

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of General Sessions

Rivers Lawton McIntosh, Circuit Court Judge

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SC Court of Appeals

Appellate Case No.: 2013-001895

State of South Carolina Respondent

v.

James Richard Bartee, Jr. Appellant

REPLY TO RETURN TO MOTION FOR APPEAL BOND

This case arose out of an alleged solicitation to kidnap James C. Williams, Jr. so he could not appear at a hearing to be held on May 30, 2012. The hearing was a civil suit where James C. Williams, Jr. and the Appellant were interested parties, and the issue was the qualification of the Appellant to run for Sheriff.

On February 18, 2014, the Appellant, James Richard Bartee, Jr., filed a Motion for Appeal Bond. In its return, Respondent stated that Appellant's request for bond should be denied because Appellant advanced no arguments upon which a viable issue for appeal may be found. At trial, the State moved to enter into evidence a copy of an audio recording allegedly covertly recorded by law

enforcement by way of a confidential informant. Trial counsel for Appellant objected to the admission of the audio on the ground that the copies had not been authenticated and were unable to be authenticated because law enforcement was no longer in possession of the original audio file. The Court entered the audio recording into evidence. Appellant submits that this is a viable issue for appeal and submits the following in support thereof.

In order for an audio recording to be admissible, the proponent of the recording must establish the authenticity of the recording. United States v. Branch, 970 F.2d 1368, 1370 (4th Cir. 1992). Before admitting an audio recording into evidence for consideration by the jury, the court must determine whether its proponent has offered a satisfactory foundation from which the jury could reasonably find that the audio is authentic. Id. The appellate court will review a decision by the trial court to admit tape recordings into evidence for an abuse of discretion and will not find error unless the foundation for admission is “clearly insufficient to insure the accuracy of the recording.” Id. at 1372 (quoting United States v. Jones, 730 F.2d 593, 597 (10th Cir. 1984)).

In determining whether a proper foundation for authenticity of an audio recording has been established, courts consider the factors as set out in United States v. McKeever, 169 F.Supp. 426 (S.D.N.Y. 1958), rev’d on other grounds, 271 F.2d 669 (2nd Cir. 1959). These factors state that there must be proof that: (1) the recording device was capable of taking the conversation now offered in evidence; (2) the operator of the device was competent to operate the device; (3) the

recording is authentic and correct; (4) changes, additions or deletions have not been made in the recording; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers are identified; and (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement. Id. at 420. The most troubling of the McKeever factors relevant to this appeal are factors two and three: that the recording is authentic and correct, and that changes, additions or deletions have not been made in the recording.

At trial, Appellant called former FBI computer forensics examiner Al Johnson to the stand. The Court qualified Mr. Johnson as an expert in computer forensics. (Exhibit A Tr. p. 115, lines 8—9). Mr. Johnson went on to describe the process by which Anderson County covertly recorded a conversation by way of their confidential informant. According to Mr. Johnson's testimony, the audio was recorded to a SD card. After the audio was recorded to the SD card, the card was placed into a computer and a program was utilized to copy the audio from the SD card to the computer in which the card was inserted. Once the audio file was copied from the SD card to the computer, the SD card was erased and therefore the original audio file was erased.

On February 8, 2013, there was a pretrial hearing in front of The Hon. J.C. Nicholson, Jr. At the hearing, Judge Nicholson asked the solicitor if the original recordings on the digital device were still available and was told they were still available. (Exhibit B Tr. pp. 62—63). Judge Nicholson then ordered the State to provide Appellant with the opportunity to examine the original audio file on the digital

device. When Mr. Johnson attempted to view and analyze the original recording, he was unable to do so because it no longer existed. (Exhibit A Tr. p. 116, line 3). Mr. Johnson asked specifically for the original file of the audio and was told that there was no original, i.e., the file was no longer on the SD card. (Exhibit A Tr. p. 117, lines 18—20).

Having access to the original audio file is paramount to a forensics examiner's ability to authenticate the evidence. Mr. Johnson stated in his testimony that for a copy to be considered a forensic duplicate and therefore accepted as an industry standard, it must be authenticated with the original. (Exhibit A Tr. p. 118, lines 23—25). Mr. Johnson then went on to explain in detail the concept of hashing. In its most basic sense, hashing involves the process of running a program against another program, or in this case an audio file, and generating a number unique to that file and only that file. This number is essentially the DNA of the file and any file that generates the same number when hashed is an exact replica of the original. (Exhibit A Tr. p. 122, lines 7—9). Mr. Johnson testified that it is extremely important to hash the original file because often times merely copying and pasting the file from one medium to another does not copy the file exactly as it should. (Exhibit A Tr. p. 123, lines 16—17).

When Mr. Johnson went to analyze the original recording on the SD card, as the State was ordered to provide and stated they had in their possession, he was unable to do so and was instead provided with two (2) copies allegedly of the original recording. Mr. Johnson was able to run a hash on the copies and

determined that they were in fact true copies of one another. He was not able to testify as to the authenticity of the copies because he did not have the original to compare them to. (Exhibit A Tr. p. 126, lines 1—3). To be sure, Mr. Johnson testified on cross-examination that he has personally seen situations where an original was copied from one medium to the next, much like law enforcement did in the instant case, and the hashes did not match meaning that the copy was not an accurate, authenticated duplicate of the original. (Exhibit A Tr. p. 126, lines 3—5). Mr. Johnson went on to state that the only items that matched, scientifically, mathematically, and forensically, were the copies he was provided. However, he stated, the two of them matching each other without an authentication back to the SD card is worthless. (Exhibit A Tr. p. 136, lines 9—18).

