Obviously,
7 a hundred reasons of could have happened. But, no, we do
8 not have them here today.

9 Q On the items that were taken did you or anybody in law
10 enforcement check on the values of the items that were
11 taken other than ask Ms. Moss?

12 A Yeah. Typically, we don't. We go on what the, the
13 victim tells us. There's no way for us to prove that the
14 value didn't -- is not the same, the value's not the same
15 as what she's recorded, and we just -- I mean, we don't
16 know that.

17 Q Okay.

18 MR. POOLE: May I approach the witness, Your Honor?

19 Q Did you do a property inventory of what --

20 MR. POOLE: Excuse me, Your Honor. Not at this time.
21 I withdraw my request to approach the witness.

22 THE COURT: Okay.

23 Q Investigator Burgess --

24 A Uh-huh.

25 Q -- did you do an inventory of what was taken?

John David Burgess
Cross-examination by Mr. Poole

1 A Eric would have. He completed the initial. Officer
2 Almond completed the order report. I'm listed as the
3 assistant person. So he would have filled out the, the
4 items that were taken.

5 Q Okay.

6 MR. POOLE: May I approach the witness now, Your
7 Honor?

8 THE COURT: Yes, sir.

9 Q May I see what you have there?

10 A It's going to be right here, the value, and then also
11 on this one probably the same thing you have.

12 Q What was taken?

13 A Issue, describe.

14 Q Could you speak up for us so --

15 A We have it on two forms or two places on the report.
16 We're going to have it on the front page, what was taken.
17 It's either -- it's going to be either stolen, damaged,
18 burned or recovered or deceased. And then there's going to
19 be additional property where if it doesn't fit on the front
20 page, then it's going to go to the supplemental page.

21 Q Okay. And all of this information was taken from what
22 Ms. Moss told you --

23 A That's correct.

24 Q -- on what I call the property inventory loss forms?

25 A Yes, sir, yes, sir.

John David Burgess
Cross-examination by Mr. Poole

1 Q You testified that you had been trained in obtaining
2 blood evidence from crime scenes.

3 A Yes, sir.

4 Q And what was the nature of that training?

5 A I've been to several. I've been to I would say at
6 least two or three classes of how to find and detect and
7 collect and preserve evidence. Yeah. I've been to
8 chemical detection, collecting evidence through chemical
9 detection agents. So there's been a few classes I've been
10 to.

11 Q How long have you been in law enforcement? Let me ask
12 you that.

13 A I've been, been employed at the city eight years.
14 Prior to that I'd worked for the County of Greenville. So
15 I have 13 years, 13 years in.

16 Q Okay. Is this the first case that you took blood
17 samples from?

18 A From what I can remember, yes, sir.

19 Q It is?

20 A Yes.

21 Q Okay. Have you ever testified in court as to having
22 collected blood samples prior to this date?

23 A I would imagine I have. I've been on several trials.
24 I am not going to try to recall, but, yes, I am pretty sure
25 I have.

John David Burgess
Cross-examination by Mr. Poole

1 Q But in this case here this was your first one?

2 A The first of collecting, the first at collecting and
3 then seeing the case through, because it's usually
4 typically assigned, maybe it's assigned, to somebody else.
5 And at the time, the investigator, however, the case was
6 given back to me.

7 Q Okay. Why, why would the case be assigned to someone
8 else?

9 A Well, following that I, I was moved over to C.I.D.,
10 criminal investigation division.

11 Q Okay.

12 A So it was one of those cases I got followed up on.

13 Q What about the buccal-swab technique?

14 A Yes.

15 Q Are you trained to do that?

16 A I would say -- there's no formal training in that.

17 Q Okay.

18 A It's pretty, pretty standard.

19 Q Was this the first time that you had done that?

20 A No, not, no, sir, not as far as buccal swabs.

21 Q Okay. The samples that you testified and identified a
22 moment ago, you gather them and you put them in the
23 evidence room.

24 A Yes, sir.

25 Q Do you ever see them after that? Let me narrow the

John David Burgess
Redirect examination by Mr. Barnette

1 question. Did you ever see those samples between then and
2 now?

3 A Other than reviewing for court, no.

4 Q Okay. And when did you review them for court?

5 A Last week, I think, Wednesday or Thursday of last
6 week.

7 Q Okay. Any of the items that were taken, were they
8 recovered?

9 A No, no, sir.

10 Q Thank you, Investigator Burgess.

11 MR. BARNETTE: Just a few on followup, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. BARNETTE

14 Q Investigator Burgess, when you do buccal swabs, what
15 do you do if you would describe for us?

16 A This is the same process. You want to make sure you
17 have a sterile Q-tip, same thing. Take them together.
18 Then rub the inside of their gum between their cheek and --
19 between their cheek and their gum up in here. That's the
20 area that they're going to rub. And, you know, you're
21 sterile as far as glove-wise. And then I always have them,
22 the person, put them into the box themselves so that I
23 don't touch the swab ever.

24 Q So you don't touch the swab or --

25 A Yes, sir.

John David Burgess
Redirect examination by Mr. Barnette

1 Q That's buccal -- the cheek swab by themselves.

2 A The cheek swab, yes. And it's a lot more invasive
3 than getting a tube of blood drawn.

4 Q Right. Used to be blood was the standard. But they
5 do this now, be less invasive.

6 A Yes, sir.

7 Q And how many break-ins have you worked over the years?

8 A I would guess. I would say 500 maybe.

9 Q In those is it, is it -- I know you check for
10 fingerprints, you check for blood. Is it usually you find
11 those things?

12 A You usually don't find none of that, no.

13 Q Right. So obviously when you saw blood, that was
14 something that got your attention.

15 A Yes, sir.

16 Q And you said that items were, items were taken.

17 A Yes, right beside the, the entertainment center where
18 she is saying that the T.V. was located, the blood's right
19 there.

20 The light at the light switch, obviously the light had
21 to come on somehow. Somebody turned on the light switch,
22 because that's where the blood was located at; and then
23 going down the hall going towards the entertainment system,
24 because the point of entry was in the back bedroom at the
25 window. Below the window is the air conditioner unit. You

John David Burgess
Redirect examination by Mr. Barnette

1 can simply stand on the air conditioner unit and go inside
2 the window.

3 Q So and this happened in September of 2005.

4 A Yes, sir.

5 Q And you kept working this case, kept looking back into
6 it.

7 A Yes, sir.

8 Q And it was 2009 when you finally got the hit off this
9 defendant suspect.

10 A April the 1st that's on the swab, yes.

11 Q Okay. And, and you obtained the buccal swab from him.

12 A Yes, sir.

13 Q And when you submitted that you received a report and
14 stated where the two swabs came from, sir?

15 A I'm sorry?

16 Q And it stated where the two swabs you collected at the
17 house back in 2005 --

18 A That's what the report said?

19 Q Yes, sir. Did it come back to this defendant?

20 A Oh, yes, sir.

21 Q Thank you, sir.

22 MR. POOLE: Nothing further.

23 THE COURT: You may step down.

24 MR. BARNETTE: Your Honor, I would like to call
25 Investigator David Reeves to the stand.

1 GEORGE DAVID REEVES, having
2 been first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MR. BARNETTE

4 Q Sir, if you would, state your full name for the
5 record, please.

6 A My full name is George David Reeves.

7 | Q Where do you work at, sir?

8 A I work for the City of Spartanburg Property and
9 Evidence Department.

10 Q What's your duties there, sir?

11 A My primary job is to receive, collect property, to
12 store it properly, to send it for analysis when required,
13 and to submit it into court when required.

14 Q And how long have you been in that position, sir?

15 | A Ten years.

16 Q Let me show you. Did you receive this sample from
17 Investigator Burgess in evidence, sir? Let me let you take
18 a look at that.

19 | A I did.

20 Q Okay. And you were the individual that secured it
21 once it was placed into evidence, is that right?

22 | A That is correct.

23 Q And was it maintained in y'all's evidence room until
24 it was taken to SLED?

25 | A Yes.

George David Reeves
Direct examination by Mr. Barnette

1 Q And who took it to SLED, sir?

2 A I took it to SLED.

3 Q Okay. And when you arrived at SLED was the three
4 vials -- if you would look in the envelope there -- are
5 those the three items that you had distributed? I believe
6 they are marked for I.D. purposes as State's Exhibits 1.1,
7 1.2 and 1.3.

8 A They are.

9 Q Okay. And did you take those to SLED and was they put
10 in a heat-sealed package?

11 A They were.

12 Q And was you present when they was put in the
13 heat-sealed package, sir?

14 A Yes, I was.

15 Q And did you see those items go inside that package?

16 A Yes, I did.

17 Q And once it was sealed, what happened then, sir?

18 A After the item was sealed by their evidence
19 technician, still in my presence, I initial and date when I
20 actually submit this item to SLED for analysis.

21 MR. BARNETTE: Your Honor, at this time I'd like to
22 mark the envelope as State's Exhibit No. 7.

23 THE COURT: No objection?

24 MR. BARNETTE: I'll let him see it, sir.

25 MR. POOLE: No objection, Your Honor.

George David Reeves
Direct examination by Mr. Barnette

1 THE COURT: It's admitted.

2 (Bag marked State's Exhibit No. 7.)

3 Q Why don't you step down here, sir, and show them real
4 quick?

5 (Whereupon, the witness left the stand.)

6 Q So it was heat sealed and secured. I mean, when you
7 say heat sealed, it's sealed, is that right?

8 A Yes, sir, completely sealed right here at this line,
9 which is why I have my initial directly over that line, so
10 that it cannot be tampered with without being broken.

11 Q Okay. So you -- that's your signa -- I mean, your
12 initials there, is that right?

13 A Yes, sir.

14 Q And it was sealed on what date?

15 A September 16th of 2005.

16 Q Okay. And it was placed in the SLED heat-sealed and
17 tamperproof bag.

18 A Yes, sir.

19 Q And of course it's been opened for court now, hasn't
20 it?

21 A Yes, sir.

22 Q Okay. If you would, please have a seat there.

23 (Whereupon, the witness returned to the stand.)

24 MR. BARNETTE: Your Honor, may I go ahead and turn the
25 ELMO on and publish it to the jury?

George David Reeves
Direct examination by Mr. Barnette

1 THE COURT: You may.

2 Q I'll show it to the jury so everybody can see this
3 better. Is this what you filled out right here, sir?

4 A Yes, it is. That's actually me filling that out.

5 Q Yes, sir. And this is your initials up here?

6 A Yes, sir.

7 Q And is this given a lab number by SLED?

8 A Yes, it is.

9 Q And the lab number was L05-10948?

10 A Yes, sir.

11 Q And John Burgess is the one that collected this, is
12 this right?

13 A Yes, sir.

14 Q And he was the one that requested the SLED to test it?

15 A Yes, sir.

16 Q Like I say, and these items, the item that you have,
17 the bag and everything, was all located in here that we
18 have up there, is that right?

19 A Yes, sir. That is correct.

20 Q Okay. I think that's all the questions. Please
21 answer any questions that Mr. Poole may have for you, sir.

22 MR. POOLE: Just one moment, Your Honor.

23 (Pause.)

24 MR. POOLE: No questions of this witness, Your Honor.

25 MR. BARNETTE: Your Honor, I'd ask for this witness to

Mylnor S. Beach
Direct examination by Mr. Barnette

1 be excused.

2 THE COURT: He may be.

3 (Whereupon, the witness was excused.)

4 MR. BARNETTE: I'd like to call Investigator Beach to
5 the stand please, sir.

6 MYLNOR S. BEACH, having been
7 first duly sworn, testified as follows:

8 DIRECT EXAMINATION BY MR. BARNETTE

9 Q If you would, sir, state your full name for the
10 record, please.

11 A Mylnor S. Beach.

12 Q And where do you work at, sir?

13 A City of Spartanburg Property and Evidence Room of the
14 Public Safety Department.

15 Q What's your duties there, sir?

16 A Property and evidence technician, marijuana analyst.
17 Same thing Mr. Reeves just told you. We receive, check,
18 maintain, store evidence from the Court, send things off
19 for analyst or analysis, excuse me.

20 Q Let me show you a bag. Let me show you State's
21 Exhibit No. 8. Let me show you what was inside of that
22 there, sir. Did you receive a buccal swab that was
23 collected by John Burgess on the defendant in this case?

24 A Yes, sir, I did.

25 Q And was that placed in y'all's evidence room box?

Mylnor S. Beach
Direct examination by Mr. Barnette

1 A Yes, sir.

2 Q And did you secure that item, sir?

3 A Yes, I did.

4 Q And when you secured that item was it taken to SLED,
5 sir?

6 A The following day.

7 Q Okay.

8 A Yes, sir.

9 Q And did you take it to SLED?

10 A I took it to SLED, yes, sir.

11 Q And at SLED did you follow the same procedures that
12 Investigator Reeves talked about? When you arrived there
13 was it put in a heat-sealed package?

14 A Yes, sir.

15 Q And was you present when that was done?

16 A Oh, yes, sir, yes, sir.

17 Q And did you initial it?

18 A Yes, I did.

19 Q And was it sealed in this tamper-sealed bag?

20 A Yes, it was.

21 MR. BARNETTE: Your Honor, I'd like to --

22 Q Is this the bag, sir?

23 A Yes, sir.

24 MR. BARNETTE: Your Honor, I'd like to enter State's
25 Exhibit No. 8 into evidence at this time.

Mylnor S. Beach
Direct examination by Mr. Barnette

1 MR. POOLE: No objection, Your Honor.

2 THE COURT: It's admitted.

3 (Bag marked State's Exhibit No. 8.)

4 MR. BARNETTE: Permission to publish at this time to
5 the jury, Your Honor.

6 THE COURT: You may.

7 BY MR. BARNETTE

8 Q Investigator Beach, was this the -- did you fill this
9 information out here?

10 A Yes, sir. Where it says sealing official, that's my
11 signature. And the date was right below it. And it's kind
12 of hard for me to say.

13 Q Yes, sir.

14 A There you go. The heat seal, you can see the line
15 running across where I put the date and my initials.

16 Q So right here's the heat sealed part, right here, is
17 that right?

18 A Yes, sir.

19 Q And that's your initials. And is that the date that
20 you placed it in the blue ink?

21 A Yes, sir.

22 Q And later on of course it was opened up here for
23 court, is that right?

24 A Yes, sir.

25 Q And when you sealed it, it was completely sealed when

Mylnor S. Beach
Direct examination by Mr. Barnette

1 it was turned over to SLED.

2 A Yes, it was.

3 Q And the items were inside this bag.

4 A There.

5 Q And there's no -- is there any way to get to it or
6 anything once it's sealed unless you open it?

7 A No, sir, not, not without opening it.

8 Q And the items that was inside, just if you open that
9 up right there, that was inside this bag, was the swab,
10 State's Exhibit No. 2 there, sir. Was that the swab that
11 you turned and put inside the heat-sealed bag or the
12 tampered-sealed bag for SLED?

13 A Yes, sir, it was.

14 Q And that was a swab from Mr. Mack, the defendant in
15 this case.

16 A I -- this is a swab that was marked for Mr. Mack. I
17 can't --

18 Q Right. That was collected by John Burgess?

19 A Yes, sir.

20 Q Okay. Thank you.

21 A Do you want this back?

22 Q Yes, sir. If you would, put it back in there.

23 (Pause.)

24 Q If you would, please answer any questions Mr. Poole
25 may have for you, sir.

1 MR. POOLE: No questions of this witness.

2 THE COURT: You may step down.

3 Let me see y'all.

4 MR. BARNETTE: We would ask for this witness to be
5 excused, Your Honor.

6 THE COURT: He may be.

7 (Whereupon, the witness was excused.)

8 (Bench conference held off the record in the presence
9 of the jury but out of the hearing of the jury.)

10 THE COURT: Ladies and gentlemen, we are going to take
11 a short break, so I'll ask you to please go to your jury
12 room.

13 Don't talk about the case. You can't talk about it
14 until deliberations start, and as you know that's not until
15 the end. So right now go to your jury room. I'll bring
16 you back after a short break to continue with the main
17 balance of the trial.

18 (The following takes place outside the presence of the
19 jury.)

20 THE COURT: Court's in recess for ten minutes.

21 (Whereupon, a recess was taken.)

22 THE COURT: Are we are ready for the jury?

23 MR. LEIBERT: Yes, sir.

24 MR. POOLE: Yes, sir.

25 THE COURT: Bring them in.

3 THE COURT: All right. We will continue with the
4 state's presentation of evidence.

7 MANUEL JOHN ORTUNO, having
8 been first duly sworn, testified as follows:

12 | A Manuel John Ortuno, O-R-T-U-N-O.

14 A I've worked at SLED as a forensic -- well, as an
15 analyst both in trace and D.N.A.

17 | A About 20 years.

19 A SLED is -- stands for the South Carolina Law
20 Enforcement Division. And it is charged with -- well, my
21 part or my knowledge of SLED is the enforcement of old
22 forensic evidence that comes into, into the laboratory and
23 is tested for identification purposes.

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Manuel John Ortuno
Direct examination by Mr. Barnette

1 A I was.

2 Q And if you would, tell the jury a little bit about
3 your education, sir.

4 A I graduated with honors from the American University
5 in Washington, D.C., with a bachelor's of science degree
6 majoring in chemistry.

7 I have a master's degree, also majored in chemistry,
8 from the University of South Carolina, Columbia.

9 I'm a graduate of the South Carolina Criminal Justice
10 Academy. I've completed my training at SLED in the field
11 of forensic serology and D.N.A. analysis.

12 I've taken the advanced D.N.A. training program at the
13 F.B.I. Academy in Quantico, Virginia. I've attended
14 numerous conferences and seminars on a yearly basis for the
15 12 years that I was employed as a forensic D.N.A. analyst.

16 Q What is D.N.A.? If you could, just briefly describe
17 what D.N.A. is, sir.

18 A D.N.A. stands for deoxyribonucleic acid. It's a very
19 large complex molecule that's found in essentially every
20 cell of the human body.

21 And of course that's important to us as forensic
22 scientists because if it's in every cell of the human body
23 any cells that are left behind at a crime scene, be they
24 blood, be they hair samples, skin cells on a doorknob, can
25 be examined and tested and a D.N.A. profile developed from

Manuel John Ortuno
Direct examination by Mr. Barnette

1 those samples and compared to standards, known samples from
2 individuals they believed to have been involved in the
3 crime. We develop the profiles from both and compare them.
4 Either they match or they don't match.

5 Q And how many times have you been qualified in state
6 court as a D.N.A. analyst or forensic scientist?

7 A Over 50 times.

8 Q And how many cases have you worked over your career?

9 A In D.N.A.?

10 Q Yes, sir.

11 A Over a thousand.

12 MR. BARNETTE: Your Honor, I'd like to move this
13 witness as an expert in the field of D.N.A., sir.

14 MR. POOLE: No objection.

15 THE COURT: He is so qualified.

16 Q Let me show you some -- what's been entered as state's
17 exhibits, sir. Let me show you what's been marked as
18 state's exhibits or entered -- actually the bag's been
19 entered as State's Exhibit 7 and State's Exhibit 8. We'll
20 start with State's Exhibit No. 7.

21 A Yes. This is a standard evidence log-in, heat-sealed
22 pouch which is used to collect and send to the appropriate
23 department evidence that's been found at a crime scene for
24 further testing.

25 Q And did you receive this bag, sir?

Manuel John Ortuno
Direct examination by Mr. Barnette

1 A Yes, sir, I did.

2 Q And was that bag sealed when you received it?

3 A Yes, it was.

4 Q And that's State's Exhibit No. 7. Is that the one in
5 2005, sir?

6 A Yes, it is.

7 Q Okay. And it appeared that no tampering had occurred
8 or anything with it?

9 A No. If any tampering had occurred I would have noted
10 it in my work sheet. And I looked at that worksheet before
11 the trial. There's nothing indicating in that.

12 Q Okay. So you received these items. And did you open
13 the bag once you received it?

14 A Yes, I opened it. In fact, it's opened over here.
15 This is the seal after I'm done working with it. It's
16 opened on this side. I remove whatever evidence is
17 present, and then I subitemize the articles contained
18 within.

19 Q And did you open the Manila bag and did you look at
20 the swabs that was submitted to it, sir?

21 A Well, within the heat-sealed pouch and this Manila
22 envelope, which also contains my initials and the lab
23 number designating the case, there were three of these
24 cardboard containers that I subitemized as 1.1, 1.2, 1.3.
25 These are SLED numbers. And each one contained one or more

Manuel John Ortuno
Direct examination by Mr. Barnette

1 swabs.

2 And what we do is we test, because what we have to do
3 first is determine whether there's human body fluid
4 present. And so we test. We do the serology component of
5 our testing, which is is it potential blood or potential
6 semen or whatever the body fluid is.

7 In this particular case we were looking for, for
8 blood. And so I took a small sample and ran a presumptive
9 test for the presence of blood. And then if, in fact, it's
10 positive those samples go on to D.N.A. testing.

11 Q Was these the samples that you tested, sir?

12 A Yes, they are.

13 MR. BARNETTE: Your Honor, I'd like to move State's
14 Exhibits 1, 2 and 3 into evidence at this time.

15 MR. POOLE: No objection.

16 THE COURT: They are admitted.

17 (Swab marked State's Exhibit No. 1.1; swab marked
18 State's Exhibit No. 1.2; swab marked State's Exhibit No.
19 1.3; swabs marked State's Exhibit No. 2; SLED report marked
20 State's Exhibit No. 3.)

21 MR. BARNETTE: May I publish these to the jury at this
22 time, sir?

23 THE COURT: You may.

24 Q Showing State's -- the one as far as State's Exhibit
25 No. 1, sir, you received that, is that correct?

Manuel John Ortuno
Direct examination by Mr. Barnette

- 1 A Yes. It contains my initials on there somewhere.
- 2 Q And on the side of it, this is the information that
- 3 Investigator Burgess filled out or the information that was
- 4 on it once you received it?
- 5 A That's correct. And that's what I used to write my
- 6 report as to the location of that swab.
- 7 Q And then of course you initialed it, is that correct?
- 8 A Those are my initials and the subitem number, 1.1.
- 9 Q 1.1 is the number used for SLED.
- 10 A Yes. The heat-sealed pouch itself was one, and
- 11 therefore anything contained within will be 1.1, 1.2 and
- 12 1.3 and so on.
- 13 Q This is State's Exhibit 1.2. Was there information
- 14 that was already written on it from Investigator Burgess?
- 15 A Yes.
- 16 Q And did you also initial this also, sir?
- 17 A Yes, that's 1.2.
- 18 Q And then showing you State's Exhibit 1.3. Again, I
- 19 apologize. Is that information that Investigator Burgess
- 20 had wrote on the side of it?
- 21 A Yes. Well, I assume. Somebody wrote it.
- 22 Q Right. Now, right. Appears to be his writing for
- 23 purposes --
- 24 A That's correct.
- 25 Q That was on there when you got it.

Manuel John Ortuno
Direct examination by Mr. Barnette

1 A That's correct, that's correct.

2 Q And then is that your initials and the numbers you
3 gave to it, sir?

4 A That's correct.

5 Q And it's 1.3.

6 A Yes, sir.

7 Q Okay. And if I could get the heat-sealed bag from
8 you, sir.

9 (Pause.)

10 Q Thank you, sir.

11 When you opened it up did you initial it, sir, and put
12 the date on it that you opened it up?

13 A Actually, the date in which I opened it up is on the
14 worksheet which I had in my case file.

15 Q Or is this the one that was sealed? I'm sorry.

16 A That's correct. Our policy is once it's sealed, just
17 as the officer that submits the evidence has to, has to be
18 present when it's sealed, and then he puts or she puts her
19 initials or his initials and date, I do the same thing when
20 I'm done with my work. And those are my initials and the
21 date, which actually comes out to the date in which I
22 opened up the pouches myself, both on the same date.

23 Q And of course that's your writing with the lab number
24 that was placed on top of it.

25 A That's just one of my organizable habits that I have.

Manuel John Ortuno
Direct examination by Mr. Barnette

1 I like to put the lab number on the top so that when these
2 heat-sealed pouches are in a large box it's very easy to
3 read versus going down into the actual SLED I.D. on the
4 bottom. That's -- those are my -- those are my letters and
5 numbers.

6 Q Okay. This is of course the --

7 A That's the SLED label that comes once anything is
8 submitted to SLED with a unique identifying bar code which
9 is not present there. It should be a little bit higher on
10 the envelope.

11 Q And that is State's Exhibit No. 7, is that right, sir?

12 A That's State's Exhibit No. 7, yes, sir.

13 Q Did you run analysis on these items, sir?

14 A I did.

15 Q And did you develop a profile?

16 A I developed profiles from two of the three boxes that
17 were submitted.

18 Q And why did you just develop two out of the three,
19 sir?

20 A You may have heard, either read in the newspapers or
21 heard on the news, or even I think the C.S.I. shows talk
22 about the backlogs that we have. Unfortunately, it's true.

23 And so in an attempt to do as many cases as possible
24 we examine the evidence in every case and determine what is
25 essential to identify a potential individual that can be

Manuel John Ortuno
Direct examination by Mr. Barnette

1 involved in that case.

2 In this particular scenario I had three swabs from the
3 same home. You never want to do just one. You like to
4 have at least two so that you can make sure they match up
5 if it's one person.

6 And so I selected two, because when we batch these
7 things if I were to do every sample for every case I'd do
8 fewer cases. And so it's just -- at this point it's -- the
9 analyst brought it back in 2006. Now it's actually policy
10 to not do all of the samples, because, once again, we're
11 trying to address the backlog. So it's analyst discretion.

12 Q And did the profile -- was 1.1 and 1.2 the profiles
13 on, sir?

14 A I performed the profiles on, yes, the swabs collected
15 from the rear bedroom and the light switch and the
16 entertainment center.

17 Q Okay. Did they come back to the same individual?

18 A They were the same unknown individual at that time.

19 Q And did you have a known suspect or known sample at
20 that time to match it to?

21 A No. There was no person identified as being related
22 to this, this incident.

23 Q Okay. So did y'all keep that information until you
24 received another sample?

25 A Well, the -- when a, when a profile is developed it

Manuel John Ortuno
Direct examination by Mr. Barnette

1 is, it is stored until there is any evidence indicating
2 that someone could, in fact, be related to this case. And
3 then of course at that point a sample can be obtained and
4 compared. Once you have a D.N.A. profile it's, it's there
5 forever.

6 Q Let me show you what's been entered into evidence as
7 State's Exhibit No. 8. If you would, take a look at that,
8 sir.

9 A Yes. This is another SLED log-in pouch that is
10 identified as State's Exhibit No. 8. And this was
11 received, I believe, about three years later. Yes. I
12 worked on this sample October the 20th of 2009.

13 Q And was it, the heat-sealed bag, sealed completely
14 when you received it, sir?

15 A Once again, it was put or else I would have put some
16 notation on that worksheet. It was.

17 Q So there was no evidence of tampering or anything.

18 A No, no.

19 Q And when you went inside of it what did -- did you
20 receive another swab, sir?

21 A Yes. There were two buccal swabs labeled belonging to
22 John Willie Mack.

23 Q And is that State's Exhibit No. 2 that's in the pouch
24 or in the Manila envelope there?

25 A Once again, the inner envelope containing the lab

Manuel John Ortuno
Direct examination by Mr. Barnette

1 number and the item number and my item No. 2. And there's
2 the name John Willie Mack on the outside of the box.

3 Q And this is what you did the analysis on, sir, was
4 this swab then?

5 A Yes, sir, yes, sir.

6 MR. BARNETTE: Your Honor, I'd like to enter State's
7 Exhibit No. 2 into evidence at this time.

8 MR. POOLE: No objection.

9 THE COURT: It's admitted.

10 (State's Exhibit No. 2 previously admitted.)

11 MR. BARNETTE: May I publish it to the jury, Your
12 Honor?

13 THE COURT: You may.

14 Q Showing you. And this is the State's Exhibit No. 2
15 sticker, is that correct, sir?

16 A As well as I can see it from here, yes, sir.

17 Q Okay. And on the side, is this the information that
18 was on the item before you received it, sir?

19 A Correct.

20 Q And later on did you initial this also, sir?

21 A Yes. That's my -- that yellow tape is also placed by
22 me to close the portion of the box that I used to open it.

23 It has my writing for the lab number, as well as the
24 item number, in this particular case item number, SLED's
25 item No. 2 and my initials.

Manuel John Ortuno
Direct examination by Mr. Barnette

1 Q Thank you, sir.

2 May I borrow that plastic bag from you?

3 (Pause.)

4 Q Thank you.

5 Showing State's Exhibit No. 8, same procedure when you
6 resealed it with your initials?

7 A That's correct. Once again, my initials and the date
8 which I -- in which I sealed it, which also coincides with
9 the date in which I analyzed this sample in this particular
10 case -- 10/20/09.

11 Q And did you perform an analysis on this item also,
12 sir?

13 A Yes. Once samples are submitted for comparison, known
14 samples such as this one, a D.N.A. profile is developed for
15 that individual. And then the values that make up the
16 D.N.A. profile are compared to the values of this unknown
17 D.N.A. sample from three years ago.

18 Q Let me hand you State's Exhibit No. 3 at this time
19 marked for I.D. purposes. Did you generate a report when
20 you did the analysis and compared that analysis these
21 items?

22 A Yes, I did.

23 Q And is that copy of your report, sir?

24 A Let me just check with my copy. That actually is the
25 second report that was issued on this case dated

Manuel John Ortuno
Direct examination by Mr. Barnette

1 October the 28th of 2009. And it appears to be identical
2 to the one I have on file. Yes.

3 MR. BARNETTE: Your Honor, I'd like to enter State's
4 Exhibit No. 3, the SLED D.N.A. report, into evidence at
5 this time.

6 MR. POOLE: No objection.

7 THE COURT: It's admitted.

8 (State's Exhibit No. 3 previously admitted.)

9 MR. BARNETTE: Permission to publish it to the jury,
10 Your Honor.

11 THE COURT: You may.

12 Q Before I do that, if you would, explain your analysis
13 and how D.N.A. is used if you would, sir.

14 A The analysis itself, as I mentioned earlier, we first
15 determine whether it's of human-body origin, in this
16 particular case blood.

17 There was two of the samples, two of the three
18 samples, were taken through a series of chemical steps that
19 allows us to extract the D.N.A. from the cell, to clean up
20 this D.N.A., to quantitate.

21 Just like any good cook that has to have a certain
22 amount of ingredients to make either a cake or a pie taste
23 right, we have to do the same thing in the laboratory. We
24 have to know exactly how much D.N.A. is there to allow for
25 the following test to be accurate.

Manuel John Ortuno
Direct examination by Mr. Barnette

1 So we have to identify how much D.N.A. is present.
2 Once we know how much D.N.A. is present, we then take it
3 through a series of, once again, chemical tests that allow
4 the amplification of the D.N.A. making a sufficient
5 quantity to then run it through an instrument that
6 identifies these particular markers or locations along the
7 D.N.A. strand which makes up the D.N.A. profile. And once
8 we have that for the evidence and we have that for the
9 standard we compare them and determine whether or not they
10 match.

11 If they do match we have four databases that are
12 used -- Caucasian, African-American, Southeastern Hispanic
13 and Southwestern Hispanic.

14 We take the value that is the lowest or weakest in
15 terms of a match to those four and use the stats developed
16 from that to arrive at a number value. In other words,
17 how -- how unique or how rare is this profile among the
18 world population. And then we place that value in the
19 report or statistic.

20 MR. BARNETTE: Publishing State's Exhibit No. 3.

21 Q Is this the front page of the report, sir?

22 A Yes, it is.

23 Q And it was Investigator John Burgess that submitted
24 it?

25 A That's correct.

Manuel John Ortuno
Direct examination by Mr. Barnette

1 Q And Mr. Mack was the subject?

2 A Yes, at that point he was the subject.

3 Q And then Ms. Moss obviously was the victim in this
4 case.

5 A Correct.

6 Q And if you would, step down, sir, if you would for a
7 second.

8 (Whereupon, the witness left the stand.)

9 Q Let me hand the pointer to you, sir.

10 If you would, go through your report, sir, and just
11 tell the jury what was found and what was done.

12 A Once again, here you have the standard, which is a
13 buccal swab from Mr. Mack. These are the same two samples
14 that were identified in the first report in which D.N.A.
15 analysis was performed.

16 This is a, a standard term that we have to use that
17 summarizes what we did. It states D.N.A. analysis was
18 performed on the items above -- these three items. And
19 this is the scientific term for what is used to develop
20 this profile -- short random repeat, S.T.R.P.C.R.D.N.A.
21 analysis. The results of the analysis are shown in Table
22 1, 2 and 3.

23 Now, before I go any further let me clarify something
24 here. D.N.A. testing began in the mid 80's. In the mid
25 80's a gentleman in England discovered that you could

Manuel John Ortuno
Direct examination by Mr. Barnette

1 locate certain locations along the D.N.A. strand that could
2 be identified to a particular individual. Of course this
3 has tremendous weight values.

4 And since the mid 80's -- well, when we began testing
5 D.N.A. we needed a sample of blood the size of a quarter.
6 We needed that much blood to be able to generate what was
7 then the first profiles.

8 As time went on and testing and research progressed
9 the samples became smaller and smaller and smaller and
10 smaller. And now we can basically get D.N.A. from a pin
11 point of blood. And what you'll see is a dot at the end of
12 a sentence. If that were blood you could develop a whole
13 profile. Skin cells on a doorknob, we can develop a whole
14 profile. So it's pretty exciting.

15 Now, the catch with that is as time progresses and the
16 science changes slightly different kits are put out that
17 allows us to compare these. And I'm telling you all of
18 this because of this right here.

19 Normally what you would have is one or two tables and
20 everything right below each other matching perfectly.
21 Unfortunately, when the original samples were performed,
22 the evidence was performed, there was one set of kits.

23 After that a new kit came out. This new kit was
24 better and more sensitive. And so things were changed a
25 little bit.

Manuel John Ortuno
Direct examination by Mr. Barnette

1 So rather than having everything fall right below the
2 table we're going to have to go back and forth to compare
3 the D.N.A. profiles. I just want to make you aware of that
4 before we start.

5 And this is what -- when you hear this, you know, on a
6 C.S.I. show on T.V. or read it in the papers, this is a
7 D.N.A. profile belonging to the evidence that was collected
8 from the light switch and the entertainment center.

9 What you have above right here, each one of these are
10 locations along the D.N.A. strand that forensic scientists
11 use to identify and develop a profile that belongs to one
12 individual to the exclusion of all others.

13 So this location right here, we look for strands of
14 D.N.A. These numbers represent those strands. You'll
15 notice -- and you have two, because all of our D.N.A. comes
16 half from our mother and half from our father. So our
17 mother would give us one of these numbers and our father
18 would give us another one. It doesn't matter which one
19 gave what. We just know that one parent gave us 16 and the
20 other parent gave us 17.

21 Now, let me also show you this one right here. Here
22 you have the same number. What does that mean? That means
23 both parents gave the exact same number. So you have one
24 number.

25 So what you'll note, what stands out immediately, is

Manuel John Ortuno
Direct examination by Mr. Barnette

1 that each of these locations, the top and bottom numbers
2 are exactly the same. What that tells us is it's the same
3 individual in each and every one of those. The question is
4 who is that individual.

5 Three years later we receive a standard from an
6 individual that is believed to have possibly been involved
7 in this case, and so the question is does his D.N.A.
8 profile match the samples from three years before.

9 And I warned you the table looks very different.
10 First of all, it's just one table now. Before we had two
11 tables. That was an older system. Now we're a little bit
12 better. We all do it in one, and we do all of these
13 samples, all of these locations, at one time instead of in
14 two different cases.

15 They're still the same locations. Actually, here
16 we've added two more locations. So we're going to compare
17 the 13 locations that belong in our present, in the first
18 kit, to the second kit.

19 And if you were to look -- and I can't read it very
20 clearly. I can read it from here. Contact lenses are not
21 very good. Let me see if I can. Okay. Here we go.
22 That's good. That's better.

23 So here you have the D.N.A. location that's the eight
24 chromosome -- I promised you. I told you that doesn't
25 really matter. This is one of the locations along the

Manuel John Ortuno
Direct examination by Mr. Barnette

1 D.N.A. strand.

2 You have a 13,15 belonging to Mr. Mack. So let's go
3 to the table we have before for D8 and locate the values in
4 that box. That's the -- right. All right. So we look
5 along here. Do you see the D8 right here? Notice that
6 it's also a 13,15. It's exactly the same values.

7 We can do that for each and every one, D21 here and
8 D21 here. Look at D21. It's 3135 -- D213135. It matches.
9 Each and every one of these, the seven is a 10,11. If we
10 go to D7, it's a 10,11. CSF1PO is a 12. Once again,
11 there's a single number because both parents gave the same
12 value. Both mother and father gave a 12.

13 CSF1PO does not appear on this one. We need to have
14 the other table, which you're covering, co-father table.
15 CSF1PO is above there. In each and every one of these
16 present here in the original evidence, they match the same
17 numbers to the -- to the known. Excuse me.

18 Q Once you did that analysis, Mr. Ortuno, what, what was
19 the results that you found?

20 A So once we look at each and every one of these
21 locations and find the numbers to be exactly the same it's
22 a D.N.A. match. And the question is how rare is this
23 combination of 16's and 17's and 15's and 17's and so on
24 among the world population. And that goes to the database
25 that I mentioned earlier.

Manuel John Ortuno
Direct examination by Mr. Barnette

1 We take the weakest number. In other words, we
2 take -- of the four databases that we compare these values
3 to we take the number that's least incriminating. But even
4 the least incriminating number is extremely large.

5 And so in the report it states -- and we can read it
6 here -- the probability right here, beginning right here,
7 the probability of randomly selecting an unrelated
8 individual having the D.N.A. profile matching these items
9 is approximately one in 1.3 quadrillion individuals.

10 Now, the world population is slightly over 6 billion.
11 I don't know exactly, 6.3 or 6.4. 1.3 quadrillion is
12 roughly 400,000 times the world population. You would have
13 to have everyone on this planet 400,000 times to have that
14 number. That's how large that number is.

15 Put another way, if billion is, is nine zeroes,
16 trillion is 12 zeroes, quadrillion is 15 zeroes. It's a
17 very large number.

18 Q If you would, write that number real quick here if you
19 would right here. And you may want to come where I'm at
20 because I think it will be upside down.

21 A On this sheet right here. It's 1.3.

22 Q That'd be your number. And that's compared to the
23 6 -- 5 or 6 billion in the world today. So that's 400,000
24 times.

25 A That's a conservative, yes.

Manuel John Ortuno
Cross-examination by Mr. Poole

1 Q And so in your opinion this would definitely be a
2 D.N.A. match.

3 A Well, what we like to say is within reasonable
4 scientific certainty. What we have here is, in fact, the
5 sample that was collected or the D.N.A. profile that was
6 developed from the samples collected at the scene,
7 originated from Mr. Mack.

8 Q Thank you, sir. If you would, please have a seat.
9 (Whereupon, the witness returned to the stand.)

10 Q If you would, sir, please answer any questions
11 Mr. Poole may have for you.

12 CROSS-EXAMINATION

13 BY MR. POOLE

14 Q Mr. Ortuno --

15 A Yes, sir.

16 Q -- just a couple of questions.

17 You know I'm not going to ask you a lot about D.N.A.

18 A I'm sorry to hear that.

19 Q You know more about it than anybody in this room,
20 don't you, sir?

21 A I don't know. I've worked hard at knowing a lot about
22 it, yes, sir.

23 Q Okay. Just this question.

24 You do not know how or when the blood got on the
25 samples that you tested. I mean, you don't know anything

Manuel John Ortuno
Cross-examination by Mr. Poole

1 about where John Mack was, what he was doing, or anything
2 whatsoever in September of 2005, I believe you said.

