

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY

J. Mark Hayes, II, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT H. KOON,

APPELLANT

APPELLATE CASE NO. 2011-200608

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF GENERAL SESSIONS
1986-GS-11-00289

THE STATE OF SOUTH CAROLINA

-VS-

ROBERT H. KOON,

Defendant.

TRANSCRIPT OF RECORD

June 27, 2011
Spartanburg, South Carolina

Ordered: November 17, 2011
Delivered: January 23, 2012

B E F O R E:

THE HONORABLE J. MARK HAYES, II, Presiding Judge.

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PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

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PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 June 27, 2011

10:27 A.M.

2 (Off-the-Record Comments)

3 THE COURT: All right. We're here on the matter of
4 *The State of South Carolina vs. Robert H. Koon* on a 29(b)
5 motion.

6 I thank you all both for sending in your briefs.
7 I've had an opportunity to be able to review them.
8 Are you all ready?

9 MR. FILE: Judge, I have the original -- you know,
10 since we're in Spartanburg and it's a Cherokee County
11 case, I wondered if you wanted me to hand these up, the
12 originals, to be filed or....?

13 THE COURT: Well don't you just mail it over to the
14 clerk, so, she'll be sure to have it.

15 MR. FILE: Okay.

16 THE COURT: I've got mine, but I've made notes on
17 mine. So, I don't have one for the court reporter, if
18 you feel like she might need one.

19 MR. FILE: All right. And, Judge, I did make copies
20 of your previous orders that were referred to in the
21 brief.

22 THE COURT: Okay.

23 (Documents handed up to the Court.)

24 THE COURT: Thank you.

25 MR. FILE: There are three (3) orders there.

1 THE COURT: Okay. Well ---

2 MR. FILE: And I've provided those orders to Mr.
3 Racine.

4 THE COURT: All right. We'll mark -- we'll take
5 these and have them marked as the State's exhibit as a
6 group.

7 (Whereupon, State's Exhibit Number 1 was marked and
8 admitted into evidence without objection.)

9 MR. RACINE: May I have just a moment, Your Honor?

10 THE COURT: Uh-huh (affirmative).

11 (Brief Pause)

12 MR. RACINE: Your Honor, as a preliminary matter, we
13 have another motion we would like to file with the Court
14 if I may approach.

15 This is a notice of a motion for a new trial. This
16 amplifies the motion we've already filed. May I
17 approach?

18 (Documents handed up to the Court.)

19 MR. FILE: And, Judge, I do have a motion I need to
20 make before the Court as far as --

21 THE COURT: All right. Now, this -- this particular
22 motion is -- is -- is signed by Mr. Koon. It does -- it
23 doesn't have Counsel's signature.

24 MR. RACINE: Your Honor, Mr. Koon has provided this
25 to me this morning. I believe that it adds to the brief

1 we've already filed.

2 Your Honor, I've not had a chance to verify that
3 each and every case in this brief has -- has not had any
4 negative treatment, so, I'm a little hesitant to ---

5 THE COURT: Okay.

6 MR. RACINE: --- sign it. And I -- I mean, in all
7 deference to Mr. Koon, every case he's given me so far,
8 and there have been quite a number, have been current and
9 good law.

10 However, I -- I feel it incumbent to let the Court
11 know that I've not had a chance to -- to go through this
12 in -- in case -- Mr. Koon has indicated he has, Your
13 Honor, and the case is good law.

14 THE COURT: Okay.

15 MR. RACINE: And I think, Your Honor, we should
16 probably put something on the record about the venue.
17 Obviously, this is Spartanburg County and it's a Cherokee
18 County matter.

19 (Brief Pause)

20 MR. RACINE: Your Honor, may I approach Mr. File and
21 ask him briefly --

22 THE COURT: Certainly.

23 (Off-the-Record Discussion)

24 MR. RACINE: Thank you, Your Honor. Mr. Koon has
25 indicated that he would be willing to waive venue if

1 perhaps he can relay that to the Court.

2 MR. KOON: Yes, sir. I would be willing to waive
3 venue to Spartanburg County in the interest of judice and
4 time restraints.