Mr. Johnson went on to state that based on his review of Anderson County's standard operating procedure ["SOP"], officers are required to retain the originals on the SD card with respect to photographic evidence. (Exhibit A Tr. p. 126 lines 20—22). Mr. Johnson stated that with respect to a forensic examiner, a digital photograph is no different from an audio file. (Exhibit A Tr. p. 146, lines 23—24). He stated that digital photographs, like audio files, have their own electronic DNA and still need to be verified and authenticated. And if the examiner does not have the original file, they must have the next best thing, which is an authenticated copy. Finally, Mr. Johnson stated that one must be able to show that the copy is an accurate representation of the original and without the original or an authenticated copy, this is impossible to do. (Exhibit A Tr. p. 147, lines 4—12). In sum, Mr.

Johnson stated that whereas it is SOP for Anderson County to retain originals on the SD card when it comes to digital photographs, there was no rational or practical reason for Anderson County to erase the original audio file on the SD card.

One could argue that the authenticity factor is paramount above all else. Here, as the expert's testimony shows, it is not possible to state with certainty the authenticity of the recording at issue because the original recording no longer exists. At the February 8 hearing, the Court ordered the State to make the original recording available to Appellant after the solicitor stated that the State still had the original recording on the device. The State argued that it is standard procedure for Anderson County to remove audio files from the SD card after they have finished recording. They went on to state that it is impractical to keep the originals on the SD card for budget and other concerns. However, as Mr. Johnson stated in his testimony, had law enforcement simply run a program against the original audio on the SD card and generated a hash prior to removing it from the SD card, he would be able to determine the authenticity of the copies. Therefore, the Appellant is not stating that Anderson County should be forced to purchase a new SD card for every single recording they make in the course of their investigations. Rather, Appellant is merely stating that Anderson County, for reasons unknown to Appellant, chose to omit the simple step of generating a hash of the original file prior to erasing the SD card. Had they performed this action, Appellant's expert would have been able to state with certainty if the copies of the recording were in fact true and accurate duplicates of the original. Without this, the copies are worthless and Appellant has

no way of knowing if the copies are authentic and were properly admitted into evidence.

The State argues that their position is supported by the decision in State v. Mitchell, 399 S.C. 410 (Ct. App. 2012). In Mitchell, a private citizen property owner used his personal motion-activated camera to take photographs of a burglar. Id. at 413. The property owner downloaded the photos from his camera to his laptop and subsequently provided the photos to law enforcement. The property owner then authenticated the photographs on the disc as the same ones captured by his camera. The court admitted the photos and deemed them to be originals. Appellant submits that the Mitchell case is distinguished from the instant case in that Mitchell involved a private citizen photographing evidence of a crime. First, Mitchell involved photographs, not an audio file as we have here. Because this was a private citizen without any of the capabilities of law enforcement or Anderson County particularly, he was unable to properly authenticate the photos. In Mitchell, the photos were provided to law enforcement by a private citizen lacking the capability to run a hashing program or otherwise properly authenticate the evidence. Here, law enforcement was fully capable and should have authenticated the audio file prior to removing it from the SD card.

Appellant concedes that a rigid application of the McKeever factors is not required in every case. Branch, 970 F.2d at 1371. Appellant does, however, submit that the McKeever factors provide guidance to the Court when ruling on authentication issues. Id. at 1372. Here, the inquiry fails upon reaching the third

factor, that the recording is authentic. Appellant submits that the Anderson County Sheriff's Department should have retained the original audio file on the SD card inasmuch as they are required to do the same for digital photographs. The requirement for retention of original digital photographs coupled with Mr. Johnson's testimony regarding the similarities of audio and photographic evidence with respect to forensic examination, show that the officers should have retained the original audio file on the SD card. Had they followed the SOP with respect to photographic evidence, Appellant would be able to determine if the audio was in fact a true and accurate copy of the original. Without the original, Appellant has no way of confirming the authenticity of the audio and therefore satisfying arguably the most important of the McKeever factors.

The State has set forth several additional arguments as to why the Appellant should be denied bond.

- (1) "The Acts necessary to accomplish the kidnapping would likely have been extremely violent. Appellant should not be released during the appeal after conviction for such an offense."
- (2) "Appellant does not possess the requisite character deserving of his release on bond pending appeal."
- (3) "Appellant may pose a danger to the same victim and community where the crime was committed. . .".

In addressing (1) above, the Appellant would state that while the charges and conviction allege serious misconduct on the part of the Appellant, the plot to kidnap

the Judge, so he would be absent from the hearing, was abandoned on May 29, 2012, the day before a hearing was to be held on the civil matter that was pending. We offer this in mitigation of the serious nature of the allegations.

Attached to this Reply is Exhibit D, which is a transcript of the audio prior to and including, the meeting between the informant and the Appellant, as well as the informant and a law enforcement officer.

Prior to the undercover meeting between the informant and the Appellant, the informant states “you mean you want me to dis-enable (phonetic) his car, you know where he can’t show up. He said yeah that’d work . . . The more I ponder on it, the more I believe that he never wanted this to take place now.” (Exhibit D, Tr. p. 29, line 23 to Tr. p. 30).

During his trial testimony, the informant would deny that his comment (that he never wanted this to take place) had anything to do with the kidnapping itself and offered two other versions of what he meant.

The transcript, prior to the undercover meeting, also revealed that the informant stated “and he even mentioned this once - - he got - - told me “Hey let’s call this off right now, because it’s not going to do no good.” (Exhibit D, Tr. p. 30, lines 13—6).

During the undercover meeting between the informant and the Appellant, the Appellant states “But it doesn’t matter if Mr. Williams didn’t show up tomorrow, they’d still go on”, meaning the hearing. (Exhibit D, Tr. p. 37, lines 18—20).

In fact, the informant gives the Appellant back the money that he allegedly

gave him to buy items to carry out the kidnapping. (Exhibit D, Tr. p. 38, lines 11—12).

The transcript of the undercover meeting also reveals the following discussion. The Appellant states that “there might be a time, but tomorrow ain’t gonna be it”. (Exhibit D, Tr. p. 46, lines 16—17).