3 A No, sir. There is no timestamp on, on these samples.

4 Q Okay. So what you testified to is what you have
5 gleaned from your vast knowledge of experience, education
6 and testing in the SLED laboratory, is that right?

7 A Yes, sir.

8 Q And you have no idea about the ultimate question in
9 this case, which is whether or not John Mack is guilty.

10 MR. BARNETTE: Your Honor, I would object. That asks
11 for speculation on the witness' part.

12 THE COURT: Well, that's what he's asking about.

13 Overruled.

14 A I'm sorry?

15 Q You don't know whether John Mack is guilty or not of
16 the crime, do you?

17 A No. My role is just simply to test the samples,
18 develop the profiles and then compare them.

19 Q And if we write down an impressive number with ten to
20 whatever power, your answer to that question wouldn't
21 change, would it?

22 A The only thing I can say within reasonable scientific
23 certainty is that the D.N.A. profile developed from the
24 evidence located at that home matched the D.N.A. profile of
25 Mr. Mack. That's all I can say.

Manuel John Ortuno
Redirect examination by Mr. Barnette

1 Q The answer to the question is your answer would not
2 change, is that right, regardless of what number you could
3 put up? You don't know whether he's guilty or not, do you?

4 A Oh, no. It's not my role to determine innocence or
5 guilt, absolutely.

6 Q I ask you to say that again.

7 A Absolutely.

8 Q Thank you.

9 MR. BARNETTE: Just one question, Your Honor, on
10 redirect.

11 REDIRECT EXAMINATION

12 BY MR. BARNETTE

13 Q But in your opinion his blood samples or the samples
14 given by Mr. Mack matches the samples found at the home.

15 A Yes.

16 MR. POOLE: Objection. Asked and answered.

17 THE COURT: Overruled.

18 Q If you would, sir.

19 A Yes.

20 Q Thank you, sir.

21 THE COURT: Step down.

22 MR. BARNETTE: I would ask the witness be excused,
23 Your Honor.

24 THE COURT: He may be.

25 Mr. Barnette, do you want to be sure all of the

1 exhibits are there?

2 MR. BARNETTE: Yes, sir. I want to make sure we
3 have -- before Mr. Ortuno goes I want to make sure we've
4 got all of the exhibits.

5 (Pause.)

6 MR. BARNETTE: We do, Your Honor.

7 THE COURT: Thank you.

8 You can be excused.

9 THE WITNESS: Thank you.

10 (Whereupon, the witness was excused.)

11 THE COURT: All right. Ladies and gentlemen, we're
12 going to recess for the afternoon.

13 So keep in mind the caution I gave you prior to
14 excusing you for lunch.

15 No discussions about the case with anybody; don't
16 conduct any research; don't do your own investigations into
17 any issue that might arise during the trial; don't allow
18 yourselves to be exposed to any type of media coverage in
19 the event there should be some.

20 Do have a good evening, and please report to your jury
21 room at 9:30 in the morning, 9:30 in the morning. Have a
22 good evening.

23 (The following takes place outside the presence of the
24 jury.)

25 THE COURT: Court is in recess until 9:30 in the

1 morning.

2 END OF PROCEEDINGS FEBRUARY 22, 2011

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Walter Max Ballard, Jr.
Direct examination by Mr. Leibert

1 (Proceedings February 23, 2011)

2 (The following takes place outside the presence of the
3 jury.)

4 THE COURT: Are we ready for the jury?

5 MR. LEIBERT: Yes, sir, Your Honor.

6 THE COURT: All right. Bring them in.

7 (The following takes place in the presence of the
8 jury.)

9 THE COURT: Good morning, ladies and gentlemen.

10 As you know, when we recessed yesterday afternoon the
11 state was still in the midst of their presentation of
12 evidence. So we'll continue with that presentation this
13 morning.

14 MR. LEIBERT: May it please the Court, Your Honor.

15 THE COURT: Mr. Leibert.

16 MR. LEIBERT: Call Mr. Max Ballard to the stand
17 please.

18 WALTER MAX BALLARD, JR.,
19 having been first duly sworn, testified as follows:

20 DIRECT EXAMINATION BY MR. LEIBERT

21 Q Please tell the jury your full name.

22 A Walter Max Ballard, Jr.

23 Q Do you own the residence at [REDACTED] West Victoria in
24 Spartanburg?

25 A Yes, sir.

Walter Max Ballard, Jr.
Direct examination by Mr. Leibert

1 Q Did you own it in September of 2005?

2 A Yes, sir.

3 Q Who was your tenant back in September of 2005?

4 A LaRhonda Moss.

5 Q When she rented your place was your place vacant or
6 was it furnished with furniture already in it?

7 A It was vacant.

8 Q When a tenant moves out do you paint the walls?

9 A Almost every time. I did that time.

10 Q And this time you did paint the walls.

11 A Yes, sir.

12 Q Do you know John Mack?

13 A No, sir.

14 Q Do you know that man seated there with the glasses and
15 not a jacket, just a blue shirt?

16 A No, sir.

17 Q Did you ever give him consent to enter that residence?

18 A I've never given anyone consent to enter one of my
19 residences.

20 Q Do you have a key to [REDACTED] Victoria?

21 A Yes, sir.

22 Q Did you ever use it while Ms. Moss was your tenant?

23 A No.

24 Q Did you ever give anyone consent to use a key while
25 she was your tenant?

Walter Max Ballard, Jr.
Cross-examination by Mr. Poole

1 A No.

2 Q Why did you have a key?

3 A In case of emergencies, or when a tenant moves out I
4 can get back in.

5 Q Was she a tenant in good standing when she left?

6 A Awesome.

7 Q Thank you. Answer any questions Mr. Poole may have.

8 CROSS-EXAMINATION

9 BY MR. POOLE

10 Q Just one question, Mr. Ballard. How long was Ms. Moss
11 a tenant of yours at this address?

12 A I didn't check my records, but it was, I believe, a
13 little over a year.

14 Q Could it have been as much as two years?

15 A It could have been.

16 Q Okay. Thank you very much.

17 MR. LEIBERT: Thank you, Your Honor.

18 THE COURT: You may step down. Thank you.

19 MR. LEIBERT: May he be excused, Your Honor?

20 THE COURT: He may be.

21 (Whereupon, the witness was excused.)

22 MR. LEIBERT: Your Honor, call Ms. LaRhonda Moss back
23 to the stand.

24 THE COURT: Ms. Moss, you've already been sworn in the
25 case, so you're still under oath for the purpose of these

LaRhonda Moss
Direct examination by Mr. Leibert

1 questions.

2 THE WITNESS: Okay.

3 MR. LEIBERT: May it please the Court.

4 THE COURT: Yes.

5 LA RHONDA MOSS, having been
6 previously duly sworn, testified as follows:

7 DIRECT EXAMINATION BY MR. LEIBERT

8 Q Ms. Moss, prior to September of 2005 was there any
9 blood on the walls near a light switch or any of your
10 furniture?

11 A No, sir.

12 Q Thank you.

13 MR. POOLE: No questions.

14 THE COURT: You may step down.

15 (Copy of Indictment No. 89-GS-42-2367 marked State's
16 Exhibit No. 4; copy of Indictment No. 99-GS-42-0698 marked
17 State's Exhibit No. 5; copy of Indictment No. 88-GS-42-1248
18 marked State's Exhibit No. 6.)

19 MR. LEIBERT: Your Honor, finally, the state and the
20 defense have stipulated to three exhibits. They are
21 State's Exhibits 4, 5 and 6. May I approach and show you?

22 THE COURT: All right. Mr. Poole, you have seen them.

23 MR. POOLE: Yes, sir.

24 THE COURT: Any objection?

25 MR. POOLE: No, sir.

LaRhonda Moss

Direct examination by Mr. Leibert

1 MR. LEIBERT: Your Honor, may I publish them to the
2 jury?

3 THE COURT: You may.

4 MR. LEIBERT: State's Exhibit 4, ladies and gentlemen,
5 is an indictment, case No. 89-GS-42-2367, the State vs.
6 John Willie Mack, indictment for burglary of a dwelling,
7 wherein Mr. Mack was convicted of burglary in the first
8 degree.

9 State's Exhibit No. 5 is case No. 99-GS-42-0698, an
10 indictment, State vs. John Willie Mack, indictment for
11 burglary second degree, wherein Mr. Mack was convicted of
12 burglary in the second degree.

13 State's Exhibit No. 6 is case No. 88-GS-42-1248, the
14 State vs. John Willie Mack, indictment for burglary third
15 degree, wherein Mr. Mack was convicted of burglary in the
16 third degree.

17 Thank you, Your Honor.

18 With that the state rests.

19 THE COURT: All right. Ladies and gentlemen, that is
20 all of the testimony to be offered by the state, at least
21 in their case in chief.

22 Before we can go any further I've a couple of legal
23 matters I'll need to address with the lawyers. It should
24 take only a moment or two. Then we'll bring you back to
25 continue with the trial.

Motion

1 So right now I'm going to ask you to please go to your
2 jury room. Do not yet discuss the case. I'll bring you
3 back in just a few minutes.

4 (The following takes place outside the presence of the
5 jury.)

6 THE COURT: All right. Any motions or other matters
7 to address before we continue?

8 MR. POOLE: Your Honor, at this time I'd make a motion
9 for a directed verdict of not guilty on both indictments on
10 behalf of Mr. Mack.

11 With regard to the burglary indictment, it alleges
12 that between September 1 of 2005 and September 6th of 2005
13 Mr. Mack did commit the offense of burglary or breaking and
14 entering.

15 And notwithstanding the fact that there is D.N.A.
16 evidence in this case, it is our position that there is not
17 any evidence that should be -- that warrants the case going
18 to the jury, establishing the fact that this defendant did,
19 in fact, take and carry away or break and enter.

20 We extend that to the same motion to the grand larceny
21 charge, and that the asportation aspect of larceny,
22 notwithstanding the fact that there exists D.N.A. evidence,
23 there's no evidence that warrants the indictment going to
24 the jury for the same reason.

25 And we'd also state that the grand larceny charge of

Motion

1 greater than one thousand, less than five thousand, there's
2 no evidence to put the monetary value of the items that
3 were alleged that were taken within that range other than
4 the testimony of the owner, Ms. Moss, who testified as to
5 the value of certain items and the value of them when they
6 were purchased.

7 We do not know what the value of the items would
8 actually be, fair market value-wise, as they would be
9 determined if there were a willing buyer and a willing
10 seller dealing at arms' length and in good faith. We don't
11 have the monetary value amount in evidence to put it within
12 that bracket of 1-K to 5-K.

13 Additionally, we would renew our motion that was made
14 prior to this case regarding the indictment timeframe. And
15 that's our motions at this point.

16 THE COURT: All right. Mr. Leibert.

17 MR. LEIBERT: Your Honor, I think it certainly is
18 sufficient to send it to the jury since there's evidence
19 from the victim that she didn't know this man.

20 Somebody went in there, and we've got scientific
21 evidence. So I certainly believe that is sufficient to go
22 to the jury.

23 As to grand larceny and petit larceny, you know, we
24 didn't have the opportunity to try to get fair-market value
25 so we could sell it because we didn't have them. But we

Motion

1 don't oppose a petit larceny charge if the Court deems that
2 appropriate.

3 THE COURT: All right. Motions are denied.

4 Anything further?

5 MR. POOLE: No, sir.

6 THE COURT: Have you talked to your client about his
7 right to testify?

8 MR. POOLE: Yes, sir, I have.

9 THE COURT: And does he indicate any preference?

10 MR. POOLE: He indicates a preference not to testify.

11 THE COURT: All right. Mr. Mack, your lawyer just
12 told me that you do not wish to testify during the trial of
13 this case.

14 Have you and he discussed the fact that you do have an
15 absolute right to remain silent if you wish to?

16 THE DEFENDANT: Yes, sir, Your Honor.

17 THE COURT: Do you understand nobody can make you take
18 the witness stand and testify, nobody can require that you
19 make any statement or answer any questions that relate to a
20 criminal charge that's been brought against you?

21 You have an absolute right to remain silent and when
22 you come to trial to require the state to come forward with
23 sufficient evidence to establish your guilt to the
24 satisfaction of a jury beyond a reasonable doubt. And you
25 never have to assist the state in their efforts to prove

1 your guilt by you taking the witness stand and answering
2 questions that might tend to prove your own guilt.

3 At the same time, if you do wish to provide this jury
4 with any additional information now is the only opportunity
5 that you will have to do so. In other words, you can't
6 wait until the jury has reached a decision and then change
7 your mind about whether or not you will testify.

8 The state has rested in their presentation. It's now
9 the time for you to present any evidence that you wish to,
10 whether you testify or whether you call other witnesses or
11 whether you simply introduce other items of evidence.

12 But this is the only chance that you will have to
13 provide any additional information and to testify if you
14 wish to.

15 But it's your choice. Only you can make it. Nobody
16 can require it either way. You get to make that decision.

17 Do you understand your right to testify as well as not
18 testify?

19 THE DEFENDANT: Yes, sir, Your Honor.

20 THE COURT: And have you and Mr. Poole discussed the
21 advantages and disadvantages of testifying as well as not
22 testifying?

23 THE DEFENDANT: Yes, sir, Your Honor.

24 THE COURT: And you appreciate what those advantages
25 and disadvantages are?

1 THE DEFENDANT: Yes, sir, Your Honor.

2 THE COURT: And have you had time to reflect upon your
3 decision as to whether or not you will testify?

4 THE DEFENDANT: Yes, sir, Your Honor.

5 THE COURT: And have you arrived at a decision?

6 THE DEFENDANT: Yes, sir, Your Honor.

7 THE COURT: And what is that decision?

8 THE DEFENDANT: I wish not to testify, Your Honor.

9 THE COURT: And is that a decision that you have
10 reached of your own free will and accord?

11 THE DEFENDANT: Yes, sir, Your Honor.

12 THE COURT: Has anybody forced you into it?

13 THE DEFENDANT: No, sir, Your Honor.

14 THE COURT: Has anybody pressured you into it?

15 THE DEFENDANT: No, sir, Your Honor.

16 THE COURT: Anybody suggested that that's what you
17 need to do?

18 THE DEFENDANT: No, sir.

19 THE COURT: You made that decision on your own?

20 THE DEFENDANT: Exclusively, yes, sir.

21 THE COURT: Sir?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And are you satisfied with it?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Okay. Do you have any other evidence you

1 want Mr. Poole to present?

2 THE DEFENDANT: No, sir.

3 THE COURT: Okay. Thank you.

4 Any requests for instructions from the state?

5 MR. LEIBERT: No, sir, Your Honor. But can I look at
6 your actual definition of larceny? I know the burglary
7 statute. I assume you're just going to read that. But the
8 larceny statute, it doesn't actually define it. And I
9 figured you were going to say something along the lines
10 intent to permanently deprive the owner. I just wanted to,
11 wanted to mention that to the jury. And I didn't want to
12 misstate what you were going to say.

13 THE COURT: Larceny is commonly referred to and known
14 as stealing. It's defined in the law as taking, stealing
15 and carrying away the personal property of another with the
16 intent to deprive the true owner of his or her property,
17 and converting the property to the taker's own use.

18 Grand larceny is a theft of property valued -- having
19 a value of more than \$1,000. Petit larceny is theft of
20 property having a value of \$1,000 or less.

21 MR. LEIBERT: And are you going to charge petit
22 larceny?

23 THE COURT: I will.

24 MR. LEIBERT: Okay. I don't have any requests. Thank
25 you.

1 MR. POOLE: Your Honor, can we approach for just a
2 moment?

3 THE COURT: Yes, sir.

4 (Bench conference held off the record.)

5 THE COURT: All right. Are we ready for the jury?

6 MR. LEIBERT: Yes, sir, Your Honor.

7 THE COURT: Bring them in.

8 (The following takes place in the presence of the
9 jury.)

10 THE COURT: Ladies and gentlemen of the jury, as you
11 know, the state has concluded in their presentation. So
12 we'll now proceed with any additional evidence that might
13 be offered by the defense.

14 Mr. Poole.

15 MR. POOLE: Your Honor, I believe the state has the
16 right to go first.

17 THE COURT: Are you resting your case?

18 MR. POOLE: Yes. That's correct.

19 THE COURT: All right. That is all of the testimony
20 and other evidence to be offered in the trial of the case,
21 and therefore what remains to be done are the lawyers'
22 final summations, after which I'll instruct you on the law.
23 And then you can begin with your deliberations in the case.

24 So please give the lawyers your attention now as they
25 give you their final summations.

Closing arguments

1 Mr. Leibert.

2 MR. LEIBERT: May it please the Court, Your Honor.

3 Mr. Poole.

4 Good morning again, ladies and gentlemen. As you've
5 heard since yesterday, we have two charges, burglary first
6 degree and grand larceny between one thousand and five
7 thousand.

8 So burglary in the first degree is defined as follows:
9 A person is guilty of burglary in the first degree if the
10 person enters a dwelling without consent and with the
11 intent to commit a crime in the dwelling.

12 And there's four other things, and we have to show one
13 of those. And in this case it is this provision: The
14 burglary is committed by a person with a prior record of
15 two or more convictions for burglary or housekeeping or --
16 or housebreaking or a combination of both. So entering a
17 dwelling without consent with the intent to commit a crime
18 and you have two or more prior convictions for burglary.

19 You heard the testimony of the victim of the
20 residence, 122 West Victoria, Ms. Moss. She left for the
21 holiday weekend September the 1st. She comes back five
22 days later.

23 She walks in the back door. She can see the front
24 door is open. Stuff's everywhere. Her T.V.'s gone, her
25 laptop computer is gone. Her jewelry box is dumped onto

Closing arguments

1 her bed and a lot of the jewelry is missing.

2 She told you she saw Mr. Mack yesterday for the first
3 time. She'd didn't know who did it. This is a case of
4 scientific evidence. This isn't a case where the neighbor
5 says I saw a guy running out and getting in a blue pickup
6 truck and he fit the general description of Mr. Mack. No,
7 no, no.

8 Mr. Mack left part of Mr. Mack on the wall and on the
9 entertainment center. Did you hear what the scientific or
10 the scientist said? Mr. Ortuno's a scientist. He said you
11 leave your cells there, you leave your D.N.A. That's what
12 this is about.

13 Okay. Burglary. Didn't have her consent to go there.
14 We brought in the landlord. Didn't -- he doesn't know
15 anything. He had a key, but he used it for emergencies
16 only, and he never had an emergency with her.

17 And during that time, September 1st of '05 until
18 September 6th of '05, he did not give anybody
19 authorization, Mr. Mack or anybody, the entire time she
20 lived there.

21 The D.N.A., that he painted the walls, and Ms.
22 Moss said there's no blood on my walls, there's no blood on
23 my entertainment center.

24 We've established burglary in the first degree. Entry
25 without consent, the dwelling or residence of another with

Closing arguments

1 intent to commit a crime.

2 A television is gone. Her laptop's gone. The locket
3 that she wanted to give her granddaughter is gone. The
4 ring of her grandmother thankfully was still there. The
5 C.D. changer is gone. The cable box is gone.

6 And Exhibit 4 that I just read to you, 89-2367,
7 burglary first degree, indictment for burglary of a
8 dwelling. That was the dwelling of Mr. Thomas Williford,
9 March 4th of 1999.

10 88-1248, another indictment. That's for a building.
11 That was the V.F.W. club February 28th, 1988, that he was
12 convicted of. That's two -- two or more.

13 There's the third one, burglary in the second degree,
14 99-0698. It was a Li'L Cricket, November 17th of 1998.

15 You will get to take these back in the jury room with
16 you. And His Honor will explain to you the limited purpose
17 you get to use these in determining the burglary first
18 degree. Right now it's the grand larceny greater than one
19 thousand, less than five thousand.

20 Ms. Moss testified the T.V. was gone. Bought it at
21 Wal-Mart. Paid \$200. I.B.M. laptop computer, \$900.
22 That's \$1,100. Right there's \$1,100.

23 She doesn't know what the value of the locket was
24 because it was a gift. She didn't know the value of some
25 of the other. But just those two items, that's \$1,100.

Closing arguments

1 The watch the -- I said it wrong because I said the
2 tennis bracelet. She says there was a tennis-bracelet
3 watch. That's \$200. Now we're at \$1,300.

4 None of these items were ever recovered. But His
5 Honor will tell you that the definition of larceny is the
6 taking or stealing of the property of another to convert it
7 to your own use and to permanently deprive them of it.
8 She'd been permanently deprived of her television and her
9 laptop computer, and more importantly some of the jewelry
10 that she -- that had sentimental value.

11 She gave value of this ruby ring and the sapphire ring
12 approximately 125 to 150. But just say a hundred for each
13 of those. So we're at nine hundred and two hundred --
14 eleven hundred. And two hundred for the watch. We're at
15 thirteen. Say a hundred each of those rings. Now we're at
16 fifteen hundred.

17 She said there were several pendants and necklaces.
18 She said six or seven of those, maybe a hundred apiece.
19 Well, 50 apiece. That's another three hundred. So now
20 we're at eighteen hundred.

21 So we, again, have established grand larceny over one
22 thousand and less than five thousand by just some of the
23 items that were taken.

24 We don't know the value of what was taken that
25 belonged to Charter. We didn't even try to use that. She

Closing arguments

1 wasn't sure what the cable box or the C.D. changer could be
2 because she said she bought the system as a whole -- the
3 speakers and the actual system and the C.D. changeover.

4 She said she wasn't even sure of the value to put on that.

5 So, now we've established we've got a burglary first
6 and we've got a grand larceny. But now what's our proof
7 that Mr. Mack is the person that did this? Well, again Ms.
8 Moss said there's no blood on the walls, there's no blood
9 on my furniture. The landlord said I painted the wall
10 before she moved in. It was vacant when she moved in.
11 There was no furniture in there. There wasn't an
12 entertainment center in there.

13 And then we heard the testimony of Mr. Ortuno. And
14 what Mr. Barnette -- he wanted to be here, but he got
15 called to the courtroom next door which is just behind that
16 wall. He wanted me to apologize that he wasn't here.

17 This is State's Exhibit No. 3 and you will see when
18 you go through this Manuel J. Ortuno, forensic scientist,
19 and what did he tell us? He has master's degree in
20 chemistry from U.S.C. He completed the -- graduated out of
21 the police academy and took extensive training at the
22 F.B.I.

23 He's been qualified as an expert over 50 times, in
24 this case without objection. And he's done over a thousand
25 of these. And you saw his testimony, and I'm not smart

Closing arguments

1 enough to try to repeat it. Anything that you might have a
2 question about you can ask to hear the testimony over
3 again. But you, you saw how he, he looked at it and said,
4 oh, I don't decide guilt or innocence, I get samples and I
5 test them. That's what I do.

6 He's not the jury; he's not the police; he's not the
7 judge. He's a scientist. And as he said, you know, I
8 just, I just test this. And he tested them.

9 And in 2005 he gets these. Okay. And they give a
10 D.N.A. profile. You know, he talks about, you know, all of
11 our cells, molecules, and have D.N.A. in them.

12 Before you remember in the mid 80's you had to have
13 blood the size of a quarter. Now it can be just a little
14 pin drop. And now sometimes you can't even see it. And
15 you wash and you can find it.

16 Okay. And so in this case the David Reeves, he
17 testified that, you know, this is the sealed back where
18 they sealed it. And if you see, see that R, that's the
19 David Reeves that, that signed it.

20 And then Mr. Ortuno, that's M.J.O. That's Mr. Ortuno
21 when he seals it back. You can see it was cut open for
22 court. And then you see everybody puts their initials on
23 this. See, that's the M.J.O. again. That's Mr. Ortuno.

24 And that's Mr. Burgess. That's the detective on the
25 case. D.B. is the drop box. And then that is David Reeves

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1 on the first one.

2 And then, see, April of 2009, same thing. That was
3 Mylnor Beach, the second guy that testified. He took it
4 down to SLED.

5 Detective Burgess. He does the swab and takes it and
6 puts it in the drop box. Then Mylnor Beach takes it from
7 the drop box and takes it to SLED. SLED puts it in, in the
8 bag.

9 And as Mr. Ortuno said, if it looked like there was
10 any tampering, okay, it would have been noted. Okay. And
11 tampering or contamination won't make it fit somebody's
12 D.N.A., but make it so you couldn't do a profile. Does
13 that make sense?

14 And then, here again, here's our initials. This one
15 is Mylnor Beach. That's in the dates. And then
16 Mr. Ortuno, remember, he's M.J.O. Look at that. And then
17 here we've got M.J.O. again. And then here's Mr. Burgess,
18 the detective, to the drop box, and then drop box to
19 Mr. Beach, and the dates.

20 And you'll get to take all of that back there. And
21 then you can look at the items inside as, as Mr. Barnette
22 put up there with everything that was listed on them if you
23 want to see them. If you want gloves, you can ask for
24 gloves.

25 All right. So now we've got a burglary first degree,

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1 we've got a grand larceny. And now as of April of
2 '09 we've got scientific, scientific evidence it's that man
3 right there.

4 One in three -- two quadrillion. I know that's a big
5 number. Well, it is what it is. Like, like Mr. Ortuno
6 said, I just analyze it. It either matches or it doesn't.
7 Okay. I don't know Mr. Mack. I don't know what he's
8 charged with. You send me this sample. I do a D.N.A. You
9 send me this sample, I will do a D.N.A. It either matches
10 or it doesn't.

11 And his approximately one in 1.3 quadrillion, the
12 probability of randomly selecting an unrelated individual
13 having that profile, and that's to the 15 -- 15 zeroes. I
14 didn't know what that was until he said it yesterday.

15 Well, it's John Mack. Okay. John Mack left some of
16 himself there. We don't need an eye witness. Okay. We've
17 got -- he left his cells there, and we've got D.N.A. That
18 makes him guilty.

19 My job is to present evidence, and I have the burden
20 of proof, beyond a reasonable doubt. Well, we have, we
21 have the D.N.A. We have a victim's home who was broken
22 into. She has property she never recovered. He's guilty.

23 Your verdict means to speak the truth. That's what
24 you do. So I'm asking you to speak the truth, and in this
25 case the truth is he's guilty as charged. Thank you.

Closing arguments

1 Mr. Poole. Do you want this?

2 MR. POOLE: Yes, sir.

3 MR. LEIBERT: Thank you, Your Honor.

4 MR. POOLE: May it please the Court, and Mr. Leibert.

5 Good morning. There's a lot I agree with what the
6 solicitor said, that is what the state said. There's a
7 whole lot I disagree with him on.

8 Of course he's right, and Judge Cole will instruct you
9 as to what these offenses are, burglary and grand larceny.
10 But the issue before you is whether or not Mr. Mack is the
11 one who committed these offenses.

12 Now, burglary is basically -- the question for you to
13 decide is whether or not Mr. Mack was the one who'd broken
14 in. The question also is for you whether Mr. Mack is the
15 one who committed the offense of grand larceny. That is
16 the taking and carrying away of the personal property of
17 another with the intent to permanently deprive that owner
18 forever of that property.

19 Now, let me start with a relatively small point with
20 regard to the larceny and go up to the more serious
21 offenses themselves, which is the burglary of course.

22 Now, Ms. Moss is a victim of a crime, and she lost
23 property. And the charge here is grand larceny between
24 \$1,000 and \$5,000.

25 I think the Court is going to instruct you on a lesser

Closing arguments

1 included offense called petit larceny where the value is
2 zero to \$1,000. You may have to make a decision on that,
3 but it's our position all the way along that Mr. Mack is
4 not the one who committed the larceny.

5 As I understood the testimony from Ms. Moss, she
6 testified that she had bought certain items like a
7 computer. She paid \$900 back in 2003.

8 There were certain items that she estimated a value of
9 to be such and such and such and such. I think there's a
10 real issue as to what the value of the property is.
11 That's, that's relatively a minor aspect of this case as
12 far as it affects Mr. Mack, but I think it's going to be an
13 issue which you'll have to deal with.

14 The larger part of this is, you know, I agree with Mr.
15 Leibert and the state that we do have some scientific
16 evidence for you to consider, but, again, this is not, you
17 know, a T.V. show. This is not something where as in
18 N.C.I.S. or any other drama you can just say, okay, we've
19 got this evidence and it's conclusive, it is definitive and
20 it wraps everything up, because it does not. It doesn't.

21 We've got a 5-day period of time where something
22 happened at this house that was not occupied. And the
23 state claims Mr. Mack is the one who broke and entered and
24 took away -- broke and entered and took away. There's
25 blood that matches him.

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1 Well, when did it occur during the 5-day period or
2 6-day period, between five and six days? How did it occur?
3 How did Mr. Mack get there? How did he leave there? The
4 problem we've got here is with the way the case was
5 investigated.

6 Now, this case, we're talking about something almost
7 six years ago. And we're talking about samples that were
8 D.N.A. samples that were taken years after and then
9 submitted years after.

10 Here we are in 2011 and they're using -- they, the
11 state, is wanting -- wants you to convict Mr. Mack based on
12 this D.N.A. evidence.

13 But again who, how, when and where? Where did the
14 property go? Why wasn't there some sort of followup on
15 recovery? Why, why is there not something like a pawn
16 ticket? Why isn't there something else to connect Mr. Mack
17 to this?

18 Let's say if it is, if it is Mr. Mack's blood, how did
19 it get there? Did somebody place it there? I don't know.

20 See, the whole thing is right over here. You've got
21 to make a decision where, whether or not he is the one that
22 broke and entered and took the property away. And the
23 state says, well, this D.N.A. is enough. But it's not.
24 It's not.

25 The Court, Judge Cole, is going to instruct you on

Jury charge

1 what a reasonable doubt is. He's also going to instruct
2 you and give you an instruction on how to use this evidence
3 of prior burglaries committed by Mr. Mack. It's a very
4 limited instruction. You can only use it for the purpose
5 of determining whether or not this, in fact, is a first
6 degree burglary.

7 But photos were lost, no followup investigation, no
8 fingerprint evidence. There's a lot of old issues. There
9 are a lot of questions. And all of this adds up to a
10 reasonable doubt. You're going to need to think about
11 that.

12 All they've got is the D.N.A. The how, when, with
13 whom, without whom, all of the unanswered questions are
14 still out there unanswered.

15 This is a serious case, so serious that it's our
16 position that what the state's got is not enough to
17 overcome what the state has to prove.

18 Thank you for your time, thank you for your attention,
19 thank for your consideration.

20 THE COURT: Mr. Foreman and ladies and gentlemen of
21 the jury, you have now heard and seen all the evidence, as
22 well as the final summations of the lawyers. And therefore
23 it now becomes my duty and obligation to instruct you on
24 the law that's applicable in this case. And then you'll be
25 asked to go back and begin with your deliberations. And

Jury charge

1 through this process you will examine all of the evidence,
2 decide the facts, apply the law and arrive at a fair and
3 just decision, whatever that decision may be.

4 It is your exclusive duty to determine what the facts
5 are. You do that through your own common sense examination
6 and evaluation of all of the testimony and other evidence
7 received during the trial of this case.

8 You 12 jurors alone will decide what weight, value and
9 effect to give to any particular testimony or other
10 evidence in the case. Again, your sole objective is to
11 simply reach the truth in the matter, and by doing that you
12 will have fulfilled your obligations as jurors, and that is
13 to simply give both the state and the defendant a fair and
14 impartial trial.

15 Now, in this case, as you know, the state through the
16 prosecutor has charged the defendant with having committed
17 the crimes of burglary in the first degree and grand
18 larceny. The state alleges that those offenses arose out
19 of one particular event or a course of events which the
20 state alleges occurred back between September the 1st and
21 September the 6th of 2005.

22 They allege by way of these indictments -- and there
23 are two separate indictments -- that the defendant
24 committed the crime of burglary in the first degree and he
25 committed the crime of grand larceny.

Jury charge

1 Now, as to those allegations and as to each of those
2 charges the defendant has entered a plea of not guilty.
3 And, as I told you, that plea of not guilty has therefore
4 placed upon the state the burden of proving the defendant's
5 guilt to the satisfaction of you 12 jurors beyond a
6 reasonable doubt before any verdict of guilty could be
7 returned as it relates to either of the charges.

8 The burden is never upon a defendant or a person
9 accused of a crime to prove that they are not guilty or to
10 prove that they are innocent because in some cases that
11 might not be possible. The burden is always upon the state
12 because they have brought those charges against the
13 defendant to establish his guilt beyond a reasonable doubt.

14 And you are further instructed that it is a vital,
15 important and cardinal rule of law that every defendant in
16 a criminal trial, no matter how serious the offense might
17 be for which that person stands charged, that person shall
18 always be presumed innocent of that charge. And that
19 presumption of innocence remains with any defendant, as it
20 does with this defendant, from the time that he is placed
21 under arrest and throughout the course of the criminal
22 process and even throughout the course of the actual trial.

23 As I told you, that presumption of innocence will be
24 with Mr. Mack even as you go back to begin with your
25 deliberations in this case. And that presumption of

Jury charge

1 innocence will be with him in that jury room, and it'll be
2 with him forever unless you 12 jurors determine that he's
3 no longer entitled to the presumption of innocence.

4 In other words, after you've considered all of the
5 evidence in the case, and from that evidence you determine
6 what you believe to be the true facts as they relate to
7 these allegations, and upon deciding those facts you apply
8 the law that I will have provided you, if you 12 jurors
9 unanimously determine that his guilt as to a particular
10 charge has been proven beyond a reasonable doubt, then he
11 would no longer be entitled to that presumption of
12 innocence as it relates to that particular charge. But it
13 is only if, unless and until you are satisfied of his guilt
14 beyond a reasonable doubt that the presumption of innocence
15 would no longer be applicable.

16 Now, while the state does have the burden of proving
17 the defendant's guilt to your satisfaction beyond a
18 reasonable doubt, that doesn't mean that the state has to
19 prove his guilt beyond all doubt or beyond any possible
20 doubt. But it does require the state to prove his guilt to
21 your satisfaction beyond a reasonable doubt.

22 The term reasonable doubt should be given its plain
23 and ordinary meaning. A reasonable doubt is the kind of
24 doubt that would cause a reasonable person to hesitate to
25 act upon the information provided.

Jury charge

1 A defendant in a criminal trial is entitled to any
2 reasonable doubt that arises from the evidence or lack of
3 evidence in a case. And if upon any factual issue
4 essential to a finding of a verdict of guilty you have some
5 reasonable doubt as to how that issue should be resolved it
6 would be your duty to resolve that reasonable doubt in
7 favor of the defendant.

8 Therefore if upon your consideration of the whole case
9 you have a reasonable doubt as to the defendant's guilt as
10 it relates to a particular indictment you must resolve that
11 reasonable doubt in his favor and return a verdict of not
12 guilty. Or in this case you might only find him guilty
13 with respect to the larceny indictment or the lesser
14 included offense that you will be able to consider based
15 upon this instruction that I will be providing you.

16 Now, the same law that provides that you are the
17 judges of the facts also provides that I am the judge of
18 the law, and that simply means that nobody's going to tell
19 you how to arrive at your determination of fact in this
20 case. You do that, as I've stated, through the exercise of
21 good judgment and common sense conscientiously applied to
22 the testimony and evidence received during the course of
23 the trial.

24 You must however under your oath as a juror accept the
25 law as I provide it to you as being the law that you are to

Jury charge

1 apply in the case.

2 In other words, you're never to concern yourself with
3 what you thought the law was before you came to serve as a
4 juror this week or what you think the law ought to be. You
5 must under your oath as a juror accept the law as I provide
6 it to you as being the law that you are to apply in this
7 case.

8 Then you simply take that law and you apply it to the
9 facts that you 12 jurors determine those facts to be based
10 upon your common-sense examination and evaluation of all of
11 the evidence received during the trial.

12 Now, as I've told you, you are the sole judges of the
13 facts in this case, and you are therefore necessarily the
14 sole judges of the credibility and the believability of
15 each witness that has testified during the course of the
16 trial.

17 In assessing or in making your assessment as to a
18 particular witness' credibility there are several factors
19 which you should take into consideration, and I'm going to
20 list those factors for you.

21 You should consider the demeanor of the witness, that
22 is how the witness appeared to you as the witness testified
23 from the witness stand. Was the witness straightforward in
24 responding to questions, or was the witness hesitant or
25 evasive in responding to questions that were asked of that

Jury charge

1 witness.

2 Simply put, did the witness appear to you to be
3 telling the truth and to have knowledge of the facts to
4 which that witness has testified.

5 You should also consider whether or not the testimony
6 of a witness is consistent, or is it inconsistent with that
7 witness' own testimony as well as with other testimony or
8 other evidence received during the trial.

9 You should also consider how the witness came to know
10 the facts to which a witness has testified. In other
11 words, what was a particular witness' opportunity and
12 ability to perceive the existence of some fact by means of
13 their senses, and then what is their ability to be able to
14 come into court and to accurately recollect to you as to
15 what they have previously perceived.

16 You may also consider any bias or prejudice or
17 interest that a witness might have with respect to a case.
18 In other words, do you find some reason that a particular
19 witness would come into court and would testify one way or
20 another to help or to hurt one side or the other, and you
21 may consider any interest that a witness might have in the
22 outcome if you determine that a witness does have such an
23 interest and you find that that interest would bear upon
24 that particular witness' credibility.

25 You may also consider whether or not the testimony of

Jury charge

1 a witness is strengthened, or is it weakened by other
2 testimony or other evidence received during the course of
3 the trial.

4 Now, during the course of this trial you've also heard
5 testimony that was elicited from a witness who was
6 qualified as an expert in a particular field. Now, while
7 the Court does make a determination as to whether or not a
8 person has sufficient qualifications allowing them to be
9 qualified as an expert and to testify as an expert, it's
10 not up to the Court to determine the credibility or the
11 weight to be given to that testimony. The jury does that.

12 In other words, the jury must assess the credibility
13 and the believability of an expert witness just as you do
14 any other witness, and it is for you 12 jurors to determine
15 what is the most credible and believable testimony that was
16 received during the trial of the case and whether or not
17 that -- and it does not matter whether that testimony came
18 from an expert witness or a lay witness. The jury still
19 has to assess, and you have the prerogative to assess, the
20 credibility of that testimony.

21 And therefore because you are the judges of the facts
22 and because you are the judges of the credibility of each
23 witness that has testified you are permitted to believe as
24 much or as little of what a witness has testified to as you
25 deem is appropriate.

Jury charge

1 And therefore you may believe everything that a
2 witness testified to; you may choose to believe none of it.
3 You may believe one portion of a witness' testimony and
4 reject some other portion of that same witness' testimony.
5 In a given case you could believe one witness as opposed to
6 several, or several as opposed to one.

7 But whatever your good judgment and common sense tells
8 you is the most believable and credible testimony is the
9 testimony you should accept, and you should reject any
10 testimony or other evidence that you find not to be
11 credible or believable. Again, your sole objective is to
12 simply reach the truth in the matter, and by doing that you
13 will have fulfilled your obligations as jurors in the case.

14 Now, while there are various forms of evidence such as
15 testimony, photographs, documents, charts and other types
16 of physical exhibits, there are really only two types of
17 evidence. Either or both of those types of evidence may be
18 used either singly or in combination to prove any fact in
19 issue. But the two types of evidence are direct evidence
20 and circumstantial evidence.

21 Now, direct evidence is the testimony of a person who
22 testifies from actual knowledge of the fact. It is
23 testimony by a person who has perceived the existence of
24 some fact by means of his or her senses, and then that
25 person comes into court and they testify as to what they

Jury charge

1 have previously seen or heard, or felt for that matter, but
2 what they have previously perceived.

3 Circumstantial evidence, on the other hand, is the
4 proof of some other fact or set of facts which taken either
5 singly or collectively may prove the existence of a fact in
6 question as a necessary consequence. That is through an
7 inference.