5 THE COURT: All right. And I believe that
6 previously I had communicated with the attorneys, in
7 trying to have this hearing scheduled in a more
8 expeditious fashion, that my schedule for Cherokee County
9 was not going to be -- that we were not going to be able
10 to have this actual hearing until sometime in the fall.

11 So, I did offer myself and make myself available to
12 do this hearing, but it would have to be in Spartanburg.
13 So, I think that the State consented to that as well; is
14 that correct?

15 MR. FILE: That's correct.

16 THE COURT: All right. Okay.

17 MR. RACINE: Thank you, Your Honor.

18 MR. FILE: Your Honor, I do have a matter to take
19 up.

20 THE COURT: Okay.

21 MR. FILE: Judge, based on my brief, as you may
22 guess, I -- it would be our -- the State's position that
23 we shouldn't even be here today.

24 I would object to any testimony being taken in this
25 matter or any further proceeding. This -- this matter

1 and this issue has been litigated previously by Mr. Koon,
2 in his prior PCR, which was before Your Honor.

3 His -- and also he -- he made a motion for your
4 reconsideration of his PCR, which you denied.

5 You addressed this very same issue that he's now
6 raising, under the guise of Rule 29, by making a motion
7 for a new trial. Your Honor addressed the very same
8 issue previously.

9 And he's -- he's also contested his burglary second
10 conviction in the case that went before the Supreme Court
11 and was overruled as far as subject matter jurisdiction
12 on that.

13 That was ruled on by the Supreme Court in *The State*
14 -- *Robert Koon vs. State of South Carolina*, which was the
15 opinion -- the 2004 opinion from the Supreme Court,
16 Judge.

17 So, again, it would be our position that this matter
18 has been litigated previously and he is collaterally
19 estopped from raising it again by way of a Rule 29 motion
20 because it's basically the same -- it -- there's no
21 basically to it; it's -- it's the same -- the very same
22 issue that he's raised before.

23 And, Your Honor, it would be our position we
24 shouldn't even be here today hearing this. And -- and,
25 again, I would -- I would object to any testimony being

1 taken in this matter. And I want to put that on the
2 record.

3 THE COURT: All right.

4 MR. RACINE: Thank you, Your Honor. Your Honor,
5 obviously we disagree. Mr. Koon has filed some new ones
6 from -- proceedings prior to this; however, they were PCR
7 hearings.

8 And -- and the point of a PCR hearing is to test
9 the sufficiency of representation and other errors in
10 either a guilty plea or a trial, Your Honor.

11 The witnesses today have -- have never testified
12 before. This is new evidence. We have two witnesses
13 here today to testify before Your Honor.

14 Like I said, they have never testified in -- in a
15 hearing like this before. This is specifically a Rule 29
16 motion to hear newly discovered evidence. It has nothing
17 to do with a PCR.

18 Your Honor, this evidence has not been presented
19 before a Court and has not been heard by a trial judge,
20 Your Honor.

21 There are some issues that have never been raised
22 before, Your Honor. And, therefore, in essence Mr. Koon
23 needs his day in court on these issues, Your Honor.

24 This hearing was specifically scheduled to hear the
25 evidence Mr. Koon has. And, with all due respect, Your

1 Honor, I think we should go forward and hear what he has
2 to present and the witnesses have to say.

3 MR. FILE: Judge, if he's trying to raise other
4 issues besides the fact that he's submitted the affidavit
5 of Mr. Harry Lovelace (phonetic), on this motion, if he's
6 trying to raise any other issues, that's not before the
7 Court today.

8 As far as the affidavit of Mr. Lovelace, he
9 submitted an affidavit to the Court. And that -- again,
10 that issue has been litigated already. And I -- it's my
11 position he's collaterally estopped from raising that.

12 But, if he's got witnesses here that are going to
13 testify to matters other than what Mr. Lovelace, that was
14 the only affidavit that was submitted and -- as far as
15 the motion and I would object to that as well.

16 MR. RACINE: Your Honor, if I may. The affidavit of
17 Mr. Lovelace has never before been presented. Mr.
18 Lovelace is here to testify regarding the contents of
19 that affidavit. And the State will have a full
20 opportunity to cross examination him with regards to
21 that.