According to the transcript, the Appellant says “there is no need, the attorney said it doesn’t matter whether he’s there or not, and if they were going to drop the case if he wasn’t there, it wouldn’t matter. Then, like I said, drive him up the road and drop him off.” (Exhibit D, Tr. p. 47, lines 1—7).

During the trial, the informant, Nicholas Blackwell testified. “They told me to hold off on the action of kidnapping the judge.” (Exhibit A, Tr. p. 572, lines 7—8). Mr. Blackwell also testified that “I began talking to Mr. Bartee, gave him the money back. You know, we talked about why we were not gonna kidnap the judge. He told me his lawyer said it wouldn’t matter if the judge didn’t show up, the case would go on.” (Exhibit A, Tr. p. 579, lines 20—24).

Blackwell also testified “it seems as if he was saying, let’s don’t kidnap the judge, let’s wait until the dust settles and we’re gonna do some other action. It was implied, you know, he never was very specific.” (Exhibit A, Tr. p. 580, lines 17—20).

Blackwell also testified:

“I believe at the point when the, the taped conversation between Bartee and I, at that point I think he had decided through his attorney that the judge not

being at the trial would have no effect; therefore, he did want to call off the kidnapping. But as a result he said we would wait till the dust settles. And I guess it's up for speculation what he meant by all that, but I assume he was speaking of doing something later on." (Exhibit A, Tr. p. 604, lines 2—9).

In addressing (2) above, the Appellant does believe he possesses the requisite character deserving of his release on bond pending appeal. In addition to the information provided in the Appellant's Motion for Appeal Bond, the Appellant worked as a Secret Service Agent for seven (7) years while living in South Carolina (Exhibit C, Tr. p. 16, lines 2—6); the Appellant received many awards for his service as a Secret Service Agent (Ex. C, Tr. p. 19, lines 9—10); and, the Appellant served in the Presidential Protection Division during the presidency of George W. Bush, and the first year of the Clinton Administration. (Ex. C, Tr. p. 128, lines 12—14).

In (3) above, the State alleges that Appellant may pose a danger to the same victim and community where the crime was committed. This is far fetched. The Appellant had a long career in the Secret Service, including being on the Presidential Protection Division. He has absolutely no history of violence. Neither he or anyone else ever approached Judge Williams to cause him any harm. The events in question took place in May of 2012, and the trial was not held until August of 2013. There is no evidence the Appellant or anyone else approached Judge Williams during that period or any other time, and there is no evidence he violated

his bond in any manner.

Wherefore, the Appellant requests that he be granted a bond pending appeal.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Jack B. Swerling". The signature is written over a horizontal line that separates it from the printed contact information below.

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May 5, 2014
Columbia, South Carolina

EXHIBIT A

1 forensics.

2 THE COURT: Any voir dire?

3 MR. WAGNER: No, sir.

4 THE COURT: Do you stipulate that Mr. Johnson is an
5 expert ---

6 MR. WAGNER: Yes. I met Mr. Johnson before. I
7 will stipulate that he is an expert.

8 THE COURT: Thank you. Very good. He will be
9 so -- he is admitted.

10 MR. BRANNON: Thank you. Forgive me, Your Honor.
11 I could have just asked that and I could have saved 20
12 minutes. I'm sorry.

13 By Mr. Brannon:

14 Q. All right. You've had an opportunity to be
15 involved in this case, correct?

16 A. That's correct.

17 Q. You were present on March the 6th of this year when
18 you were to review an audio recording, correct?

19 A. That is correct.

20 Q. All right. Now, you don't know this, probably, but
21 there was a hearing in front of Judge Nicholson sometime
22 before March the 6th when the State was ordered to
23 provide you and Mr. Bartee's team the opportunity to
24 review the original. Do you remember that?

25 A. I remember -- yes, I do remember that I was

1 supposed to be there reviewing the original, yes.

2 Q. Okay. Did you do that?

3 A. I was unable to view or analyze an original.

4 Q. Okay. All right. Now I'm gonna backtrack. You
5 haven't been in the courtroom. But I do this (putting
6 hands on table), I put my fingerprints down, right?

7 A. That is correct.

8 Q. Somebody, some qualified technician comes in and
9 lifts what are called latent prints, right?

10 A. That is correct.

11 Q. If I've never been arrested or had my fingerprints
12 taken such that they would go into some database
13 somewhere, what good is that print?

14 A. That print would come back as a not on file, so the
15 print in and of itself could identify no one because it
16 hasn't been authenticated by a known original subject
17 print.

18 Q. Okay. Now, how do you authenticate my latent
19 print?

20 A. Your latent print would be authenticated once the
21 print has been lifted and sent to the lab. They would
22 run it through AFIS, and if there is a match, in other
23 words, a set of fingerprints that are already on file,
24 then that print would come up as a match. That law
25 enforcement agency would then be notified that there is

1 a match and this is the name of the individual who has
2 the match.

3 If the person is not within that database, then you
4 don't have a match. You've got to have an original,
5 you've got to have what would be called an original.

6 Q. Right. And, in other words, you can't authenticate
7 that?

8 A. You cannot authenticate that.

9 Q. And the only way to authenticate my prints is to
10 match them to another set of my known prints, correct?

11 A. That is correct. That and also with DNA. It's all
12 the same type of identification process. It is a
13 comparative process.

14 Q. Okay. Now, on March the 6th, what did you look at?

15 A. On March the 6th, when I arrived, I was given a
16 briefing on the, on the equipment. And I was then shown
17 copies, what were said to be copies, of sound files.
18 And asked specifically for the original of the sound
19 file. Of course, I was told that there was no original,
20 meaning there was no longer a file on the SD card.

21 Q. Okay. Let me stop you and back you up a little
22 bit. Please explain to the Court how you were -- how
23 the recording series was done. Can you do that? In
24 other words, it was recorded to what and then moved to
25 what? Can you do that?

1 A. And I'm speaking now from what I -- my best
2 information and belief when it comes down to where it
3 was recorded from because I was not there.