8 An inference is simply a deduction of fact that may
9 logically and reasonably be drawn from the proof of some
10 other fact or set of facts. In other words, it's not a
11 fact proven by the direct testimony of a witness based upon
12 their personal perception, but it is a conclusion which
13 might reasonably be drawn from the proof of other facts.

14 In other words, you may infer that a particular event
15 occurred or that a particular fact exists based upon the
16 proof of sufficient factual circumstances which would
17 reasonably warrant your arriving at a particular
18 conclusion.

19 The law however makes absolutely no distinction
20 between the weight or value to be given to direct evidence
21 as opposed to circumstantial evidence, nor is a greater
22 degree of certainty required of circumstantial evidence as
23 opposed to direct evidence.

24 Whatever the type of evidence used to prove any fact
25 in issue, you should consider all of the evidence presented

Jury charge

1 during the trial of the case and after carefully
2 considering and weighing all of that evidence in your minds
3 if you are not convinced of the guilt of the defendant as
4 to a particular charge beyond a reasonable doubt, then you
5 must resolve that doubt in his favor and return a verdict
6 of not guilty.

7 Now, in this case, as you know, the defendant is
8 charged with two separate and distinct offenses, and one is
9 burglary in the first degree and the other is grand
10 larceny. Both of these are statutory offenses, in other
11 words, they're set forth in the South Carolina Code of
12 Laws, which are the blue volumes of books you see over
13 here.

14 Every year the legislature meets from January until
15 June. During that time they pass a number of laws, rules
16 and regulations that govern our conduct in a variety of
17 ways.

18 Some of those laws that are passed are criminal
19 statutes, and it just means that the legislature enacts a
20 law that prohibits us as citizens from engaging in
21 particular types of conduct. Where a person is found to
22 have engaged in that conduct in violation of that statute,
23 then it subjects that person to some prescribed form of
24 punishment or penalty.

25 But understand that the jury is never to be concerned

Jury charge

1 with punishment or penalty. Your sole obligation, function
2 and duty in the trial of a case is to determine whether or
3 not a defendant has been proven guilty of a crime alleged
4 against him by the state.

5 You are to make that determination based upon the
6 evidence presented and the applicable law. You are not to
7 consider any consequence of that decision. So you may
8 never take into consideration any potential or possible
9 punishment that might result. You're not to consider that.
10 You are just to determine whether or not the evidence in
11 the case establishes his guilt beyond a reasonable doubt.

12 But the two statutes that are referenced by the
13 offenses of burglary in the first degree and grand larceny
14 are sections 16-11-311 which defines the crime of burglary
15 in the first degree and 16-13-30 which addresses the crime
16 of grand larceny. I'm going to begin with 16-11-311 which
17 defines the criminal offense known as burglary in the first
18 degree.

19 Section 16-11-311 provides that a person is guilty of
20 burglary in the first degree if the person enters a
21 dwelling without consent and with the intent to commit a
22 crime therein, and an additional factor, that when in
23 effecting entry or while in the dwelling he is armed with a
24 deadly weapon or causes physical injury to a person who's
25 not a participant in the crime, or uses or threatens the

Jury charge

1 use of a dangerous instrument, or displays what appears to
2 be a knife or firearm, or the entering or the remaining or
3 the burglary occurs in the nighttime, or the burglary is
4 committed by a person with a prior record of two or more
5 convictions for burglary or housebreaking, or a combination
6 of both.

7 And therefore based upon the foregoing statute that I
8 have just read, before you could return a verdict of guilty
9 as to the crime of burglary in the first degree it would be
10 necessary that the evidence in this case has established
11 beyond a reasonable doubt the four following essential
12 elements:

13 No. 1, it must be established that the defendant
14 entered a dwelling. Entry is an indispensable element in
15 the crime of burglary. Entry is the act of going into the
16 dwelling. And, as I've stated, the entry must be into a
17 dwelling. And a dwelling is defined as a building or a
18 structure which is used or normally used for sleeping,
19 living or lodging by a person.

20 Secondly, there must be an entry of a dwelling without
21 consent. Entering without consent means to enter a
22 dwelling without the consent of the owner or the person
23 otherwise in lawful possession of the dwelling.

24 Thirdly, there must be an entry of a dwelling without
25 consent and with the intent to commit a crime therein.

Jury charge

1 There must be an intent to commit a crime, whether or not
2 any crime is actually committed, accomplished or completed.

3 The mere entering of a dwelling without an intent to
4 commit a crime does not constitute the crime of burglary.
5 It is only when there is an entering accompanied with an
6 intent to commit a crime that the crime of burglary is
7 complete. And the crime of any grade or severity is
8 sufficient to satisfy this particular element of the crime
9 of burglary.

10 An intent refers to the state of a person's mind which
11 directs his actions towards a specific object or goal. The
12 entry of a dwelling without consent and with the intent to
13 commit a crime therein completes the crime of burglary.

14 As I've stated, in order for any burglary to be a
15 burglary in the first degree there's a fourth element that
16 has to be established. In this particular case the only
17 element that fits in the category of the fourth element
18 that the state is alleging is that the burglary was
19 committed by a person with a prior record of two or more
20 prior convictions for burglary.

21 Now, in this case the state is alleging that the crime
22 of burglary is in the first degree because the burglary was
23 committed by a person with two or more prior convictions
24 for the crime of burglary, and therefore in this case you
25 have heard evidence regarding the defendant having

Jury charge

1 previously been convicted of the crime of burglary.

2 You are instructed that such evidence is offered for
3 and may only be considered by you for a very limited
4 purpose. The purpose for which it is offered is to
5 establish a particular degree of burglary in the event you
6 determine that a burglary has been established by the
7 evidence in this case.

8 It is not being offered as proof of the defendant's
9 commission of the crime of burglary for which he is now
10 standing trial, nor may it be considered by you as evidence
11 that the defendant did commit the crime of burglary.

12 If you determine that the state has proven beyond a
13 reasonable doubt that the defendant committed the crime of
14 burglary, that is the entering of a dwelling without
15 consent and with the intent to commit a crime therein, then
16 you may consider the evidence of those prior burglary
17 convictions as it relates to the issue as to what degree of
18 burglary has been committed.

19 You are not permitted to consider such evidence for
20 any other purpose. You may not consider such evidence as
21 evidence of the defendant's bad character, nor may you
22 consider it as evidence that the defendant may have acted
23 in accordance with prior conduct.

24 It may only be considered by you in determining the
25 degree of burglary if you find beyond a reasonable doubt

Jury charge

1 that the defendant has been proven guilty of the crime of
2 burglary.

3 And therefore in this case in order to establish the
4 crime of burglary in the first degree the state would have
5 to have proven to your satisfaction beyond a reasonable
6 doubt that this defendant, John Mack, did enter a dwelling
7 without consent and with the intent to commit a crime
8 therein, and that he has two or more prior convictions for
9 the crime of burglary.

10 The second indictment is the indictment for grand
11 larceny, and that indictment alleges that the defendant
12 committed the crime of larceny on the same date and time as
13 alleged in the burglary indictment.

14 Larceny is commonly referred to and known as stealing.
15 Larceny is defined in the law as the taking and the
16 stealing and the carrying away of the personal property of
17 another with the intention of permanently depriving the
18 true owner of his or her property and intending to convert
19 that property to the taker's own use.

20 Grand larceny is defined as a theft of personal
21 property belonging to another having a value of more than
22 \$1,000.

23 Petit larceny is the theft of personal property
24 belonging to another having a value of \$1,000 or less.

25 I instruct you further, and I emphasize to you, that

Jury charge

1 the fact that a defendant does not testify during the trial
2 of a criminal case is not a fact or circumstance which may
3 be considered by you 12 jurors in any way whatsoever during
4 your deliberations or in your determination as to whether
5 or not his guilt has been proven beyond a reasonable doubt.

6 You may not weigh -- you may not allow such a fact to
7 weigh in the slightest degree against a defendant, because,
8 as I told you, the burden is always upon the state to
9 establish a defendant's guilt beyond a reasonable doubt.
10 The burden is never upon a defendant or a person accused of
11 a crime to prove that they are not guilty or to prove that
12 they are innocent because in some cases that might not be
13 possible.

14 And therefore you are not to draw any inference nor
15 reach any conclusion from the fact that a defendant does
16 not testify during the trial of the case, nor may that fact
17 even be discussed by you jurors while you are engaged in
18 your deliberations in this matter.

19 Now, ladies and gentlemen, I am not in any way
20 concerned with what your decisions are, but you are
21 instructed that any decision you reach must be unanimous.
22 All 12 of you must be in agreement.

23 Now, Mr. Foreman, you will be called upon to preside
24 over the jury deliberations in the jury room simply to
25 ensure that those deliberations are carried out in some

Jury charge

1 orderly fashion. But all jurors are expected to
2 participate, because, as I've stated, the decision, any
3 decision you reach, has to be unanimous. And a verdict is
4 intended to be a consensus opinion of all 12.

5 Now, in this case, Mr. Foreman, you're going to have
6 the indictments which set forth the charges against the
7 defendant.

8 The indictments are not evidence of anything. They're
9 not proof of anything. They do not establish anything.
10 They're simply the charging papers.

11 But in this case they also will be in the jury room
12 because they will serve as the verdict forms. In other
13 words, it's going to be on the back of each of the separate
14 indictments that you are to indicate the jury's unanimous
15 decision as it relates to the charge that's set forth in
16 that particular indictment.

17 Now, with respect to the indictment charging burglary
18 in the first degree you have two possible verdict forms,
19 and those two possible verdict forms are guilty and not
20 guilty.

21 So whatever that decision is that you and your jurors
22 reach, Mr. Foreman, I'll ask you to indicate that decision.
23 On the back of the indictment you'll see in the lower
24 left-hand corner the word verdict. And it's beneath that
25 word that you'll indicate the jury's decision with respect

Jury charge

1 to that indictment.

2 Sign your name as the foreperson. You're the only
3 juror that needs to sign the verdict form. And there's
4 also a place for you to insert the date.

5 With respect to the indictment charging the crime of
6 grand larceny, you're going to have three potential verdict
7 forms. Those three potential verdict forms are guilty,
8 meaning guilty of the charge in the indictment, which is
9 grand larceny.

10 And second possible verdict form is guilty of petit
11 larceny. Petit larceny is a lesser included offense. And
12 of course the degree of larceny, whether it be grand
13 larceny or petit larceny, depends upon your determination
14 of the value of the property taken. So you'll have that
15 option to only find the defendant guilty of the lesser
16 offense of petit larceny. If that's your decision you have
17 to write that on that verdict form, which would be guilty
18 of petit larceny.

19 And the third possible verdict form is not guilty. If
20 the state has failed to prove either grand or petit larceny
21 or you have a reasonable doubt as to its existence, then
22 the verdict would be not guilty.

23 Now, during deliberations there may come a time where
24 you have some question about the testimony or the evidence
25 or you wonder if there's some other evidence that might be

Jury charge

1 in existence that you could have that you believe might
2 assist you in arriving at a decision.

3 Understand that now that you're going back to begin
4 your deliberations in the case no additional evidence may
5 be received. So even if there was something out there that
6 you think might benefit you, you couldn't have it even if
7 it does exist because the evidence is closed. No more
8 evidence can be received. So your decision has to be based
9 upon what's already been presented.

10 I'm never permitted to answer questions that relate to
11 issues of fact. So if you have some question about the
12 facts in the case, I can't respond to it.

13 If you have a question about witness testimony and you
14 think that question can be answered by having a witness'
15 testimony replayed in whole or in part, you are permitted
16 to have that testimony replayed.

17 I don't have transcripts to send back to the jury
18 room. But if you want to hear testimony of a witness, if
19 you'll let us know we can bring you back into the
20 courtroom, and we can have that testimony replayed in whole
21 or in part as the jury wishes.

22 If at any time you have a question about the law that
23 you are to apply, I am permitted to answer those questions.
24 So if you need for me to provide you a reinstruction or you
25 need an additional explanation or a clarification of some

Jury charge

1 point of law, I am permitted to provide you with that
2 additional instruction, explanation or clarification.

3 So, Mr. Foreman, if at any time during deliberations
4 you have some matter that you need to address to me if
5 you'll write it on a piece of paper, give it to the
6 bailiff, he'll provide it to me, and I'll respond
7 accordingly.

8 After you and your fellow jurors have reached a
9 decision, as I say, you indicate that decision on the back
10 of each of the indictments as indicated, sign your name and
11 date it.

12 Tell the bailiff you have reached the decisions, but
13 don't give the bailiff the verdict forms. You hold on to
14 the verdict forms. And you'll bring those into the
15 courtroom when I bring you back to receive the verdict.

16 All right. I think that covers everything. So with
17 the exception of Ms. Davis, I'll ask the 12 primary jurors
18 if you'll please go to your jury room. Do not yet begin
19 deliberations.

20 I've got some matters I'll need to address with the
21 lawyers. If I don't need to bring you back for any reason
22 I'll send word by way of the bailiff that you can begin
23 with your deliberations.

24 In that event he or she will bring to the jury room
25 all of the exhibits which have been introduced.

Verdict

1 And to you, Mr. Foreman, they'll also bring the
2 indictments which will serve as the verdict form.

3 So please retire but don't begin deliberations until
4 you receive word to do so.

5 (Whereupon, the jury retired to deliberate at
6 11:08 a.m.)

7 (Whereupon, the alternate juror was excused.)

8 THE COURT: Are there any exceptions taken to the
9 instruction or requests for additions to the instruction by
10 the state?

11 MR. LEIBERT: No, sir, Your Honor.

12 THE COURT: By the defendant?

13 MR. POOLE: None here.

14 THE COURT: Let me ask y'all to verify the exhibits
15 before they go back, please.

16 (Pause.)

17 THE COURT: We will be at ease while the jury is
18 deliberating.

19 (Whereupon, a recess was taken.)

20 THE COURT: The jury has reached a verdict. Are we
21 ready to receive it?

22 MR. LEIBERT: Yes, sir, Your Honor.

23 MR. POOLE: Yes, sir.

24 THE COURT: Okay. Bring them in.

25 (Whereupon, the jury returned to the courtroom at

Verdict

1 12:30 p.m. to report its verdict.)

2 THE COURT: Mr. Foreman, have you and your fellow
3 jurors reached a unanimous decision as to each of the
4 separate indictments?

5 THE FOREMAN: Yes, sir, we have.

6 THE COURT: Have you indicated those decisions on the
7 back as requested?

8 THE FOREMAN: Yes, sir, as the foreman.

9 THE COURT: Did you sign your name and date it?

10 THE FOREMAN: Yes, sir.

11 THE COURT: If you will, please hand those up by way
12 of the bailiff.

13 You may publish the verdicts.

14 THE CLERK: State of South Carolina, County of
15 Spartanburg, Court of General Sessions, Indictment
16 2006-GS-42-1166, State vs. John Mack, indictment for grand
17 larceny, the jury finds John Mack guilty. Signed by the
18 foreperson, Mr. Simon, this -- February 22nd of 2011 --
19 February 23rd. I'm sorry.

20 And Indictment No. 2006-GS-42-1167, State vs. John
21 Mack, burglary first degree, guilty. Again, signed by
22 Mr. Simon. Signed today's date, February 23rd of 2011.

23 Ladies and gentlemen of the jury, is this your verdict
24 and still your verdict? If so, please raise your right
25 hand.

Verdict

1 (Whereupon, all jurors responded in the affirmative.)

2 THE CLERK: So say you all.

3 THE COURT: Does the defendant wish to have the jury
4 polled?

5 MR. POOLE: Yes, sir.

6 THE COURT: All right. Poll the jury, please, ma'am.

7 THE CLERK: Ladies and gentlemen of the jury, I'll be
8 asking you a question, and that question is is this your
9 vehicle and still your verdict. When I call your jury
10 name -- when I call your name and your juror number, if you
11 would, just answer yes or no.

12 Juror No. 19, Donald Clark.

13 THE JUROR: Yes.

14 THE CLERK: Juror 109, Kenneth Owens.

15 THE JUROR: Yes.

16 THE CLERK: Juror No. 129, Carol Robinson.

17 THE JUROR: Yes.

18 THE CLERK: Juror No. 52, Daniel Gamble.

19 THE JUROR: Yes.

20 THE CLERK: Juror No. 169, Joyce Winning.

21 THE JUROR: Yes.

22 THE CLERK: Juror No. 100, Edna Moore.

23 THE JUROR: Yes.

24 THE CLERK: Juror No. 172, Brianna Woodsby.

25 THE JUROR: Yes.

Verdict

1 THE CLERK: Juror No. 8, Kimbrell Bishop.

2 THE JUROR: Yes.

3 THE CLERK: Juror No. 3, Eric Anderson.

4 THE JUROR: Yes.

5 THE CLERK: Juror No. 144, Shango Simon.

6 THE JUROR: Yes.

7 THE CLERK: Juror No. 55, Christopher Gideon.

8 THE JUROR: Yes.

9 THE CLERK: And Juror No. 12, Teresa Brown.

10 THE JUROR: Yes.

11 THE CLERK: The jury has been polled.

12 THE COURT: All right. Any other matters we need to
13 address with the jury present?

14 MR. LEIBERT: No, sir, Your Honor.

15 MR. POOLE: No, sir.

16 (Whereupon, the trial jury was excused.)

17 (Bag previously marked State's Exhibit No. 7 for
18 Identification marked Court's Exhibit No. 1; bag previously
19 marked State's Exhibit No. 8 for Identification marked
20 Court's Exhibit No. 2; affidavit, affidavit and notice
21 marked Court's Exhibit No. 3.)

22 MR. POOLE: Your Honor, may it please the Court.

23 I've told Mr. Mack that these sentencing sheets are in
24 the course of this process, they need to be signed by the
25 defendant to acknowledge basically that he was found guilty

Sentence and motion

1 by a jury and these sentencing sheets are used by the Court
2 in deposition of sentence, that's where you write the
3 sentence. And I also told him that it in no way
4 compromises his right to appeal or any types of other
5 matters. And he is reluctant to sign them.

6 And also I do have a motion for the record. So I
7 don't know if I'm putting the cart before the horse on this
8 or not.

9 MR. BARNETTE: May I approach, Your Honor?

10 THE COURT: All right. Mr. Poole, any other matters
11 we need to address prior to the imposition of sentence?

12 MR. POOLE: Yes, sir. At this point I would like to
13 renew my motion made prior to the trial of this case with
14 regard to the indictment.

15 Also, we would move for a new trial, and that is based
16 upon the previous motion made at the end of the
17 presentation of the state's case in our motion for a
18 directed verdict.

19 THE COURT: All right. Those motions are denied.
20 Anything else?

21 MR. POOLE: No, sir.

22 THE COURT: All right. Anything further on behalf of
23 the state?

24 MR. LEIBERT: Yes, sir, Your Honor.

25 May I approach with Court's Exhibit 3?

Sentence and motion

1 THE COURT: Okay.

2 MR. LEIBERT: It consists of a notice of life pursuant
3 to 17-25-45 dated October the 4th of 2007, and the
4 affidavits wherein counsel and the defendant were served
5 personally.

6 And the basis for that, Your Honor, is actually
7 State's Exhibit 4, which is the burglary first prior
8 conviction.

9 THE COURT: All right. Mr. Poole, you've talked with
10 your client about the service of the notice of the state's
11 intention to seek a life sentence pursuant to 17-25-45 in
12 the event he were convicted or found guilty of burglary in
13 the first degree?

14 MR. POOLE: We have discussed that.

15 THE COURT: And you did receive service of the notice?

16 MR. POOLE: Our office did so.

17 THE COURT: More than ten days prior to trial?

18 MR. POOLE: That's correct.

19 THE COURT: Are you in agreement that Mr. Mack also
20 received notice personally?

21 MR. POOLE: Yes, sir, as is reflected by an affidavit
22 that I have in my possession.

23 THE COURT: Have you discussed that with him? Does
24 he, does he admit to having received the notice?

25 THE DEFENDANT: He had told me that he taken --

Sentence

1 Mr. Cheek from his office told me it was tooke off, you
2 know, the table, and, you know, that --

3 THE COURT: My question is did you receive notice --

4 THE DEFENDANT: Yes, sir, yes, sir.

5 THE COURT: -- that the state was seeking a life
6 sentence.

7 THE DEFENDANT: Yes, yes, sir.

8 THE COURT: Okay. All right. Anything else on behalf
9 of the state?

10 MR. LEIBERT: Your Honor, do you want his prior
11 record?

12 THE COURT: Yes, just state it for the record.

13 MR. LEIBERT: Your Honor, in addition to State's
14 Exhibits 4, 5 and 6, and do you need to see those -- the
15 burglary?

16 THE COURT: I've seen those.

17 MR. LEIBERT: And then additionally there's three more
18 burglaries that we didn't prove. 99-697 was a burglary
19 third degree; 99-698 was a burglary second violent; and
20 99-700 was a burglary second violent.

21 Additionally in 1987 he had a criminal domestic
22 violence; December of '88, a petit larceny; 4/13/89, a
23 petit larceny; November of '94, criminal domestic violence
24 and breaking arrest; 1995, conspiracy to distribute
25 cocaine; and March of '99 grand larceny.

Sentence

1 Ms. Moss understands the sentence, but she asks if she
2 could briefly address Your Honor if that will be all right.

3 THE COURT: Okay. Sure.

4 THE VICTIM: Your Honor --

5 THE COURT: You need to back up because I can't even
6 see if you get too close.

7 THE VICTIM: -- I feel sorry for his family, but when
8 he broke into my house it was the first time in my life I
9 had ever been single, and for two years I was doing very
10 good and I was very proud. And I had a beautiful little
11 house. And I fed the raccoons and the opossums, and I was
12 so happy.

13 And when he did that it took away all of my security.
14 I'm scared to stay by myself now. I have three dogs, and I
15 have a security alarm, and I still lock my bedroom door.

16 I used to be very trusting. I trusted everybody. And
17 now I don't trust anybody.

18 I had to move, and I wasn't prepared to move because I
19 didn't have any money saved up. I was making my bills, but
20 I wasn't saving anything. So I had to move several times.
21 And it put me in bad debt. And I'm still paying a friend
22 that I had to borrow money from to get into another place
23 to live.

24 And it's not revenge. I don't want revenge. And it's
25 not that I fear for my life, because I'm in Canada now, and

Sentence

1 I know he'll never be able to bother me. But I know if he
2 gets off he will do it to another woman, and I don't want
3 any other woman to ever go through what he did to me and
4 what I'm still suffering today because of what he did. And
5 I know he's not sorry for it. And that's all.

6 THE COURT: Thank you, ma'am. Good luck to you.

7 THE VICTIM: Thank you.

8 MR. LEIBERT: Thank you, Your Honor. That's all.

9 THE COURT: All right. Mr. Poole.

10 MR. POOLE: May it please the Court, Your Honor.

11 Mr. Mack is 42 years of age. He's lived most of his
12 life here in Spartanburg County. He is a father.

13 It is my understanding from the language of
14 17-25-45(a) that the Court's sentence must be mandatory.
15 We'd ask for any consideration possible from the Court.

16 I think it may be important to indicate that Mr. Mack
17 was served with these warrants on February 28th of 2006.
18 And that's all I can say at this point.

19 THE COURT: All right. Mr. Mack, anything you want to
20 add to what your lawyer has told me?

21 THE DEFENDANT: I been incarcerated in the department
22 of corrections two years. I been in the county for five.
23 And they just brought me something.

24 I don't understand, you know, where does blood come
25 in. You know what I'm saying. Blood come in. I don't

Sentence

1 understand that. I mean, I don't understand how they said
2 that this blood was mine and I did this, you know what I
3 mean? How they get this?

4 They didn't even take no pictures of where this blood
5 was located, you know what I'm saying, stating that I did
6 this. I didn't do this, Your Honor. I didn't go into this
7 lady's house.

8 Because they find that blood, I don't do that. I
9 don't know if I was with a friend or whatever. But, you
10 know what I'm saying, because I do understand D.N.A.
11 testing, and I believe scientists do the right thing
12 explaining that. But I wouldn't come home committing no
13 crime, taking no jewelry from her, Your Honor.

14 I'm sorry that it happened to her, but I didn't do it
15 to her. Yes, I got a criminal record. You know what I'm
16 saying? If I was guilty of it I would have plead (sic)
17 guilty, because I pleaded guilty to the charges that I was
18 guilty of. I pleaded guilty. But I didn't take in no kind
19 of form or no jury trial or nothing.

20 This is the only time I ever did it in my life,
21 because I knowed I wasn't guilty of this, this right here,
22 even though they feel that I am because I got a record of
23 it. And that's what I feel that they found, you know.
24 That's why they say I did it.

25 But I can't fathom in my mind how my blood got there.

Sentence

1 And to say blood is here or here, Mr. Cole, and without no
2 picture, Mr. Cole, how could, how could I plead guilty to
3 something like that? I mean, this is my life.

4 I got three kids, man. I won't see no, no sign of
5 this. And when she says this, I'm sorry it happened to
6 you. I didn't do it to you, Ms. Moss. I didn't do it to
7 you, ma'am.

8 You know, I just don't want my life to be taken for
9 something that's replacement, you know. I don't want my
10 life gone.

11 I got to go through courts and keeping fighting to get
12 my life back. I don't know how long be incarcerated, but
13 if you could give me opportunity to get myself together,
14 you know what I'm saying.

15 I know they gave me this notice of life sentence. I
16 want you to understand that I didn't do this, and I didn't
17 do this, man. If I would have I would have pleaded guilty.
18 I wouldn't have took it through this, you know. They
19 belong to me.

20 You know, I done my -- you know, they, they come to me
21 and brung that warrant and said things that I was confused
22 about, the warrant at first. When they said life, they
23 brung me a warrant.

24 And then on the indictment it said either-or, or, or,
25 you know what I'm saying, like at night, you know, it just,

Sentence

1 it just don't compute, you know. How am I going to say I
2 did something and you ain't telling me exactly what's going
3 on? I couldn't -- I didn't do this. I didn't do this.

4 I hope you just show some remorse and let me have some
5 of my life, at least you know, so I can see my kids. I
6 been locked up since I was 37. I been waiting five years
7 to get this, go to court.

8 I been -- Mr. Leibert is probably upset with me
9 because I tried to file a paperwork to make him -- serve
10 paperwork and make him take me to court so I can get this
11 resolved and get on with my life. But I didn't want my
12 life to be taken from me, you know.

13 I mean, they, they found me guilty, you know, I mean,
14 the evidence that they providing to my best, you know, I
15 got, I can't fathom. You know, I can't fathom.

16 If -- I don't know what Mr. Burgess got this blood
17 from or how he did this. I can't, I can't discern, you
18 know. And me and him, we done had arguments or whatever
19 about this thing, you know what I'm saying. I don't talk
20 with him. I tried to talk to him.

21 But if I was guilty I would have, I would have pleaded
22 guilty. I wouldn't touch it. I pleaded guilty to every
23 charge that I did in my life, and I went and did my time
24 for it, and I got out, you know, and tried to make myself,
25 you know.

Sentence

1 I had gotten a little bit out of the way, but I did --
2 I wouldn't break in nobody's house. I was going to the
3 liquor store. I didn't break in nobody's house, Mr. Cole.
4 I didn't break in this lady's house. I didn't break.

5 I know they found me guilty. I mean, they got their
6 own opinion. I mean, once you put out there that I did
7 some other burglary, they going to lean either way, you
8 know, you know, even though you, you stressed and told them
9 that. But when you put it out there like that they really
10 done sold my fate, you know, because they thinking that if
11 I did them, I did them, I did that, but I didn't. I didn't
12 do that, you know. And I feel that I just ask you for some
13 mercy in my life. Just ask you for my life.

14 THE COURT: All right. Anything further?

15 Indictment 2006-1167, that's the indictment for
16 burglary, wherein the jury has found you guilty of burglary
17 in the first degree, the Sentence of the Court is you, John
18 Willie Mack, be confined to the South Carolina Department
19 of Corrections for the period of your natural life.

20 Indictment 2006-1166, grand larceny, five years
21 concurrent with that sentence imposed on 1167.

22 Mr. Mack, you have a right to appeal the verdict of
23 the jury and the Sentence of the Court. You must file any
24 notice of your intention to appeal those decisions within
25 ten days of today's date?

Sentence

1 THE DEFENDANT: Could I get -- where I could get -- I
2 need --

3 THE COURT: Mr. Poole will advise you about that.

4 MR. POOLE: I've told Mr. Mack that we will take care
5 of all of that for him.

6 THE COURT: Okay.

7 MR. POOLE: Thank you, Your Honor.

8 THE COURT: All right.

9 END OF REQUESTED TRANSCRIPT OF RECORD

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Certificate

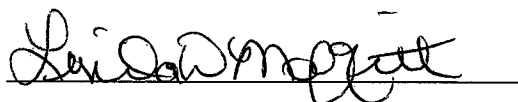
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh 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 trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 22nd and 23rd days of February 2011.

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

July 8, 2011

A handwritten signature in cursive script, appearing to read "Linda D. Moffitt", is written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

Spartanburg County Courthouse

RANDOM STRIKE SHEET

JUDGE NAME : Cole, J. Derham

TRIAL TYPE : Criminal

PANEL ID : 2006GS4201167

COURTROOM JAR

DESCRIPTION : STATE VS JOHN MACK

Sorted by: Random Nbr

Trial

NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
1 Clark, Donald S	19	W	M	(✓)	(✓)	()	
2 Owens, Kenneth E	109	O	M	(✓)	(✓)	()	
3 Edwards, W Ryon	36	W	M	(✓)	(X)	()	
4 Eidson, Joel L	38	W	M	(✓)	(X)	()	
5 Robinson, Carol A	129	W	F	(✓)	(✓)	()	
6 Gamble, Daniel G	52	O	M	(✓)	(✓)	()	
7 Pollard, Finley L	119	B	M	(✓)	(X)	()	
8 Winning, Joyce A	169	W	F	(✓)	(✓)	()	
9 Moore, Edna K	100	W	F	(✓)	(✓)	()	
10 Woodsby, Brianna A	172	W	F	(✓)	(✓)	()	
11 Biltoft, Gregg A	7	W	M	(✓)	(X)	()	
12 Bishop, Kimbrell E	8	W	F	(✓)	(✓)	()	
13 Anderson, Eric T	3	W	M	(✓)	(✓)	()	
14 Simon, Ifekan Shango E	144	O	M	(✓)	(✓)	()	
15 Gideon, Christopher A	55	W	M	(✓)	(✓)	()	
16 Arthur, Natarsha L	81	B	F	(X)	()	()	
17 Fortenberry, Brian L	46	W	M	(✓)	(X)	()	
18 Brown, Teresa L	12	W	F	(✓)	(✓)	()	
19 Davis, Alicia M	29	B	F	(✓)	(✓)	()	
20 Smith, Milton A III	149	W	M	()	()	()	
21 Jackson, Gloria	79	B	F	()	()	()	
22 Grna, Loretta M	63	W	F	()	()	()	
23 Pierson, James E	117	W	M	()	()	()	
24 McClure, Charles A	98	W	M	()	()	()	

WITNESSES
1. SENTENCE MADE
2. REPORT ENDED
3. ☒ COURT PUBLIC
4. ☒ Spartanburg Public Safety Dept
5. ☒ CHARGED WARRANT
6. ☒ CHARGED WARRANT
7. ☒ ASSESSMENT AND
8. ☒ TRAFFIC VIOLATIONS COPY

Computer

Computer

ARREST WARRANT NUMBER

K112716

ACTION OF GRAND JURY

Amy E. Cronica
Foreperson of Grand Jury
Date: 3-30-06

VERDICT

Guilty

MAKING KITCHENS
Simon
2006 APR -4 PM 2:38

Foreperson of Petit Jury
Date: 23 FEB 2014
I. Simon

06 GS-42-1166
DOCKET NO.

The State of South Carolina
County of Spartanburg
Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

APR 03 2006

TERM

THE STATE
vs.

John Mack

Indictment for
GRAND LARCENY

SC Code: 16-13-30 (B) (1)
CDR Code: 0478
Class FEL-F

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

MAR 30 2006

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

GRAND LARCENY

The Defendant, John Mack, did in Spartanburg County, between September 1, 2005 and September 6, 2005, feloniously take and carry away goods from Larhonda Moss, valued more than One Thousand Dollars, described as follows: a cable box, laptop computer, and jewelry with the intent to deprive the owner permanently of such property, in violation of Section 16-13-30 (B) (1), Code of Laws of South Carolina (1976, as amended).

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


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

183

COUNTY OF SPARTANBURG

STATE VS.

John Willie Mack

AKA:

Race: B Sex: M Age: 43

DOB: SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: SPARTANBURG, SC

DL#: [REDACTED] SID#: [REDACTED]

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

In disposition of the said indictment comes now the Defendant who was

TO: Larceny / Grand Larceny, value more than \$1,000 but less than \$5,000

INDICTMENT/CASE#: 2006GS4201166

A/W#: K112716

Date of Offense: 2/28/2006

S.C. Code §: 16-13-0030(B)

CDR Code #: 0478

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-13-0030(B) of the S.C. Code of Laws, bearing CDR Code # 0478

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature] 9994 [Signature] 4499
ERBERT TONY SC Bar# 13039 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:☐ 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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUPTotal: \$ plus 20% fee: \$ days/hours Public Service EmploymentPayment Terms: ☐ Set by SCDPPPSRecipient:

*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	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk KG McKunney, DCCourt Reporter: Olinda Moffitt

SCCA/217 (06/2010)

Presiding Judge [Signature]Judge Code: 2053Sentence Date: February 23, 2011

ARREST WARRANT

K-

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
SPARTANBURG COUNTY

THE STATE

against

MACK, JOHN WILLIE

Address: [REDACTED]
SPTRBG, SC

Phone: _____ SSN: _____

Sex: M Race: B Height: 5' 11" Weight: 180

DL State: _____ DL#: _____

DOB: _____ Agency ORI#: _____

Prosecuting Agency: _____

Prosecuting Officer: BURGESS J D

Offense: LARCENY / GRAND LARCENY, VALUE
MORE THAN \$1,00 Offense Code: 0478

Code/Ordinance Sec. 16-13-0030(B)(1)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (LS.)

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant MACK, JOHN WILLIE

on 2-28-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

JAMES PASLAY
180 MAGNOLIA STREET
SPARTANBURG, SC 29306

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

SPARTANBURG COUNTY

Personally appeared before me the affiant BURGESS J D who
being duly sworn deposes and says that defendant MACK, JOHN WILLIE
did within this county and state on 02/01/05-02/06/05 violate the criminal laws of
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of SPARTANBURG
in the following particulars:

DESCRIPTION OF OFFENSE: LARCENY / GRAND LARCENY, VALUE MORE THAN \$1,00
16-13-0030(B)(1)

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:

THE DEFENDANT DID TAKE, STEAL, AND CARRY AWAY A CABLE BOX, LAPTOP COMPUTER,
AND JEWELRY VALUED IN EXCESS OF \$1000.00 INTENDING TO PERMANENTLY DEPRIVE
THE OWNER OF THE ITEMS.

WARRANT BASED UPON POLICE INVESTIGATION

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

SPARTANBURG

Affiant's Address SPTBG CITY PD
SPTBG, SC 29306

Affiant's Telephone 596-2019 000-0000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF 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 02/01/05-02/06/05 defendant MACK, JOHN WILLIE
did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of SPARTANBURG) as set forth below:

DESCRIPTION OF OFFENSE: LARCENY / GRAND LARCENY, VALUE MORE THAN \$1,00
16-13-0030(B)(1)

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 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 FEBRUARY 28, 2006

Signature of Issuing Judge

Judge Code: 483

JAMES PASLAY

(LS.)

Judge's Address 180 MAGNOLIA STREET
SPARTANBURG, SC 29306

Judge's Telephone 864 596-2564

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

WITNESSES

1. SENTENCE MADE

2. REPORT MADE

3. *Spartanburg* Public Safety Dept.

4. INDEXED

5. FILED

7. RESOLUTIVE AND

TRAFFIC VIOLATIONS COPY

ARREST WARRANT NUMBER

K112715

ACTION OF GRAND JURY

Amy E Cronica
Foreperson of Grand Jury

Date: *3-30-06*

VERDICT

Guilty

J. Simon
Foreperson of Petit Jury

Date: *23 FEB 2010*

DOCKET NO.

06-GS-42- *1167*

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

APR 03 2006

TERM

THE STATE

vs.

John Mack

Indictment for

BURGLARY, FIRST DEGREE
(Dwelling)

SC Code: 16-11-0311

CDR Code: 0079

Class: FEL/EXM (V)

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on MAR 30 2006, the Grand Jurors of
Spartanburg County present upon their oath:

BURGLARY, FIRST DEGREE**(DWELLING)**

That the Defendant, John Mack, did in Spartanburg County between September 1,
2005 and September 6, 200⁵, wilfully and intentionally enter the dwelling belonging to
Larhonda Moss located at _____, Spartanburg, South Carolina, without
consent and with the intent to commit a crime therein, and that the defendant did enter
the dwelling either;

(1) In the nighttime and/or

(2) In effecting entry or while in the dwelling or in immediate flight, he or another
participant in the crime

(a) was armed with a deadly weapon; and/or

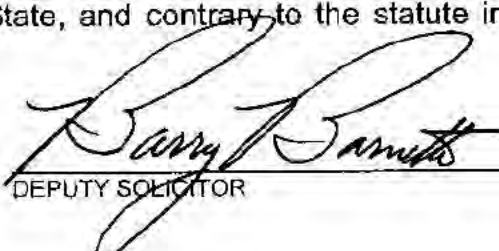
(b) caused physical injury to any person who is not a participant in the
crime; and/or

(c) used or threatened the use of a dangerous instrument; and/or

(d) displays what is or appears to be a knife, pistol, revolver, rifle,
shotgun, machine gun, or other firearm; and/or

(3) The Defendant has a prior record of two or more convictions for the burglary or
housebreaking or a combination of both, in violation of Section 16-11-311, Code of
Laws of South Carolina (1976) as amended.

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


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

STATE VS.

John Willie Mack

AKA:

Race: B Sex: M Age: 43

DOB: SS#

Address:

City, State, Zip: SPARTANBURG, SC

DL#: SID#:

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

In disposition of the said indictment comes now the Defendant who was

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

in violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☒ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Libert Tony 9994 *John Willie Mack* *Boyer Poole* 4499
 SC Bar# 13039 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 life 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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk *KG McKinney, DC*Court Reporter: *Linda Moffitt*

SCCA/217 (06/2010)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS4201167

A/W#: K112715

Date of Offense: 2/28/2006

S.C. Code § : 16-11-0311

CDR Code #: 0079

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

PTUP

 days/hours Public Service EmploymentObtain 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 FundOther:

☐ Condition Discharge, § 44-53-450(C) requires
 \$350 be paid to the Clerk prior to case disposition

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Presiding Judge *William Dale*Judge Code: *2053*Sentence Date: *February 23, 2011*

ARREST WARRANT

K-

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

SPARTANBURG COUNTY

THE STATE

against

MACK, JOHN WILLIE

Address: [REDACTED]

SPTBG, SC

Phone: _____ SSN _____

Sex: ☒ Race: ☒ Height: 5'11" Weight: 180

DL State: _____ DL#: _____

DOB: _____ Agency ORI#: _____

Prosecuting Agency: _____

Prosecuting Officer: BURGESS J D

Offense: BURGLARY / BURGLARY (AFTER

JUNE 20, 1985) - FI Offense Code: 0079

Code/Ordinance Sec. 16-11-0311

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to law.

Signature of Judge

(L.S.)