22 In addition, Your Honor, we have Mr. Gary Mallard
23 (phonetic), the attorney who represented the Defendant at
24 1986 guilty plea. He is here to testify as to his
25 collection -- his recollection regarding that, Your

1 Honor.

2 And, again, the State will have ample opportunity to
3 cross examine regarding that. And we feel we should be
4 able to go forward.

5 MR. FILE: Judge, the representation that -- this
6 isn't a PCR action as Mr. Racine says. To -- to have the
7 attorney from the guilty plea, it sounds to me like we're
8 going down the road of doing his twentieth (20th) PCR
9 action, Judge.

10 And -- and, they're -- you know, I'm certain there
11 would have been a transcript from the previous guilty
12 plea.

13 I think you've cited, at least part of that in your
14 previous order of the Court, regarding the fact that he
15 had -- he pled guilty to these charges.

16 And -- and the judge asked him about it being a
17 nighttime burglary and he admitted it, Judge.

18 I -- I would object to any testimony that -- that an
19 attorney that represented the Defendant would -- would
20 have to offer to the Court because this isn't a PCR
21 action.

22 THE COURT: All right.

23 MR. RACINE: Your Honor, if I may just briefly? Mr.
24 Mallard's testimony, he actually represented the
25 Defendant on another charge, but his testimony goes to

1 show the -- pertains to how the police -- and how the
2 police in Gaffney misrepresented various facts to Mr.
3 Koon in order to induce him to plead guilty.

4 The guilty transcript that we'll address, that will
5 relate to this hearing, it clearly shows that Mr. Koon
6 maintained his innocence and entered his guilty plea only
7 to take advantage of a ten-year negotiated sentence
8 offered to him by the State to wrap up numerous charges.

9 Your Honor, Mr. Mallard has evidence that we believe
10 supports our contention that the new -- part of the newly
11 discovered evidence in this case is this pattern engaged
12 in by the police of misrepresentation of facts.

13 Also, Mr. Mallard has some testimony he can deliver
14 regarding the issue of due diligence and the attempt to
15 discover evidence which is part of the Rule 29 new
16 evidence -- elements required to prove it, Your Honor.
17 So, we feel that, that should be heard.

18 THE COURT: All right. I will take these things --
19 motion under advisement and we'll proceed with the
20 presentation of the testimony.

21 The -- in reading the Defendant's motion, it was the
22 first time that I recall that there was a mention of the
23 -- of the need to present a witness like the attorney.

24 So, if the State, after the hearing, feels the need
25 that they need to keep the record open to present

1 something on that issue, I'd be more than happy to allow
2 the State the opportunity to do that.

3 MR. FILE: Thank you, Your Honor.

4 THE COURT: All right. Yes, sir?

5 MR. RACINE: Thank you, Your Honor. Before we get
6 started, I would request permission to pass up to Your
7 Honor Mr. Koon's affidavit of due diligence.

8 He has signed this affidavit this morning. And I
9 believe I indicated to Mr. File that I would be
10 presenting this. So, if I -- I may approach?

11 (Document handed up to the Court.)

12 MR. RACINE: Thank you, Your Honor. And, Your
13 Honor, we fully expect Mr. Koon to testify regarding all
14 the facts of this affidavit. We just wanted to submit
15 this to the Court, so, it has a written reference before
16 it.

17 Your Honor, with your indulgence, I have just a few
18 comments before we call our first witness that I would
19 like to put before the Court.

20 Thank you, Your Honor. Basically, this is a Rule
21 29(b) motion based on after-discovered evidence. And Mr.
22 Koon is requesting to be awarded a new trial in -- in
23 this matter.

24 At first glance, a Rule 29(b) would seem like not a
25 hugely important motion; however, because of the nature

1 of the facts in this case, this -- this motion is quite
2 serious and -- and very important to Mr. Koon.

3 As a little bit of background -- and, Your Honor,
4 I'll be short because I know you're intimately familiar
5 with the procedural history of -- of his case.

6 Mr. Koon pled guilty in 1986 to several charges.
7 Because of that guilty plea, he received two strikes.

8 Included in that guilty plea were several charges of
9 second degree burglary. And, Your Honor, after various
10 procedures in -- in the Supreme Court and -- and the
11 Court of Appeals and -- and other Courts, of that guilty
12 plea, there are three second degree burglaries that
13 remained, Your Honor.