4 But, with regard to that, my understanding is this.
5 The recording to the SD card was done in a covert manner
6 wherein an informant or a cooperating witness was
7 speaking with another individual. That particular
8 conversation was recorded digitally to the SD card on
9 the device or within the device that the individual was
10 wearing.

11 The SD card and the device was then turned over to
12 the authorities who the confidential informant was
13 working for, and at that point in time the device was
14 placed into a machine, a computer, and specialized
15 software, Toker, copied from the SD card to a computer
16 or another hard drive, another piece of media, the
17 actual original or a copy of the original.

18 Q. Okay. Now, is there a difference between cut and
19 copy?

20 A. Technically, yes. Most people use the terms
21 relatively generically. But a copy for a forensics
22 examiner is not necessarily a forensic duplicate. It is
23 only a copy that can be used. But in order for it to be
24 a forensics duplicate, accepted practices in the
25 industry, it must be authenticated with the original.

1 of, every intelligence agency that I know of. The
2 number that is produced by the MD5 system is a 128-bit
3 mathematical number unique to that file. That file and
4 that file only in the world will have that number.

5 The SHA1 algorithm will produce an even greater
6 value, 160-bit value, that is also unique to that file
7 just like my DNA or your DNA is unique to you. Any file
8 coming back with that number is an exact replica
9 forensically unchallenged of the original.

10 Q. Okay. Now, so if you run this, this recording on
11 this SD card against that software, either one, the SHA
12 or the MD5, it's gonna give it its DNA?

13 A. That is correct.

14 Q. And then, if you move it from that SD card, that
15 DNA is gonna go with it, correct?

16 A. That is correct.

17 Q. So you are moving the original?

18 A. If you move it, that's correct, yes, sir.

19 Q. Okay. And, when you move the original, it takes
20 its DNA with it, correct?

21 A. That's correct.

22 Q. All right. And so, then, if you make a copy of the
23 original, what's gonna go to that copy?

24 A. If you make a copy -- let me ask this question. Is
25 it a forensics copy or just a copy?

1 Q. It's a forensics copy.

2 A. A forensics copy, we don't call it copy.

3 Q. Okay.

4 A. We call it export.

5 Q. Okay.

6 A. If it is exported out forensically, there is first
7 what is called an acquisition hash; in other words, the
8 forensic software does a hash against the file and gives
9 you, once again, its DNA. When the forensics software
10 has completed its export, it does what is called a
11 verification hash and it matches the verification hash
12 with the acquisition hash.

13 If that export is successful, or let's say if that
14 export exported accurately, the two numbers should match
15 perfectly.

16 There are times when copying and moving do not take
17 the file exactly correctly.

18 Q. Okay. But if you -- if you produce, if you export
19 forensically a data file, you have created a duplicate
20 original?

21 A. That is correct.

22 Q. Okay. Now, you were shown two disks on March the
23 6th. Correct?

24 A. Correct.

25 Q. And you did your forensic magic stuff, and you

1 Q. Is it possible for you to prove that this disk is
2 an accurate copy of the original?

3 A. If I had the original I could ---

4 Q. Okay.

5 A. --- because I would need to run a hash against the
6 original or accept a previously run hash.

7 Q. Right. But on March the 6th, did they give you the
8 original?

9 A. No.

10 Q. Do you believe that the original exists today?

11 A. Well, I was told that it does not.

12 Q. Okay. So is there any way to confirm the
13 authenticity of this, of this recording?

14 A. Scientifically, mathematically I know of no way to
15 prove the authenticity of that recording or any
16 recording without the original, going back to the
17 fingerprint model.

18 Q. Okay. Now I want to go to FBI procedures. FBI is
19 involved with the recording of a conversation between
20 the State's snitch in this case and someone allegedly
21 called James Richard Bartee, Junior. Okay?

22 A. And this is a hypothetical?

23 Q. This is a hypothetical. FBI is involved. Give me
24 the procedure.

25 A. The procedure would be after -- first of all, all

1 that I would. Because for me empirical proof comes in a
2 scientific way, the mathematical hash. So, no, I would
3 not, primarily because I have seen copies like that made
4 and the hashes do not match, which means that there was
5 an issue in the transfer process and you have to do it
6 all over again. It does happen forensically.

7 Q. Okay. But in this case they matched?

8 A. No, no, no. Matching against the original. You've
9 got to have the original. The only thing that matched
10 in this case were the two copies matching each other.
11 What I'm -- what I'm trying to say is this. In order
12 for me to say that they would match, I would have to
13 have to have had the original hash value from the file
14 on the SD card, and at that point in time I would be
15 able to say, this copy is a match to the SD card or this
16 copy is a match to the SD card. But the two of them
17 matching each other without an authentication back to
18 the SD card is basically worthless.

19 Q. Not if you have four agents that testified that
20 that's exactly what was said and that that's an exact
21 and true and accurate recording of what was recorded?

22 A. Okay. If we're talking about the voice, if we're
23 talking about authentication through the law enforcement
24 officer being there, that's not what I evaluate, that's
25 not what I am an expert in, so that's a whole different

1 has been authenticated with the hash value that has been
2 verified. They don't give me an original. They give me
3 the hard drive with the image that's been authenticated
4 and verified, and when I run my hash against what they
5 gave me, 100 percent of the time it's come up a match.
6 So I know that SLED does it based upon the Federal Rules
7 of Evidence and the South Carolina State Rules of
8 Evidence.

9 The other agencies I have had no recent contact
10 with them to know how they do what they do. But again,
11 if an examiner tells you that they don't use hashing to
12 verify and authenticate, that would surprise me.

13 Q. I'm not trying to put words in your mouth. But the
14 bottom line. Your testimony here today basically is
15 that when you were at the FBI y'all have a different
16 version of the original versus what the guys in this
17 case do?

18 A. That is not my testimony. We do not have a
19 different version. In fact, as I said, on pages 11 and
20 12 of 24, along with page 15 of 24 of the Anderson
21 County SOP, they pretty much say the same thing that I'm
22 saying right now, but it is in conjunction with photos.