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant MACK, JOHN WILLIE on 2-28-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

JAMES PASLAY
180 MAGNOLIA STREET
SPARTANBURG, SC 29306

STATE OF SOUTH CAROLINA)

☒ County/ ☐ Municipality of)

SPARTANBURG COUNTY)

Personally appeared before me the affiant BURGESS J D who being duly sworn deposes and says that defendant MACK, JOHN WILLIE did within this county and state on 02/01/06-02/06/06 violate the criminal laws of the State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of SPARTANBURG in the following particulars:

DESCRIPTION OF OFFENSE: BURGLARY / BURGLARY (AFTER JUNE 20, 1985) - FI 16-11-0311

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:

THE DEFENDANT DID ENTER THE DWELLING OF LARHONDA MOSS, RD, SPTBG SC WITHOUT CONSENT AND INTENDING TO COMMIT A CRIME THEREIN, AND THE DEFENDANT ENTERED IN THE NIGHTTIME.

WARRANT BASED UPON POLICE INVESTIGATION

Signature of Affiant

STATE OF SOUTH CAROLINA)

☒ County/ ☐ Municipality of)

SPARTANBURG)

Affiant's Address SPTBG CITY PD

SPTBG, SC 29306

Affiant's Telephone 596-2019 000-0000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF 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 02/01/06-02/06/06 defendant MACK, JOHN WILLIE did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of SPARTANBURG) as set forth below:

DESCRIPTION OF OFFENSE: BURGLARY / BURGLARY (AFTER JUNE 20, 1985) - FI 16-11-0311

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 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 FEBRUARY 28, 2006

Signature of Issuing Judge

Judge Code: 483

JAMES PASLAY

Judge's Address 180 MAGNOLIA STREET

SPARTANBURG, SC 29306

Judge's Telephone 864-596-2564

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

BWT#K112715- Inured 7-13-09
Served 2-28-06

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Spartanburg)John Willie Mack 257219)
Full name and prison number (if any) of Applicant.)**2013-CP-42-2013**

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

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

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

1. Place of detention LEE CORRECTIONAL INSTITUTION HOWARD HALL
2. Name and location of Court which imposed sentence GISHAMVILLE SC 29010
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:
 - (a) BURGLARY FIRST-2006-GS-42-1167.
 - (b) GRAND LARCENY-2006-GS-1166.
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) FEBRUARY 23, 2011 LIFE, BURGLARY FIRST.
 - (b) FEBRUARY 23, 2011 FIVE (5) YEARS FOR GRAND LARCENY

Revised 3/2003

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SPARTANBURG COUNTY
2013 MAY -6 AM 11:22
M. J. C. BLAKEY

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) ☒ after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. THE COURT OF APPEALS OF SOUTH CAROLINA
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. THE COURT OF APPEALS AFFIRMED CONVICTIONS
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. AFFIRMED APRIL 17, 2013
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. AFFIRMED PURSUANT TO: RULE 220(b) SCACR,
- ii. STATE V. SHODEMAKER, 276 S.L. 86, 98, 275 S.E.2d 876, 879
- iii. STATE V. WESTON, 367 S.L. 279, 292-93, 625 S.E.2d 641, 646 (2006)
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: SEE ATTACHMENT TO APPLICATION TO ALLEGATION SET OUT IN QUESTION (10)

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SOUTH CAROLINA
JULY 13 2013
MAY - 5 AM 11:23
JOHN BLANKLEY

- (a) _____
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHMENT TO APPLICATION TO SUPPORT FACTS QUESTION (11)
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (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 FOR ORDER SOLGA CONFINING, FILED APRIL 12, 2013
- ii. APPLICATION FOR FORENSIC DNA TESTING, FILED SEPTEMBER 27, 2012
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. SPARTANBURG COUNTY
- ii. SPARTANBURG COUNTY
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. N/A
- ii. N/A
- iii. _____

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SPARTANBURG COUNTY
2013 MAY -6 AM 11:22
MARCO BLACKEY

- iv. _____
- (d) the date of each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

No

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

- (a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

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STANTON COUNTY
2013 MAY -6 AM 11:22
M. JONE BLACKEY

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) HAVE NOT BEEN PREVIOUSLY PRESENT BECAUSE: [REDACTED] ->
- (b) THEY WERE NOT APPROPRIATE ISSUES FOR DIRECT APPEAL.
- (c) _____

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

- (a) your arraignment and plea? YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? DNA TESTING AND MOTION TO CORRECT
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. JAMES CHEEKS, 366 NORTH CHURCH STREET SUITE 3000 SPARTANBURG
- ii. S. ROGER POOLE, 366 NORTH CHURCH STREET SUITE 3000 SPARTANBURG
- iii. WILLIAM McPHERSON, 366 NORTH CHURCH STREET SUITE 3000 SPARTANBURG
- (b) the proceedings at which each such attorney represented you:
- i. JAMES CHEEKS, ARRAIGNMENT, S. ROGER POOLE, TRIAL,
- ii. S. ROGER POOLE, SENTENCING, WILLIAM McPHERSON, DNA HEARING
- iii. LANELLE C. DURANT, APPEAL
19. State clearly the relief you seek in filing this application:
APPLICANT SEEKS RELIEF FROM HIS CONVICTIONS AND SENTENCE.
20. Are you now under sentence from any other court that you have not challenged?
N/A

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 CLERK OF COURT
 SPARTANBURG COUNTY
 2013 MAY -6 AM 11:22
 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
 County of)

VERIFICATION

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

John W. Blackley

SWORN to and subscribed before me this 1
 day of May, 2003.

Maureen Wilson (L.S.)
 Notary Public

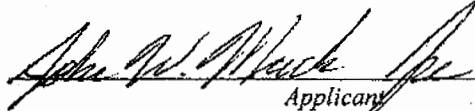
My Commission Expires: 3/8/2020

FILED
 CLERK OF COURT
 S. AUSTIN COUNTY
 2013 MAY -6 AM 11:22
 M. JOPE BLACKLEY

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
1 day of May, 2013.


Notary Public

My Commission Expires: 3/8/2020

FILED
CLERK OF COURT
STANTON COUNTY
2013 MAY -6 AM 11:22
H. HOPE BLACKLEY

ATTACHMENT OF PAGE 3 10 AND 11, GROUNDS
FOR RELIEF WITH SUPPORTING FACTS.

10.(A) APPLICANTS RIGHT TO EFFECTIVE ASSISTANCE
COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT
TO THE UNITED STATES CONSTITUTION AND SOUTH
CAROLINA LAW WAS VIOLATED AS A RESULT OF COUNSELS
FAILURE TO MAKE OBJECTION TO THE AMENDMENT
TO THE INDICTMENT.

11.(A) CRIMINAL DEFENDANT ARE ENTITLED TO RESUBMISSION
OF THE INDICTMENT TO THE GRAND JURY. WHEN THE
INDICTMENT IS FILED WITH THE COURT, NO CHANGE CAN
BE MADE IN THE BODY OF THE INSTRUMENT BY ORDER
OF THE COURT OR BY THE PROSECUTING ATTORNEY, WITHOUT
A RESUBMISSION OF THE CASE TO THE GRAND JURY.
AND THE FACT THAT THE COURT MAY DEEM THE CHANGE
IMMATERIAL, AS STRIKING OUT OF SURPLUS WORDS,
MAKES NO DIFFERENCE, THE INSTRUMENT, AS THE
THUS CHANGED, IS NO LONGER THE INDICTMENT OF THE
GRAND JURY WHICH PRESENTED IT.

EX PARTE BAIN, 32 MARCH 28, 1887 (121 U.S. 1, 7 S.Ct. 781).
THE DATE IN APPLICANTS INDICTMENT WAS CHANGE
AFTER APPLICANT WAITING FIVE (5) YEARS FOR TRIAL.
SEE TRANSCRIPT OF RECORD. 2006-GS-42-1166; 1167.

TR. TRANS. PAGE 8 - LINES 25 - PAGE 9, LINES 1.

FILED
CLERK OF COURT
STAFFORD COUNTY
2013 MAY -6 AM 11:22
M. ROPE BLACKLEY

10(B). APPLICANTS RIGHT TO FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW WAS DENIED AS A RESULT OF MISCONDUCT OF THE TRIAL JUDGE IMPROPERLY STATED ONLY ONE AGGRAVATING CIRCUMSTANCES TO BE PROVED.

11(13). APPLICANT WAS PUT ON NOTICE IN THE TRUE BILLED INDICTMENT FOR ALL AGGRAVATING CIRCUMSTANCES. DOING SURY CHARGE STATED, IN THIS PARTICULAR CASE, THE ONLY ELEMENT THAT FITS IN THE CATEGORY OF FOURTH ELEMENT. THE STATEMENT CHANGED THE APPLICANT TRUE BILLED INDICTMENT. TRANSCRIPT OF RECORD 2006-GS-42-1166;1167 FEBRUARY 22-23, 2011. PAGE 146, LINES 19-6 OF PAGE 147. THE STATEMENT CHANGED THE NATURE OF THE INDICTMENT. THE STATEMENT WAS MADE BY THE TRIAL JUDGE.

FILED
CLERK OF COURT
SCOTT WOODS COUNTY
2013 MAY -6 AM 11:22
K. HOPE BLACKLEY

10 (C). APPLICANTS RIGHT TO A FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW WAS DENIED AS A RESULT OF MISCONDUCT OF THE POLICE AND SOLICITORS WITH REGARD TO D.N.A EVIDENCE.

11 (C). UNDER BRADY V. MARYLAND, 373 U.S. 83 (1963), THE PROSECUTION HAS AN AFFIRMATIVE DUTY TO MAKE AVAILABLE TO THE DEFENSE ANY EVIDENCE WHICH IS EXCULPATORY FOR THE DEFENDANT IN CRIMINAL TRIAL. IN THIS CASE, THE POLICE RECOVERED BLOOD. THIS WAS VIRTUALLY THE ONLY PIECE OF PHYSICAL EVIDENCE THAT WAS ARGUED TO TIE APPLICANT TO THE SCENE OF THE CRIME. UNDER CRIMINAL PROCEDURAL OF SOUTH CAROLINA RULE 5, PART C, DEFENDANT HAS A RIGHT TO INSPECT TANGIBLE ITEMS, PICTURES AND REPORT. WHEN POLICE AND SOLICITORS DID NOT TURN OVER THE TANGIBLE ITEMS OR PHOTOGRAPHS TO APPLICANTS ATTORNEY FOR INSPECTION, THIS PREJUDICED APPLICANT TO A FAIR TRIAL.

FILED
CLERK OF COURT
SHERIFF'S COURT
2013 MAY -6 PM 11:22
M. ROPE BLADKLEY

10 (D). APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE SOUTH CAROLINA CONSTITUTION WHEN TRIAL COUNSEL'S FAILURE TO SECURE AN OBJECTION TO SWABS BEING ADMITTED INTO EVIDENCE WHEN STATE DID NOT PRODUCE TANGIBLE ITEMS OR PICTURES THAT WAS SAID TO BE SWABED DURING TRIAL.

11 (D) UNDER CRIMINAL PROCEEDURAL OF SOUTH CAROLINA RULE 5, PART C, DISCOVERY, DEFENDANT HAS A RIGHT TO INSPECT TANGIBLE ITEMS, PICTURES AND REPORTS BEFORE TRIAL. COUNSEL FAILED TO MAKE AN OBJECTION TO THE SWABS. SEE, TRANSCRIPT OF RECORD 2006-GS-42-1166; 1167. TR. TRANS. PAGE 79, LINES 25, TR. TRANS. PAGE 70-71, PAGE 84, LINES 1, TR. TRANS. PAGE 87-110. BRADY VS. MARYLAND, 373 U.S. 83 (1963) PENNSYLVANIA VS. RITCHIE, 480 U.S. 107, 107 S.Ct. 989, 94 L.Ed. 2d 40 (1987).

10 (E) APPLICANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW WAS VIOLATED AS A RESULT OF COUNSEL'S FAILURE TO SECURE AN OBJECTION TO PAST CRIMINAL HISTORY TO BE ADMITTED AS EXHIBITS IN FRONT OF JURY BEFORE TRIAL. JUDGE GIVE HIS INSTRUCTION TO JURY ON THE LIMITED ADMISSIBILITY.

11 (E) SOUTH CAROLINA RULES OF EVIDENCE RULE 404 EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS IS NOT ADMISSIBLE TO PROVE THE CHARACTER OF A PERSON IN ORDER TO SHOW ACTION IN CONFORMITY THEREWITH. STATE VS. BENTON (S.C. 2000) 338 S.C. 151, 526 S.E.2d 228. CRIMINAL LAW-KEY 673 (5) CRIMINAL LAW-KEY 369.2167. SEE: TRANSCRIPT OF RECORD, 2006-GS-42-1166; 1167. TR. TRANS. PAGE 115-116. TR. TRANS. PAGE 126. TR. TRANS. PAGE 147-149.

FILED
CLERK OF COURT
JULY 6 2006
BLADE
MAY 6 2006

10(F). APPLICANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW WAS VIOLATED AS A RESULT OF COUNSEL'S FAILURE TO THOROUGHLY AND PROPERLY EXAMINE A CRUCIAL PROSECUTION WITNESS.

11(F). THE SOLICITOR CALLED TO TESTIFY A WITNESS NAMED LARHOND MOSS. MS. MOSS CLAIMS SHE WAS A EYEWITNESS TO SEEING BLOOD IN HER HOME. HOWEVER A POLICE REPORT FILED 9/11/2005, STATED THAT SE GALLMAN AND BURGESS 3D CALLED MS MOSS TO ASK HER SHOULD BLOOD FOUND SHOULD BE ON THE ITEMS THAT THEY PROCESSED. WHY THIS CALL WAS MADE AFTER SHE SAW THE BLOOD AT THE CRIME SCENE? MS. LARHOND MOSS TESTIMONY WAS EXTREMELY DAMAGING TO THE APPLICANT BUT AT THE SAME TIME WAS HIGHLY SUSPECT. TRIAL ATTORNEY DID NOT ASK MS. MOSS DID SHE ^{SEE} ANY BLOOD BUT ONLY ASK QUESTION EXTREMELY DAMAGING TO THE APPLICANT. HE DID NOT STATE ANYTHING ABOUT POLICE REPORT FILED 9/11/2005 OR SEEING BLOOD. SEE TRANSCRIPT OF RECORD 200L-GS-42-1166/1167. TL TRANS PAGE 52-54.

10(G). APPLICANT'S RIGHT AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW WAS VIOLATED WHEN LARHOND MOSS PERSUADED HERSELF BY DELIBERATELY MAKING MATERIAL FALSE OR MISLEADING STATEMENT WHILE UNDER OATH.

11(G). STATE V. HATTAWAY, 2 NOTT AND MCL 118.10 AM DEL. 580. THE POLICE REPORT FILED 9/11/2005 BY POLICE OFFICERS SE GALLMAN AND BURGESS 3D STATED THAT LARHOND MOSS WAS CALLED TO BE ASKED, "BLOOD THAT WAS FOUND SHOULD BE ON ITEMS THEY PROCESSED."

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CLERK OF COURT
STATE OF SOUTH CAROLINA
2013 MAY -6 PM 11:22
H. HOPE BLACKLEY

10 (H). APPLICANT'S RIGHT TO A FAIR TRIAL GUARANTEED BY THE FOURTEENTH AND SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW WAS DENIED AS A RESULT OF COUNSELS FAILURE TO FILE FOR A SPEEDY TRIAL.

11 (H). APPLICANT FILED A 42 U.S.C AND 1983 FEDERAL LAWSUIT IN THE UNITED STATES DISTRICT COURT DEALING WITH HOLDING ME BACK FROM FAST AND SPEEDY TRIAL. SEE: CIA NO. 908-3726-DEN-BM AND CIA NO. 7:10-2372-DEN-BM. I HAVE WROTE OFFICE OF DISCIPLINARY, THE SUPREME COURT OF SOUTH CAROLINA. APPLICANT WAS DENIED HIS RIGHT FAST AND SPEEDY AND WITNESSES LOST.
 U.S. V. DELO. 422 F.2d 487, 495 1ST. CIR. (1970)
 U.S. V. BAHAMONDE-445 F.3d 1225-1228-1231-32 (9TH CIR. 2006).

1.

I DO NOT HAVE POST-CONVICTION COUNSEL AT THIS TIME FURTHER, I DO NOT YET HAVE A COPY OF TRIAL COUNSEL'S FILE, ACCESS TO DISCOVER, ACCESS TO FUNDS FOR EXPERT AND INVESTIGATIVE SERVICES, OR ANY ABILITY TO CONDUCT AN INVESTIGATION. GIVEN THOSE LIMITATIONS, I CANNOT PROVIDE FURTHER INFORMATION REGARDING ADDITIONAL CLAIMS FOR POST-CONVICTION RELIEF. ALTHOUGH I BELIEVE THERE ARE OTHER VIABLE POST-CONVICTION CLAIMS AVAILABLE TO ME. WITH THE EXCEPTION OF THE SPECIFIC ISSUES INCLUDED IN THIS APPLICATION AT THIS TIME, I DO NOT WAIVE THE ATTORNEY-CLIENT PRIVILEGE TO ANY EXTENT AND I REQUEST THAT MY TRIAL COUNSEL NOT PROVIDE ANY PORTION OF MY FILES TO ANY REPRESENTATIVE OF THE ATTORNEY GENERAL'S OFFICE OUTSIDE THE SCOPE OF THESE SPECIFIC CLAIMS.

FILED
 CLERK OF COURT
 STAFFORD COUNTY
 2013 MAY -6 AM 11:22
 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
	)	2013-CP-42-2063
John Willie Mack, #257219,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed May 6, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2006 term of the Spartanburg County Grand Jury for burglary – 1st degree (2006-GS-42-1167) and grand larceny (2006-GS-42-1166). The Applicant was represented by J. Roger Poole, Esquire. On February 23, 2011, the Applicant proceeded to trial and was convicted of the charges by a jury. The Honorable Lee S. Alford sentenced Applicant, pursuant to a negotiated sentence, to concurrent sentences of fifteen years for trafficking and five years for possession with intent to distribute. Judge Alford also terminated Applicant's probation relating to prior charges at this time.

A timely notice of appeal and brief were filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Mack, Op. No. 2013-UP-161 (filed April 17, 2013). The Remittitur was returned on May 7, 2013.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records and the trial transcript. 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:

- a. Ineffective assistance of counsel, in that;
 - i. Counsel failed to object to the amendment of the indictment,
 - ii. Counsel failed to object to the admission of evidence when the State failed to produce tangible items or pictures of items swabbed,
 - iii. Counsel failed to object to Applicant's prior criminal history being presented to the jury,
 - iv. Counsel failed to thoroughly and properly examine a crucial prosecution witness to address her perjury,
 - v. Counsel failed to file a motion for a speedy trial,
- b. Trial court error, in that;
 - i. The trial judge improperly stated that only one aggravating circumstance had to be proven,
- c. Misconduct of Solicitor's office and law enforcement with regards to DNA evidence,
 - i. Brady violation because the State did not turn over the blood evidence.

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, (1984); Butler, 334 S.E.2d 813. Respondent notes that it appears the Applicant appeared and pled guilty voluntarily without the assistance of counsel.

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.

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 Applicant also alleges that the trial judge committed various errors during the trial. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

V.

The Respondent construes the final ground to allege that the State withheld favorable evidence in violation of Rule 5, SCRCrimP and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

The Respondent submits that this ground for relief is totally without merit. However, the allegation concerning a Brady violation probably raises questions of fact that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this ground for relief. Sharper, Id.

VI.

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

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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March 18, 2014.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

John Willie Mack,

2013-CP-42-2063

Applicant,

v.

CERTIFICATE 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 Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
P.O. Box 1015
Rock Hill, SC 29730



Anne A. Mueller
Legal Assistant for the Respondent

DATED this 18th day of March, 2014.

1 STATE OF SOUTH CAROLINA }
 2 COUNTY OF SPARTANBURG } COURT OF COMMON PLEAS NONJURY

3
 4 JOHN WILLIE MACK,)
 5 Applicant,)
 6 vs.)
 7 THE STATE OF SOUTH CAROLINA,)
 8 RESPONDENT.)

TRANSCRIPT
 OF
 RECORD
 2013-CP-42-2063

9
 10 January 14th, 2015
 11 Spartanburg, South Carolina

12
 13 B E F O R E:

14 THE HONORABLE DEADRA L. JEFFERSON, Judge.

15
 16 A P P E A R A N C E S:

17 LEAH B. MOODY
 18 ESQ.
 Attorney for the Applicant

19 SUZANNE H. WHITE
 20 ASSISTANT ATTORNEY GENERAL
 Attorney for the Respondent

21
 22
 23 PAMELA E. GREEN
 24 Circuit Court Reporter
 25 Seventh Judicial Circuit

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John Willie Mack - Direct examination
by Ms. Moody

1 P R O C E E D I N G S

2

3 THE COURT: This is John Willie Mack versus the State,
4 2013-CP-42-2063. It's before the Court on an application
5 for post-conviction relief.

6 He was convicted on -- as a result of a trial that
7 commenced on February 23rd of 2011 before Judge Newman.
8 He received life for burglary in the first degree on
9 Indictment 2006-1167 and five years on grand larceny,
10 Indictment 2006-1166. He was represented by J. Roger Poole.
11 Ms. White represents the State. Ms. Moody represents the
12 Applicant.

13 Is the Applicant ready to proceed?

14 MS. MOODY: Yes, ma'am.

15 THE COURT: Is the State ready to proceed?

16 MS. WHITE: Yes, Your Honor.

17 THE COURT: You may call your first witness, Ms. Moody.

18 MS. MOODY: Thank you, Your Honor.

19 THE COURT: You welcome.

20 MS. MOODY: I would call John Willie Mack.

21 THE COURT: Sir, if you'd come to the stand to be
22 sworn.

23 JOHN WILLIE MACK, being first duly
24 sworn, testified as follows:

25 THE COURT: You can put your right-hand down. Have a

John Willie Mack - Direct examination
by Ms. Moody

1 seat.

2 (Witness complies.)

3 THE COURT: State your full for the record spelling
4 your last name for the court reporter.

5 THE WITNESS: My name is John Willie Mack.

6 THE COURT: I can't hear you, sir.

7 THE WITNESS: My name is John Willie Mack.

8 THE COURT: Okay. Please spell your last name for the
9 court reporter.

10 THE WITNESS: M-A-C-K.

11 THE COURT: Thank you.

12 You may proceed.

13 DIRECT EXAMINATION

14 BY MS. MOODY:

15 Q Mr. Mack, where are you currently being held?

16 A Lee County Correctional Institution.

17 Q You need---

18 A Lee County Detention -- Correctional Institution.

19 Q Okay. And you're being held in Lee County for what
20 charges?

21 A First degree burglary and grand larceny.

22 Q Okay. And as to those charges, are these the charges
23 that you were sentenced on and received your current
24 sentence?

25 A Yes, ma'am.

John Willie Mack - Direct examination
by Ms. Moody

1 Q Okay.

2 A Yes.

3 Q Your attorney, at that time, was Mr. Poole?

4 A Yeah, Roger Poole.

5 Q Okay. And was he your first attorney?

6 A No, I had several attorneys. I had Karen Quimby, which
7 is -- she was trying to file for DNA thing or what I wanted
8 to address the Court about because we ain't have, you know,
9 the proceedings not been done on that.

10 Q Well, well, first of all, let's just go through who
11 your attorneys were first.

12 A Okay.

13 Q Okay.

14 A We had -- I had Karen Quimby, William McPherson after I
15 had her, and then Roger Poole, and then you have James
16 Cheeks. He was in and out during different things too. So
17 you had -- I had -- all in all I had four attorney I think
18 on this situation I'm facing right now.

19 Q And you went to trial on this case, correct?

20 A Yes, ma'am.

21 Q Okay. And in that trial your attorney was Mr. Poole?

22 A Yes, ma'am.

23 Q Okay. Now, the charges that you were sentenced on you
24 were getting ready to go into you had some DNA issues that
25 you wanted the Court to be aware of.

John Willie Mack - Direct examination
by Ms. Moody

1 A Yeah, I wanted to be aware of I had a DNA application I
2 filed in the Courts in General Sessions. I know and
3 understand this is a Common Plea Court, Your Honor, and I
4 need to have that, you know what I'm saying, issue resolved.
5 I wanted to ask for a continuance for that to happen so I
6 could present -- cause it dealing with DNA cause that what
7 he said they found. The State said they found DNA.

8 So I'm telling them my DNA wasn't, wasn't there. So I
9 put in an application to DNA P, PCR application and they
10 haven't ruled on it yet. So I don't know if I'm putting
11 this PCR first before that get resolved to whatever, but I
12 need to get it resolved. They said it was in Judge Cole
13 courtroom. I think this was the courtroom that we held it
14 in or whatever, but I need to resolve first cause I got
15 issues dealing with this DNA that need to be addressed.

16 In other words, the DNA need to be addressed first so I
17 can move the issues on my PCR application that I filed under
18 this 2013-CP-42 right here. It's an issuing that deal with
19 my DNA. I need it, you know, I need it resolved. Need the
20 DNA application resolved first cause I filed it first.

21 Q Okay. Hold on one second.

22 Okay. Your Honor, may we approach?

23 THE COURT: Pardon me?

24 MS. MOODY: May we approach?

25 THE COURT: Yes.

John Willie Mack - Direct examination
by Ms. Moody

1 (WHEREUPON, a bench conference was held at this time.)

2 Q Okay. And, Mr. Mack, getting back to your application,
3 you understand that the judge is not granted a continuance
4 in this?

5 You understand that?

6 A Yes, I just want it on the record, yes.

7 Q Okay.

8 THE COURT: Sir, it's on the record and the motion for
9 continuance is denied. The Court can discern no reason to
10 delay these proceedings. It's a 2013 case. We're now in
11 2015. The relief that is being requested pursuant to the
12 PCR statute has no bearing on whether you can meet your
13 burden of proof on ineffective assistance of counsel, and,
14 therefore, they are not interrelated and there's no need for
15 this matter to be delayed. The motion for continuance is
16 denied.

17 You may proceed.

18 Q So, Mr. Mack, you've filed your application for
19 post-conviction relief --

20 A Yes, ma'am.

21 Q -- against Mr. Poole?

22 A Mr. Poole.

23 Q And Mr. Poole only?

24 A Yeah. Well, and McPherson too. I wanted him to be
25 here too because he was part of the investigation that I,

John Willie Mack - Direct examination
by Ms. Moody

1 you know what I'm saying, I put his name in the application,
2 but, yeah, I wanted him to, him too because he, you know, he
3 participated in, you know what I'm saying, preparing my
4 defense for this, for this trial that I took in '11 --
5 February, February 2011.

6 Q Okay.

7 A I need him. I wanted him present.

8 Q And your other counsel that you listed is Mr. James
9 Cheeks?

10 A Yes, he was just -- I just listed because the -- I
11 listed his name because the, the application wanted me to,
12 you know, explain who was, you know what I'm saying, who was
13 representing me during these proceedings and different
14 things and he represented me on my bond hearing. So I had
15 to---

16 Q Okay.

17 A ---put his name on it.

18 Q All right. So I'm just, I'm just going through the
19 people that you listed.

20 All right?

21 A Uh-huh. (Affirmative).

22 Q All right. You listed Mr. Cheeks, correct?

23 A Right.

24 Q Mr. Poole?

25 A Right.

John Willie Mack - Direct examination
by Ms. Moody

1 Q Mr. McPherson?

2 A Right.

3 Q And Ms. Durant, Lenell Durant, the---

4 A Yes.

5 Q ---appellate counsel?

6 A Yes.

7 Q Okay. And in your application, the reasons why you
8 listed these individuals as ineffective assistance of
9 counsel, can you please state to the Court?

10 A Well, when I, when I -- I came in. They brought me a
11 warrant I think February 28th, 2006, and they told me that
12 they found my blood somewhere. Now, I was trying to explain
13 to the police I didn't, I didn't leave my blood nowhere and
14 this was my position on it, on the, on the matter. So, you
15 know, I think I waited five years or whatever before I went
16 to trial, but I was -- you know, I kept my position. I
17 didn't leave my blood nowhere.

18 Q Okay. So listen, listen to my question.

19 A Uh-huh. (Affirmative).

20 Q You have filed a ineffective assistance of counsel
21 against your attorneys?

22 A Right. Yeah, right.

23 Q And your basis, you filed that one, your counsel failed
24 to object to the amendment in your indictment?

25 A Right, I mean he moved to squash it on the record. He

John Willie Mack - Direct examination
by Ms. Moody

1 moved to squash it before the trial was had, you know what
2 I'm saying. So the judge denied the squashing. It was
3 Judge Cole and he denied the motion.

4 So he asked him, you know, asked him did he, did he --
5 cause the solicitor moved to amend it because of the
6 timeframe, and I was, you know what I'm saying, they was
7 telling me it happened from 2005 to 2006, and I like nah,
8 you know, you know, that's what they told me. So they broke
9 it down and said it happened in -- a week apart, you know
10 what I'm saying, from 2005 to -- 2005, September the 1st
11 of 2005 to September 6th. So they broke it down a week.

12 So he -- they amended it and I wanted him to, you know,
13 make an objection to that cause the squashing and amending
14 to me is the same thing. You know, you say---

15 Q So, let me ask you this.

16 They amended the indictment---

17 A They amended the indictment.

18 Q ---dated from September 1st---

19 A Right.

20 Q ---2005 to September 6th, 2005?

21 A Exactly.

22 Q Is that correct?

23 A Yeah.

24 Q And so you're saying that your attorney failed to
25 object to that amendment?

John Willie Mack - Direct examination
by Ms. Moody

1 A To that amendment, yes, ma'am.

2 Q Okay.

3 A He objected to it, you know, to squashing it when he
4 moved to squash it, you know what I mean, and then he didn't
5 really make no objection on the record about that.

6 Q Okay.

7 A You see what I'm saying?

8 Q Now, your second grounds were ineffective.

9 Was it your counsel failed to object to the admission
10 of evidence when the State failed to produce tangible items
11 or pictures of items swabbed?

12 A Yeah, I mean under -- on the Rule 5, if I got here the
13 things, it tells me that me and Karen Quimby, that's why I
14 didn't put her in the application, Karen Quimby filed this
15 and we asked for, you know what I'm saying, the independent
16 testing. We gonna do all that before she, she went to
17 another firm.

18 But we asked for this, and he told me personally, he
19 said well, I'm gonna get with these attorneys and I'm gonna
20 try to explain see can we get this stuff so we can, you
21 know, we be able, you know, find out what's going on cause
22 he was brought in kind of late.

23 Q Okay. So when you say him, he said he was gonna get
24 with the attorneys and talk about---

25 A Yeah, that was prosecuting. I'm sorry.

John Willie Mack - Direct examination
by Ms. Moody

1 Q ---and try to get---

2 A My prosecuting (sic) is the one that told me that he
3 was gonna get with the attorney and he was gonna talk to him
4 about what they was doing in the case, McPherson, Karen
5 Quimby.

6 Q Mr. Cheeks.

7 A Mr. Cheeks and everybody. He was gonna explain to them
8 how, you know what I'm saying, how we was gonna pursue my
9 defense, you know.

10 Q Okay. Now, when you're talking about the tangible
11 items, can you please tell the Court what items you wanted
12 your attorney to object to as inadmissible?

13 A Well, they say that -- well, first they, they -- I, I
14 told them at trial, at first, when they said that, you know,
15 we -- he questioned them about what that location, what it
16 was, and you know what I'm saying, he asked him did he have
17 any pictures. You know, he got to that point, you know what
18 I'm saying, and the records would show that he got to the
19 point where he asked him why he didn't have no pictures and
20 so I said you know---

21 Q Well, wait a minute.

22 A ---he came to the---

23 Q Mr. Mack, I need you to tell me the items.

24 A Okay.

25 Q The Court does not know the items---

John Willie Mack - Direct examination
by Ms. Moody

1 A Where he said---

2 Q ---the items that you're talking about.

3 A Okay. He talking about the -- they said a light
4 switch. Say a large area of blood was behind the light
5 switch. They said a large -- that large amount of blood was
6 on the, on the book shelf, and I think they said an
7 entertainment center that they say a large amount of blood
8 was on, you know.

9 Q Okay. And so, at the trial, the State tried to
10 introduce those items or are you saying that the State tried
11 to introduce those pictures?

12 A They didn't, they didn't do only swabs. That's only
13 thing they introduced.

14 Q Okay.

15 A And I'm trying to object to them swabs being introduced
16 after Mr. -- because they didn't show anything where they
17 come from, you know what I'm saying, and I didn't see -- I
18 put in the Rule 5, you know what I'm saying, it's in -- I
19 got a record over there what date I put it in. I put in
20 Rule 5 for discovery before we moved, you know what I'm
21 saying, to trial.

22 Q So before trial --

23 A Uh-huh. (Affirmative).

24 Q -- there was a discovery motion filed and you received
25 evidence from the State?

John Willie Mack - Direct examination
by Ms. Moody

1 Is that correct?

2 A I didn't receive nothing but a police report. That's
3 the evidence that I got for the Rule 5. That was it.

4 Q But your attorney received evidence---

5 A No.

6 Q ---from the State?

7 A He never did bring it to my attention if he did
8 cause---

9 Q Okay.

10 A ---I asked him for it.

11 Q Well, when I say that, your attorney didn't receive the
12 actual swabs.

13 Isn't that correct?

14 A No, I didn't even see the swabs they say they swabbed.
15 I didn't even see the blood they say they swabbed. I didn't
16 even see that swab. I don't want to see it. I wanted to
17 see the stuff. I didn't really want to see that. I want to
18 swab the same thing. I want an independent test from the
19 jump. So---

20 Q Okay. So let me---

21 A He knew that.

22 Q Let me ask you this.

23 Your -- what did your attorney get to observe or,
24 excuse me, review that gave you information that they had
25 swabs?

John Willie Mack - Direct examination
by Ms. Moody

1 A They just told me they had swabs. I mean you reviewed
2 it, but I, I didn't review it. He say they had swabs.

3 Q Okay.

4 A I told him. You can get -- I mean it wasn't me if he
5 did have swabs. It wasn't my blood. So, you know, I, I
6 mean, you know, I told him straight up from the jump I mean.

7 Q Okay. And so when you got to trial you wanted your
8 attorney to object to those swabs or any results coming from
9 those swabs---

10 A Yeah, I mean---

11 Q ---at the trial?

12 A I mean self-explanatory for I'm telling you---

13 Q I understand that, Mr. Mack, but the judge is not aware
14 of your case.

15 A Oh, okay, okay. I'm sorry.

16 Q So I'm asking you, you wanted your attorney, at the
17 trial, to object to---

18 A Exactly.

19 Q ---those swabs coming into evidence?

20 A Exactly, yeah. Exactly cause he -- I was trying to
21 tell him that. He say he grabbed the mic. We was sitting
22 at the table. He grabbed the mic and he told -- he said you
23 need to be quiet because we, we in Court. You know, I'm
24 trying to help in my defense cause he let stuff go on that
25 shouldn't be going on and I couldn't get up and scream and

John Willie Mack - Direct examination
by Ms. Moody

1 yell, you know, and disrespect the Court.

2 Q Okay. So your attorney didn't object to those items.

3 The next thing that you filed in your application was
4 your counsel failed to object to your prior criminal history
5 being presented to the jury.

6 A Okay. Let me see where you's at.

7 Yeah, I did file -- yeah, I did say that because the --
8 okay. Yes, I did.

9 Okay. Now, yeah, he filed -- yeah, you -- he -- I see.
10 well, in my application I got it listed at E application,
11 right to defense of counsel that's guaranteed by the Sixth
12 Amendment to the United States and the South Carolina
13 Constitution was violated as a result of counsel failure to
14 secure and object to past history, criminal history by, by,
15 you know, as exhibits in front of the jury before trial,
16 trial judge, you know.

17 Basically what I'm saying in that is that he failed to,
18 you know, he -- it's like a first degree burglary. It's
19 16-11-311. You got three aggravating circumstances. Now I
20 didn't know which aggravating circumstances I was gonna be
21 able to defend against. So I wanted to make sure, you know
22 what I'm saying, that this record didn't get put into the
23 record to the jury. That's my whole thing. I ain't, you
24 know what I'm saying, he didn't explain to me how that
25 works.

John Willie Mack - Direct examination
by Ms. Moody

1 The only thing I was given an indictment with all the
2 aggravating circumstance. It wasn't like three -- it's like
3 16-11-311(d) or 16-311(c), you know what I'm saying, like in
4 the nighttime burglary or it could be with a weapon or it --
5 could it be whatever. So they didn't tell me exactly what,
6 you know, to, to trial came, you know.

7 Q So when you spoke with Mr. Poole at the trial, you
8 wanted him to object to that?

9 A Yeah, I wanted him to object to, you know, you know --.

10 Q Your prior record coming in?

11 A Yeah, I mean that's, that's, that's, that's why he --
12 that's what the reason for me not taking the stand.

13 Q Okay.

14 A I wasn't gonna take the stand because of that because I
15 wanted to use -- so they, the jury won't be out weighing it
16 different from another something just happened in another
17 timer, era, whatever, and whatever. That's, that's my main
18 point. But he didn't let me, he didn't -- you know, he
19 should of objected to the way it goes back to the amendment
20 to the indictment cause they amended to say it happened at
21 nighttime.

22 You know, Judge Cole said this the only one that fits.
23 So, you amending that, you know, indictment, and this was,
24 you know, it still -- it didn't -- that's how he got in the
25 record, that you -- more than two priors. They got it in

John Willie Mack - Direct examination
by Ms. Moody

1 the record that way using that, that statute without giving
2 me even notice of that's the only one that I had to defend
3 against.

4 I had to -- a whole broad indictment for each, you know
5 what I'm saying, category up there of first degree burglary.
6 If you read the State versus Lynch, you know what I'm
7 saying, it's a case dealing with Lynch. well, he had a
8 first degree burglary with all the aggravating circumstances
9 that was, you know what I'm saying, saying that they
10 different like State versus Solewell.

11 Q Okay.

12 A Nighttime different from a, from a, from a daytime.

13 Q Okay.

14 A You feel me?

15 So this---

16 Q I think that you explained what you mean.

17 A Yeah.

18 Q You wanted it to be---

19 A Just---

20 Q ---specifically---

21 A Just let me know that I'm specifically fighting two or
22 more priors. That's it.

23 Q Okay.

24 A I didn't know that. That's what I'm trying to tell,
25 you know.

John Willie Mack - Direct examination
by Ms. Moody

1 Q And you didn't know that when you went in a trial?

2 A I didn't know that. He---

3 Q Okay.

4 A I didn't.

5 Q All right. So then your next allegation against
6 your -- Mr. Poole is your counsel failed to thoroughly and
7 properly examine a crucial prosecution witness to address
8 her perjury.

9 You indicated that one of the witnesses I guess---

10 A Linda, Linda Moss. Linda Moss. She was, she was the
11 one that say -- was caused -- said call the police and said
12 this house broken into it and she said she seen this blood
13 and stuff like that and whatever, and, and he didn't really
14 cross stuff about seeing the blood location on what it was
15 on, you know what I mean, or what type of location it was.
16 He was just asking her, you know, you moved the counter and
17 all this stuff. I mean---

18 Q Okay. Now---

19 A That means a whole disrespectful thing to look like.
20 He didn't cross-examine to, to see like, you know -- it was,
21 it was damaging to me the way he cross-examined her.

22 Q Okay. So Ms. Moss, the victim in the case --

23 A Uh-huh. (Affirmative).

24 Q -- that's who you're saying he did not properly
25 examine?

John Willie Mack - Direct examination
by Ms. Moody

1 A No, he didn't. He didn't, when I asked him to, he
2 didn't even really pay me no attention to it cause I'm --
3 specifically she states she a witness to seeing the blood.
4 I mean that's what she said she seen. She said she seen
5 this and that and whatever.