14 One was thrown out I believe on subject matter
15 jurisdiction grounds. However, the importance is that
16 two of those second degree burglaries convictions were
17 ruled to be the same offense under the recidivist statute
18 by counting strikes.

19 So -- so, two of those second degree burglaries
20 count as one strike against Mr. Koon. The third second
21 degree burglary conviction, based on that guilty plea, is
22 the one we're here for Your Honor today on; it's the
23 burglary of the Cudd-Lovelace Insurance Agency.

24 Your Honor, that was charged as -- and Mr. Koon pled
25 guilty to a second degree burglary. That constitutes

1 another strike.

2 The importance of this is that, if -- if Mr. Koon
3 prevails on this motion and he is successful in getting a
4 new trial, he will obviously be moving the State to amend
5 the charge to a third degree burglary that does not
6 allege a nighttime offense.

7 The importance of that is that a third degree
8 burglary does not count as a strike.

9 Now, when Mr. Koon later pled guilty to -- to some
10 different charges in 1998 and received -- he was
11 convicted and he received his third strike.

12 Your Honor, as -- as a result of -- I'm sorry, he --
13 he went to trial on that and was found -- was found
14 guilty.

15 At his sentencing, Your Honor, the judge used the
16 prior convictions, from the 1986 guilty plea, to enhance
17 his penalty and sentenced him to life without parole.

18 And the upshot of this is that, if -- if Mr. Koon is
19 successful and gets a new trial, on the Cudd-Lovelace
20 burglary, we believe that, that would be changed from a
21 second degree burglary to a third degree burglary, which
22 would remove one of the strikes, which would, then, allow
23 Mr. Koon to be re-sentenced under the 1998 conviction.

24 And, frankly, Your Honor, we don't believe he would
25 get life without parole. In fact, based on the burglary,

1 I think he would be eligible for up to fifteen (15)
2 years.

3 The -- the difference is, Your Honor, with respect
4 to this motion, if Mr. Koon prevails, he will eventually
5 leave the Department of Corrections. If he does not,
6 then, he's going to die in prison.

7 Therefore, despite the fact of this being a Rule 29,
8 kind of an uncommon motion, this is very important to Mr.
9 Koon.

10 Your Honor, in order for a Defendant to prevail on a
11 Rule 29, there's various elements he has to prove. When
12 we are presenting our evidence today, we -- we would like
13 Your Honor to consider Defendant's motion from basically
14 two vantage points.

15 The first is consider the rules of law governing
16 Rule 29 and what is necessary to prove a motion under
17 Rule 29.

18 Your Honor, this law is clear. *State vs. Hill*
19 (phonetic) has set out the elements required to prevail
20 on a Rule 29 motion.

21 They are the new evidence would probably change the
22 result if a new trial is had;

23 Secondly, the new evidence has been discovered since
24 the trial. Thirdly, the new evidence could not have been
25 discovered before trial.

1 Fourth, the new evidence is material to the issue of
2 guilt or innocence. And, five, the new evidence is not
3 merely cumulative or impeachment.

4 Your Honor, the testimony is going to show that --
5 that each of these elements is met by Mr. Koon's new
6 evidence. And, briefly, I'm going to touch the
7 highlights and, then, we'll get into the testimony.

8 Your Honor, the evidence in this case, the only
9 evidence showing the time at which this burglary could
10 have occurred is evidence from Mr. Harry Lovelace.

11 The nighttime element was asserted by the police;
12 however, there was no factual basis for that whatsoever.
13 There's -- there's no nighttime element that can be shown
14 beyond a reasonable doubt.

15 Your Honor, secondly, the existence of Harry
16 Lovelace was discovered after the Defendant's guilty
17 plea.

18 The police engaged in some conduct that we will get
19 into that in essence prevented the Defendant of learning
20 of the existence of Mr. Harry Lovelace.

21 It was only through his investigation that he
22 finally found Mr. Lovelace.

23 Your Honor, the witnesses at the time of this
24 burglary, and just prior to the Defendant's guilty plea,
25 in essence refused to cooperate with the Defense in this

1 matter.