23 And keep in mind a digital photo is just another
24 digital file, no real differences with a sound file. In
25 fact, the same relative kinds of compression that you

1 would use on one you would use on the other.

2 And examiners look at things as a file. It's a
3 file. It doesn't matter whether if it's an image of a
4 picture or a sound. It is still a file, it still has
5 its own electronic DNA. It still needs to be verified,
6 it still needs to be authentic, and if you don't have
7 the original, you have to have the next best thing under
8 the rules of evidence, and that is an authenticated
9 copy, because the rules of evidence state that you must
10 be able to show that the copy is an accurate
11 representation of the original and you can't show an
12 accurate representation if it's not scientific.

13 Q. If you have five officers that can authenticate it,
14 do you understand that ---

15 THE COURT: Let's move forward. I got it.

16 MR. WAGNER: Yes, sir.

17 That's all I've got, Judge.

18 MR. BRANNON: Just a few.

19 THE COURT: Guys, we are not even done with one
20 motion and it is 20 minutes till five.

21 MR. BRANNON: I understand.

22 THE COURT: Okay.

23 MR. BRANNON: Okay.

24 THE COURT: I'm just telling you we'll be out of
25 time is what I'm saying, so just be careful.

1 We talked for a few minutes about that. I don't
2 remember the details, other than, after we had the
3 conversation he wanted me to meet him; which I did, I, I
4 met him at Anderson County Detention Center or sheriff's
5 office, one. I believe the Detention Center.

6 Q. Along with that timeframe did Bartee call you?

7 A. He did. Yeah. They told me to hold off on the
8 action of kidnapping the judge.

9 Q. Why was that?

10 A. He was wanting to consult with his attorney because
11 for some reason they had a suspicion that the trial
12 would be proceeding with or without the judge as long as
13 his attorney was present.

14 Q. When you say "they" called, who called you
15 specifically?

16 A. I believe it was Joe.

17 Q. Okay. And what exactly did he tell you?

18 A. He told me to hold off. He said we're gonna talk
19 to Bartee's lawyer, but it seems as if they may have the
20 trial anyway, even if the judge does not show up for
21 court, they won't dismiss it, he said, so let's just
22 wait until we talk to his attorney before we go any
23 further.

24 Q. Was that before or after you talked to Michael
25 Sloan?

1 A. Well, because Bartee was, had a trial the next
2 morning. We had, you know, wanted to hurry up and get
3 over there so we would have time to talk.

4 Q. Okay. So did you go to Bartee's house?

5 A. I did.

6 Q. Did you go around the back door?

7 A. I did.

8 Q. And what happened next? What happened?

9 A. He let me in. He was watching television.

10 Q. What was he watching?

11 A. The Hatfield and McCoys, I guess it's a series, it
12 could have been a movie, I believe it was a series, a
13 show that was on television.

14 Q. Who was there?

15 A. Just Bartee. I assume his wife was there in the
16 bed, but Bartee is the only person I seen.

17 Q. Were there any other cars in the driveway?

18 A. No.

19 Q. All right. What happened next?

20 A. I began talking to Bartee, gave him the money back.
21 You know, we talked about why we were not gonna kidnap
22 the judge. He told me his lawyer said it wouldn't
23 matter if the judge didn't show up, the case would go
24 on. He told me the FBI would be here tomorrow blaming
25 him, even though he had previously told me to blame

1 Jerry Edwards for the kidnapping.

2 He was watching a TV show. And I recall he said,
3 This is one of those things you sit on and wait and let
4 the dust settle. Just like on this TV show, the
5 Hatfields and the McCoys, you just let the dust settle.
6 Then you don't need a mask when you sneak up on them.
7 Don't even let them know what hit him.

8 Q. What did he mean by that?

9 MR. BRANNON: Object.

10 THE COURT: Sustained.

11 By Mr. Wagner:

12 Q. What else did he say?

13 A. Uh, you know, he told me the judge was a weasel.
14 He said a lot.

15 Q. Did he tell you not to do it or did he just tell
16 you to wait?

17 A. It seems as if he was saying, Let's don't kidnap
18 the judge, let's wait till the dust settles and we're
19 gonna do some other action. It was implied. You know,
20 he never was very specific.

21 MR. BRANNON: Objection.

22 THE COURT: He's giving his impression. I overrule
23 that.

24 THE WITNESS: He never was very specific. But it
25 implied to me, my perception of it was when he said I

1 temporarily delayed possibly?

2 A. I believe at the point when the, the taped
3 conversation between Bartee and I, at that point I think
4 he had decided through his attorney that the judge not
5 being at the trial would have no effect; therefore, he
6 did want to call off the kidnapping. But as a result he
7 said we would wait till the dust settles. And I guess
8 it's up for speculation what he meant by all that, but I
9 assume he was speaking of doing something later on.

10 MR. WAGNER: Thank you. If you would answer any
11 questions Mr. Brannon may have.

12 THE WITNESS: Yes.

13 THE COURT: Cross-Examination.

14 MR. BRANNON: May it please the court?

15 THE COURT: Yes, sir.

16 Cross-Examination by Mr. Brannon:

17 Q. Mr. Blackwell, how old are you?

18 A. 29.

19 Q. Where did you go to high school?

20 A. West Oak.

21 Q. Did you graduate?

22 A. I did.

23 Q. Okay. What year?

24 A. I graduated in 1998, early.

25 Q. Okay. Did you ever go to college anywhere?

EXHIBIT B

1 THE COURT: Okay.

2 MR. MOORE: But that doesn't mean that the I.D.
3 of the voices has not been modified from the original.
4 And we believe there may have been -- we believe based
5 upon what has -- we've already had that's been modified
6 and edited, we believe we either don't have a complete
7 version of the tapes or ---

8 THE COURT: But won't the digital recording
9 tell you that?

10 MR. MOORE: The original device as recorded
11 will tell us. Yes, sir. That's what I want.

12 THE COURT: Wouldn't that tell you that?
13 Solicitor, what were you going to say on the tape?

14 MS. ADAMS: Judge, Anderson County narcotics
15 officers are the ones that did the recordings. Mr. Moore
16 ---

17 THE COURT: Did they do it digitally, or did
18 they do it on a DVD?

19 MS. ADAMS: Well, they used their narcotics
20 devices. I believe the original is probably on a
21 computer and Mr. Moore is more than welcome to go and sit
22 and listen. It's the same thing that he has. What he's
23 referring to is we did a transcript of what was on the
24 tape ---

25 THE COURT: All right. Is the original

1 recordings on the digital device still available?