6 So that's one thing I wanted to bring out in the police
7 report cause it's the only evidence I had in the discovery
8 that worked with, and the police report is stated that she
9 was called to say the blood was on or was located on a
10 specific item.

11 Called -- why, why you went out to call her when you
12 already say you seen it?

13 That didn't make no sense to me and I was trying to
14 bring that out to him. So --.

15 Q Okay.

16 A I don't, I don't, you know, I ain't -- that's what I,
17 that's what I'm trying to, you know, get -- convey to him.

18 Q Okay. Now, the next issue that you had you filed --
19 you stated your counsel failed to file a motion for a speedy
20 trial.

21 A Yeah.

22 Q And can you please relay to the Court---

23 A Well, I tried to file a -- I was in Court -- I was in
24 the county jail, which, you know, I went back to early. I
25 was in jail from 2006 -- I was incarcerated from 2006 to

John Willie Mack - Direct examination
by Ms. Moody

1 2005 (sic) and I was kind of writing -- I was writing the
2 Solicitor's Office. I was writing Cole. I was writing
3 everybody trying to get to Court, and they kept changing
4 attorneys. So I kind of understand that. So I was letting
5 them know off the top I needed fast speedy trial. This
6 thing's getting older and older. I need to get it in.

7 So I had to end up filing 83s trying to get this
8 address and I filed 83 with the Federal Courts trying to get
9 the address. They finally took me to Court after I, you
10 know, filed 83s. Like I filed it twice. I filed one on
11 McPherson. I couldn't sue him cause he was immune from it,
12 you know what I'm saying, trying to get me to Court. That's
13 what the whole point was about finding it, you know, cause I
14 had some other basic things going on too.

15 Q So Mr. Poole didn't get you to your trial or you're
16 saying all the attorneys that you've listed in your
17 application did not get you to---

18 A They didn't---

19 Q ---your trial?

20 A Except Durant. She was Appellate Offense (sic). She
21 didn't, she---

22 Q Right.

23 A ---personally she didn't really. I just label her name
24 there because the application said that, but not that they
25 didn't, they didn't, they didn't -- I wrote McPherson after

John Willie Mack - Direct examination
by Ms. Moody

1 I found Karen Quimby wasn't my attorney. I wrote him and
2 told him, when I was in the Wateree Correctional
3 Institution. I got copies of those and stuff like that, you
4 know, I don't know if---

5 Q But your issue was mainly -- your issue was getting to
6 a trial?

7 A Yes.

8 Q And they didn't file---

9 A No.

10 Q ---your motion for a speedy trial?

11 A They didn't. They never did file it.

12 Q Okay. Now, as to the trial error, error that you
13 indicate in your application, you indicated that the trial
14 judge improperly stated that only one aggravating
15 circumstance had to be proven.

16 A Yeah.

17 Q I believe---

18 A He said the, he said the only one that fit, he said the
19 only one fit. So, me personally, you telling me this.
20 You're saying the other ones I ain't got to worry about no
21 more cause when you give me an indictment, that's each and
22 every element of the indictment you got to prove it. So I'm
23 thinking I got to say the nighttime, with a weapon, not that
24 particular one.

25 So they kind of -- when he told the jury that that's

John Willie Mack - Direct examination
by Ms. Moody

1 the only one that fit, he kind of like amending the
2 application in an undercover type.

3 You feel me?

4 And that's what I felt that she, you know, it should of
5 been brought to my -- you know, it should of been objected
6 to by Mr. Poole.

7 Q Okay. I mean you wanted Mr. Poole to object to---

8 A Yeah I wanted to object to that cause it was wrong
9 cause he, you know, I mean, I mean it was just -- he was
10 just addressing the jury. I think it closing argument and
11 jury charge or whatever. He was, he was stating that, and
12 I, I needed him, you know, let him know that wait a minute,
13 now he just saying this the only one that fit now. They
14 don't need me no whole broad indictment to prove that. I
15 mean I don't, I don't, I didn't -- I don't get it.

16 Q Okay. Now, there was some misconduct that you alleged
17 in your application that the Solicitor's Office and law
18 enforcement with regard to the DNA evidence and you talked
19 about that just a few minutes ago.

20 A Uh-huh. (Affirmative).

21 Q Is there anything else that you wanted to add to that?

22 A Yeah, I just, I just want to let them know that, you
23 know, that, you know -- well, not -- when you put in a Rule
24 5, I mean, you know, under the Constitution, South Carolina
25 Constitution, Article, Article I, Section 3, I got a right

John Willie Mack - Direct examination
by Ms. Moody

1 to due process. If you, if, you know, you're violating
2 that, you know.

3 Q So, but specifically you said that they didn't turn
4 over---

5 A They didn't turn over---

6 Q ---the blood evidence.

7 A They didn't turn over none of that.

8 Q So---

9 A We didn't have it at trial. We don't -- still don't
10 have it. I'm still in prison doing life sentence. I still
11 don't got it. I'm, you know, I'm still---

12 Q So let me, let me -- I, I hear what you're saying, but
13 let's be clear for the Court.

14 A Okay.

15 Q You're saying what they didn't turn over---

16 A Yeah.

17 Q ---you wanted them to turn the items over or the swabs?

18 A The items. I want, I want the items. That's all I
19 wanted from the jump.

20 Q Okay. So hold on.

21 A Okay.

22 Q You wanted the State to turn those items over so that
23 you could independently test those items?

24 A Uh-huh. (Affirmative).

25 Right. Exactly. I mean Karen Quimby, she had left --

John Willie Mack - Direct examination
by Ms. Moody

1 I guess she was happy because she went to another firm or
2 whatever, but we discussed all this, man. He, he told me --
3 I mean we went in this blind cause he didn't get with her.
4 He didn't discuss nothing with her. They didn't do nothing
5 you know and I---

6 Q And so you felt that that---

7 A Yeah, it's, it's a big crucial state. That's the only
8 thing you're saying tied me to the crime, yeah, I felt that
9 that was the issue, which you saying this tied me to the
10 crime, my blood was there, my biological blood was there.
11 This -- you saying this part of me. That what you saying.

12 Q Okay. But let me, let me -- you're feeling -- you're
13 saying that all these things, along with that DNA -- are you
14 saying that is that's what prejudiced you in your trial?

15 A Yeah, it's prejudicing me because I didn't have that
16 evidence so I could confront it. I need to confront that
17 evidence so I could know, you know, what to say at trial, do
18 during trial. I needed a cont -- you know, confront it, you
19 know, that what the, the Constitution deal with.

20 I mean the Sixth Amendments, I got it in here, the
21 Sixth and the Fourteenth Amendment deal with that, you know,
22 and this what I'm, this what I'm doing this whole P, this
23 whole PCR is about, the Constitutional violation of the
24 United States Constitution. That's what it's about, and if
25 you read Article III like I mentioned earlier, it's the same

John Willie Mack - Direct examination
by Ms. Moody

1 thing, due process. If you said---

2 Q Okay. Now---

3 A ---I did something I need to be able to, to hand it
4 over so I can be able to defend against it.

5 Q Okay. So now let me ask you this.

6 You had Mr. McPherson as your attorney?

7 A (Witness nods affirmatively.)

8 Q And, at that point, you-all had a hearing on
9 October 24th, 2008?

10 A Yeah, I guess with -- I think it was Judge Newman. He,
11 he presided over that.

12 Q Okay. Can you explain to -- at that point -- at that
13 hearing, did you ask your attorney to ask for those -- that
14 DNA?

15 A Well, he, he stated that -- he say we don't really need
16 this at this point. So you know what I'm saying. So he say
17 you ain't got to worry about them tangible items right there
18 at this point. We just trying to just fight, you know,
19 what's, what's in front of us with right now. They trying
20 to get a sample, you know. They trying---

21 Q So---

22 A ---to want a sample because they said they lost
23 whatever sample. So it didn't make no sense to me anyway
24 cause you, you already said it. Now you want a sample for
25 comparison and I was like no, I'm kind of against that

John Willie Mack - Direct examination
by Ms. Moody

1 because, you know, this three years later, you know. It's
2 two years later or whatever.

3 I said no, I don't think that's cosher. That's why I
4 didn't agree with giving it to them when you, when you, you
5 know, and I tried to go on record. He come to me in many
6 ways that he could of got it, you know, but I don't know,
7 you know, cause I know, I know they waited three years
8 later.

9 Now I'm confused. It's the squabs (sic) you got three
10 years later, and then you gonna compare it with, you know
11 what I'm saying, you know, I don't understand that. That's
12 what I was trying to explain to Cole in my sentencing,
13 which, you know, didn't do no good because the jury found me
14 guilty or whatever, but --.

15 Q But let me ask you this. I just want to be clear for
16 the Court.

17 Did your attorney ask the State for those items?

18 A Yeah, Karen Qumiby, Karen Quimby asked for them. I
19 didn't put her in the thing because---

20 Q She---

21 A ---she, she asked for them. That's why I ain't got
22 no---

23 Q She asked for the actual items?

24 A Yeah, I got her -- I got it. I can show you.

25 Q No, I'm just asking you the question.

John Willie Mack - Direct examination
by Ms. Moody

1 A Yes, ma'am.

2 Q I just wanted you to ask (sic) that question.

3 A Yes, ma'am.

4 Q So -- and the State didn't provide those items at the
5 time of the trial?

6 A No, ma'am, they didn't.

7 Q Did Mr. Poole ask for those items at the trial?

8 A No, ma'am, he didn't.

9 Q Okay. Is there -- now, is there anything else that you
10 felt that the Court, excuse me, that the -- Mr. Poole or any
11 of the other attorneys that you've listed did that caused
12 you to be prejudiced in your case?

13 A Yeah, it's -- it was deficient. They trying to make
14 sure that I get this evidence. They were deficient in that
15 and I mean it's prejudicing me against my trial. The
16 evidence that they say that tied me to the crime. So when
17 they told me that, I feel like it's a whole, you know what
18 I'm saying, the guy -- the people that I put in that PCR
19 application was deficient by getting that evidence that I,
20 that I requested you know.

21 I requested that. Karen Quimby, I can't blame her
22 because she wasn't a part of that. She did her job. She
23 asked for that and they suppose to, you know, they in a firm
24 together, you know, even though it's the Public Defender's
25 office. They a firm and they suppose to communicate with

John Willie Mack - Direct examination
by Ms. Moody

1 each other, and they suppose to know, you know, these
2 things.

3 Q Okay.

4 A So --.

5 Q Now, did you -- can you tell the Court what sentence
6 you are serving now?

7 A I got a life sentence for first degree burglary. I got
8 five years for grand larceny, and I wanted to, you know, I
9 mean I know you busy, but I wanted to amend, amend something
10 to, to the application about dealing, dealing with the grand
11 larceny charge because they, they didn't even discover
12 anything. You know, I wanted to amend that.

13 Q So when, when you're talking about the grand larceny,
14 you're saying that---

15 A The grand larceny charge, they say, they say it's items
16 missing from her home. They says I think was a laptop,
17 computers, jewelry. Some other things was, was missing.
18 I'm not -- I done got the record. I can't remember
19 everything that was missing, but I think some jewelry,
20 laptop, computer, something like that.

21 Q But your overall defense was that it was not you,
22 correct?

23 A That's what I'm saying, that they didn't get none of
24 this stuff from me and they charged me with Grand Jury --
25 with grand larceny.

John Willie Mack - Direct examination
by Ms. Moody

1 Q Grand larceny.

2 A They just saying that what was missing because they say
3 they found the blood, but, you know, they didn't -- you
4 know, they brung me -- I went to -- it's a complicated thing
5 I got. I'm trying to understand.

6 Q Well, I'm, I'm just asking you, as to your charges, the
7 burglary first and the grand larceny, you maintain your
8 innocence that that -- you did not commit those crimes?

9 A Exactly.

10 Q Okay. So that's not necessarily a, an amendment, is
11 it?

12 You're maintaining that you didn't do it?

13 A Yeah, that, that's from -- yeah.

14 Q Okay. So now what relief are you asking the Court to
15 grant you here today?

16 A Well, I'm asking to grant me a new trial so I can be
17 able to get this evidence so I can prepare for this trial
18 and show the jury, you know what I'm saying, this wasn't me.
19 I can keep my innocence. I want to be -- want to get this,
20 you know, to test this stuff, to get it presented to the
21 jury so we can have -- we got new facts. We got new
22 different information that's going on and I want to be able
23 to present it---

24 Q So now---

25 A ---present it to them.

John Willie Mack - Direct examination
by Ms. Moody

1 Q Okay. And in this proceeding, the post-conviction
2 relief, you're stating that, to the Court that your attorney
3 was ineffective for doing, ineffective for doing all these
4 things we just went over --

5 A Exactly.

6 Q -- for not doing those things?

7 A Exactly.

8 Q okay. And you were prejudiced because you were found
9 guilty---

10 A Yeah.

11 Q ---of a crime that you---

12 A Yeah.

13 Q ---maintain your innocence on?

14 A Yeah, I didn't commit it, you know. It's, it's you
15 know --.

16 Q And so you're asking the Court to grant you a new
17 trial?

18 A Yeah, so, you know, cause, you know, I -- vacate it,
19 you know what I'm saying, so I could be able to, you know
20 what I mean, go to a new trial so we could, you know, I can
21 express myself. I can have an opportunity to get on the
22 stand, you know what I'm saying, cause I got that taken
23 away from me and explain myself to the jury so we, you know
24 what I'm saying, so they can, you know, if I do that it be
25 okay even though I got a criminal record, you know. If I

John Willie Mack - Direct examination
by Ms. Moody

1 didn't do something, I should of got up there the first
2 time. So that's what I want an opportunity to, to do.

3 Q Is there anything else you wish to tell the court?

4 A That about covers everything.

5 Q Okay.

6 A But I got some stuff right here that I mean at the end
7 of the application.

8 Q If that's case law the Court has it.

9 A Yeah. Okay. Okay.

10 Q All right. Please answer any questions that the State
11 has.

12 THE COURT: You may proceed.

13 CROSS-EXAMINATION

14 BY MS. WHITE:

15 Q Mr. Mack, the State introduced your prior record, and
16 then the judge gave the jury a limiting instruction about
17 that.

18 Do you recall that?

19 A Yeah, he, he did that, but he did that after all the
20 solicitor's Office presented it before he did that. He --
21 they presented it -- if you were to check the record, he
22 presented this -- he didn't present that limiting
23 instruction until after the solicitor put my criminal record
24 on. He did that after.

25 Q Right.

John Willie Mack - Cross-examination
by Ms. White

1 A He didn't do it before.

2 Q And that was my question.

3 They presented the criminal record of your prior
4 burglaries and then the Court instructed the jury that
5 evidence was considered for only the limited purpose to
6 establish the particular degree of burglary that you were
7 being charged with?

8 Do you recall that?

9 A Yes, ma'am, I recall that.

10 Q Okay. And do you recall that, in the police report you
11 said you read, your blood was actually matched through
12 CODIS?

13 The blood that was found in the home was matched
14 through CODIS---

15 A Uh-huh. (Affirmative).

16 I mean---

17 Q ---independently and then they went to get a match and
18 that's when you had the hearing with Mr. McPherson?

19 A Right, but the, the CODIS, you know what I'm saying,
20 they never did say how, how they got in CODIS. They never
21 did mention how it got into CODIS in the first place.

22 Q Okay. So you weren't aware of your blood being taken
23 from---

24 A I wasn't---

25 Q ---from your prior stints---

John Willie Mack - Cross-examination
by Ms. White

1 A I mean it, I mean it was -- they had, you know, tried
2 to take it when I was at -- you know, I refused it. So I'm
3 trying to figure out, you know what I'm saying, why, you
4 know, it's, it's even been presented as being in the, the
5 system that when I was incarcerated in I think '99 and I
6 think DNA thing didn't come out until like 2000, and I'm
7 trying to figure out how my blood be in the system---

8 Q Okay.

9 A ---in the first place.

10 Q And your attorney said you never obviously saw the
11 items or the swabs, but did you see the report from SLED
12 that showed that you were a match?

13 A Yes, I seen, I seen -- I, I -- it's, it's -- I had two
14 different SLED reports. I had -- you had Ortuno you had
15 Mc -- Rhonda Fields and they had like Rhonda Fields say if,
16 you know, say it different from what Ortuno said because she
17 was the first one that conducted the DNA testing, and her
18 article that I read, when her testing was read, she say if
19 you want a known comparison, if you want a known comparison,
20 if you read it correctly, please submit known blood.

21 So that's what I'm saying. I ain't -- I didn't -- what
22 was going on.

23 Q Okay. So you---

24 A Now when Ortuno, he came three years later and he say
25 well, it's him using. So I, I don't understand that.

John Willie Mack - Cross-examination
by Ms. White

1 Q So you think that there's some questions about the
2 actual SLED testing?

3 A Yes, it's, it's, it's been my position from the
4 beginning.

5 Q Okay. All right. Thank you.

6 That's all I have for this witness, Your Honor.

7 THE COURT: Any redirect?

8 MS. MOODY: No redirect, Your Honor.

9 THE COURT: Sir, you may step down.

10 Does the Applicant have any further witnesses?

11 MS. MOODY: No, Your Honor.

12 THE COURT: I'm gonna take a brief restroom break,
13 restroom break after which we will resume and I assume the
14 State has only one witness?

15 MS. WHITE: Yes, Your Honor.

16 (WHEREUPON, a short recess was taken at this time.)

17 THE COURT: Is the State -- yeah.

18 Is the State ready to proceed?

19 MS. WHITE: Yes, Your Honor.

20 THE COURT: You may call your next witness.

21 MS. WHITE: We call Roger Poole.

22 THE COURT: Sir, if you'd come to the stand and be
23 sworn.

24 ROGER POOLE, being first duly
25 sworn, testified as follows:

Roger Poole - Direct examination
by Ms. White

1 THE COURT: If you'd have a seat for me, sir, and state
2 your full name for the record spelling your last name for
3 the court reporter.

4 THE WITNESS: My name is James Roger Poole. P-O-O-L-E.

5 THE COURT: Thank you.

6 You may proceed.

7 MS. WHITE: Thank you, Your Honor.

8 THE COURT: You welcome.

9 DIRECT EXAMINATION

10 BY MS. WHITE:

11 Q Mr. Poole, do you recall representing Mr. Mack on these
12 charges?

13 A Yes, I do.

14 Q Okay. And we've talked about several other attorneys.

15 Were you appointed through a position at the Public
16 Defender's Office?

17 A That's correct. Karen Quimby was his first attorney.

18 She was in the PD's Office here, his first, his first

19 attorney. Then William McPherson. They both moved on and I
20 inherited the case in 2009.

21 Q And, in fact, so when you took the case on in 2009 that
22 was, let's see, two years prior to trial, is that right,
23 maybe?

24 A That's right.

25 Q Okay. So you represented him that whole time?

Roger Poole - Direct examination
by Ms. White

1 A During the entire two years. That is correct.

2 Q Did you have the benefit of the files that William and
3 Karen had prepared or any conversations with them about what
4 had been going on in the case prior?

5 A Well, I had inherited the files and their notes and all
6 of their work product. He had several cases that were
7 pending at one time, and I don't recall actually talking to
8 Mr. McPherson or Ms. Qumiby about Mr. Mack's case. I don't
9 recall any conversations. They had moved to further places.

10 Q And out-of-state, is---

11 A Yes.

12 Q ---both of them, right?

13 A Right.

14 Q What was your conversation -- do you recall meeting
15 with Mr. Mack and any discussion you had with him about any
16 defense?

17 A We met on several occasions, and, of course, as always,
18 at the Spartanburg County Detention Facility. We talked
19 about the case on numerous occasions. At the same time we
20 were trying to work the case out. Mr. Mack had been served
21 timely with a life without parole. The State seeking an
22 LWOP against him and he had timely been served with that.

23 So we were trying to get it worked out simultaneously
24 and that's how Mr. Cheek became involved in the negotiations
25 with the solicitor's office. We were dealing with two

Roger Poole - Direct examination
by Ms. White

1 solicitors, the chief solicitor -- well, not at that time.
2 Barry Barnette, the deputy solicitor, and Tony Leibert were
3 the prosecutors, and so Mr. Cheek had conversations with him
4 as well as I in the attempts to work it out.

5 Several offers were made. Mr. Mack declined every one
6 of them.

7 Q And can you tell what the offers were that were made?

8 A To the best of my recollection, it started out as 20
9 years and then they came down by five year increments,
10 ending up, the final offer being a ten year sentence --

11 Q And was it -- would that---

12 A -- in exchange for a plea.

13 Q I'm sorry.

14 Did that involve wrapping up multiple charges or was
15 that just on this burglary first, grand larceny?

16 A It was my impression that just plead on these cases or
17 plead on all cases or whatever, get ten years. If all of
18 them were not disposed of, they would be cast aside,
19 dismissed.

20 Q Okay. And you said that Mr. Mack refused to accept
21 that offer?

22 A That is exactly right.

23 Q So he wanted to proceed to trial.

24 What did he provide you with in the way of any defense?

25 A Well, we talked about the case and he gave me some

Roger Poole - Direct examination
by Ms. White

1 names of potential witnesses, but I was unable to locate
2 anybody and bear in mind that there had been a long period
3 of time between 2009 and 2005. well, four years. I could
4 not contact anyone. I didn't -- he couldn't provide me with
5 any contact information. Just some vague names and vague
6 recollections.

7 Q And were these supposed alibi witnesses or just---

8 A I don't even know what exactly they were going to say.
9 Just names.

10 Q Were you familiar with the blood evidence that the
11 police had found on the scene?

12 A That's right. I was.

13 Q And at the time that you took over the case there had
14 already been a match to Mr. Mack through the CODIS system.

15 Is that right?

16 A That's right. Through the CODIS system there had been
17 a match made and then the -- a request was made by the State
18 or SLED specifically for confirmation and confirmation came
19 about as a result of a hearing held in front of Judge Newman
20 in 2008, October I do believe, when Mr. McPherson was
21 present at that hearing. Mr. McPherson objected to giving a
22 Buccal swab and Judge Newman ordered that Mr. Mack should
23 give a Buccal swab.

24 Q And as a result of that, did you ultimately receive
25 reports in discovery from SLED indicating that that was a

Roger Poole - Direct examination
by Ms. White

1 match to the Applicant?

2 A That's right, and I shared all that information with
3 Mr. Mack.

4 Q And that's what I was gonna ask.

5 Obviously he says he never saw the actual swabs or
6 items, but he had the report that indicated that the, the
7 blood or the sample matched his?

8 A Right. It's the typical SLED report, 3.1 equals --
9 matches 3.1, Buccal swab annotations, and all that sort of
10 thing.

11 Q Was there any other evidence or discovery that you had
12 that you reviewed with him?

13 A Well, the police report, we went over that several
14 times. We went over the whole case. One aspect of this
15 case was that the defendant -- I -- was her name Ross, Moss?

16 Q The victim in the---

17 A That's right.

18 Q Yeah.

19 A The, the victim, Ms. Moss, had moved to Canada, and
20 they -- the State wanted me to stipulate to a Skype of
21 testimony in -- for her to be -- testify through Skype in
22 the courtroom in a trial. Of course I would not consent to
23 that.

24 I would keep Mr. Mack apprised of the State's attempts
25 to get Ms. Moss from Canada. I think he came under the

Roger Poole - Direct examination
by Ms. White

1 impression that she probably would not show eventually, and
2 holding that false hope, she did show. They, they got her
3 down here and she did testify at trial as the first witness.

4 Q And, in fact, she testified she had been gone for a
5 period of time, I guess it was several days, which is why
6 the issue with the indictment had arisen at the beginning.

7 Is that right?

8 A She had been gone for a period of time, came to her
9 home, saw the visible evidence of -- that it had been broken
10 into and testified to the missing items.

11 Q In regards to the indictment and the amendment to the
12 indictment, you objected or moved to quash the indictment
13 based on it being too overly broad I believe and not
14 providing sufficient notice for the days.

15 Once that was adjusted and the State made a motion to
16 amend, what was your thought process on whether or not
17 there's a legal reason to move to quash it at that point?

18 A Well, the, the reason for the motion to quash was
19 because the dates listed from a particular date in early
20 September of 2005 to a date in early September of 2006, over
21 a year, I moved to quash. That motion was denied and then a
22 request was made to amend.

23 At that point in time I just stated into the record as
24 long as my motion to quash is contained therein, I can not,
25 in good conscious, object to an amendment of the dates

Roger Poole - Direct examination
by Ms. White

1 because I was aware of -- I was not taken by surprise that
2 the, the Court -- that the case was going to focus on a
3 particular period in the Year 2005. We were prepared for
4 that, and if I had said that I objected to it, the follow-up
5 question would be how is your client prejudiced and then I
6 couldn't give a reason.

7 Q Okay. In regards to moving to have the actual items or
8 swabs brought in, was there anything that you felt
9 prejudiced him with not having that when you have the SLED
10 report?

11 A No.

12 Q And is it common for items, when they're been blood
13 testing on, you know, pieces of whether it's a light switch
14 of a wall or an item from someone's home, is it, is it
15 common for those to be brought in?

16 A It is highly uncommon. You don't introduce items with
17 blood in them, especially these days, into evidence where
18 they can be looked at by a jury and/or touched.

19 Q And so fears of it being tainted or, or messed with
20 could potentially cause that?

21 A Right. I'm not aware of where -- of a bloody light
22 switch or a bloody anything being presented in any trial
23 that I've been involved in.

24 Q Okay. Was there ever any question of whether or not
25 Mr. Mack was gonna testify at the hearing?

Roger Poole - Direct examination
by Ms. White

1 A He was generally disposed toward not testifying
2 throughout our conversation.

3 Q And from your understanding, was that based on his
4 prior record or --?

5 A I believe that was probably the compelling reason.

6 Q Okay. And was that something that you supported?

7 A Well, that was his decision. I left it up to him.

8 Q Okay. One quick second.

9 (Pause.)

10 Q Okay. Was there anything ever mentioned to you about a
11 motion for speedy trial or any issues with that?

12 A He wanted to get in trial and that was obvious. The
13 case was old. I, I wanted to also. I didn't file a motion
14 for speedy trial because there was a -- I was in constant
15 contact with the solicitors and we were -- it was a period
16 of time where we had to wait, I think, on the results from
17 SLED, from the 2008 hearing. So -- and we were on the
18 docket at one time prior to his actual trial and the night
19 before there was an unexpected death in my family and I
20 could not go to a trial the next day.

21 Q All right. And then I'm sure the, the coordinating of
22 the witness from Canada might of created some issues as
23 well?

24 A On one or two occasions I think so.

25 Q Okay. Okay. Thank you very much.

Roger Poole - Direct examination
by Ms. White

1 That's all I have at this time.

2 THE COURT: Any questions for the witness?

3 MS. MOODY: Yes, ma'am.

4 May it please the Court?

5 THE COURT: Yes, ma'am.

6 CROSS-EXAMINATION

7 BY MS. MOODY:

8 Q Mr. Poole, in terms of preparing for the trial, what
9 would you say was the biggest issue that you had confronting
10 you in the trial?

11 A The DNA.

12 Q Okay. And with the DNA, did you have an opportunity to
13 talk to Mr. Mack about how that DNA affected his probability
14 of being found not guilty?

15 A Oh, we talked about that a lot.

16 Q Okay. And during your discussions, did you-all talk
17 about possibly having an expert test those -- the DNA that
18 was found?

19 A I didn't really go there too much because Mr. Mack,
20 whenever we talked, he wanted to talk about other things
21 other than that. In other words I felt uneasy about getting
22 an expert to do an independent DNA testing because, if it
23 had come back to Mr. Mack, then we would of had one further
24 confirmation to deal with rather than just basically one
25 SLED confirmation.

Roger Poole - Cross-examination
by Ms. Moody

1 Q Okay. So when you---

2 A So I -- the, the risk of, of going down that road I, I
3 felt was really really tough.

4 Q So now did you have that conversation -- I guess your
5 testimony today is you didn't have that conversation with
6 Mr. Mack about having one further---

7 A No, I don't recall having that conversation with him.
8 Probably not, no.

9 Q Okay. And at the trial when, I believe it -- Rhonda
10 Fields tested or asked for the confirmation by submitting a
11 sample, but then the, the actual person who testified is
12 Ortuno?

13 A Correct.

14 Q Okay. And, and during that time, did you challenge any
15 of his testing with regard to the DNA or his, the results of
16 the DNA?

17 A No, he, he was the, the usual scientist, SLED witness.
18 You know, he comes -- takes the witness stand up here, looks
19 at the jury, answers the questions, looks at the jury, gives
20 them all that mathematical probabilities, statistical
21 information, you know, and I saw no way of challenging his
22 testimony except to ask obviously you don't know how the
23 blood got there --

24 Q Okay.

25 A -- and that, that was all we had to work with, how did

Roger Poole - Cross-examination
by Ms. Moody

1 the blood got -- get there. We had a five year, a five day
2 period of time that happened five years ago and how did it
3 get there was the only thing I could work with.

4 Q Okay. So, at -- so I guess your, looking at your
5 strategy, you felt that there was nothing to challenge or
6 other than that how did it get there?

7 A I wasn't smart enough and I don't know of anybody that
8 is to be able to take on DNA evidence --

9 Q Okay.

10 A -- given by---

11 Q What do you mean by that?

12 A Well, the -- in the transcript, it -- he goes through
13 and talks about how the DNA evidence works, and then he
14 gives a statistical value. I forget what it was in this
15 case. It was the likelihood of Mr. Mack being the possessor
16 of this particular DNA is one in quadrillion or whatever---

17 Q Okay.

18 A ---and how you go from Step A to that final number, you
19 know, I don't, I don't know how you can really do much work
20 with that.

21 Q Well, did you consider, at any point, questioning or
22 challenging the method of testing or did you -- you got that
23 information and you felt comfortable that their testing was
24 done appropriately at SLED?

25 A I couldn't come up with anything to say that it was

Roger Poole - Cross-examination
by Ms. Moody

1 inappropriate.

2 Q Okay. So -- but did you have an opportunity to talk
3 about this with Mr. Mack?

4 A We talked about what that testimony was gonna be about,
5 yes.

6 Q Okay. And as far as the actual light switch and the
7 entertainment and the window where the, the swabs came from,
8 you know I believe you understood Mr. Mack's wanting those
9 items, but did you have an opportunity to talk with the
10 solicitor's Office about, you know, what they had physically
11 outside of the swabs?

12 A The thing that was lacking most -- I didn't talk to
13 them about the existence of, you know, it still being around
14 or not, but probably not because this was so late in the
15 game. I mean years after the actual crime occurred that may
16 not exist anymore.

17 I do know that the State didn't have any photographs.
18 That is John Burgess had taken photographs, he was the lead
19 investigator, and he had misplaced them and he was not able
20 to introduce them in trial. So --.

21 Q That kind of worked in your favor?

22 A That's, that's right.

23 Q Okay. Okay. Now, as to -- I beg the Court's
24 indulgence.

25 THE COURT: Uh-huh. (Affirmative).

Roger Poole - Cross-examination
by Ms. Moody

1 (Pause.)

2 Q Well, I might -- you might of already answered this.

3 As far as the, the location of the burglary, did you
4 have any notes or did you try to have that location
5 inspected or anybody to go into that apartment, I believe it
6 was an apartment---

7 A Uh-huh. (Affirmative).

8 Q ---to like look at the light switch and window?

9 A No, I did not.

10 Q All right.

11 A I did not do that.

12 MS. MOODY: Okay. No further questions for this
13 witness, Your Honor.

14 THE COURT: Any redirect?

15 MS. WHITE: Nothing, Your Honor.

16 THE COURT: Sir, you may step down.

17 Anything further from the State?

18 MS. WHITE: Nothing further from the State.

19 THE COURT: Any rebuttable testimony from the
20 Applicant?

21 MS. MOODY: No, sir. No, ma'am.

22 THE COURT: Anything further for the record from the
23 Applicant?

24 MS. MOODY: Nothing further, Your Honor.

25 THE COURT: Any argument from the Applicant or the

1 State?

2 MS. MOODY: Well, Your Honor, we just ask the Court to
3 grant Mr. Mack his relief.

4 He indicates that he felt that his attorney did not
5 make certain objections and investigate as to the evidence
6 that the State had on his behalf as well as making
7 objections to the Court's comment during the jury trial
8 regarding which actually fit in terms of what the State had
9 to prove, and I -- basically, as I understand it, he is
10 challenging the Court's comment on the evidence that was
11 presented by the State in their case in chief.

12 As far as the blood, the DNA, Your Honor, is my
13 client's position and I just state this for the record, I
14 know that Judge Cole is got to rule on this matter, my
15 client takes the position that those items could of been
16 independently tested to prove his, his innocence in this
17 case, and he maintained his innocence throughout the entire
18 time, and his counsel failed to do that, and he takes the
19 position that that would have exonerated him, I guess, so to
20 speak, in the terms of whether he was at this location at
21 Victoria Road and whether or not he actually took any items
22 from that property.

23 And based on that, Your Honor, he feels that his
24 attorney prejudiced him to the degree that he is now serving
25 a life sentence, and, again, he -- I understand the

1 testimony came out about what offers were made. However, my
2 client takes the position that he was innocent and he did
3 not want to plead to any charge with regard to the burglary
4 and we ask the Court grant him his relief.

5 THE COURT: Would the State like to respond?

6 MS. WHITE: Thank you, Your Honor.

7 The State would just argue that, with the record and
8 testimony presented today, we think it's clear that the
9 Applicant is failed to meet his burden of proof of
10 establishing that, that counsel was deficient in any manner
11 or that he was prejudiced by any alleged deficiency, and,
12 therefore, the application should be denied.

13 THE COURT: Considering the applicable standard, I find
14 the Applicant is failed to meet his burden of proof.

15 After having heard Mr. Poole's testimony, I find his
16 testimony credible in its entirety. He did appropriately
17 move and objected to and made a motion to quash the
18 indictment. It was denied. In light of that, he really did
19 not have any good faith or legal basis to object to an
20 amendment, and he preserved the record, as he's required to
21 do, by making the motion to quash.

22 I agree with Mr. Poole and I've never seen actual items
23 brought into a courtroom. Normally what happens is crime
24 scene collects samples, swabs. Those are preserved
25 according to the chain of evidence, and then I would assume

1 that a person's home, once burglarized, is able to go back
2 to some semblance of normalcy by cleaning off their items.
3 So it would not of existed.

4 So it's a bit of a nullity, a bit of a circular
5 argument to make that these actual items should now be
6 tested and I'm overlapping a little with the motion that was
7 made by Judge -- to Judge Cole and I don't know how he's
8 gonna rule on it, but as a matter of practicability, I don't
9 know how you're gonna do that because I would imagine,
10 especially in light of the fact that the victim has moved to
11 Canada, how you would ever actually be to able get these
12 items and really frankly the evidence was preserved and
13 there's no indication in the record that it wasn't and that
14 it could not be subject to some independent testing.

15 I find credible Mr. Poole's testimony that he did not
16 move for independent testing because he suspected, in light
17 of all the circumstances strategically, that he did not want
18 another report confirming or corroborating his client's
19 genetic material be left at the scene of this crime, and
20 there would of been no basis for him to object to the DNA
21 evidence coming into, into the trial record of this case,
22 and there's also no factual basis or good faith basis for
23 him to have objected to the methodology of the testing as
24 corroborated by the trial record.

25 Now, what the State did not, and maybe I missed

1 something, and bear with me one moment.

2 (Pause.)

3 THE COURT: I don't recall any testimony regarding his
4 cross-examination of the victim in this case, Ms. Moss. He
5 alleges that she committed perjury and that his counsel's
6 cross of the witness was damaging.

7 So did you, in fact, cross-examine Ms. Moss and what is
8 your perception of did it -- did she, in fact, perjure
9 herself and did you explore that in your cross-examination
10 of the witness?

11 MR. POOLE: Yes, ma'am, I did cross-examine Ms. Moss.
12 She was the first witness up, and the, the -- it's in the
13 transcript.

14 THE COURT: And I've read it, but it still needs to be
15 addressed for the record because it wasn't in examination---

16 MR. POOLE: Yes, ma'am.

17 THE COURT: ---and he raised it and I need to know what
18 your response is to that allegation.

19 MR. POOLE: My response is this. I was not aware at
20 the time that she was perjuring herself in anyway, and,
21 therefore, I could not come up with any question to -- on
22 that point. Her demeanor as a witness was very very good
23 and very firm.

24 THE COURT: As a result -- is there any question of the
25 witness as a result of the Court's questioning from the

1 Applicant?

2 MS. MOODY: Your Honor, he takes the position that---

3 THE COURT: I need to know if they're any questions for
4 the witness.

5 MS. MOODY: Yes, sir. Yes, ma'am. Excuse me.

6 The Applicant would like to know is there -- what was
7 the purpose of them calling her to confirm blood?

8 Did she see---

9 THE COURT: I need to know if -- I need questions asked
10 of this -- the Court had made an additional inquiry and I'm
11 giving you the opportunity to ask questions of the witness
12 since I didn't do it while he was on the stand.

13 MS. MOODY: Right. I thought I was asking him that.

14 THE COURT: Pardon me?

15 MS. MOODY: I thought I -- I was directing that
16 question to him.

17 THE COURT: Oh, I'm sorry. Go ahead. I apologize.

18 MR. MOODY: So, I guess it's kind of different right
19 here.

20 So he wants to know why you didn't question the witness
21 as to the police report wherein the police report it said
22 that they called her asking if she saw any blood?

23 MR. POOLE: Could you bear with me just a minute?

24 THE COURT: Yes, sir.

25 (Pause.)

1 MR. POOLE: I'm looking at the trial notes under her
2 name. It looks like her direct testimony stated that she
3 saw a freezer door open, the front door opened, and that she
4 caught -- my note says called 9-1-1, and I do not recall
5 how -- the fact that she called 9-1-1 and was anyway
6 anything wrong with that.

7 THE COURT: Does that answer the question, Ms. Moody?

8 MS. MOODY: And beg the Court's indulgence. I'm trying
9 to find --.

10 (Pause.)

11 THE COURT: Uh-huh. (Affirmative).

12 MS. MOODY: I believe, Your Honor, if I may ask this.

13 As to the narrative from the police report that was
14 made on February 28th, 2006, do you see that?

15 MS. WHITE: Is that this one?

16 MS. MOODY: Yes.

17 So the question is why didn't you question her about
18 the, the blood, and I think he's -- this may have been
19 misread.

20 If I may read it into the record?

21 The -- Burgess stated I received my request from SLED
22 that SLED had a match to the blood I submitted from the B&E.
23 The suspect was John Willie Mack, black male. I spoke to
24 Ms. Moss by phone and it gives a phone number,
25 (864)621-7517, on February 28th, 2006, who stated she did

1 not know anyone by that name. Ms. Moss stated no should,
2 I'm assuming he left out one, no should have left blood on
3 the items that I processed. The warrants will be sought.

4 I guess he's saying that she must of known him.

5 MR. POOLE: She must of known him?

6 MS. MOODY: I guess because that's how I read this.

7 MR. POOLE: I take, I take a different interpretation
8 as that she did not know him.

9 MS. MOODY: Right.

10 And he's saying that she perjured herself.

11 MR. POOLE: I did not follow that line of thinking in
12 the trial.

13 MS. MOODY: Okay. So when you say you didn't follow
14 that line of thinking, from your knowledge, are you saying
15 that he indicated he did not know her?

16 MR. POOLE: In my conversations with him he, he said he
17 did not know her.

18 MS. MOODY: Okay. No further questions.

19 THE COURT: Any questions from the State?

20 MS. WHITE: Just on that same document, I will ask Mr.
21 Poole, in the first paragraph, if it's clear that it says
22 Ms. Moss told him that the items were missing, and then I,
23 referencing the officer, found blood on the entertainment
24 center on the book shelf and on the light switch?