2 Further, the State, as we'll see from the evidence,
3 did not comply with the Rule 5 motion and kept evidence
4 regarding this nighttime element or frankly the lack
5 thereof from the Defendant.

6 Your Honor, the nighttime element is -- is material
7 to the Defendant's innocence because a burglary second
8 degree, based on a nighttime element, cannot be proved
9 and no conviction can be had for second degree burglary
10 when there's no evidence to support the nighttime
11 element.

12 That's a required element; without it, it should be
13 a burglary third, not a burglary second degree.

14 And, then, finally, Your Honor, the evidence in this
15 case is -- is not cumulative.

16 (Brief Pause)

17 MR. RACINE: Your Honor, cumulative evidence is --
18 is evidence that is augmenting or giving force to
19 evidence or increasing it by successive petitions.

20 Your Honor, in this case, it can't be cumulative
21 because there's no evidence of the nighttime element in
22 -- in this matter.

23 The evidence that will be and should have been
24 presented is only that the burglary was discovered at
25 9:00 a.m. That leaves multiple hours of daylight in

1 which this crime could have occurred.

2 Your Honor, the second vantage point we would like
3 the Court to consider, when it analyzes this hearing, is
4 -- is we would like the Court to consider Defendant's
5 motion from the perspective of thirteen juror.

6 Your Honor, case law has established that a trial
7 judge in South Carolina has broad discretion when the
8 judge feels that justice has not been done.

9 Your Honor, throughout the evidence, we would ask
10 the Court to be mindful of the thirteenth juror doctrine,
11 listen to all the evidence as it's presented, and
12 seriously consider whether this man should be held to a
13 second degree burglary conviction instead of a third
14 degree and whether this Defendant needs and is entitled
15 to a new trial.

16 Your Honor, with that we would like to call our
17 first witness.

18 (Off-the-Record Comments)

19 MR. RACINE: Just a moment, Your Honor.

20 THE COURT: Uh-huh (affirmative).

21 (Off-the-Record Discussion)

22 MR. RACINE: Your Honor, we would call Mr. Gary
23 Mallard.

24 THE COURT: Come on around, sir. Just come right up
25 here and place your left hand on the Bible and raise your

1 right hand and let me swear you in.

2 (Whereupon,

3 GARY MALLARD

4 having been first duly sworn, testified as follows:)

5 DIRECT EXAMINATION by MR. RACINE:

10:49 A.M.

6 (Off-the-Record Comments)

7 Q. Mr. Mallard, would you, please, state your full name
8 for the record?

9 A. Gary Paul Mallard (phonetic).

10 Q. And what is your occupation?

11 A. I have a part-time criminal defense practice. And I
12 also work for the Greenville County Disabilities and Special
13 Needs office.

14 Q. How long have you been an attorney?

15 A. Since 1981.

16 Q. Okay. And obviously you were an attorney in 1986?

17 A. Yes.

18 Q. And -- now, have you ever testified in a hearing
19 before?

20 A. Yes.

21 Q. And you've testified in PCR hearings; is that...?

22 A. Yes.

23 Q. Okay. Can you tell the Court what type of -- or
24 characterize the PCR hearings you've testified in?

25 A. (No Response)

1 Q. Well, let me cut to the chase: Have you testified
2 in PCR hearings involving Mr. Koon?

3 A. Yes.

4 Q. Now, back in 1986, how did you first come into
5 contact with Mr. Koon?

6 A. I was doing volunteer work with the South Carolina
7 Protection and Advocacy. And they wanted to do a follow-up
8 with Mr. Koon because they had represented him a few years
9 earlier as -- as a juvenile.

10 Q. Okay. And, at some point, were you later retained
11 by Mr. Koon?

12 A. Yes.

13 Q. Please, tell the Court how that came about.

14 A. After speaking with him about the PA stuff, he was
15 arrested I think about the same time or something and we
16 discussed his criminal case. And I agreed to take it.

17 Q. Okay. So, you represented him on some criminal
18 charges?

19 A. Yes. I represented him on the -- the criminal
20 charges that occurred around -- well, on March 13th or 14th of
21 you know...