2 MS. ADAMS: Yes, sir. We can ---

3 THE COURT: Okay. Then make that available for
4 you ---

5 MS. ADAMS: Absolutely.

6 THE COURT: --- and Mr. Moore to sit down and
7 listen to it and compare it to what he has, okay?

8 MS. ADAMS: Absolutely.

9 THE COURT: Has it been transcribed?

10 MS. ADAMS: We did transcribe it, Judge, yes.

11 And that's what I think he's talking about ---

12 THE COURT: Have you given him a copy of the
13 transcription?

14 MS. ADAMS: I mean, we did that as an aid to
15 help make it easier to ---

16 THE COURT: Have you given him a copy of the
17 transcript?

18 MS. ADAMS: Yes, sir.

19 THE COURT: You have?

20 MS. ADAMS: Yes, sir. We've given him
21 everything that we have.

22 THE COURT: Okay. All right.

23 MR. MOORE: They haven't given me a copy of the
24 transcription.

25 THE COURT: Mr. Moore?

EXHIBIT C

- 1 A. In 1993 they transferred me here.
- 2 Q. So you were in South Carolina working as a federal
3 law enforcement officer?
- 4 A. Yes.
- 5 Q. For almost ten years; is that correct?
- 6 A. Seven years here.
- 7 Q. Okay. '93 to 2000, correct?
- 8 A. Yes.
- 9 Q. Okay. All right.
- 10 A. Now, there was other -- you asked me about the
11 locksmith job.
- 12 Q. I'll get back to that. How old were you -- and I
13 can't, this early in the morning, do the math. But how
14 old were you on December the 14th, 1985?
- 15 A. 1985? Let's see, '75. Twenty to twenty-nine, I
16 guess.
- 17 Q. Okay. Do you remember being in the courtroom and
18 your friend Joe Milbert was on the witness stand, and
19 Madam Solicitor stood up and held up a piece of paper and
20 said, did you know your friend was suspended? Do you
21 remember that?
- 22 A. Oh, absolutely.
- 23 Q. And she said, for making a racial slur. Do you
24 remember that?
- 25 A. Yes.

1 fingerprints. And I went back and we served it. And I
2 think sometimes the best defense is an offense. So she
3 came in and filed a complaint in the office that I had
4 mistreated her by us giving her those subpoenas.

5 Q. Okay. So she reported you for doing your job?

6 A. Absolutely.

7 Q. Okay. All right. Were you ever suspended again in
8 your career as a secret service agent?

9 A. No. I received many, many awards for my performance
10 awards.

11 Q. Okay. Did you make a racial comment to anyone?

12 A. No.

13 Q. Now, let's put it all out there.

14 A. Okay. Yeah. Please, I'd like that.

15 Q. Where were you when this person alleged that you
16 cursed or made a racial statement?

17 A. I was on an undercover assignment in Cleveland,
18 Ohio, and had stopped at a gas station to fill up my
19 undercover car.

20 Q. All right. Now, this person who made this
21 allegation, she says that you called her either a cow or
22 a black bitch.

23 A. That's what the report says.

24 Q. Now, that's what the report says. But even the
25 person who says you said it can't remember what you said?

1 A. No, I did not call her a black bitch.

2 Q. But you were suspended, correct?

3 A. Yes.

4 Q. For this incident?

5 Now, Mr. Bartee, how long have you been a senior
6 special agent? How long were you a senior special agent
7 with the Secret Service?

8 A. I was a special agent from '83 to 2000. The title
9 senior special agent probably came -- it came while I was
10 serving on the Presidential Protection Division.

11 Q. So what year was that?

12 A. I was on the President -- from all of George Bush's
13 term, '89-ish and I believe first eight, ten, twelve
14 months of Bill Clinton's administration.