25 MR. POOLE: That probably is the first indication and

1 the indication that the one who found the blood was the
2 officer --

3 MS. WHITE: Okay. Thank you.

4 MR. POOLE: -- in charge.

5 MS. WHITE: That's all I have, Your Honor.

6 THE COURT: I have reviewed the transcript in this
7 matter, and I can discern no deficiencies in Mr. Poole's
8 cross-examine of the -- cross-examination of the witness.

9 The record is completely devoid of any information that
10 would of been germane to impeaching her. I've not heard
11 anything that would rise to the level of perjury, especially
12 where Mr. Poole indicates his clients told him that he
13 didn't know her. So I've not heard any testimony that would
14 support that she actually knew him or that, in anyway, her
15 testimony, testimony was perjured or it was not based on her
16 rational perception of what took place in her residence.

17 He also alleges that there was a failure to make a
18 motion for a speedy trial. Again, I can not discern any
19 prejudice to him regarding that in that the issue at this
20 point is moot. He received a speedy trial -- he received a
21 trial in this matter, and, again, I can not discern any
22 basis upon which a speedy trial -- the only result he would
23 of gotten in a speedy trial motion would of been for the
24 trial to have been set, and Mr. Poole is testified that he
25 didn't make a motion because he was in constant

1 communication with the solicitor's office in terms of
2 selecting a mutually agreeable date for trial and they had
3 already been placed on a trial roster.

4 I do not find any merit in the argument that the trial
5 judge made an improper statement or jury instruction
6 regarding his prior record. One of the elements of burglary
7 is a prior burglary and the judge appropriately instructed
8 that it was for the limited purpose of meeting the elements
9 of the offense of burglary in the first degree, and that's
10 at Page 148 and 149 of the transcript, and that it was to
11 only be considered for that purpose, that it was not to be
12 evidence, you know, that he was not to suffer any prejudice
13 regarding that, that it was -- but it is appropriately an
14 element of burglary in the first degree. It is
15 appropriately admitted as evidence, and there's no basis for
16 his counsel to object regarding that and the jury charge was
17 appropriate.

18 His position is inaccurate. The Court charges all of
19 the elements of the statute and tells the jury that the
20 state has the burden of proving one of those elements. They
21 don't have to prove all three, and the purpose of an
22 indictment is to put you on notice as to what you're being
23 charged with and what you have to defend, and clearly the
24 statute was cited which puts you on notice, and as counsel
25 indicated, none of this came as any surprise because he knew

1 what the allegations were and he was ready and prepared to
2 defend against them.

3 I can not discern, in the record, any evidence of
4 misconduct on behalf -- by the solicitor's office in that
5 all information regarding the DNA analysis and testing was
6 turned over, and was went over with the Applicant with --
7 by -- with Mr. Poole.

8 I can not discern any evidence of any violation of his
9 due process rights. So no relief can be granted on that
10 grounds -- on that ground.

11 I think that covers all of his issues, does it not,
12 everything that he's alleged?

13 MS. MOODY: Yes, ma'am.

14 THE COURT: Therefore, he's failed to meet his burden
15 of proof and the motion -- application for post-conviction
16 relief is denied.

17 Ms. White will provide the Court with a proposed order
18 within 20 days of today. She'll do that in word format and
19 also copy Ms. Moody on, on that at the same time that she
20 submits it to the Court, and she'll make any findings of
21 fact and conclusions of law that are supported by the
22 record.

23 MS. WHITE: Thank you, Your Honor.

24 THE COURT: Thank you very much.

25 MS. MOODY: Thank you, Your Honor.

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* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh 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 Common Pleas for Spartanburg County, South Carolina, on the 14th day of January, 2015.

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

May 13th, 2015

A handwritten signature in cursive script, reading "Pamela E. Green", written over a horizontal line.

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

John Willie Mack, #257219,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2013-CP-42-2063

ORDER OF DISMISSAL

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Leah B. Moody, Esquire
Respondent's Attorney:	Suzanne H. White, Esquire
Trial Counsel:	J. Roger Poole, Esquire
Schmerber Motion Counsel:	William McPherson, Esquire
Date of Hearing:	January 14, 2015
Court Reporter:	Pamela E. Green

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed May 6, 2013. The Respondent made its Return on or about March 18, 2014. An evidentiary hearing into the matter was convened on January 14, 2015, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. J. Roger Poole, Esquire (Counsel) also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the transcript.

CLERK OF COURT
SPARTANBURG COUNTY
2015 APR 14 AM 8:30
M. HEPE BLACKEY

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2006 term of the Spartanburg County Grand Jury for Burglary–First Degree¹ (2006–GS–42–1167) and Grand Larceny² (2006–GS–42–1166). On September 12, 2008, the State moved to compel the Applicant to produce a DNA sample, pursuant to Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) before the Honorable Clifton J. Newman. At the Applicant's Schmerber hearing, he was represented by William McPherson, Esquire. At trial, the Applicant was represented by J. Roger Poole, Esquire (Counsel). On February 22, 2011, the Applicant proceeded to trial and was convicted of the charges by a jury. On February 23, 2011, the Honorable J. Derham Cole sentenced the Applicant, pursuant to S.C. CODE ANN. § 17–25–45(A) (2005), to life imprisonment without possibility of parole (LWOP) for Burglary–First Degree and a concurrent term of five (5) years' imprisonment for Grand Larceny.

The Applicant's Counsel filed a timely notice of appeal and brief on the Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Mack, Op. No. 2013–UP–161 (filed April 17, 2013), *available at* 2013 WL 8507869.³ The Remittitur was returned on May 7, 2013.

¹ "Burglary in the first degree is a [violent, most serious] felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen [(15)] years." S.C. CODE ANN. § 16–11–311 (2005); S.C. CODE ANN. § 16–1–60 (2005); S.C. CODE ANN. § 17–25–45 (2005).

² Grand Larceny is a felony punishable by a fine in the court's discretion or "ten [(10)] years [in prison] if the value of the personalty is five thousand dollars [(\$5,000.00)] or more." S.C. CODE ANN. § 16–13–30(B)(1) (2005).

³ A review of the subsequent history of the Applicant's appeal reveals that the Applicant did not petition for certiorari and review of the Court of Appeals' affirmance to the South Carolina Supreme Court. In his Application for Forensic DNA Testing, filed with the Spartanburg County General Sessions Court on September 27, 2012, the Applicant asserts that he awaits results of SLED's DNA test from his trial, pending the resolution of his ongoing

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CLERK OF COURT
SPARTANBURG COUNTY
2015 APR 10 AM 8:55
M. HOPES

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - i. Counsel failed to object to the amendment of the indictment,
 - ii. Counsel failed to object to the admission of DNA evidence when the State failed to produce tangible items or pictures of items swabbed,
 - iii. Counsel failed to object to Applicant's prior criminal history being presented to the jury,
 - iv. Counsel failed to thoroughly and properly examine a crucial prosecution witness to address her perjury,
 - v. Counsel failed to file a motion for a speedy trial,
2. Trial court error, in that;
 - i. The trial judge improperly stated that only one aggravating circumstance had to be proven,
3. Misconduct of Solicitor's office and law enforcement with regards to DNA evidence,
 - i. Brady violation because the State did not turn over the blood evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

appeals in the appellate courts. The Applicant challenges the DNA evidence as grounds for his collateral attack before this Court.

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HOSPITALITY
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Motion for Continuance

At the commencement of his PCR hearing, the Applicant requested a continuance of his evidentiary hearing pending the outcome of his Application for Forensic DNA Testing, filed with the Spartanburg County General Sessions Court on September 27, 2012. The Applicant alleged that the State told him they found his DNA in the CODIS system, but had yet to produce the results during the pendency of his PCR action. The Applicant also indicated that he believed his prior attorney William McPherson, Esquire, who argued his Schmerber motion and who currently lives in Texas, should be present for his evidentiary hearing.

The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citing Bridwell v. Bridwell, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983)). See Hudson v. Blanton, 282 S.C. 70, 74, 316 S.E.2d 432, 434 (Ct. App. 1984) (noting that in order to justify a continuance, a moving party must show the absence of some material evidence and due diligence on his part to obtain such evidence). Cf. Beasley v. Kerr-McGee Chem. Corp., 273 S.C. 523, 532, 257 S.E.2d 726, 730 (1979) (finding a movant failed to show due diligence to justify a continuance when he had eight months from filing of the complaint until trial to prepare). The bald assertion that the Applicant or his counsel were not ready to go forward and the Applicant was unprepared is not a sound basis for granting a motion for continuance. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996); Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2001) (“[T]he denial of a motion for a continuance on the ground that [a party] has not had time to prepare is rarely disturbed on appeal.”).

The Applicant claims that the DNA introduced at trial has bearing on his claim of

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[Signature]

CLERK OF COURT
SPARTANBURG COUNTY
2013 APR 29 AM 8:53
J. HIGGINS
BEASLEY

ineffective assistance of counsel and that the results of the DNA testing could rise to the level of after discovered evidence. The Applicant's DNA was found on a light switch, bookshelf, and entertainment center in the house that the Applicant allegedly burglarized. The Applicant explained that after his trial, he requested SLED re-test the evidence containing his DNA. The Applicant requests that the actual, physical items in the home where the burglary took place be re-tested, not the original DNA swabs. He further explained that Judge J. Derham Cole heard argument on his motion, but had not yet issued a final order in connection with his request.

This Court finds that the Applicant filed his Application for Forensic DNA Testing almost two (2) years ago and has since obtained counsel to represent him in his PCR matter. Further, the DNA issue dates back to the Applicant's trial in February 2011, over three (3) years before the instant PCR hearing. As of the hearing date, the Applicant and his attorney have not resolved the issue. Thus, the Applicant has failed to show good cause to continue this matter in the hopes of obtaining purportedly beneficial evidence and testimony. Further, as elaborated below, the test results of the physical items in the home have no bearing on the Applicant's burden of proving trial Counsel was ineffective. He further argues that counsel for his Schmerber motion William McPherson, Esquire, should be present for his evidentiary hearing. Mr. McPherson currently lives in Texas. However, the Applicant cannot show that Mr. McPherson would provide any relevant testimony supporting his grounds for relief. Additionally, the Applicant does not allege with any particularity that Mr. McPherson was deficient in his representation of the Applicant in the Schmerber motion. Therefore, the Applicant's motion for a continuance is denied. However, the Applicant is not prejudiced in any manner by the present action proceeding. Any findings by this Court regarding his PCR application will not preclude the applicant from pursuing additional relief available to him as a result of any additional

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findings regarding prevailing on any pending motion to retest the DNA.⁴

The Court allowed the Applicant the opportunity to state all relevant grounds regarding this issue on the record. Thereafter, the Court proceeded with the Applicant's evidentiary hearing.

Summary of Testimony

The Applicant testified that he was currently incarcerated at the South Carolina Department of Corrections Lee County Correctional Institute on charges of Burglary-First Degree and Grand Larceny. The Applicant testified that four (4) attorneys represented him, including various attorneys in the Seventh Circuit Public Defender's Office. The Applicant elaborated that James Cheek, Esquire, represented him on his bond hearing; William McPherson, Esquire represented him on his Schmerber motion; J. Roger Poole, Esquire (Counsel) represented him at trial; and LaNelle Cantey DuRant, Esquire was his appellate counsel. The Applicant testified that he waited five (5) years to go to trial.

The Applicant alleged that Counsel failed to object to the amendment of the indictment. However, he admitted that Counsel made a motion before Judge Cole to "squash it" for inaccurately reflecting the dates of offense between September 1, 2004 and September 6, 2005, but the judge denied his motion. The Solicitor made a motion to amend the indictment, which the trial court granted, but the Applicant believed that Counsel should have objected to or moved to quash the amended indictment.

The Applicant testified that he received a copy of the arrest warrant dated February 28, 2006, indicating that the Applicant's DNA was matched to blood found at the crime scene based on a CODIS hit. The Applicant testified that he believes the physical and tangible items needed to be tested or introduced at trial, included the light switch, bookshelf, and entertainment center.

⁴ Rule 29, SCRCrimP and S.C. Code Ann. § 17-28-100 (1976).

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The Applicant testified that the State introduced only the swabs with blood taken from the items, not any pictures of the items or the items themselves. The Applicant also testified that he believed there should have been an independent investigation of the swabs and DNA. The Applicant alleges the Solicitor's Office and law enforcement committed prosecutorial misconduct amounting to a Rule 5, SCRCrimP violation for failure to provide the Applicant the swabs themselves, the pictures of the items swabbed, the items themselves, and the items' locations in the home. The Applicant testified that law enforcement discovered a large amount of blood on the light switch, bookshelf, and entertainment center, but that the Solicitor's Rule 5 disclosure contained only the police report and never turned over the swabs or items. The Applicant claimed that if Counsel received additional evidence, he did not bring it to the Applicant's attention. The Applicant testified that he never received SLED's swabs and said that the swabs were not "his blood." However, he admitted that he saw the SLED DNA report. The Applicant testified that the defense's theory was that the perpetrator was "not me" and that he maintained his innocence. The Applicant alleged that the DNA evidence would conclusively prove that the burglar was "not me." He opined that obtaining an independent test of the items would discover new information and new facts undermining his conviction and supporting a motion for a new trial. As background for the Applicant's Grand Larceny charge, he stated that the victim and law enforcement discovered items such as jewelry and a laptop missing from the residence.

Prior to trial, the Applicant asked the State for the actual items, which request the State did not oblige. The Applicant testified that Counsel told him that they did not need the items at that point. The Applicant stated that law enforcement needed his DNA sample for comparison. The Applicant further testified that Counsel failed to request the items at the time of the trial. The

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Applicant further alleged that he wanted Counsel to object to the swabs coming into evidence, but during trial, Counsel said "you need to be quiet."

The Applicant testified that Counsel failed to object to the Solicitor publishing his prior record to the jury because the Applicant was unaware that he was also trying to combat his prior convictions at trial. However, he admitted that the court gave the jury a limiting instruction. The Applicant further testified that Counsel failed to effectively cross-examine the victim, LaRhonda Moss, as to her observations of blood in her home. The Applicant testified that he believes that her testimony contradicts the police report, which indicates that the police initially observed the blood, and that she perjured herself. The Applicant testified that Counsel failed to file a motion for a speedy trial. The Applicant then testified that the trial judge improperly stated to the jury that his charge was only one (1) of the elements the Assistant Solicitor was required to prove at trial. Finally, the Applicant claimed a violation of his constitutional due process rights.

Counsel testified that he inherited the case in 2009, two (2) years prior to trial, from two (2) prior attorneys, Karen Quinby, Esquire, and William McPherson, Esquire from the Public Defender's Office. Counsel testified that he received a copy of the prior attorney's notes, files, and all work product; however, he did not speak with the attorneys because they moved out of state. Counsel testified that he met with the Applicant numerous times at the detention center to discuss his charges, defenses, and the case in general. Counsel testified that he shared all discovery materials with the Applicant, including the SLED and police reports.

Counsel testified that originally he was hoping to work out a plea arrangement because the Applicant had been served with a notice that the State intended to seek a sentence of imprisonment without possibility of parole. Counsel testified that the Applicant had several cases pending at one time and that he was attempting to work the entire case out. Counsel testified that

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James Cheek, Esquire, then became involved and assisted him in plea negotiations. Counsel testified that the State extended three (3) offers for twenty (20) years; fifteen (15) years; and then a final offer for a plea to the Applicant's current charges in exchange for dismissal of the remaining charges and ten (10) years, respectively, all of which the Applicant rejected. Counsel testified the Applicant insisted on going to trial.

Counsel testified that the Applicant provided him some vague names of potential alibi witnesses, but Counsel was unable to locate any of the witnesses. He testified that because of the lapse in time between the date of offense in 2005 and his preparation for trial beginning in 2009, the Applicant provided only vague names and recollections and no contact information. Ultimately, the Applicant and Counsel had no idea what any potential witnesses might say.

Counsel testified that he was aware of the blood evidence on the scene and that the DNA was the Applicant's biggest issue and hurdle because the DNA at the scene matched the Applicant on the CODIS system. The State moved to confirm the CODIS match by compelling the Applicant to produce an additional DNA sample in 2008. Counsel testified that McPherson, the Applicant's prior attorney, objected to the State obtaining a Buccal swab from the Applicant; however, Judge Clifton Newman ordered the Applicant to provide a sample. When the SLED report came back a match, Counsel shared the report with the Applicant, even though he did not see the swabs or the items themselves. Counsel characterized the report as a typical SLED report including DNA analysis of each item.

Counsel testified that he reviewed the discovery, including the SLED and police reports and the whole case several times with the Applicant. Counsel testified that he spoke with Applicant a great deal about the DNA issue and discussed "probabilities." Counsel testified that he advised the Applicant that he could try to challenge how the Applicant's blood was left in the

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residence when cross-examining the SLED witness, but Counsel had no evidence that the testing was improper. Counsel elaborated that the two, usual SLED scientists and experts, Rhonda Fields or Manuel John Ortuno could testify as to their results, which consisted mainly of statistics and numerical information. Counsel explained that he could discern no basis to challenge such scientific evidence and that his only strategy to ameliorate the SLED analysis was to question the experts: "you don't know how the blood got there." Counsel considered the argument that he could question the experts about the five (5) day span of time, which was five (5) years ago to try to undermine the results before the jury. Counsel characterized his frustration: "I'm not smart enough, and I don't know who is, to take on DNA evidence." However, Counsel did explain what the DNA experts' testimony would be about to the Applicant.

Counsel explained to the Applicant that it would be highly uncommon to bring actual items with blood on them to enter into the record as evidence at trial. He testified that exposing the jury to those items would be a biohazard, but that the Applicant still wanted the State to produce them. Counsel obliged and asked the Solicitor whether the items were still in custody, but because it was "so late in the game," the actual items with the DNA on them probably no longer existed.

Counsel also testified that the Applicant never wanted to discuss calling an expert witness because the Applicant always wanted to discuss other issues. Counsel was wary of presenting an expert or having an independent test completed because Counsel was concerned that it could hurt the Applicant if the results were likely the same and the State's evidence was "doubled" by another confirmation of the Applicant's guilt. Counsel opined that that strategy is a "risk" and that he could not recall whether he discussed that strategy with the Applicant. Counsel testified

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that he did have an investigator with his office work with him on the case, but he did not ask the investigator to go view the residence where the burglary occurred and that Counsel personally did not go to the apartment to look at the light switch or other items. Counsel also testified that Officer Burgess misplaced the photos of the scene and blood, which Counsel believed worked in the Applicant's favor.

Counsel testified that the victim, Ms. Moss, had moved to Canada and the State requested to allow her to testify via SKYPE, which Counsel objected to. Counsel testified that he believed the Applicant was holding out hope that the victim would not appear for the trial; however, she came from Canada and testified at trial.

Counsel testified that he moved to quash the Burglary indictment because of the scrivener's error: the dates reflected a time frame of over one (1) year spanning 2005-2006. Counsel's argument was that the date of offense included in the indictment was too broad, but the court denied his motion. Counsel testified that the State then moved to amend the indictment, which motion was granted. Counsel explained that he had preserved error for appellate review by arguing his motion to quash the indictment. He further explained that in objecting to the State's motion to amend the indictment, he could not in good conscience object to the date range because he had no good faith argument that he and the Applicant were taken by "surprise." Rather, Counsel testified, he and the Applicant were aware of the error and the accurate date range—based on the argument he utilized during his motion to quash—and were ultimately prepared to defend the charges. Thus, Counsel explained, based on the procedural circumstances, he could not articulate any prejudice inuring to the Applicant.

Counsel testified that the Applicant was generally disposed not to testify on his behalf at trial. Counsel opined that the Applicant's prior record was "probably the compelling reason."

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However, Counsel further testified that the Applicant's decision whether to testify or not was "his decision, I left it up to him."

Counsel acknowledged that the case was old and he shared the Applicant's sentiment that he wanted it tried, but testified that he did not file a motion for speedy trial because he was in constant contact with the Assistant Solicitor, Barry Barnette, to set up a mutually agreeable trial date. Additionally, the Applicant's case languished on the docket because of the period of time the parties had to await SLED results following the Schmerber motion in 2008. Further, Counsel testified that the first time the Applicant's trial was set on the trial docket; he experienced a death in the family the night before and could not go forward at that time. Counsel offered that the victim's move to Canada presented logistics issues as well.

Counsel further opined that he could discern no basis to cross-examine, impeach, or question the victim about possible perjured statements. To the contrary, Counsel stated, the victim's demeanor was good and firm. Counsel testified that based on the police report narrative, dated February 28, 2006, which posed questions to the victim about the blood evidence, he understood that the victim did not know the Applicant. Counsel stated that at one point, there was some confusion about whether the Applicant claimed the victim knew him, but the Applicant finally said that he did not know the victim. Counsel clarified that the officer in charge of the crime scene investigation discovered the blood.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. This Court found the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations raised in the application and at the hearing.

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In a PCR action, "the burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant 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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See id. at 117-18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 301 S.C. 1, 10, 386 S.E.2d 624, 625 (1989).

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325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

The Applicant alleges he received ineffective assistance of counsel. This Court finds the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations. This Court finds Counsel is a criminal practitioner who has experience in the trial of serious offenses. This Court finds Counsel provided credible testimony during the Applicant's evidentiary hearing. Counsel conferred with the Applicant and discussed the pending charges, the elements of the charges and what the State was required to prove, the Applicant's version of the facts, the penalty ranges associated with the charged offenses, and the Applicant's defenses he could present at trial. The record also reflects that Counsel fully argued all motions on the Applicant's behalf and zealously advocate on his client's behalf.

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. This Court finds that the Applicant has failed to meet his burden of proof as to this claim.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992). Courts must be wary of second

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guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)). See Stokes, 308 S.C. at 548, 419 S.E.2d at 778–79 (finding counsel's decision not to call witnesses reasonable where their testimony would have been of no value to the case and witnesses were not credible); Abney v. State, 408 S.C. 41, 51, 757 S.E.2d 544, 549 (Ct. App. 2014) ("While trial counsel should consult with his client, the final decision on strategy belongs to counsel."); Moore v. State, 399 S.C. 641, 723 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551 (2004) ("Attorneys have a duty to consult with their clients regarding 'important decisions,' including questions of overarching 'defense strategy.' . . . This does not require counsel to obtain the defendant's consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights [to plead guilty, waive a jury, testify on his own behalf, or take an appeal] cannot be made for the defendant by surrogate").

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev'd on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court further finds Counsel adequately conferred with the Applicant and provided thorough representation. This Court finds that Counsel's representation did not fail

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that all of the surrounding circumstances must be weighed to make an accurate determination of whether the defendant was prejudiced by a lack of notice and an insufficient indictment).

Further, “[w]here time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred.” State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991). “In such a case, however, the indictment must show the offense was committed prior to the finding of the indictment.” Id. (citing State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939)).

In a post-conviction relief action, an Applicant challenging the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. CODE ANN. § 17-19-90 (2003) (“Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.”).

The Applicant was fully aware of the charges he was facing and suffered no surprise or prejudice by the court amending the Burglary indictment to reflect the correct dates of the offense.⁵ Based on Counsel’s credible procedural synopsis and a review of the record, Counsel properly moved to quash the indictment, which motion was denied (Tr. 6:2–9:2). The court questioned the Solicitor about the nature of his motion to amend and deduced that the indictments contained a scrivener’s error (7:15–8:2). In his motion to quash, Counsel argued that the period of time contained in the Burglary indictment September 1, 2005 through September 6, 2006, was overly broad and vague (Tr. 6:11–24). However, Counsel was required to argue that the Burglary indictment was insufficient based on the Grand Larceny indictment. Counsel

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accordingly argued that the Grand Larceny indictment, in contrast to the Burglary indictment, contained the time frame of September 1, 2005 through September 6, 2005 (Tr. 6:25–7:2). Implicit in Counsel’s argument was the assumption—which was confirmed based on the discovery in the Applicant’s case—that both the Burglary and Grand Larceny occurred at or around the same time.⁶ Counsel stated on the record that the defense had prepared its case on the offenses occurring during September 2005 (Tr. 7:9–14). The Court then granted the State’s motion to amend and the indictment was corrected to reflect the accurate time frame. Based on his ethical obligations as an officer of the court, Counsel could not propound a diametrically opposed argument, while utilizing his prior argument in order to challenge the amendment. Ultimately, Counsel properly challenged the indictments in accordance with the statutes and case law expounded above and preserved error for appellate review (Tr. 8:3–24).

This Court finds Counsel’s testimony credible that he and the Applicant were aware of the applicable time period based on the discovery turned over by the State and their trial preparations and thus suffered no surprise or prejudice sufficient to invalidate the indictment. This Court finds that after the amendment, the Burglary indictment sufficiently described the offense in order to provide the Applicant notice of the charged offenses. Therefore, this Court finds that the indictments are sufficient on their face, but for the scrivener’s error. Accordingly, this Court finds that Counsel was not ineffective in arguing his motion to quash. Similarly, this Court finds that counsel was not ineffective for failing to challenge the amendment of the indictments. The Applicant’s assignment of error is without merit.

⁵ This Court notes that the sentencing sheet on the Applicant’s Burglary–First Degree conviction contains the incorrect date of offense. However, the Applicant does not challenge this error on collateral review before this Court. This Court can discern no prejudice, as the error was clearly a scrivener’s error.

⁶ Although the Applicant was facing numerous different charges at the time he went to trial on the instant Burglary and Grand Larceny offenses, neither Counsel nor the Applicant raised the possibility that the indictments were insufficient for failing to accurately describe concurrent crimes. The Solicitor thereafter clarified any misunderstanding that the offenses did not occur at the same time (Tr. 7:24–8:1).

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Failure to Object to Admission of DNA Evidence

The Applicant alleges that Counsel was ineffective for failing to object to the admission of the DNA evidence based on his inability to enter the bloody items from the scene of the crime and the swabs themselves, or both. This Court finds that Counsel was not ineffective for failing to object to the admission of evidence regarding the blood swabs and DNA testing. This Court finds Counsel's testimony credible that he felt admission of the items themselves was highly unusual and a biohazard and that, based on the length of time between the offenses and the trial, the actual items and the blood on the items likely no longer existed. This Court further finds credible Counsel's strategy not to obtain an independent expert because of the risks of confirming the State's DNA match. This Court also finds that Counsel was not ineffective for failing to object to or attack the DNA testing methodology, the chain of custody, or the qualifications of the SLED experts. Counsel had no good faith or legal basis on which to challenge the testing. Based on this Court's review of the record, there is no indication that the DNA evidence was not properly preserved (Tr. 62-65; 89-90). Moreover, this Court finds that Counsel adequately cross-examined the SLED expert within the normal range of competency, especially considering his constraints regarding the uncontradicted certainty of the DNA results (Tr. 107:14-109:8).

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at

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693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

This Court further finds that Counsel was not ineffective for failing to obtain a dueling DNA expert or investigate the defense of invalidating the DNA evidence. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), *overruled on other grounds*, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385–86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521–22, 123 S. Ct. 2527, 2535 (2003).

Our Courts have repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant's mere speculation as to what a witness

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testimony would have been by itself cannot satisfy the Applicant's burden of showing prejudice. Id. (citing Glover, 318 S.C. at 498–99, 458 S.E.2d at 540). See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (“So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.”); Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066) (“Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

The Applicant has failed to provide this Court with any actual evidence tending to prove his assertions at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). Ultimately, the Applicant has failed to produce the putative witnesses and present their purportedly beneficial testimony at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant failed to produce any evidence or testimony to support his claim that an independent expert or that any additional investigation into the swabs themselves or the items from which blood was collected would have affected the outcome of his trial. The Applicant asserts that a re-testing of the actual items themselves, pursuant to his Application for Forensic DNA Testing, filed September 27, 2012, will show that his DNA does not match the blood found on the scene. However, the Applicant has failed to articulate any scientific or logical basis supporting his contention that a third testing of the evidence will reveal that the DNA is a match.

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The Solicitor already confirmed the CODIS match by obtaining an independent test by virtue of Judge Newman's Order for DNA Testing, filed January 23, 2008. This Court finds most compelling the SLED analyst's expert testimony that the probability of selecting a random, unrelated individual having the same DNA found at the scene matching the Applicant's profile was approximately one in 1.3 quadrillion individuals (Tr. 106:7-107:7). Based on the certainty of the scientific evidence presented at trial, this Court finds that the Applicant could not be prejudiced by Counsel's failure to offer putatively exculpatory physical evidence. The test results of the physical items in the home have no bearing on the Applicant's burden of proving trial Counsel was ineffective. Thus, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to further investigate the DNA evidence, subpoena potential witnesses, or obtain the swabs or items for admission at trial.

Failure to Object to Publication of Criminal History and Trial Court Error

This Court finds that Counsel had no basis to object to the State's publication of the Applicant's criminal history in order to satisfy the elements of Burglary-First Degree and the trial court instructed the jury on the current, prevailing, and accurate law applicable to the particular facts of the case (Tr. 146:19-150:9). The State published the Applicant's prior Burglary convictions in the form of a stipulation to the jury: Burglary-First Degree (Indictment Number 89-GS-42-2367), Burglary-Second Degree (Indictment Number 99-GS-42-0698), and Burglary-Third Degree (Indictment Number 88-GS-42-1248) (Tr. 116:1-18). The jury heard no further recitation of the Applicant's criminal record.⁷

⁷ The Applicant's criminal history includes three (3) charges for Burglary-Third Degree in 1999, Burglary-Second Degree, Violent in 1999, Burglary-Second Degree, Violent in 1999; however, the Applicant was not convicted of those Burglaries. The Applicant had a 1987 Criminal Domestic Violence, a 1988 Petit Larceny, a 1989 Petit Larceny, a 1994 Criminal Domestic Violence and Resisting Arrest, a 1995 Conspiracy to Distribute Cocaine, and a 1999 Grand Larceny. The Applicant's record also included a 1989 Burglary-First Degree, a 1999 Burglary-Second Degree, and a 1988 Burglary-Third Degree.

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“A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both.” S.C. CODE ANN. § 16-11-311(A)(2) (2005). The two prior convictions were an element of the crime for which Appellant was charged and the State was required to prove the two prior convictions in order to prove the element of the crime. See State v. Hamilton, 327 S.C. 440, 443, 486 S.E.2d 512, 513 (Ct. App. 1997). Moreover, the court instructed the jury that in considering the elements of Burglary–First Degree, they were precluded from considering possible penalty or punishment (Tr. 145:21–146). Ultimately, the Court charged the current, correct, and prevailing law applicable to the finite facts of the case and Counsel had no duty to object to the instruction. See State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (citing Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004); State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); State v. Adkins, 353 S.C. 312, 318–19, 577 S.E.2d 460, 464 (Ct. App. 2003)) (“[T]he trial court is required to charge only the current and correct law of South Carolina. . . . The law to be charged must be determined from the evidence presented at trial. . . . The substance of the law is what must be charged to the jury, not any particular verbiage.”). Furthermore, the Applicant was not prejudiced because the court included the appropriate limiting instruction, charging the jury that it could consider the Applicant’s prior Burglary conviction only for the limited purpose of finding one element of the offense beyond a reasonable doubt (Tr. 149:2–150:9). The court specifically instructed the jury that they could not consider the charge for any other purpose, including for the purpose of proving the Applicant committed the prior Burglary, for the purpose of establishing the Applicant’s bad character or

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for the purpose of concluding that the Applicant acted in accordance with prior bad conduct (Tr. 149:8–150:2).

Ineffective Examination of Witness

This Court finds that the Applicant has failed to meet his burden of proof of establishing that Counsel was ineffective in his cross-examination of the victim. The Applicant presented no testimony to support his claim that the victim committed perjury on the stand, particularly since the victim's testimony that she did not know the Applicant was consistent with Applicant's assertion that he did not know the victim. Further, the Applicant alleged that the victim perjured herself and Counsel's cross-examination was damaging to the Applicant's case. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778–79 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

The Applicant did not proffer any questions counsel allegedly failed to ask and did not present any testimony showing the witness' answers at trial would have been different. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). This Court finds credible counsel's testimony that the Applicant's demeanor was good and firm. Further, the Applicant's assertion that the victim perjured herself by lying about who discovered the blood is without merit. The

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transcript reveals that the victim's testimony that the responding officer found the blood—which he pointed out to the victim to discover—on her bedroom wall by the light switch, on the bookcase, and on the entertainment center is uncontradicted (Tr. 52:25–53:11). Therefore, Counsel need not have further questioned the victim on this subject. Upon review of the record, this Court finds no deficiencies in Counsel's cross-examination and can discern no information germane to impeaching the victim's credibility, proving her perjury, or regarding her non-existent relationship with the Applicant. Further, Counsel followed the directives of his client—who asserted that he did not steal jewelry from the victim—and cross-examined the victim about the items she alleged were stolen (Tr. 54:11–58:13). Accordingly, the Applicant has not proven that a different approach to cross-examination would have been beneficial to the defense.

Failure to File Motion for Speedy Trial

The Applicant asserts that Counsel was ineffective because the Applicant sat in jail for five (5) years before his case was called to trial and Counsel never filed a speedy trial motion on his behalf. "The right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." Beavers v. Haubert, 198 U.S. 77, 87, 25 S.Ct. 573, 49 L.Ed. 950 (1905). "A speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay." Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966). The court should balance factors including "the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered." State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012). The speedy trial clock does not begin to run "[u]ntil there is some delay which is presumptively prejudicial." Barker v. Wingo,

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407 U.S. 514, 530, 92 S.Ct. 2128, 2182 (1972). See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct. App. 2007) (applying abuse of discretion standard to speedy trial claim).

Finally, this Court finds that the Applicant failed to meet his burden of proof of establishing he suffered any prejudice relating to Counsel's failure to file a motion for speedy trial. This Court finds credible Counsel's testimony that a speedy trial motion would not have been applicable in the Applicant's case because he and the Assistant Solicitor were in constant contact seeking to agree upon a mutually agreeable trial date. This Court can discern no evidence that the Applicant's case languished at the behest of the Solicitor and to the ignorance of Counsel. See Langford, 400 S.C. at 440–41, 735 S.E.2d at 481. Furthermore, the Applicant could not be prejudiced by Counsel's failure to move for a speedy trial—the remedy associated with a speedy trial motion is to set the case for trial on a trial docket. Counsel credibly testified that the Applicant's case was, in fact, set on a trial docket, but due to various innocuous scheduling conflicts on behalf of both the Solicitor and Counsel—including transporting the victim from Canada and a death in Counsel's family on the eve of trial—the Applicant's case was continued from term to term. Therefore, this claim is denied and dismissed.

Prosecutorial Misconduct and Brady Violation

"A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963); State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment

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evidence as well as exculpatory evidence. Id. (citing United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985)). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 388–89, 434 S.E.2d 266, 267–68 (1993). “Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Id.

This court finds that the Applicant’s Brady rights were not violated. The Applicant failed to prove that the Solicitor’s office or law enforcement suppressed any evidence. This Court finds that the Applicant failed to prove any misconduct on behalf of either the Solicitor’s office or law enforcement. This Court finds the testimony of Counsel credible that the State turned over all discovery materials which he reviewed with the Applicant. Therefore, this claim is denied and dismissed.

All Other Allegations

As to any and all allegations that the Applicant raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations, which are denied and dismissed.

CONCLUSION

This Court finds in regards to the allegations of ineffective assistance of counsel, Applicant’s testimony as a whole was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel’s conduct does not fall below the objective standard of reasonableness. This Court finds that the Applicant failed to meet his burden of proof to support

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J. HOPE BLACKLEY

his claims. Therefore, they are denied and dismissed.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by Counsel's representation. See id. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

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

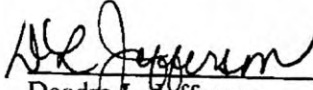
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 454, 409 S.E.2d 395, 396 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, 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. The Applicant's attention is directed to South Carolina Appellate Court Rule 203 for appropriate procedures for appeal.

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CLERK OF COURT
SOUTH CAROLINA
APPELLATE COURT

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 Respondent.

AND IT IS SO ORDERED this 6th day of April, 2015.


Deadra L. Jefferson
Presiding Judge
Seventh Judicial Circuit

Charleston, South Carolina
At Chambers

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SPARLAND COUNTY
2015 APR 10 AM 8:53
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

April 10, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

John Willie Mack
Applicant # 257219

7TH JUDICIAL CIRCUIT

CASE # 20130942-2063

CERTIFICATE OF SERVICE

VS
State
Respondent

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated April 6, 2015 on April 10, 2015

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Deanne White
Abby Haeberle
Heath Moody

April 10, 2015
(Date)

Corie Seef
(Signature)

STATE OF SOUTH CAROLINA

COUNTY OF SPARTINBURGJOHN W. MACK, SCDC # 257219

Name of applicant and Inmate number (if applicable)

OR

IN THE INTEREST OF

Juvenile

v.

State of South Carolina

) IN THE COURT OF (Select one)
) ☒ GENERAL SESSIONS
) ☐ FAMILY COURT
) JUDICIAL CIRCUIT

) APPLICATION FOR
) FORENSIC DNA TESTING

) ORIGINAL INDICTMENT NO.
) 2006 -GS- 42 - 1167

) OR
) ORIGINAL PETITION NO.

) -JU-

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INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may continue an 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 end 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 or adjudicated.

I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

1. Identify the proceedings in which the applicant was convicted or adjudicated:

February 22-23, 2011, Applicant went to trial before Judge Derham Cale for
Burglary First Degree and Grand Larceny. (16-11-0311)

2. Give the date of the entry of the judgment and sentence: February 23, 2011

Judgment: Guilty -- Sentence: Life

and current place of incarceration: Lee Correctional Institution, Bishopville, S.C.

3. Identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication:

(a) (Ongoing) Appeal in the Appellate Court

(b) _____

(c) _____

4. Make a reasonable attempt to identify the physical evidence or biological material that should be tested: All physical tangible evidence: lightswitch, bookshelf,

and entertainment center.

Identify the specific type of DNA testing being sought:

Blood comparison is being sought of physical tangible item and blood from

Applicant.

5. Explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity:

Blood swabs were stated to be identity of Applicant, however, there

was not any pictures showing the location where stated blood swabs were

said to have come from and there was not any tangible items where stated

blood swabs were taken from ... during court proceedings.

6. Explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result:

DNA testing was done on swabs sent to SLED by Inv. John Burgess. SLED did

not swab and conduct a DNA test on the lightswitch, bookshelf, or enter-

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SPRING COUNTY
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tainment center. A DNA test done on the tangible evidence will show pro-
bative results. There were two different forensic analyst from SLED with
different information. See attached: two forensic analysis reports.

7. Explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching:

This dispute of DNA testing being done on the tangible items [lightswitch,
bookshelf, and entertainment center will constitute new evidence because
pictures were said to be lost that were to show blood swab location(s).

8. I assert that I am actually innocent of the listed offense, that this offense is listed in S.C. Code Ann. § 17-28-30 and that I am currently incarcerated for the listed offense. I attest that this application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

9. If DNA testing is conducted and results are determined to be inculpatory by the Court, I understand that:

- ✓(a) The Court may hold me in contempt of court if it determines that my assertion of actual innocence was intentionally false;
- ✓(b) The Court may assess the cost of any DNA testing against me;
- ✓(c) The South Carolina Department of Corrections may use this determination to deny good conduct credit; and,
- (d) The Department of Probation, Parole, and Pardon Services can use this determination to deny parole.