22 Q. Okay. And, I'm sorry, did you -- what did you bring
23 with you today?

24 A. I brought my case file.

25 Q. Okay. Now, Mr. Mallard, I believe you indicated you

1 represented Mr. Koon on offenses connected with P&G Motors and
2 -- and Bill Willard (phonetic); is that correct?

3 A. Yes, I believe so. Let me -- warrants 541 --
4 540120, 121 and 122, breaking and entry into the office of --
5 of Phil Willard, stealing his -- stealing Bill Willard's
6 truck. And, yeah, the office of P&G Motors exactly.

7 Q. Okay. So, you did not, in fact, represent Mr. Koon
8 on the burg -- on the burglary charge regarding Cudd-Lovelace
9 Insurance; is that correct?

10 A. I -- I don't believe so. That occurred around the
11 28th. And the only fee agreement I have -- the only evidence,
12 in terms of discovery and stuff, all relates to the charges of
13 March 13th and 14th.

14 Q. Okay.

15 MR. FILE: Your Honor, I would -- I would object to
16 any further testimony from this witness at this time. He
17 -- he didn't represent him on the Cudd-Lovelace case,
18 which is what we're here about.

19 And I would ask that he be dismissed and excused as
20 a witness.

21 MR. RACINE: If I may, Your Honor. He was present
22 at the guilty plea where Mr. Koon pled guilty to the
23 Cudd-Lovelace offense.

24 And, in addition, Your Honor, he has evidence to
25 show a pattern. If Your Honor will give me a little bit

1 of latitude, I'll ferret that out rather quickly.

2 THE COURT: All right. I'll give you a little bit
3 of latitude, but Mr. File makes a significant point with
4 that. Go ahead.

5 MR. RACINE: Just a moment, Your Honor.

6 (Off-the-Record Discussion)

7 Q. (By Mr. Racine) All right. With respect to the
8 charges you represented Mr. Koon on, is it your belief that
9 those offenses occurred on the same date?

10 A. Probably, hard to tell. If they were at nighttime,
11 there's a -- there's a possibility one could have occurred
12 slightly before the other, but it's hard to say.

13 Q. Let me jump down before the solicitor gets antsy.
14 Did you discuss with Mr. Koon whether he should -- well, let
15 me ask you this: When Mr. Koon pled guilty, what was the
16 nature of his guilty plea?

17 A. (No Response)

18 Q. In other words, was there a package deal?

19 A. Yes, yes. I had prepared for trial. We had sort of
20 a near alibi defense.

21 He had gone to visit his -- his dad the prior day.
22 There was a question about whether or not he would have had
23 time to do the offenses that, you know, I was retrained to
24 defend him for. And, at one point, he had an alibi witness
25 who later recanted.

1 But after the -- the charges later than mine and his
2 bond was -- was revoked, at -- at -- at some point, he was
3 like able to easily go over the fence at the -- at the
4 detention center, went to Myrtle Beach.

5 I -- I think maybe there was a -- a car theft or
6 something involved there, and, then, returned to Cherokee
7 County.

8 So, there were numerous other charges. And he --
9 his -- my best recollection is that he sort of negotiated the
10 plea agreement himself from the jail cell to include
11 everything.

12 And, then, I was sort of presented with, "Yeah, this
13 is the package -- this is the package deal, ten (10) years,
14 for -- for all of them.

15 Q. And that would be ten (10) year concurrent on all
16 the charges?

17 A. Yes.

18 Q. Okay. And -- and those would include the charges
19 you represented him on -- him on and the burglary of the Cudd-
20 Lovelace Insurance Agency?

21 A. Yes.

22 Q. Okay. So, you had defenses to -- to your charges?

23 A. Yes, I did.

24 Q. Okay. And, when you went to advise Mr. Koon about
25 the possibility of going to trial, in your opinion, he had

1 already negotiated to plea guilty with the police?

2 A. Yes.

3 Q. Okay. Did he tell you he was not guilty?

4 A. I believe he did indicate that.

5 Q. Okay. Well, do you remember the police discussing
6 mud samples?

7 A. Yes.

8 Q. Please tell the Court about that.

9 MR. FILE: Your Honor, I would object to this. This
10 has nothing to do with -- with the Cudd-Lovelace
11 Insurance Agency or -- or -- or the affidavit he
12 submitted.