15 Q. So roughly how many years?

16 A. Four.

17 Q. So you retired in 2000?

18 A. Four, four and a half. And then they transferred me
19 to Greenville.

20 Q. Right. But with the title senior special agent, you
21 were a senior special agent for four years?

22 A. No. I was a senior special agent probably from
23 somewhere '92 to '93 until I retired.

24 Q. And you retired in 2000; isn't that correct?

25 A. Yes.

EXHIBIT D

1 BUMPED HIM ON THE SHOULDER AND SAY, "HEY, WHAT YOU
2 DOING?" AND IT WAS BARTEE. I DIDN'T RECOGNIZE
3 HIM 'CAUSE HE WAS WEARING A STRAW HAT, YOU KNOW.
4 AND, UH, HE SAT THERE AND TALKS TO THIS GUY, YOU
5 KNOW, AND I'M KIND OF IN AND OUT OF THE
6 CONVERSATION. MY WIFE AND KIDS WERE OVER HERE AND
7 -- I HAD TO CHASE MY BOY AROUND AND ALL THIS
8 STUFF. WELL, THE GUY WALKS OFF AND THE CROWD KIND
9 OF THINS OUT A LITTLE BIT. AND THEN HE JUST, YOU
10 KNOW, GOES LIKE THIS -- AND HE KIND OF LEANS INTO
11 ME A LITTLE BIT AND SAID, "I WONDER WHAT WOULD
12 HAPPEN IF THE JUDGE DIDN'T SHOW UP TO THE COURT
13 CASE?" SO, I JUST KIND OF LAUGHED. I THOUGHT HE
14 WAS JUST, YOU KNOW -- I -- AND I SPILLED BEER ON
15 HIM WHEN HE DID IT. I'M LIKE (INAUDIBLE) -- I
16 JUST KIND OF LAUGHED AND I SAID, "I DON'T KNOW."
17 AND HE SAID, "WELL, THEY'D HAVE TO DISMISS IT,
18 WOULDN'T THEY?" I SAID, "YEAH, PROBABLY." HE
19 SAID, "WHY DON'T YOU TAKE CARE OF THAT FOR ME."
20 (LAUGHTER) THE NEXT DAY, YOU KNOW, I CALLED HIM
21 UP AND, UH -- THAT'S WHEN I REALIZED HE WAS DEAD
22 SERIOUS. YOU KNOW, I DON'T KNOW -- YOU KNOW,
23 "WHAT ARE YOU TALKING ABOUT? YOU MEAN YOU WANT ME
24 TO DIS-ENABLE (PHONETIC) HIS CAR, YOU KNOW, WHERE
25 HE CAN'T SHOW UP?" HE SAID, "YEAH, THAT'D WORK."

1 BUT HYPOTHETICAL, SEE -- YOU KNOW, HE WAS VERY
2 CAREFUL ABOUT NOT (INAUDIBLE) -- THE MORE THAT I,
3 UH, PONDER ON IT, THE MORE I BELIEVE THAT HE NEVER
4 WANTED THIS TO TAKE PLACE NOW. I THINK, I THINK
5 MORE THAN ANYTHING, HE WAS WANTING TO FEEL ME OUT.
6 BECAUSE HE SPENT--OUT OF HIS OWN MOUTH--ABOUT, UH,
7 ABOUT THIRTY THOUSAND DOLLARS (\$30,000). HE TOLD
8 ME HE LOST ABOUT TWO MILLION DOLLARS
9 (\$2,000,000,000) ON HIS HOME. I KNOW HE'S ALREADY
10 GOT ABOUT THIRTY GRAND (\$30,000) IN HIS CAMPAIGN
11 BASICALLY -- WE'RE GOING TO MAKE A RIGHT AT THIS
12 NEXT RED -- NOT THIS LIGHT, BUT THE NEXT ONE.
13 BUT, HE, HE BASICALLY, UH, WAS BROKE. AND HE EVEN
14 MENTIONED THIS ONCE -- HE GOT -- TOLD ME, "HEY,
15 LET'S CALL THIS OFF RIGHT NOW, BECAUSE IT'S NOT
16 GOING TO DO NO GOOD." HE SAID, "ONE THING I KNOW
17 ABOUT OPERATIONS, AND YOU DON'T WASTE THEM, YOU
18 KNOW, SOMETHING BIG ---

19 BY OFFICER: HERE?

20 BY MALE #1: --- YEAH, MAKE A RIGHT HERE.
21 THIS IS HIGHWAY 130. HE SAID, "YOU DON'T WASTE A,
22 A BIG BILL ON SOMETHING WITH NO AFFECT." YOU
23 KNOW, HE SAID, "YOU KNOW, IT MIGHT BE THAT THEY
24 SUCCEED AT GETTING ME OFF THE BALLOT, YOU KNOW."
25 HE SAID, "IF THEY DO, I'LL FILE INDEPENDENT COME

1 DIDN'T LOOK AT IT CLOSE. WITH THE FLASH GOING
2 OFF, MUZZLE OFF AND EVERYTHING. I MEAN, WHAT DOES
3 HE THINK? HE'S AN ACTION STAR?

4 BY MALE #1: HE'S A FUCKING IDIOT.

5 BY MALE #2: I KNOW, BUT I'D BE LUCKY IF HE
6 KILLED HIMSELF WITH THAT THING. THAT'S WHY I'M
7 SAYING, ---

8 BY MALE #1: HEY, DID YOU SEE THE DUCKS THAT
9 THEY HAD? (LAUGHTER)

10 BY MALE #2: --- THAT'S WHY I'M SAYING JERRY
11 EDWARDS HAS THROWN HIM TO THE WOLVES. BECAUSE ---

12 BY MALE #1: YEAH.

13 BY MALE #2: --- JERRY WOULDN'T HAVE ALLOWED
14 A PICTURE LIKE THAT. DO YOU KNOW WHAT I'M SAYING?
15 AND THEN SOME GIRL WROTE SOMETHING OR ANOTHER
16 ABOUT HIM GOING TO (INAUDIBLE) AND HAVING BIG
17 LUNCHES. ME -- (INAUDIBLE) -- I AIN'T GOT NOTHING
18 TO DO WITH OCONEE (INAUDIBLE). BUT, IT DOESN'T
19 MATTER IF MR. WILLIAMS DIDN'T SHOW UP TOMORROW,
20 THEY'D STILL GO ON.

21 BY MALE #1: THEY CAN?

22 BY MALE #2: AIN'T THAT SOME SHIT?

23 BY MALE #1: YOUR LAWYER TOLD YOU THAT?

24 BY MALE #2: YEP.

25 BY MALE #1: HUH.

1 BY MALE #2: SOMEBODY CAN SUE YOU. IT DON'T
2 MATTER IF HE DIDN'T SHOW UP. JULIAN CAN STILL DO
3 IT. IF JULIAN WASN'T THERE, THEY'D JUST POSTPONE
4 IT. AIN'T THAT A CROCK OF CRAP ESTABLISHED
5 SYSTEM? IF YOU DIDN'T SHOW UP, ---