JOHN WILLIE Mack Jr

Print Applicant Name

Mr. John W. Mack, #257219
 Lee C.I. - Kershaw S. 1118
 990 Wisacky Highway
 Bishopville, SC 29010-1775

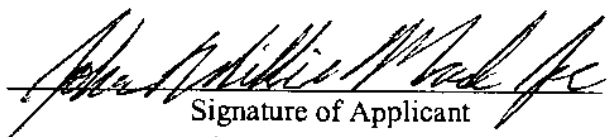
John Willie Mack Jr
 Signature of Applicant

STATE OF SOUTH CAROLINA

County of Lee

VERIFICATION

I John W. Mack, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; and that the matters and allegations set forth are true.


 Signature of Applicant

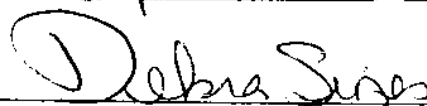
John W. Mack, # 257219

Lee C.I. - Kershaw S. 1118

990 Wisacky Highway

Bishopville, S.C. 29010-1775

SWORN to and subscribed before me this 24
 day of Sept., 2012.


 Notary Public (L.S.)

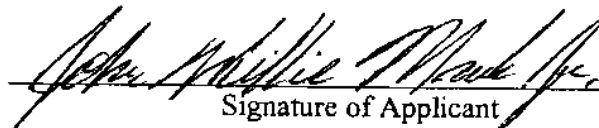
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 M. HOPE BLACKLEY

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, John W. Mack, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- ✓(1) I am the applicant in this action and I believe I am entitled to redress.
- ✓(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Signature of Applicant

John W. Mack, #257219

Lee C.I. - Kershaw S. 1118

990 Wisacky Highway

Bishopville, SC 29010-1775

SWORN to and subscribed before me this 24
day of Sept., 2012


Notary Public (L.S.)

My Commission Expires: 11-4-2015

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5 John Willie Mack,) 2006-GS-42-1166;1167
6 Defendant.) October 31, 2014
7) Spartanburg, South Carolina

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9
10 B E F O R E:

11 HONORABLE J. DERHAM COLE, JUDGE
12
13

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

15 BARRY JOE BARNETTE, ESQUIRE
16 ANTHONY C. LEIBERT, ESQUIRE
17 Attorneys for the State

18 LEAH B. MOODY, ESQUIRE
19 Attorney for the Defendant
20
21

22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

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Motion -- page 4.

No sworn testimony.

1	<u>EXHIBITS</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
3	S-1	Transcript dated September 12, 2008	12	
4	S-2	Transcript dated February 22, 2011	12	
5	S-3	Final brief	12	
6	S-4	Final brief	12	
7	S-5	Appeal	12	
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1 THE COURT: We're here in the matter of John W. Mack.
2 This is a hearing pursuant to Section 17-28-90.

3 You're John Mack?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Ms. Moody, you represent Mr. Mack?

6 MS. MOODY: Yes, sir, Your Honor.

7 THE COURT: Mr. Leibert and Solicitor Barnette are
8 here on behalf of the state. All right.

9 MR. LEIBERT: Your Honor, may I give you a very brief
10 background of the case that brought us to this point?

11 THE COURT: Sure.

12 MR. LEIBERT: Indictments No. 2006-1166 for grand
13 larceny and 1167 for burglary first went to trial before
14 Your Honor on February 22nd and 23rd of 2011.

15 The jury found him guilty, and it was pursuant to
16 LWOP. You gave him natural life as to the 1167 and five
17 years concurrent on 1166.

18 It was affirmed by the Court of Appeals on April
19 17th of 2013. They heard oral arguments on the matter. It
20 was an unpublished opinion.

21 Mr. Mack had Roger Poole at that trial.

22 He then filed this pro se application on the 24th of
23 September of 2012. He was initially appointed Christopher
24 Brough. He asked that Christopher Brough be relieved. He
25 was.

1 The public defender's office was appointed. They
2 asked to be relieved because there's a P.C.R. pending. And
3 Ms. Moody had been appointed on the P.C.R. And there's a
4 provision in the act, No. 17-28-10, that says if appointed
5 counsel on the P.C.R. should be appointed on this.

6 Essentially, what he's asking for in No. 4 of his
7 application is he wants the light switch, the bookshelf and
8 the entertainment center.

9 Now, what happened in that case -- and Your Honor
10 heard the trial, and I know it's a thousand cases ago --
11 but they swabbed the light switch, the entertainment center
12 and the bookshelf.

13 It was three years later after that was sent to SLED
14 that they actually got a CODUS hit, and then we did a
15 confirmatory test that he opposed. And that's one of the
16 exhibits you have on the short transcript. And that -- but
17 that's what brings us here.

18 It's been affirmed on appeal. There's a P.C.R.
19 pending.

20 And in his application under actual innocence he's
21 asking apparently for those actual items. Those actual
22 items were never taken. And the D.N.A. was one in 1.3
23 quadrillion that it could be an unrelated individual. And
24 that was explained in the trial, that that would be
25 6 billion people on earth. And if there was 400,000 for

1 each person that would be 1.3 quadrillion.

2 So there's one provision under 17-28-90 that pretty
3 much is whether there should be D.N.A. testing, or there's
4 that one provision -- I think No. 6 -- that says if there's
5 already been some D.N.A. testing chances of it being more
6 probable with that. That's not the case here.

7 So that's what bring us to this point. The solicitor
8 is going to make a legal argument after he presents,
9 Mr. Mack presents, his case or what he has to prove under,
10 I believe, 28-90. Thank you, Your Honor.

11 THE COURT: All right. Ms. Moody.

12 MS. MOODY: Thank you, Your Honor. May it please the
13 Court.

14 I believe the recitation of the proceedings prior to
15 this are correct as the state says.

16 As I have spoken with my client briefly before Your
17 Honor took the bench, I confirmed whether or not he wanted
18 actual testing of the blood swabs that were taken from that
19 apartment on that day in 2005, and he informs me that he
20 would like to have the actual items tested, which would be
21 all physical, tangible items that were not taken into
22 possession by the state -- well, law enforcement at that
23 time -- the items being the light switch, the -- and I'm
24 saying the actual light switch or referring to it as I read
25 the transcript. It is the area next to the trans -- excuse

1 me -- the light switch.

2 THE COURT: Excuse me. It's the what next to the
3 light switch?

4 MS. MOODY: It's like the sheetrock, the wall.

5 THE COURT: The wall.

6 MS. MOODY: Portion of the wall would be the
7 appropriate request in terms of the light switch.

8 THE COURT: All right.

9 MS. MOODY: The bookshelf as well as the entertainment
10 center.

11 And I believe the testimony that came from the trial
12 indicated that the original investigator, the first officer
13 on the scene that actually processed the scene, he was the
14 person that swabbed the blood from each of those locations
15 in that particular apartment.

16 He came to the trial, and he testified on the record
17 that there were pictures taken. Those pictures however
18 were lost by the time the state took this case to trial.

19 With that, he testified how he removed the blood or
20 swabbed the blood from the bookshelf, the entertainment
21 center, and the area next to the light switch.

22 From there, Your Honor, he had those items put into
23 BEST evidence bags, and they were taken to SLED.

24 Again, my client states that he's never gotten to see
25 the pictures because they were lost. And he didn't get to

1 see the actual items. And he's saying that he is actually
2 innocent and that it was not him.

3 I believe on appeal Ms. LaNelle DuRant -- and I
4 believe the Court has a copy of that appeal brief from his
5 appeal -- Ms. LaNelle DuRant indicated that -- well, there
6 were no objections in the record, but she challenged the
7 D.N.A., and she challenged it for the specific fact that
8 there was no one else to testify that he was in the actual
9 apartment on that day and that that was an error.

10 And at this time, Your Honor, I would offer my client
11 to be able to tell you more distinctly what else he would
12 ask the Court to do in terms of this application.

13 THE COURT: well, I don't need to hear from him. I
14 just need to hear from his lawyer, which is you.

15 MS. MOODY: Yes, sir.

16 THE COURT: That's what he is requesting? I mean,
17 that's what he --

18 MS. MOODY: well, he's requesting testing of those
19 tangible items.

20 THE COURT: All right. Mr. Barnette.

21 MR. BARNETTE: Thank you, Your Honor.

22 I believe -- and I agree with Mr. Leibert from there.
23 These items were -- basically, the testing was done. Those
24 items have been introduced. Actually, they're still in the
25 record -- 1.1 and 1.2 was actually tested in this case,

1 Your Honor, and came back, the result, showing an absolute
2 match that this was the defendant's blood from that
3 standpoint.

4 To ask the Court now to go back and get the actual
5 items would be impossible from this standpoint. Obviously,
6 it was years ago. The victim actually moved shortly after
7 that. She'd actually moved to Canada. We'd actually
8 brought her back from Canada to testify in this case, Your
9 Honor.

10 And, basically, No. 6, the physical evidence of
11 biological materials sought to be tested, was not
12 previously subject to D.N.A. testing. It was. That was
13 collected. A swab was collected from there, Your Honor.

14 And it says to grant this you'd have to find a more --
15 substantially more probable result. You're not going to
16 find a more probable result than what was found in this
17 case. John Ortuno from SLED testified to that, Your Honor,
18 in this case.

19 And I believe this is just an effort. I've handed a
20 case up, Your Honor. I don't know if there's any case law
21 on this section in South Carolina, Your Honor, but I did
22 look up. And our Supreme Court in 2009, Your Honor, heard
23 the issue. The case was district attorney -- District
24 Attorney's Office for the 3rd Judicial District vs.
25 Osborne, Your Honor. It's cited as 557 U.S. 52, 129 South

1 Carolina Reporter 2308, Your Honor, in that case.

2 And they do not have a statute in Alaska like we do
3 here. However, the Court talked if you look on page eight
4 of that opinion -- talked about the requirements and
5 mentioned our statute, South Carolina Code Section
6 17-28-40, where they must -- the state impose a range of
7 diligent requirements. Several require that testing could
8 not be technologically impossible at trial. Well, it was
9 possible at trial.

10 This is a situation -- and the D.N.A. testing has not
11 changed. We do S.T.R. testing in D.N.A. And we used it
12 then and still use it today, Your Honor. So nothing's
13 changed from there, Your Honor.

14 And one thing the Court talked about. In this case
15 the client tried to use a 1983 action as a discovery
16 mechanism to try to get the actual items so he could test
17 them like what this individual is trying to do here. Of
18 course these items do not -- do no longer exist.

19 And the pictures being missing was brought out at the
20 actual trial, Your Honor, and that was discussed in front
21 of the jury from that standpoint. So there was no
22 prejudice in that standpoint.

23 The concern I've got is the same concern that Justice
24 Alito had in the opinion on page 16, and basically the
25 problem with this kind of allowing this D.N.A. testing to

1 just run rampant, to just do it -- and the defendant has
2 received a life sentence. He got an LWOP based off his
3 prior record.

4 It says then after conviction with nothing to lose the
5 defendant could demand D.N.A. testing and hope that some
6 happy accident, for example, the greater contamination of
7 the evidence, provide a basis for seeking post conviction
8 relief. Denying the opportunity for the subject to attempt
9 to gain the justice system should not shock the conscious
10 of the Court.

11 That's basically he's reaching for straws. He's
12 trying to do anything he can. This is a perfect example,
13 and that's what Justice Alito was talking about in this
14 opinion, Your Honor.

15 We would ask for this application to be denied, Your
16 Honor. He has not shown any basis for that.

17 I do have several exhibits to hand up in support of
18 our position, Your Honor.

19 State's Exhibit 1. Let me make sure. Ms. Moody I
20 think's seen all of these, but I just want to make sure.
21 State's Exhibit 1, Your Honor, is actually the hearing that
22 was held in front of Judge Newman on September 12th of 2008
23 where we had received a CODUS hit concerning the defendant
24 and we went to get a confirmatory test to have that buccal
25 swab taken that was tested by SLED.

1 State's Exhibit 2, Your Honor, is the actual trial
2 that was held in front of Your Honor back on
3 February 22nd and 23rd of 2011. It contains all of the
4 testimony concerning in that case.

5 State's Exhibit 3, Your Honor, and State's Exhibit 4
6 is the -- State's Exhibit 3 is the brief of the appellant,
7 John Mack, that was done in front of the Court of Appeals,
8 Your Honor. State's Exhibit 4 is the respondent's brief --
9 the brief -- respondent's brief concerning that, Your
10 Honor.

11 And State's Exhibit 5 is where the decision was
12 affirmed.

13 And Ms. Moody is correct. The D.N.A. testing was
14 talked about by Ms. -- by Attorney DuRant in that case,
15 Your Honor. And obviously the Court of Appeals has heard
16 that matter before.

17 I'd like to enter this in the record, Your Honor, and
18 make it a part of the record and the facts in this case
19 from the state's presentation.

20 May I approach the bench, Your Honor?

21 THE COURT: Yes.

22 MS. MOODY: Without objection, Your Honor.

23 MR. BARNETTE: Could I have one second, Your Honor?

24 (Pause.)

25 (Transcript dated September 12, 2008, marked State's

1 Exhibit No. 1; transcript dated February 22, 2011, marked
2 State Exhibit No. 2; final brief marked State Exhibit No. 3;
3 final brief marked State Exhibit No. 4; appeal marked State
4 Exhibit No. 5.)

5 MR. BARNETTE: Thank you, Your Honor.

6 MS. MOODY: Your Honor, if I may address the Court.

7 My client tells me that he requested -- there was a
8 notice of appearance and request for discovery that was
9 filed by Kim [sic] Qimbly [sic] from the Spartanburg County
10 Public Defender's Office on March 3rd of 2006. And I
11 believe what he's alleging here is that he requested this
12 information about the D.N.A. or the items that were
13 collected from the -- the apartment location, that being
14 the bookshelf, the entertainment center and the portion of
15 the wall next to the light switch.

16 His -- I guess his position if I'm -- if I'm stating
17 this correctly is that he requested it. And he feels that
18 it's a violation of his Rule 5 motion that was submitted to
19 the state during that time when they did not choose those
20 items.

21 And, again, I'm making -- I would like to make this
22 clear for the Court that the swabs that were taken from
23 those items, he is not requesting those. He's actually
24 requesting the tangible items. And he wants this to be a
25 part of his application that he made a request pursuant to

1 Rule 5.

2 THE COURT: All right. Solicitor, did I understand
3 you to say earlier that these items are no longer
4 available?

5 MR. BARNETTE: The actual physical items I would not
6 think so, Your Honor, because that's from 2006. And he
7 wasn't arrested until 2009 when we had the CODUS hit from
8 that situation.

9 And this person's moved. It's been rerented. I'm
10 sure it's been repainted and recleaned and whatever. I
11 mean, it's been eight years ago.

12 Now, the actual swabs are still available that was
13 swabbed from those items.

14 THE COURT: Okay.

15 MR. BARNETTE: And, Your Honor, the problem I've got
16 now is that -- no reflection on Ms. Moody because she's
17 representing her client -- but seems like when we -- one
18 avenue's blocked, he's decided to change and go a different
19 direction.

20 Now he's going back and saying Karen Quimby didn't do
21 this or did that for him. So now he keeps changing. This
22 is a perfect example of a defendant trying to gain in the
23 system and just try hopefully gets lucky that he can punch
24 clear at some point, because obviously when he's not happy
25 with attorneys he decides he wants to try to get rid of

1 them or whatever. He had, I think, Mr. McPherson for the
2 swab hearing, and he actually had Mr. Poole for the trial
3 hearing.

4 So no reflection on Ms. Moody, but obviously this
5 defendant keeps trying to gain in the system by changing
6 his position consistently.

7 THE COURT: All right. Anything else?

8 MS. MOODY: Well, I will just -- I'm not saying that
9 Karen Quimby -- he's not filed a P.C.R. application against
10 Ms. Quimby. He's not alleging that Ms. Quimby didn't do
11 anything.

12 His position is simply that when requested for those
13 items the state didn't turn those items over for his own
14 independent testing. And I believe under the statute if
15 he -- if you were to grant him independent testing under
16 section -- excuse me -- 17-28-90(c)(d) that if there was
17 any kind of independent testing they would have to
18 cooperate with SLED in performing those tests.

19 MR. BARNETTE: Your Honor, if I could just -- I
20 apologize. I just want to make sure.

21 So he's saying that Karen Quimby asked for independent
22 testing back then? I don't remember independent testing
23 being asked at any point in this trial or in this case.
24 And I think Mr. Leibert wants to elaborate on that.

25 MS. MOODY: That's not what I'm saying. I

1 keep confusing --

2 MR. BARNETTE: Okay. I'm sorry. I just --

3 MS. MOODY: I'm not trying to confuse it. I'm just
4 saying that a motion was filed. The person, his lawyer at
5 the time, was Ms. Quimby. And she filed that motion. And
6 his position is that at the time that she filed it those
7 things should have been turned over to his attorney for
8 them to do independent testing.

9 Whether or not that was discussed, he has not told me
10 that, that it was discussed at that time. And I'm quite
11 sure it wasn't discussed at the time that she filed the
12 motion. I'm not sure whether it was discussed at the trial
13 phase, whether they wanted to do independent testing.
14 That's --

15 THE COURT: All right. Well, does the record reflect
16 that, or is there any record to reflect that Ms. Quimby
17 asked the solicitor to turn over those three items to her
18 for independent testing?

19 MS. MOODY: No, sir, Your Honor. I don't have
20 anything such as a transcript. Nothing of that nature.

21 THE COURT: Well, is there any discovery requests in
22 that regard?

23 MS. MOODY: This is just the request for the discovery
24 for all evidence. And he's saying that -- his position, he
25 think that -- his position is that he thinks that there

1 is -- it is exculpatory evidence in that it's not -- he was
2 not the person, it was not his blood.

3 THE COURT: I see. Okay.

4 MR. BARNETTE: And, Your Honor, just to clear the
5 record.

6 I think what they're talking about is the standard
7 Rule 5 that obviously -- and the problem I've got is
8 there's not been any exculpatory evidence shown in this
9 case. All of it has been inculpatory from the D.N.A.
10 testing. Thank you, Your Honor.

11 THE COURT: All right. I will review the record, as
12 well as the applicable law and statutes. And while I'm
13 doing that I'm going to ask each of you to prepare me
14 proposed orders.

15 Ms. Moody, you'll prepare one granting his request
16 based upon appropriate facts and the law. The state will
17 prepare one denying that request based upon the appropriate
18 facts and the applicable law.

19 Okay. And then I'll make that determination.

20 END OF REQUESTED TRANSCRIPT OF RECORD

21

22

23

24

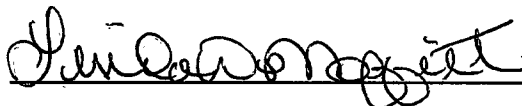
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh 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 trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 31st day of October 2014.

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

July 1, 2015

A handwritten signature in cursive script, appearing to read "Linda D. Moffitt", written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG)

ORDER ON APPLICATION FOR
FORENSIC DNA TESTING

The State)

2006-GS-42-1166

vs.)

2006-GS-42-1167

John Mack)

RECEIVED

MAR 14 2022

S.C. SUPREME COURT

Date: October 31, 2014
 Judge: Honorable J. Derham Cole
 Court Reporter: Linda Moffitt
 Solicitor: Barry J. Barnette
 Asst. Solicitor: Anthony Leibert
 Atty. for the Defendant: Leah Moody

This matter was heard on October 31, 2014, pursuant to the Application for Forensic DNA Testing under §17-28-10, SC Code of Laws (1976, as amended).

The Defendant filed this action *Pro Se* on September 24, 2012.

FACTS AND PROCEDURAL HISTORY

Between September 1, 2005 and September 6, 2005 the Defendant broke into LaRhonda Moss' home and stole her television, computer, CD charger, and jewelry.

After a long Labor Day weekend, Moss returned to her home and immediately realized someone broke into her house through her bedroom window. Defendant's blood was found in three places in Moss' house: 1) on the entertainment center where Moss' television was stolen; 2) on the light switch near the window in the bedroom where Appellant broke into the house, and; 3) on the bookshelf in the hallway. Moss testified that the blood found in her house was not in her house prior to September of 2005.

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22

Investigator Burgess took swabs of the blood found in all three sites and sent it to SLED for DNA testing.

Manuel John Ortuno, a forensic DNA analyst from SLED, testified that he examined the DNA from the blood swabs taken from Moss' house and determined that the DNA belonged to the same unknown individual. On February 10, 2006, there was a CODIS (combined DNA index system) hit identifying Defendant. On April 1, 2009 Investigator Burgess collected a buccal swab from Defendant and sent the swab to SLED for DNA testing.

On October 20, 2009, Ortuno compared the DNA from the blood swabs from Moss' house to the DNA from Defendant's buccal swabs. Ortuno concluded that the DNA samples collected from Moss' house originated from Defendant. Furthermore, Ortuno testified that the probability of randomly selecting an unrelated individual having the same DNA profile matching the DNA found in Moss's house was approximately one (1) in 1.3 quadrillion individuals.

At trial, both Moss and Max Ballard, who was Moss' landlord, testified that they did not know Defendant, and they did not give Defendant consent to enter Moss' house.

On February 22-23, 2011, Defendant proceeded to trial before the Honorable J. Derham Cole. At the end of the trial, the jury found Defendant guilty as charged. Judge Cole sentenced the Defendant to the mandatory sentence of life without possibility of parole based upon Defendant's prior conviction for first-degree burglary.

On April 17, 2013, the South Carolina Court of Appeals affirmed Defendant's conviction. (Op. No. 2013-UP-161)

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The Defendant's PCR action is currently pending in which Leah Moody, Esquire was appointed to represent Defendant. Pursuant to §17-28-60, SC Code of Laws (1976, as amended), Ms. Moody was appointed to represent Defendant in this action as well.

DISCUSSION

It appears to be the Defendant's position that he is entitled to relief because the State did not actually take physical custody of the light switch in the victim's residence, as well as her entertainment center and bookshelf. At trial, Investigator Burgess testified that those three (3) items were processed and the samples sent to SLED for DNA analysis. The results were then entered into CODIS. SLED received a CODIS match identifying the Defendant as a match. A confirmatory test, which Defendant opposed, was ordered and those results also matched the Defendant's DNA. At trial, the Defendant did not raise the issue of wanting the actual items produced.

As stated above, the probability of a random individual other than Defendant matching the DNA results is 1 in 1.3 quadrillion. SLED agent John Ortuno testified at trial that quadrillion is 15 zeros, billion is 9 zeros, and trillion is 12 zeros. Agent Ortuno went on to explain that to reach the number of 1.3 quadrillion, you would have to count every individual on the planet 400,000 times.

In the case of District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009), the United States Supreme Court held that "... after conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident - for example, degradation or contamination of the evidence - would provide the basis for seeking post-conviction relief. Denying the opportunity for such an attempt to

game the criminal justice system should not shock the conscience of the Court."

CONCLUSION

The items Defendant is seeking to be tested were previously subjected to DNA testing and further testing would not provide a more probative result. Defendant's application does not state a sufficient basis for this court to grant relief under this Act.

Accordingly, the Defendant's application is:

DENIED.

Dated 5/18/15


J. Derham Cole
Judge of the Seventh Judicial Circuit

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M. HOPE BLACKLEY

2015-CP-42-3806

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

JOHN W. MARK SR #257219

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (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 thereon 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 LEE CORRECTIONAL INSTITUTION 990 WISACKY
2. Name and location of Court which imposed sentence BETHLEHEM S.C. 29010
3. Name(s) of co-defendant(s) (if any) THE SEVENTH CIRCUIT COURT OF SPARTANBURG COUNTY
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) BURGLARY FIRST-2006-GS-42-1167
 - (b) GRAND LARCENY-2006-GS-1166
 - (c) -----
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) FEBRUARY 23, 2011 LIFE, BURGLARY FIRST
 - (b) FEBRUARY 23, 2011 FIVE (5) YEARS FOR GRAND LARCENY

Revised 3/2003

MAILED
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more

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY
CLERK OF COURT
SPARTANBURG COUNTY
2015 AUG 28 AM 9:11
M. HOPE BLACKLEY

6. Check whether a finding of guilty was made:

- 326 (a) after a plea of guilty _____
(b) after a plea of not guilty ✓
(c) after a plea of nolo contendere _____

Did you appeal from the judgment of conviction or the imposition of sentence?

YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. THE COURT OF APPEALS OF SOUTH CAROLINA

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. THE COURT OF APPEALS AFFIRMED CONVICTIONS

ii. _____

iii. _____

(c) the date of each such result:

i. AFFIRMED APRIL 17, 2013

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. AFFIRMED PURSUANT TO: RULE 220(b) SCACR

ii. STATE V. SHOEMAKER, 276 S.C. 86, 88, 215 S.E. 2d 187, 819

iii. STATE V. WESTON, 367 S.C. 279, 292-93, 625 S.E. 2d 641, 648 (2006)

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully.

SEE ATTACHMENT TO APPLICATION TO ALLEGATION SET OUT IN QUESTION (10)

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SPARTANBURG COUNTY
2013 SEP 10 PM 12:35
M. HOPE BLACKLEY

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SPARTANBURG COUNTY
2013 AUG 28 AM 9:48
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State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) SEE ATTACHMENT TO APPLICATION TO SUPPORT FACTS QUESTION (11)

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? YES

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? YES

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? YES

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. APPLICATION FOR FORENSIC DNA TESTING, FILED 09/27/2012

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. THE SEVENTH CIRCUIT COURT OF SPARTANBURG COUNTY

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. ON OCTOBER 31, 2014, PURSUANT TO THE APPLICATION

ii. FOR FORENSIC DNA TESTING UNDER SEC 17-28-10-1728-120

iii. WAS DENIED BY S. DERHAM COLE ON MAY 18, 2015.

CLERK OF COURT
SPARTANBURG COUNTY
M. HOPE BLACKLEY
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328

(d) the date of each such disposition:

ON OCTOBER 31, 2014 A HEARING WAS HAD.

i. ON MAY 18, 2015 DENIED.

iii. _____

iv. _____

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

i. FACTS AND PROCEDURAL HISTORY WAS ENTERED

ii. BY THE SEVENTH CIRCUIT OFFICE.

iii. _____

iv. _____

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

NO

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) NONE

(b) _____

(c) _____

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

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SPARTANBURG COUNTY

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M. HOPE BLACKLEY

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SPARTANBURG COUNTY

2015 DEC 28 AM 9:44

M. HOPE BLACKLEY

Revised 3/7/83

- (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. LEAH B. MOODY LLC

ii. ---

iii. ---

(b) the proceedings at which each such attorney represented you:

i. LEAH B. MOODY, LLC, APPLICATION FOR FORENSIC DNA

ii. TESTING, 2006-GS-42-1167 (K-112715)

iii. ---

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

AN APPEAL ON THE DNA APPLICATION FOR FORENSIC
DNA TESTING

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

NO

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SPARTANBURG COUNTY
2015 SEP 10 PM 12:36
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SPARTANBURG COUNTY
2015 AUG 28 AM 9:40
M. HOPE BLACKLEY

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VERIFICATION

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

[Signature]
[Signature]

SWORN _____ and subscribed before me this 25
 day of Aug _____, 2015.

[Signature]
 Notary Public

(L.S.)

My Commission Expires: 11-4-2015

CLERK OF COURT
 SPARTANBURG COUNTY
 2015 SEP 10 PM 12:36
 M. HOPE BLACKLEY

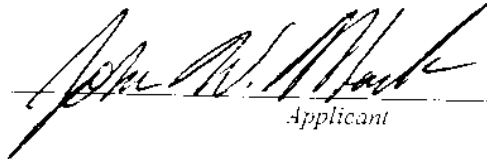
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 SPARTANBURG COUNTY
 2015 AUG 28 AM 9:40
 M. HOPE BLACKLEY
 Revised 3/2/03

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

331

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
25 day of Aug, 2015.


Notary Public

My Commission Expires: 11-4-2015

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CLERK OF COURT
SPARTANBURG COUNTY
2015 SEP 10 PM 12:36
M. HOPE BLACKLEY

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 AUG 28 AM 9:48
M. HOPE BLACKLEY

ATTACHMENTS OF PAGE 2 AND 3 QUESTIONS (10) (11).

10.(A) INEFFECTIVE OF DNA COUNSEL
LEAH B MOODY.

11.(A) DNA COUNSEL, LEAH B. MOODY
WAS INEFFECTIVE FOR FAILURE TO
APPEAL DEFENDANT DNA APPLICATION
TIMELY UNDER DNA ACT SEC. 17-28-90 (B)
DECIDED MAY 18, 2015

CLERK OF COURT
SPARTANBURG, SC
2015 SEP 10 AM 12:36
M. HOPE BLACKLEY

10. (B) INEFFECTIVE OF DNA COUNSEL
LEAH B MOODY.

11. (B) DNA COUNSEL, LEAH B. MOODY WAS
INEFFECTIVE FOR FAILURE TO HAVE THE
(~~JURY~~ ~~TRIAL~~) RECUSE OR REMOVE HIMSELF FROM
DNA HEARING WHEN REQUESTED BY
DEFENDANT.

CLERK OF COURT
SPARTANBURG, SC
2015 AUG 28 AM 11:40
M. HOPE BLACKLEY

THIS P.L.R. ACTION IS NOT A SUCCESSIVE OR SECOND APPLICATION
DEFENDANT HAS A PENDING APPLICATION UNDER CASE NO.
2013-CP-42-2463 IN THE SOUTH CAROLINA SUPREME COURT.
THIS P.L.R. APPLICATION IS BEING FILED FROM A GENERAL
SESSIONS MATTER HEARD OCTOBER 31, 2014 AND DECIDED
MAY 18, 2015 UNDER SOUTH CAROLINA APPLICATION FOR FORENSIC
DNA TESTING 17-28-10 THRU 17-28-120. THIS DNA ACT
HAS NOW MOVED TO A CIVIL UNIFORM POST-CONVICTION
PROCEDURE ACT UNDER 17-27-10 THRU 17-27-150 FOR
INEFFECTIVE DNA COUNSEL.

HEBEAS PETITION CANNOT BE FILE UNTILL DEFENDANT³³³
HAS EXHAUST HIS ADMINISTRATIVE REMEDIES IN THE
SOUTH CAROLINA COURT SYSTEM.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 SEP 10 PM 12:36
M. HOPE BLACKLEY

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 AUG 28 AM 9:40
M. HOPE BLACKLEY

~~Exhibit (A), P.L.R. Court~~
EXHIBIT (A), P.L.R. Court
The South Carolina Court of Appeals

John Willie Mack, Appellant,

v.

The State, Respondent.

Appellate Case No. 2015-001240

ORDER

Because Appellant has failed to timely serve the notice of appeal, this appeal is dismissed. *See* Rule 247(b), SCACR ("The notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the final order."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice."). The remittitur will be sent as required by Rule 221(b), SCACR.

Jessie M. Cretton AS
 FOR THE COURT

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
 Robert Michael Dudek, Esquire *MPM*
 Salley W. Elliott, Esquire

FILED

CLERK OF COURT
 SPARTANBURG COUNTY
 2015 AUG 28 AM 9:40
 M. HOPE BLACKLEY

M. HOPE BLACKLEY,
CLERK OF COURT.

CLERK OF COURT, SPARTANBURG
POST OFFICE BOX 3483
SPARTANBURG, SOUTH CAROLINA 29304-3483

CLERK OF COURT
SPARTANBURG COUNTY
2015 SEP 10 PM 12:35
M. HOPE BLACKLEY

AUGUST 25, 2015

DEAR MS. BLACKLEY,

COULD YOU PLEASE FILE THIS P.C.R. APPLICATION AND
BRING IT TO THE COURT'S ATTENTION (SOLICITORS OFFICE,
SEVENTH CIRCUIT, ATTORNEY GENERALS OFFICE).

PLEASE ~~MAKE~~ THE COURT AWARE THAT THIS APPLICATION IS
BEING FILED FROM A HEARING HEARD OCTOBER 31, 2014 AND
DECIDED MAY 18, 2015 FROM A GENERAL SESSIONS MATTER.
PLEASE SEND A STAMP COPY BACK TO THE DEFENDANT OF
THE APPLICATION.

APPRECIATE YOUR TIME IN THIS MATTER.
IN KIND REGARDS.

John W. Mack

CLERK OF COURT
SPARTANBURG COUNTY
2015 AUG 28 AM 9:39
M. HOPE BLACKLEY

JOHN WILLIE MACK JR.
2572 19th F-1-A-1118-70
LEECH, 990 WISKEY HWY
BETHSVILLE SOUTH CAROLINA
29010.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
John Willie Mack, Sr.,	)	Case No.: 2015-CP-42-3806
S.C.D.C. No. 257219,	)	
	)	
Applicant,	)	
	)	RETURN AND MOTION TO DISMISS
v.	)	
	)	
State of South Carolina	)	
	)	
Respondent.	)	
	)	

Respondent, in making its Return to the application for post-conviction relief ("PCR") filed by John Willie Mack, Sr. ("Applicant") on September 10, 2015 ("the Application"), would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the April 2006 term of the Spartanburg County Grand Jury for grand larceny (2006-GS-42-1166) and burglary in the first degree (2006-GS-42-1167). J. Roger Poole, Esquire, represented Applicant. Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty as indicted on February 23, 2011. Judge Cole sentenced Applicant to imprisonment for concurrent terms of 5 years for the grand larceny and life without parole (LWOP) for the burglary.

Applicant filed a timely notice of appeal and a direct appeal was perfected by LaNelle Cantey DuRant, Esquire. By opinion decided April 17, 2013, the South Carolina Court of

Appeals affirmed Applicant's convictions. State v. Mack, Op. No. 2013-UP-161 (S.C. Ct. App. dated April 17, 2013). The Remittitur was returned to the circuit court on May 7, 2013.

First PCR Application: 2013-CP-42-2063

Applicant filed his first application for post-conviction relief on May 6, 2013 (2013-CP-42-2063). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to object to the amendment of the indictment,
 - b. Counsel failed to object to the admission of evidence when the State failed to produce tangible items or pictures of items swabbed,
 - c. Counsel failed to object to Applicant's prior criminal history being presented to the jury,
 - d. Counsel failed to thoroughly and properly examine a crucial prosecution witness to address her perjury,
 - e. Counsel failed to file a motion for a speedy trial,
2. Trial court error, in that;
 - a. The trial judge improperly stated that only one aggravating circumstance had to be proven,
3. Misconduct of the Solicitor's office and law enforcement with regards to DNA evidence,
 - a. Brady violation because the State did not turn over the blood evidence.

Respondent made its return on March 18, 2014. An evidentiary hearing into the matter was convened on January 14, 2015, before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and J. Roger Poole, Esquire, also testified. By written Order dated April 6, 2015, and filed April 10, 2015, Judge Jefferson denied and dismissed the application.

Applicant filed a timely notice of appeal. Wanda H. Carter, Esquire, filed a Johnson Petition for Writ of Certiorari¹ on Applicant's behalf and petitioned to be relieved as counsel. By Order dated August 11, 2016, the Supreme Court of South Carolina denied counsel's petition

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)

to be relieved and directed the parties to submit a petition and return. This matter remains pending before the Supreme Court.

Application for Forensic DNA Testing

Applicant filed an application for Post-Conviction DNA Testing in the Spartanburg County Court of General Sessions under the original indictment numbers for the burglary and grand larceny convictions pursuant to S.C. Code Ann. § 17-28-10, et seq. (2014). The general sessions' post-conviction DNA application was heard by the Honorable J. Derham Cole on October 31, 2014. Applicant was represented by Leah Moody, Esquire, and the State was represented by Assistant Solicitor Anthony Leibert, Esquire. The application was denied by order dated May 18, 2015, and filed on May 19, 2015.

Applicant thereafter filed a notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal as not timely served by Order filed July 16, 2015. Mack v. State, S.C. Sup. Ct. Order filed July 16, 2015. The Remittitur was returned to the circuit court on August 4, 2015.

II.

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

1. Ineffective assistance of counsel, in that:
 - a. "DNA counsel, Leah B. Moody, was ineffective for failure to appeal defendant's DNA application timely under DNA Act Sec. 17-28-90(6)
 - b. "DNA counsel, Leah B. Moody, was ineffective for failure to have the trial judge recuse or remove himself from the DNA hearing when requested by Defendant."

Attached to and incorporated herein are the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate

records, Applicant's prior PCR records, and the records of this current PCR action. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

Respondent submits this PCR application should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. An allegation of ineffective assistance of counsel appointed pursuant to the "Access to Justice Post-Conviction DNA Testing Act" does not form a collateral attack on the validity of the conviction or sentence, and may not form the basis for relief in any post-conviction relief action. S.C. Code Ann. § 17-28-60; see also Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) ("PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by Section 17-27-20(a)."). Therefore, pursuant to Rule 12(b)(6), SCRCP, the application should be

dismissed for failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

IV.

To the extent that the application may be interpreted or amended to attack Applicant's underlying convictions, Respondent submits this PCR application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Section §17-27-45(A) provides:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the charges he challenges in this application on February 23, 2011. The Remittitur was returned May 7, 2013. Therefore, Applicant was required to file this PCR application no later than May 7, 2014. This application was filed on September 10, 2015, which was *more than one year beyond* the expiration of the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the application should be summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

V.

To the extent that the application may be interpreted or amended to attack Applicant's underlying convictions, Respondent further submits this PCR application should be summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been raised previously. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, the application should be summarily dismissed because it is successive.

VI.

Respondent denies each allegation not expressly admitted, qualified, or explained.

VII.

WHEREFORE, Respondent moves to summarily dismiss the application for being untimely, successive, and failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

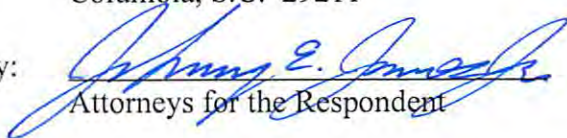
DONALD J. ZELENKA
Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

JOHNNY E. JAMES JR.
Staff Attorney

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondent

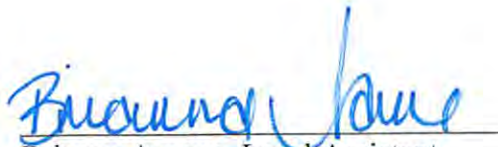
Columbia, South Carolina
23 March, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	2015-CP-42-3806
JOHN WILLIE MACK, SR. #257219,	)	
	)	
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 and Motion to Dismiss** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

John Willie Mack, Sr., #257219
Lee Correctional Institution
990 Wisacky Hwy
Bishopville, SC 29010

DATED this 23rd day of March, 2017.


 Brianna Arnone, Legal Assistant
 For Respondent

ORIGINAL

June 29, 2017
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

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

RODNEY RICHEY, ESQ.
Attorney for the Applicant

VALERIE GIOVANOLI, ESQ.
Attorney for the Respondent

APRIL HERRON
Official Court Reporter

There were no witnesses.

There were no exhibits.

» > 0 < «

Certificate of Reporter 14

1 MS. GIOVANOLI: May it please the Court?

2 THE COURT: Yes, ma'am.

3 MS. GIOVANOLI: This is the case of John Willie
4 Mack, Sr. vs. The State of South Carolina. I'm
5 sorry, case No. 2015-CP-42-3806. We're before The
6 Court on a Application for Post-Conviction Relief
7 that was filed on September 10th, 2016. Applicant is
8 presently incarcerated. He was indicted in
9 April 2006 for burglary in the first degree. Jay
10 Roger Poole represented The Applicant. Applicant
11 proceeded to trial before The Honorable J. Derham
12 Cole and had a jury. The jury found The Applicant
13 guilty as indicted on February 23rd, 2011.

14 Judge Cole sentenced The Applicant to
15 imprisonment for concurrent terms to five years for
16 grand larceny. And I apologize, he was indicted for
17 grand larceny and burglary, first. He was found
18 guilty of both charges, he was sentenced to
19 imprisonment for a term of five years for grand
20 larceny and life without parole for the burglary.