13 I think we're getting too far afield on this.
14 He's -- he's testified as far as rep -- representing him
15 on -- on matters. But it would be our position that
16 there shouldn't be any further testimony.

17 MR. RACINE: Your Honor, with respect to this, this
18 testimony goes directly to the new evidence of pattern
19 and routine and the misrepresentation of the Gaffney
20 police.

21 This -- this witness can collaborate those
22 allegations. And we believe this is directly relevant to
23 Mr. Koon's motion under Rule 29(b), newly discovered
24 evidence of the habit and routine of the Gaffney Police
25 misrepresenting facts and in a sense tricking this

1 Defendant into entering a guilty plea.

2 THE COURT: All right. I'm going to give you some
3 leeway. I'm going to let him pursue this.

4 MR. RACINE: Thank you, Your Honor. I'll try to
5 make it very brief.

6 Q. (By Mr. Racine) Please tell the court about these
7 mud samples.

8 A. Okay. My -- my -- my memory is a little vague, but
9 initially they were trying to tie into one of my crime scenes
10 based on mud that may have been on his shoe. And he was --
11 and he was like really concerned about that.

12 Q. Now, did you later discovered that there was no
13 analysis on that mud?

14 A. I was told verbally by the police, by somebody in
15 the police department, that basically they weren't going to do
16 -- do anything because it was all very inconclusive, nothing
17 much was there.

18 Q. So, if the police had told Mr. Koon that they had
19 conducted an analysis of the mud and that analysis concluded
20 that the mud from his shoes was the same as the mud at the
21 crime scene, that would have been a misrepresentation?

22 A. Yes.

23 Q. Okay. Now, are you at all familiar with South
24 Carolina statute 24-21-640, which has to do with parole and
25 police conduct?

1 A. Somewhat.

2 Q. Okay.

3 MR. RACINE: May I approach the witness, Your Honor?

4 THE COURT: Yes, sir.

5 MR. RACINE: Thank you.

6 (Document handed to the witness.)

7 Q. I'm going to hand you this document and direct your
8 attention to the highlighted portion. Would you, please, take
9 a moment to review that statute?

10 (Brief pause while the witness examines document.)

11 A. Yes.

12 Q. Okay. Based on that statute and your knowledge -

13 MR. RACINE: May I approach the witness again, Your
14 Honor?

15 THE COURT: (Nods affirmatively.)

16 Q. Based on this statute and your knowledge of criminal
17 law, is there an incentive for the police to charge crimes
18 that could have occurred on the same day on separate days?

19 A. Well, yes.

20 Q. Okay. And that would be because in the facts I
21 used, it would affect a person's eligibility for parole -

22 MR. FILE: Your Honor, I would object to this
23 testimony. Again, I -- I don't think it has anything to
24 do with what we're here about.

25 MR. RACINE: Again, Your Honor, this is just how it

1 pertains to misrepresentation to this Defendant. This is
2 newly discovered evidence and his testimony directly
3 supports the bad conduct of the Gaffney Police.

4 MR. FILE: But there's been no foundation for it,
5 Your Honor.

6 THE COURT: All right. I'm going to allow you to
7 pursue that line of questioning.

8 (Brief Pause)

9 THE COURT: Did he answer? Did the witness answer?

10 MR. FILE: I'm not sure.

11 MR. RACINE: Well, I'll just ask again.

12 Q. (By Mr. Racine) Would there be a motive for the
13 police to charge offenses that could have occurred on the same
14 day on different days?

15 A. Yes.

16 Q. And is that what you believe happened to Mr. Koon
17 with respect to the charges the police alleged against him on
18 the 13th and 14th regarding P&G Motors and Bill Will -- Willard?

19 (Brief Pause)

20 A. Possibly. In -- in other words, it -- it might be
21 conceivable that the offenses occurred on different calendar
22 days if one occurred before midnight and one occurred
23 afterwards.

24 But, if it occurred within -- I mean, you know, in
25 terms of their relation to each other, they would have

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1 occurred within a one-day period.