6 BY MALE #1: IF I DON'T WANT -- GO TO COURT,
7 I GOT A DAMN BENCH WARRANT ON ME.

8 BY MALE #2: SEE, WATCH WHAT I'M SAYING. THE
9 SYSTEM'S STACKED, AIN'T IT, FOR THE LAWYERS AND
10 STUFF?

11 BY MALE #1: HERE'S A HUNDRED AND THIRTY-
12 EIGHT DOLLARS (\$138.00). AND ---

13 BY MALE #2: NO PROBLEM.

14 BY MALE #1: --- I TOLD YOU, NOW, THAT SOME
15 OF IT I USED IN GAS. YOU KNOW WHAT I MEAN?

16 BY MALE #2: I KNOW, YOU'VE BEEN TRYING HARD.
17 I WOULDN'T DOUBT THAT. SAVE THAT.

18 BY MALE #1: (INAUDIBLE)

19 BY MALE #2: MAKE IT, MAKE IT A (INAUDIBLE).

20 BY MALE #1: I WAS KIND OF LOOKING FORWARD TO
21 BUSTING HIM IN THE HEAD.

22 BY MALE #2: WELL, WE CAN WAIT ON THAT.

23 (LAUGHTER)

24 BY MALE #1: WAIT ON IT?

25 BY MALE #2: YEAH. THE FIRST THING WE HAVE

1 BY MALE #2: THERE'S A REASON HE'S A FORMER
2 STATE TROOPER.

3 BY MALE #1: (LAUGHTER) I MEAN, I DON'T SEE
4 HOW NOBODY TAKES HIM SERIOUSLY. I REALLY THOUGHT
5 THAT IT WAS A COMPUTER ANIMATED VOICE. I DON'T
6 SEE HOW NOBODY COULD TAKE HIM SERIOUSLY. IF HE
7 WAS SITTING THERE TALKING TO ME AT MY WINDOW, I'D
8 LAUGH AT HIM.

9 BY MALE #2: I AGREE WITH YOU.

10 BY MALE #1: (LAUGHTER) MAN, I WAS OVER
11 THERE -- I WAS ALL PSYCHED UP (INAUDIBLE).

12 BY MALE #2: YEAH. WELL, I'M JUST SAYING YOU
13 DON'T SPEND YOUR POLITICAL. -- TILL YOU HAVE TO.
14 YOU KNOW WHAT I'M SAYING?

15 BY MALE #1: YEAH.

16 BY MALE #2: THAT'S WHAT I THINK. THERE
17 MIGHT BE A TIME, BUT TOMORROW AIN'T GONNA BE IT.

18 BY MALE #1: YEP. WELL, ---

19 BY MALE #2: BUT RIGHT NOW, THEY'D BLAME ME
20 ANYWAY.

21 BY MALE #1: HUH?

22 BY MALE #2: I SAY, IF IT HAPPENED TOMORROW,
23 THEY'D BLAME ME ANYWAY.

24 BY MALE #1: YOU THINK SO?

25 BY MALE #2: I MEAN, IT'S -- THERE'S NO NEED.

1 THE ATTORNEY SAID IT DOESN'T MATTER WHETHER HE'S
2 THERE OR NOT.

3 BY MALE #1: RIGHT.

4 BY MALE #2: NO NEED. IF THEY WOULD SAY THEY
5 WERE GOING TO DROP THE CASE IF HE WASN'T THERE, IT
6 WOULDN'T MATTER. THEN, LIKE I SAID, DRIVE HIM UP
7 THE ROAD AND DROP HIM OFF; RIGHT?

8 BY MALE #1: TAKE HIM TO ASHEVILLE? I WAS
9 GOING TO TAKE HIM TO TABLE ROCK, MAN.

10 BY MALE #2: SOMEWHERE -- I THINK YOU NEED
11 SOMEWHERE WHERE IT TAKES A LONG TIME TO GET BACK.

12 BY MALE #1: YEAH.

13 BY MALE #2: RIGHT?

14 BY MALE #1: YEAH. (LAUGHTER)

15 BY MALE #2: THAT WOULD MAKE HIM PEE HIS
16 PANTS ANYWAY, WOULDN'T IT?

17 BY MALE #1: YEAH.

18 BY MALE #2: YOU NEVER KNOW. THEY W- -- I'M
19 SURE HE OWNS A GUN, TOO.

20 BY MALE #1: THAT'S WHAT I NEED.

21 BY MALE #2: WEASEL.

22 BY MALE #1: THAT'S WHAT I NEED. THAT -- I
23 NEED ME A DAMN GUN, BOY.

24 BY MALE #2: YOU NEED SOMETHING. ALL RIGHT.
25 LET'S BOTH GET SOME REST.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAY 07 2014
SC Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of General Sessions

Rivers Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2013-001895

State of South Carolina Respondent

v.

James Richard Barte, Jr. Appellant

PROOF OF SERVICE

I, Kellie A. Switzer, certify that I have served the **Reply to Return to Appellant's Motion for Appeal Bond** on the following, by depositing a copy of it in the United States Mail, postage prepaid, on May 5, 2014, addressed to:

Salley W. Elliott, Senior Assistant Deputy Attorney General
Office of the South Carolina Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

May 5, 2014



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May 5, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. James Richard Bartee, Jr.
Appellate Case No.: 2013-001895

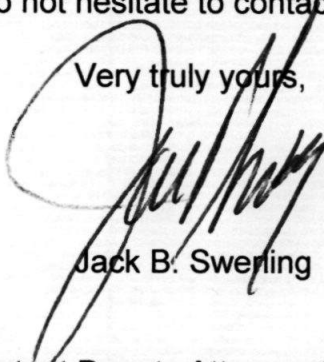
Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of the Reply to Return to Motion for Appeal Bond, along with the Proof of Service, in the above referenced matter. It would be greatly appreciated if you would clock the extra copy and return it to me in the enclosed envelope.

By copy of this letter, I am serving Salley W. Elliott, Senior Assistant Deputy Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,


Jack B. Swerling

JBS/kas
Enclosure

cc: Salley W. Elliott, Senior Assistant Deputy Attorney General
James Richard Bartee, Jr. #00356847
Elizabeth Bartee
Kenneth R. Bartee

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SC Court of Appeals