21 The Applicant filed a timely Notice of Appeal.
22 That appeal was perfected by Lanell Canty Durant by
23 opinion on April 17, 2003, the South Carolina Court
24 of Appeal confirmed The Applicant's conviction. He
25 actually filed his first PCR Application on May 6,

1 2013. An evidentiary hearing was heard into the
2 matter before the Honorable Deadra L. Jefferson.
3 Applicant was present at the hearing and he was
4 represented by Miah B. Moody. By written Order dated
5 April 6th, 2015 and filed April 10th, 2015, Judge
6 Jefferson denied and dismissed that application.

7 Applicant filed a timely Notice of Appeal of
8 that dismissal and Wanda A. Carter filed a Johnson
9 Petition for Writ of Certiorari on Applicant's
10 behalf. By Order dated August 11, 2016, the Supreme
11 Court of South Carolina denies counsel's petition of
12 Writ of Certiorari. Then Applicant also filed an
13 Application for Forensic DNA testing. This is
14 pursuant to South Carolina Code Section 17-28-10.
15 There was a hearing held in the Court of General
16 Sessions before the Honorable J. Derham Cole on
17 October 31st, 2014. Applicant was represented again
18 by Miah B. Moody in that hearing. And the
19 application was denied by Order dated May 18th, 2015.
20 Applicant thereafter filed a Notice of Appeal of that
21 dismissal and the South Carolina Court of Appeals
22 dismissed that appeal as not being timely served.

23 Applicant thereafter filed a second and
24 concurrent Post-Conviction Relief Application on
25 September 10th, 2015 alleging that Miah B. Moody was

1 ineffective because he [verbatim] failed to file the
2 appeal of the denial of his DNA action timely. The
3 State filed its return and motion to dismiss on
4 March 23rd, 2017, requesting a summary dismissal for
5 failing to state a cognizable claim under the
6 Post-Conviction Procedure Act and for failing -- for
7 filing outside the statute of limitations and for any
8 claims -- for any claims arising from his original
9 conviction. As well as the application being
10 successive.

11 We are here now to address The State's motion to
12 dismiss. I believe that because it's my motion, I
13 will go forward with argument.

14 THE COURT: Yes, ma'am.

15 MS. GIOVANOLI: Your Honor, in this case The
16 State realizes that the case law is pretty clear that
17 ineffective assistance of a post-conviction relief
18 counsel is not a cognizable claim under the act.
19 Under the Post-Conviction Procedure Act. There is
20 one exception to that and that is pursuant to Austin
21 v. State, in which a belated appeal can be granted to
22 a post-conviction relief applicant whose attorney
23 failed to file an appeal for him. Austin has not
24 been extended to include counsel in DNA actions. DNA
25 actions are governed by a totally different section

1 of the code. They're held in General Sessions Court
2 and they're actually handled by the Solicitor's
3 Office and not the Attorney General's Office.

4 And so, I guess to the extent that The Court may
5 be inclined to extend Austin to this claim, we would
6 argue against that. There's no precedent for it. As
7 well as if you'll look at Section -- give me one
8 second. If you look at Section 17-28-60 of the DNA
9 Act -- and I apologize, I refer to it as the DNA Act,
10 it's actually a Access to Justice Post-Conviction DNA
11 Act. So, if you will allow me to abbreviate that as
12 DNA Act. In the last sentence of that section, this
13 is notable because it's not -- this sentence is not
14 included in the PCR Act.

15 It says, The performance of counsel pursuant to
16 this part shall not from the basis for relief in any
17 post-conviction relief proceeding.

18 The language of the statute is plain and
19 unambiguous, it's clear and concise. And therefore,
20 the statute must be applied according to its plain
21 meaning.

22 THE COURT: Tell me again, I got the statute up
23 in front of me but I don't see that language.

24 MS. GIOVANOLI: 17-28-60.

25 THE COURT: 60?

1 MS. GIOVANOLI: Six zero.

2 THE COURT: Okay, 60. Gotcha.

3 MS. GIOVANOLI: Yes. And that's the last
4 sentence of that. That section refers to the
5 appointment of counsel.

6 THE COURT: Okay.

7 MS. GIOVANOLI: And this sentence is not
8 included in the actual post-conviction relief section
9 which is 17.

10 MR. RICHEY: Wait a minute.

11 MS. GIOVANOLI: 17-27.

12 What's that?

13 And because the legislature has been pretty
14 clear and straightforward on including that sentence
15 in the act, we would argue that Austin should not be
16 extended to include claims of ineffective assistance
17 of DNA counsel, if you will.

18 THE COURT: Okay.

19 MS. GIOVANOLI: So, that is our position. As
20 far as the statute of limitations and the
21 successiveness, I believe that those are pretty well
22 captured in our written motion. I believe the main
23 issue here is whether this is a cognizable claim
24 under Post-Conviction Procedural Relief Act.

25 THE COURT: Okay, thank you very much.

1 All right, Mr. Richey, I'll be happy to hear
2 from you.

3 MR. RICHEY: Thank you, Your Honor, may it
4 please the Court?

5 THE COURT: Yes, sir.

6 MR. RICHEY: Your Honor, I will just say, this
7 application is filed solely on the DNA issue. I will
8 tell The Court when I looked at this, The Applicant
9 has a right to appeal this issue. I mean, I think
10 the statute is clear that he has the right to appeal.

11 And if I refer to 17-28-90, it says, All rules
12 and statutes -- all rules and statutes application in
13 criminal proceedings are available to the applicant.

14 Your Honor, I think that section gives him the
15 right to come back and have an appeal. I think the
16 PCR attorney the Attorney General referred to, allows
17 him to get a belated appeal. Even a PCR case. Okay.
18 I mean, he has the right to do that. And in this
19 case, Your Honor, he was represented by counsel, he
20 has no mechanism of filing that appeal. And I say
21 that the attachment that he put in that application,
22 he has 10 days to file the timely appeal. That's
23 consistent with the criminal procedure.

24 So, at that particular point, I don't believe
25 the legislature made the rule where the lawyer could

1 not file the appeal, that he could not pursue it.
2 Okay. I mean, he has no mechanism of doing it if
3 he's represented by counsel, they don't file the
4 appeal. I don't believe the intent of this statute is
5 to preclude him from that. I don't believe that
6 that's the intent.

7 So, I believe when you look at the totality,
8 that in a PCR proceeding, if the PCR lawyer fails to
9 file the notice of appeal, then he's entitled to a
10 belated appeal. So, in looking at all that, I
11 just -- I just believe the intent here for this
12 gentleman is to be able to appeal this case. Because
13 under The State's theory, he's out of luck, sorry.
14 Your lawyer didn't file it timely, you're done, can't
15 do it. And I don't think that's the intent of the
16 statute. I think the intent of the statute is for
17 him is to be able to appeal this case.

18 And we're at the motion of dismissal. Now, we
19 believe we should have a evidentiary hearing so we
20 can bring Ms. Moody in here and see what went on with
21 this appeal.

22 THE COURT: Okay.

23 MS. GIOVANOLI: May I respond briefly?

24 THE COURT: Yes, ma'am.

25 MS. GIOVANOLI: Counsel states that he's simply

1 out of luck and that's not The State's position. I
2 do believe his recourse could be a State Habeas
3 Corpus Petition. As far as expanding the claims for
4 a Post-Conviction Relief Application to include
5 ineffective assistance of DNA counsel. I think the
6 legislature's been very clear. And we don't need to
7 go into the legislature's intent because they were so
8 clear and concise with the statutory language.

9 And again, the Appellate Courts have not
10 extended an exception under Austin v. State to
11 ineffective assistance of DNA counsel. And we would
12 argue that it not be extended here today. And if
13 that is something that the Appellate Courts want to
14 do, then that should be taken up on appeal. That's
15 The State's position.

16 THE COURT: Okay.

17 All right, Mr. Richey, you'd like to respond,
18 sir?

19 MR. RICHEY: Your Honor, I think that's exactly
20 The State's position is out of luck. I think -- I
21 think everybody can agree that he should be entitled
22 to get an appeal. I think everybody can agree on
23 that point, that this gentleman should get an appeal.
24 I think everybody agree on that point. And I just
25 think this proceeding is more cleaner and clear cut

1 to grant him an appeal, at least have a hearing to
2 get this appeal out the way. I don't think that's an
3 extension of the statute, I don't think -- I think
4 that goes with the intent of the belated. You know,
5 counsel has a duty, you know, and what The State
6 wants to do is keep pushing the can down the hill so
7 they can fight it in the proceeding. I just think
8 the gentleman should be entitled to an appeal. He
9 had a lawyer, the lawyer didn't file it. This is the
10 only recourse he really has.

11 THE COURT: Okay. All right. I understand
12 Mr. Mack's position, I really do. And -- but I think
13 this law is contrary to Mr. Mack's position. A PCR
14 Application is not the venue for challenging PCR
15 counsel's performance. There may or may not be other
16 venues but I think there are but I don't make any
17 representation. I will tell you that the specific --
18 the appeal as to the DNA issue, is probably --
19 wouldn't be very productive. I'm reading the same
20 Statute 17-28-90. And I've read the Order of Judge
21 Cole in the PCR application. And it says, You're
22 only entitled to the DNA testing if the physical
23 evidence or biological material sought to be tested
24 was not previously subject to DNA testing.

25 It looks to me like it was already subjected to

1 DNA testing. You just disagree with the results.
2 And, you know, at the time of trial would have been
3 the time to get those samples into the conducted DNA
4 testing on it. But it was clearly available. I
5 think the purpose of that statute is to make sure
6 that those people who can be exonerated by and
7 through DNA evidence that has not been closely
8 inspected before, will have that opportunity to have
9 it reinspected. And that's a good law, I like that.
10 I think that all the evidence that is available
11 should be tested and should be subject to inspection.
12 In this case, it looks like it was available and
13 subject to inspection.

14 Now, that's neither here nor there as far as
15 this hearing is concerned, that's just a editorial
16 comment looking at the statute. But I don't think
17 that the PCR Application questioning deficient
18 conduct of the PCR counsel is appropriate. And I
19 think the law specifically precludes it. And I think
20 that as an additional sustaining factor, Section
21 17-28-90, precludes the Defendant from seeking
22 additional testing of being successful in requiring
23 additional testing be made. So, on those grounds
24 I'll grant The State's motion.

25 MS. GIOVANOLI: Thank you, Your Honor.

1 THE COURT: Yes, ma'am, thank you.

2 MS. GIOVANOLI: I will submit a final order of
3 dismissal.

4 THE COURT: Okay, thank you.

5 (WHEREUPON, the proceedings were concluded.)
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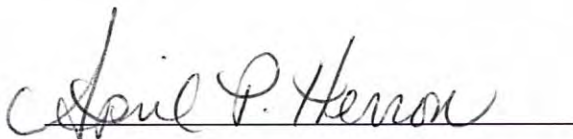
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth 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
Common Pleas for Spartanburg County, South Carolina, on
the 29th day of June, 2017.

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

October 17, 2017

A handwritten signature in cursive script, reading "April P. Herron", written over a horizontal line.

APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
John Willie Mack, Sr.,	)	Case No.: 2015-CP-42-3806
S.C.D.C. No. 257219,	)	
	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina	)	
	)	
Respondent.	)	
	)	

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by John Willie Mack, Sr. (“Applicant”) on September 10, 2015 (“the Application”). Respondent made its Return and Motion to Dismiss, requesting the Application be summarily dismissed. On June 29, 2017, a hearing on Respondent’s Motion to Dismiss was convened at the Spartanburg County Courthouse. Applicant was present and represented by Rodney W. Richey, Esquire. Assistant Attorney General, Valerie Garcia Giovanoli, represented Respondent.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the April 2006 term of the Spartanburg County Grand Jury for grand larceny (2006-GS-42-1166) and burglary in the first degree (2006-GS-42-1167). J. Roger Poole, Esquire, represented Applicant. Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty as indicted on February 23, 2011. Judge Cole sentenced Applicant to

imprisonment for concurrent terms of 5 years for grand larceny and life without parole (LWOP) for burglary.

Applicant filed a timely notice of appeal and a direct appeal was perfected by LaNelle Cantey DuRant, Esquire. By opinion decided April 17, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Mack, Op. No. 2013-UP-161 (S.C. Ct. App. dated April 17, 2013). The Remittitur was returned to the circuit court on May 7, 2013.

First PCR Application: 2013-CP-42-2063

Applicant filed his first application for post-conviction relief on May 6, 2013 (2013-CP-42-2063). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to object to the amendment of the indictment,
 - b. Counsel failed to object to the admission of evidence when the State failed to produce tangible items or pictures of items swabbed,
 - c. Counsel failed to object to Applicant's prior criminal history being presented to the jury,
 - d. Counsel failed to thoroughly and properly examine a crucial prosecution witness to address her perjury,
 - e. Counsel failed to file a motion for a speedy trial,
2. Trial court error, in that;
 - a. The trial judge improperly stated that only one aggravating circumstance had to be proven,
3. Misconduct of the Solicitor's office and law enforcement with regards to DNA evidence,
 - a. Brady violation because the State did not turn over the blood evidence.

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Respondent made its return on March 18, 2014. An evidentiary hearing into the matter was convened on January 14, 2015, before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on

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his own behalf, and J. Roger Poole, Esquire, also testified. By written Order, dated April 6, 2015 and filed April 10, 2015, Judge Jefferson denied and dismissed the application.

Applicant filed a timely notice of appeal. Wanda H. Carter, Esquire, filed a Johnson Petition for Writ of Certiorari¹ on Applicant's behalf and petitioned to be relieved as counsel. By Order dated August 11, 2016, the Supreme Court of South Carolina denied counsel's petition to be relieved and directed the parties to submit a petition and return. This matter remains pending before the Supreme Court.

Application for Forensic DNA Testing

Applicant filed an application for Post-Conviction DNA Testing in the Spartanburg County Court of General Sessions under the original indictment numbers for the burglary and grand larceny convictions pursuant to S.C. Code Ann. § 17-28-10, et seq. (2014). The general sessions' post-conviction DNA application was heard by the Honorable J. Derham Cole on October 31, 2014. Applicant was represented by Leah Moody, Esquire, and the State was represented by Assistant Solicitor Anthony Leibert, Esquire. The application was denied by order dated May 18, 2015, and filed on May 19, 2015.

Applicant thereafter filed a notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal as not timely served by Order filed July 16, 2015. Mack v. State, S.C. Sup. Ct. Order filed July 16, 2015. The Remittitur was returned to the circuit court on August 4, 2015.

Current PCR Application

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

1. Ineffective assistance of counsel, in that:

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)

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- a. "DNA counsel, Leah B. Moody, was ineffective for failure to appeal defendant's DNA application timely under DNA Act Sec. 17-28-90(6)
- b. "DNA counsel, Leah B. Moody, was ineffective for failure to have the trial judge recuse or remove himself from the DNA hearing when requested by Defendant."

Also before this Court are the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, Applicant's prior PCR records, and the records of this current PCR action.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Failure to State a Claim

This Court finds the application must be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. An allegation of ineffective assistance of counsel appointed pursuant to the "Access to Justice Post-Conviction DNA Testing Act" ("DNA Counsel") does

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HOPE BLACKLEY

not form a collateral attack on the validity of the conviction or sentence, and may not form the basis for relief in any post-conviction relief action. S.C. Code Ann. § 17-28-60; see also Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (“PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by Section 17-27-20(a).”) (emphasis redacted).

Furthermore, this Court finds Applicant’s allegation of ineffective assistance of DNA counsel is specifically precluded by § 17-28-60, S.C. Code Ann., which states in relevant part, “[t]he performance of counsel pursuant to this article **shall not** form the basis for relief in any post-conviction relief proceeding.” (emphasis added.) The legislature has set forth plain and unambiguous language in this section of the Access to Justice Post-Conviction DNA Testing Act and therefore it is clear that PCR is not the proper venue for challenging the performance of DNA counsel.

Furthermore, according to Judge Cole’s order denying relief under the DNA Act, the evidence Applicant was seeking to be tested was previously subjected to DNA testing and further testing would not provide a more probative result. This Court notes that the DNA Act is an avenue for a defendant to obtain DNA testing of evidence not tested prior to trial. This was not the case for Applicant. Therefore, this Court finds an appeal of Judge Cole’s order would be futile.

Statute of Limitations

To the extent that the application may be interpreted or amended to attack Applicant’s underlying convictions, the Court finds the application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. Section §17-27-45(A) provides:

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An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the charges he challenges in this application on February 23, 2011. The Remittitur was returned May 7, 2013. Therefore, Applicant was required to file this PCR application no later than May 7, 2014. This application was filed on September 10, 2015, which was ***more than one year beyond*** the expiration of the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Court shall summarily dismiss the application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

Successiveness

To the extent that the application may be interpreted or amended to attack Applicant's underlying convictions, the Court finds it must also summarily dismiss the current application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally

adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” Id. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been raised previously. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, the Court shall summarily dismiss the application because it is successive.

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SPARTANBURG COUNTY
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CONCLUSION

For the foregoing reasons, the application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE.**

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 2 day of July, 2017.



ROBIN B. STILWELL
Presiding Judge
Seventh Judicial Circuit

COLUMBIA, South Carolina

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2015-CP-42-3806

JOHN WILLIE MACK, SR., SCDC#: 257219,

APPELLANT,

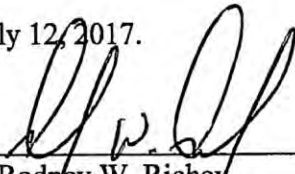
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

John Willie Mack, Sr. appeals the denial of his Post- Conviction Relief. The Post- Conviction Relief action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on June 29, 2017 and Order issued on July 2, 2017 and filed on July 7, 2017. The Appellant received notice of the judgment on July 12, 2017.



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Other Counsel of Record:
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Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2015-CP-42-3806

JOHN WILLIE MACK, SR., SCDC#: 257219,

APPELLANT,

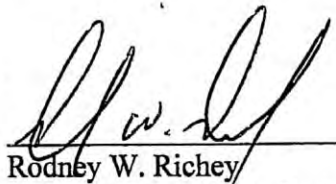
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

EXPLANATION

John Willie Mack, Sr. appeals the denial of his Post- Conviction Relief. Mr. Mack filed this Post-Conviction Relief case to get an appeal from his DNA Testing hearing. His counsel did not appeal the Court's denial of his request for DNA Testing. He is requesting that this Court allows him to appeal the ruling of trial judge. This was the only method he had to get the appeal.



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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2015-CP-42-3806

JOHN WILLIE MACK, SR., SCDC#: 257219,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

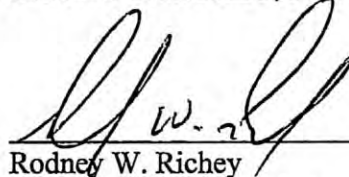
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on July 17, 2017, addressed to their attorney of record, Valerie Garcia Giovanoli, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: July 17, 2017

RICHEY & RICHEY, P.A.



Rodney W. Richey
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(864) 467-0646 fax

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

John Willie Mack, Sr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-001570

Appeal From Spartanburg County
Robin B. Stilwell, Trial Judge
J. Derham Cole, DNA Court Judge
Robin B. Stilwell, PCR Court Judge

Unpublished Opinion No. 2019-UP-386
Submitted October 1, 2019 – Filed December 18, 2019

AFFIRMED

Appellate Defender Jessica M. Saxon, of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Megan Harrigan
Jameson, and Assistant Attorney General Johnny Ellis
James, Jr., all of Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code Ann. § 17-28-60 (2014) ("The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding."); *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("[A] court must abide by the plain meaning of the words of a statute.").

AFFIRMED.¹

LOCKEMY, C.J., and KONDUROS and HILL, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

John Willie Mack, Sr., Petitioner,

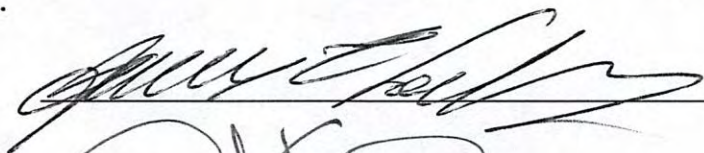
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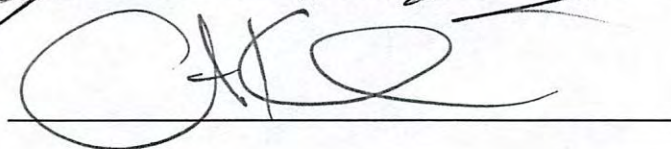
State of South Carolina, Respondent.

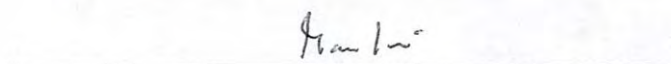
Appellate Case No. 2017-001570

ORDER

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

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

Megan Harrigan Jameson, Esquire

Johnny Ellis James, Jr., Esquire

Alan McCrory Wilson, Esquire

Jessica M Saxon, Esquire

The Honorable Robin B. Stilwell

FILED

January 23, 2020

The Supreme Court of South Carolina

John Willie Mack, Sr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-000329

Lower Court Case No. 2015-CP-42-03806

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted to review the court of appeals' decision in *Mack v. State*, Op. No. 2019-UP-386 (S.C. Ct. App. filed Dec. 19, 2019). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

August 7, 2020

cc: Jessica M Saxon, Esquire
Alan McCrory Wilson, Esquire
Chelsey Faith Marto, Esquire
Amy Kathryn West Cox, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

John Willie Mack, Sr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-000329

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Robin B. Stilwell, PCR Court Judge

Opinion No. 28025
Heard March 3, 2021 – Filed April 28, 2021

REVERSED AND REMANDED

Appellate Defender Jessica M. Saxon, of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Chelsey Faith Marto, both of
Columbia, for Respondent.

CHIEF JUSTICE BEATTY: We granted John Willie Mack, Sr.'s petition
for a writ of certiorari to review *Mack v. State*, Op. No. 2019-UP-386 (S.C. Ct.

App. filed Dec. 18, 2019), in which the court of appeals affirmed the PCR court's dismissal of Mack's second application for post-conviction relief ("PCR") alleging his DNA counsel failed to timely appeal the denial of his application for DNA testing under the Access to Justice Post-Conviction DNA Testing Act ("DNA Act"), S.C. Code Ann. §§ 17-28-10 to -120 (2014). Because Mack was prevented from seeking appellate review, we find it is necessary to provide an avenue of relief akin to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) that affords him the opportunity to obtain belated review. Accordingly, we reverse and remand to the court of general sessions for an evidentiary hearing consistent with this opinion.

I. FACTS

On September 6, 2005, LaRhonda Moss ("Victim") returned to her home in Spartanburg after spending the Labor Day weekend out of town and discovered someone had broken into the house through her bedroom window. She noticed her television, laptop computer, CD changer, and certain items of jewelry were missing and other personal items were strewn throughout the home. Notably, blood was found on her entertainment center in the living room, on a bookshelf in the hallway, and on the wall near a light switch in the bedroom. Law enforcement swabbed the blood and sent the evidence to the State Law Enforcement Division ("SLED") for DNA testing. The physical items containing the blood were not collected or preserved. Photographs showing the location of the blood evidence were taken at the crime scene, but they were subsequently lost and not available at trial. Thereafter, law enforcement discovered the blood samples from Victim's home matched Mack's DNA in the Combined DNA Index System ("CODIS"), and he was indicted for first-degree burglary and grand larceny. Three years later, the State moved to compel Mack to submit to a buccal swab test to confirm the DNA match, and the circuit court granted the request. The DNA evidence found in the blood samples was the only evidence presented at trial linking Mack to the charged crimes. The case proceeded to a jury trial in February 2011, and Mack was convicted and sentenced to life imprisonment without the possibility of parole for first-degree burglary and a concurrent term of five years' imprisonment for grand larceny. Mack appealed his convictions and sentences, and the court of appeals affirmed in *State v. Mack*, Op. No. 2013-UP-161 (S.C. Ct. App. filed April 17, 2013).

In September 2012, while his appeal was still pending, Mack filed a *pro se* application for forensic DNA testing pursuant to the DNA Act. In May 2013,

while his application for DNA testing was pending, Mack filed his first application for post-conviction relief under the Uniform Post-Conviction Procedure Act ("PCR Act"), S.C. Code Ann. §§ 17-27-10 to -160 (2014), alleging ineffective assistance of trial counsel. At the start of his PCR hearing in January 2015, he moved for a continuance in order to first obtain a ruling on his 2012 *pro se* application for DNA testing under the DNA Act. The PCR court denied the continuance on the ground that his ineffective assistance of trial counsel claim was not related to his request for new DNA testing, and any decision as to his PCR application would have no bearing on his request for relief under the DNA Act. In April 2015, the PCR court denied his PCR application, and Mack filed a *Johnson*¹ petition for a writ of certiorari to review the decision. Following an order from this Court requesting Mack to file another petition addressing a specific question, we denied the petition in February 2018.

In October 2014, a hearing was held on Mack's *pro se* application for post-conviction DNA testing during which he requested testing of the physical items where his blood was allegedly found rather than a retesting of the swabs collected in 2005. On May 18, 2015, the court issued an order denying his request, finding (1) testimony at trial established the blood samples taken at the crime scene were tested and matched Mack in a 1 in 1.3 quadrillion probability; (2) he did not raise the issue at trial of producing the actual items from which the blood samples were taken; and (3) the items he sought to test were previously subjected to DNA testing and further testing would not provide a more probative result. Mack received written notice of entry of the order on May 20, 2015, and his DNA counsel served a notice of appeal on the State on June 3, 2015. The court of appeals dismissed the appeal as untimely under Rule 247(b), SCACR. *Mack v. State*, S.C. Ct. App. Order dated July 16, 2015.

In September 2015, Mack filed a second PCR application alleging DNA counsel was ineffective for failing to timely appeal the denial of his application for post-conviction DNA testing. The State filed a return and moved to dismiss his application. Two years later, the PCR court held a hearing on Mack's second PCR application and dismissed with prejudice his request for relief. Specifically, the PCR court held his second PCR application failed to state a cognizable claim for relief, was barred by the statute of limitations, and was successive to his previous application under the PCR Act. The court also determined his claim was

¹ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

prohibited by section 17-28-60 of the DNA Act. Mack appealed the PCR court's order, and the court of appeals affirmed the dismissal of his second PCR application. *Mack v. State*, Op. No. 2019-UP-386 (S.C. Ct. App. filed Dec. 18, 2019). Following the denial of his petition for rehearing, Mack filed a petition for a writ of certiorari to review the court of appeals' decision, which this Court granted.

II. STANDARD OF REVIEW

"In a PCR case, this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "However, this Court gives no deference to the PCR court's conclusions of law, and we review those conclusions de novo." *Id.* (citing *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

III. DISCUSSION

Mack contends the court of appeals erred in affirming the PCR court's dismissal of his second PCR application alleging DNA counsel was ineffective for failing to timely appeal the denial of his application for post-conviction DNA testing. Specifically, he claims that filing a second PCR application was his only avenue to seek appellate review and to obtain his "one fair bite at the apple" due to DNA counsel's deficient conduct. *See Odom v. State*, 337 S.C. 256, 261–62, 523 S.E.2d 753, 755–56 (1999) (stating "an applicant is entitled to a full adjudication on the merits of the original petition, or 'one bite at the apple'" and noting Austin "never received a full procedural 'bite at the apple' because he was prevented from seeking *any* review of the denial of his PCR application"). Consequently, Mack requests this Court to extend our decision in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) to the DNA Act and grant him belated review of the denial of his request for post-conviction DNA testing.

In *Austin*, the petitioner's original PCR application was denied, and counsel failed to seek appellate review. *Id.* at 454, 409 S.E.2d at 396. Subsequently, the petitioner filed a second PCR application alleging his counsel was ineffective for failing to seek appellate review of the PCR court's order. *Id.* We noted that, under the PCR Act, "[t]he right to seek appellate review of the denial of PCR is expressly authorized by state law." *Id.* (citing S.C. Code Ann. § 17-27-100 (2014)). Based

on our extension of *Anders v. California*, 386 U.S. 738 (1967) to PCR matters in *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), which acts "as a safeguard of the right to appeal," we recognized the petitioner was entitled to the assistance of appellate counsel in seeking review of the denial of PCR. *Id.* We further found the petitioner's allegation that counsel failed to seek appellate review sufficiently stated a claim of ineffective assistance. *Id.* Therefore, we crafted a remedy to correct the unfairness that had occurred by providing relief through a belated appeal. *Id.*; see *Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009) (noting *Austin* appeals are "belated appeals intended to correct unjust procedural defects").

Mack argues this case is on all fours with *Austin* because he was prevented from seeking appellate review due to counsel's failure to timely serve the notice of appeal. Similar to *Austin*, which was based on the statutory right to appellate review under the PCR Act, the right to appellate review of an order granting or denying post-conviction DNA testing under the DNA Act is also expressly authorized by statute. S.C. Code Ann. § 17-28-90(G) (2014) ("The applicant and the solicitor or Attorney General, as applicable, shall have the right to appeal a final order denying or granting DNA testing by a writ of certiorari to the Court of Appeals or the Supreme Court as provided by the South Carolina Appellate Court Rules."). As a result, Mack claims the only way to correct the unfairness in this case is to craft a remedy similar to the one created in *Austin* to allow him to obtain belated review.

It is undisputed that Mack's DNA counsel failed to timely serve the notice of appeal. See Rule 247(b), SCACR ("The notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the final order."); *Mack v. State*, S.C. Ct. App. Order dated July 16, 2015 (dismissing Mack's appeal for failure to timely serve the notice of appeal under Rule 247(b), SCACR). We therefore understand why Mack filed a second PCR application in this instance because there is no existing procedural mechanism that allows him to seek the appellate review to which he is statutorily entitled. As we held in *Austin*, we find *Anders* similarly applies to the DNA Act to safeguard an applicant's statutory right to seek appellate review and entitles him to the assistance of appellate counsel.² See *Odom*, 337 S.C. at 261, 523 S.E.2d at 755–56 (noting a full

² Similar to the PCR rules, the DNA Act requires that counsel be appointed for an indigent DNA testing applicant. See Rule 71.1(d), SCRCP (requiring the court to

adjudication on the merits or "one bite at the apple" includes both the right to appeal and the right to the assistance of counsel in that appeal); *Austin*, 305 S.C. at 454, 409 S.E.2d at 396 (recognizing *Anders* applies in PCR matters and entitles a petitioner to the assistance of appellate counsel); *see also State v. Velasquez-Cardenas*, 815 S.E.2d 9, 17–18 (N.C. Ct. App. 2018) (holding *Anders* procedures apply to an appeal of the denial of a motion for post-conviction DNA testing and stating there is "no valid reason to deny *Anders*-type protections to defendants in criminal proceedings from which there is a statutory right of appeal"). Because Mack was unjustly prevented from seeking appellate review and deprived of his full "bite at the apple," we must provide an avenue of relief akin to *Austin* that affords him the opportunity to obtain belated review.

We hold that an applicant for post-conviction DNA testing may file a petition for belated review when he is prevented from seeking appellate review, such as when counsel fails to seek timely review. *Cf. Odom*, 337 S.C. at 261, 523 S.E.2d at 756 ("An *Austin* appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when an attorney fails to seek timely review."). Because an application for post-conviction DNA testing under the DNA Act must be filed with the clerk of court of the court in which the conviction or adjudication took place, the petition for belated review must also be filed in that court and request an evidentiary hearing. *See* S.C. Code Ann. § 17-28-40(B) (2014) ("The application [for DNA testing] must be verified by the applicant and filed under the original indictment number or petition with the clerk of court of the general sessions court or family court in which the conviction or adjudication took place."). The petitioner will be entitled to belated review if the circuit court judge³ affirmatively finds either: (1) the petitioner requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review was not knowingly and intelligently waived. *Cf. Odom*, 337 S.C. at 262,

appoint counsel to assist a PCR applicant if he is indigent); S.C. Code Ann. § 17-28-60 (2014) (requiring the court to appoint counsel for an indigent DNA testing applicant and noting that counsel appointed in an ongoing PCR proceeding must also serve as DNA counsel).

³ In cases where the conviction or adjudication took place in the family court, the family court judge shall hold the requested evidentiary hearing and make a finding as to whether the petitioner is entitled to belated review.

523 S.E.2d at 756 (outlining the standard the PCR judge must apply in determining whether a PCR applicant is entitled to an *Austin* appeal).

If the circuit court finds the petitioner is entitled to belated review, the petitioner shall serve and file a petition for a writ of certiorari under Rule 247, SCACR.⁴ The first question in the petition shall address whether the circuit court properly found the petitioner is entitled to belated review. In addition, the petition shall raise and address the questions the petitioner seeks to have reviewed regarding the decision on the application for post-conviction DNA testing.

If the circuit court finds the petitioner is not entitled to belated review, the petition for a writ of certiorari shall address only the question of whether the circuit court erred in finding the petitioner is not entitled to belated review. However, the petition shall also include a statement of the questions the petitioner would raise regarding the decision on the application for post-conviction DNA testing if belated review is granted.

Regardless of the finding of the circuit court, the Appendix under Rule 247(e), SCACR, shall contain the entire record before the lower court, including the transcript of any hearing held and the orders issued by the court as to both the application for post-conviction DNA testing and the petition seeking belated review, along with an index.⁵

Unlike the *Austin* review procedure, the petitioner will not be required to establish prejudice under the standard outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). See *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993) (noting "*Strickland* is concerned with attorney performance in the course of representation" and "does not apply to deprivations of counsel altogether," which occurs when counsel fails to file a notice of appeal); see also *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) ("[I]t is unfair to *require* an indigent, perhaps *pro se*,

⁴ See S.C. Code Ann. § 17-28-90(G) (2014) (granting applicants for post-conviction DNA testing the right to appeal by a writ of certiorari to the court of appeals or this Court as provided by the South Carolina Appellate Court Rules); Rule 247(a), SCACR (providing an order denying or granting DNA testing under the DNA Act shall be reviewed upon petition for a writ of certiorari).

⁵ This procedural guidance is based on that specified by *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992), for cases involving belated review under *Austin*.

defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."). Instead, prejudice will be presumed. *See Roe*, 528 U.S. at 483 (holding prejudice will be presumed where "counsel's deficient performance deprived him of a notice of appeal, and hence, an appeal altogether"); *Rodriguez v. United States*, 395 U.S. 327, 330 (1969) ("Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings."); *see also Frasier v. State*, 306 S.C. 158, 161, 410 S.E.2d 572, 574 (1991) (reviewing the denial of PCR and holding "counsel was ineffective in failing to perfect petitioner's appeal, and that petitioner was prejudiced thereby because but for counsel's deficient performance, petitioner would have taken a direct appeal").

Here, we find Mack's allegation that his DNA counsel failed to timely serve the notice of appeal from the order denying his application for post-conviction DNA testing permits him to seek belated review in accordance with this opinion. Therefore, we remand the case to the court of general sessions for an evidentiary hearing on the issue of whether he requested and was denied an opportunity to seek appellate review or the right to appellate review was not knowingly and intelligently waived. *See Wilson v. State*, 348 S.C. 215, 218–19, 559 S.E.2d 581, 583 (2002) (remanding for an evidentiary hearing to determine whether the petitioner knowingly and intelligently waived his right to appeal); *Austin*, 305 S.C. at 454–55, 409 S.E.2d at 396 (remanding for an evidentiary hearing to determine whether the petitioner requested and was denied an opportunity to seek appellate review). If the circuit court finds Mack is entitled to belated review, he may file a petition for a writ of certiorari under Rule 247, SCACR.

IV. CONCLUSION

Because Mack was prevented from seeking appellate review, we find it is necessary to provide an avenue of relief akin to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) that affords him the opportunity to obtain belated review. Accordingly, we reverse and remand to the court of general sessions for an evidentiary hearing consistent with this opinion.

REVERSED AND REMANDED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

evidentiary hearing to address Mack's PCR application was held on January 14, 2015. The Honorable Deadra Jefferson presided over the PCR hearing. The state was represented by Suzanne White. Mack was represented by Leah Moody. At the conclusion of the PCR hearing the court denied Mack's PCR application. An order of dismissal was filed on April 10, 2015. Mack immediately filed an appeal of the PCR court's decision. On February 1, 2018, the Court denied certiorari. As stated above, Mack filed a pro se application for retesting of the DNA in his case while his direct appeal was still pending. On October 31, 2014, a hearing was convened before the Honorable J. Derham Cole. Barry Barnette and Anthony Leibert represented the state. Mack was again represented by Leah Moody. The order denying Mack's request for DNA testing was filed on May 19, 2015. DNA counsel filed the Notice of Appeal out of time. Mack filed a notice of appeal of the DNA court's denial. On July 16, 2015, the Court of Appeals dismissed Mack's appeal as not timely served. On September 10, 2015, Mack filed a second PCR application wherein he alleged that DNA counsel was ineffective for failing to appeal the decision of the DNA court. The state filed a return and motion to dismiss on March 23, 2017, arguing that Mack had failed to state a cognizable claim under the PCR Act, that the application was not filed within the statute of limitations, and that the application was successive to Mack's initial PCR application. A hearing was held on June 29, 2017, before the Honorable Robin B. Stilwell, solely to address the state's motion to dismiss. Mack was represented by Rodney Richey. The state was represented by Valerie Giovanoli. The court heard argument from both parties before granting the state's motion to dismiss. On July 7, 2017, the PCR court filed an order denying Mack's second PCR application and dismissing it with prejudice. The order from the DNA Act hearing was filed one month after the initial PCR court's order of dismissal which had been filed on April 10, 2015. No evidentiary hearing was ever held on the merits of Mack's

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PCR application which is the subject of this appeal. Rodney Richey, filed an appeal of Judge Stilwell's order. Counsel also filed a separate accompanying explanation which provided that Mack had filed the second PCR application as the only means to appellate review of the order issued by the DNA court. Former Appellate Defender LaNelle Durant filed a petition for writ of certiorari on March 16, 2018. The state filed its return on July 12, 2018. The case was transferred to the Court of Appeal on July 25, 2019, and certiorari was granted on March 6, 2019. The Court of Appeals affirmed the second PCR court's decision in Mack v. State, 2019-UP-386 (Ct. App. filed December 18, 2019). Mack filed a petition for rehearing on December 20, 2019. The Court of Appeals denied the petition for rehearing on January 23, 2020. Mack sought a writ of certiorari to the Supreme Court to review the decision by the Court of Appeals. The Supreme Court granted certiorari on August 7, 2020 and remand the case to General Session Court on May 20, 2021.

AGREEMENT OF THE PARTIES

1. The action was filed on September 27, 2012 and denied by The Honorable J. Derham Cole on October 31, 2014.
2. The Notice of Appeal filed by Defendant's counsel was not filed timely;
3. Because of the untimely filing of the Notice of Appeal, the Defendant is entitled to a belated appeal on his application for Access to Justice Post-Conviction DNA Testing Act claim;

CONCLUSION

IT'S SO ORDERED that the Defendant, John W. Mack, is granted a belated appeal on his application for Access to Justice Post-Conviction DNA Testing Act claim.

AND ITS SO ORDERED.

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STANTON COUNTY
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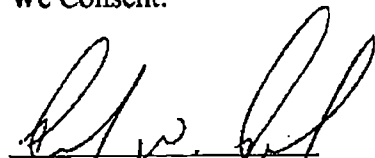
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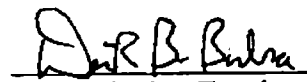
The Honorable Grace Gilchrest Knie
Judge of the Seventh Judicial Circuit

Dated: 2/15, 2022.

We Consent:



Rodney Richey, Esquire
Attorney for the Defendant



Derrick Balsa, Esquire
Attorney for the State

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