2 Q. Did the police ever discuss with you the reasons
3 they charged these two crimes on two different days?

4 A. No.

5 Q. In fact, based on your knowledge and your testimony,
6 they had already talked with Mr. Koon and worked out a plea
7 agreement, correct?

8 A. I had talked with -- with -- with Robbie before that
9 and had done considerable investigation.

10 It was only, after the other offenses were
11 committed, that -- that I -- you know, we decided -- we
12 decided to go on with the -- with the guilty plea.

13 Q. Do you remember when you were retained by Mr. Koon?

14 (Brief Pause)

15 A. We signed our -- our -- the contract for legal
16 services on March 24th, 1986.

17 Q. Okay. Do you have any idea when the police
18 discussed with Mr. Koon his plea arrangement?

19 A. (No Response)

20 Q. Could it have been after you were retained?

21 A. Oh, it was definitely after I was retained because
22 it was after he had gotten out on bond with -- with my charges
23 and, then, arrested for charges on -- on or around March 28th,
24 had -- had left the exercise yard of the Cherokee Detention
25 Center via a conveniently placed ladder that was just left in

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 there, had gone to Myrtle Beach and returned from Myrtle Beach
2 with more new charges.

3 Q. Okay. Let me ask you about that escape charge.
4 Would you, please, explain to the Court what -- what that
5 referred to?

6 A. That was the only charge that I was able to like --
7 to get dropped. And I specifically wanted a trial because it
8 -- it definitely appeared to me that the police had set him
9 up.

10 They -- they -- they had allowed him the use of the
11 -- the exercise yard attached to the jail, you know, enclosed
12 with, you know, the barbed wire or whatever.

13 But, then, left -- conveniently left a ladder out in
14 the exercise -- out in the exercise yard, which, you know,
15 made it really easy to go over a fence.

16 Q. Do you think they did that intentionally?

17 A. Yes.

18 MR. RACINE: Bear with me for just a moment, Your
19 Honor.

20 (Off-the-Record Discussion)

21 Q. (By Mr. Racine) In -- in your opinion, do you
22 believe that the police discussing and working out a plea
23 arrangement with Mr. Koon, without you being present after
24 being retained, is misconduct?

25 (Brief Pause)

1 A. Well, yes. They had been -- they certainly had been
2 specifically advised by me in a letter not to discuss, at
3 least my charges, without my being there.

4 Q. And your charges were wrapped up in the negotiated
5 plea?

6 A. Yes.

7 Q. I want to turn your attention just briefly to the
8 actual guilty plea. Were you present at the guilty plea?

9 A. Yes.

10 Q. Okay. Was Mr. Koon represented by another attorney?

11 A. Harry Klein (phonetic); the public defender over in
12 Cherokee County, represented him on his other charges.

13 Q. Okay. And Mr. Klein has since passed away, correct?

14 A. Yes.

15 Q. And Mr. Klein, in fact, represented him on the Cudd-
16 Lovelace burglary that we're here for today?

17 A. I believe so.

18 MR. RACINE: Your Honor, may I approach the witness?

19 THE COURT: (Nods affirmatively.)

20 Q. (By Mr. Racine) I'm going to hand you this document
21 and represent to you that, that is a transcript of the 1986
22 guilty plea.

23 A. Okay.

24 Q. I'm going to direct your attention down to the lower
25 part of the page and ask you to, please, just review the

1 questions and answers there.

2 (Brief Pause while the witness reviews the
3 document.)

4 A. Okay.

5 Q. Based on your review of that and your recollection,
6 did Mr. Koon assert innocence?

7 A. Well, yeah. Here he just says -- when asked if --
8 you told me -- the Court said, "You told me you were guilty.
9 Are you guilty?" And he responds, "I'm facing a lot of time.
10 It just would be better for me to plea guilty."

11 Q. Okay. So, in essence, what the Defendant indicated
12 to the Court is that he was pleading guilty because, if he
13 didn't, he was facing a whole lot more time than the
14 negotiated ten years; is that a fair statement?

15 A. Yes.

16 Q. Okay. Are you familiar with *North Carolina vs.*
17 *Alford*?

18 A. Yes.

19 Q. Okay. And, in that case, I believe the Court said
20 or allowed a defendant to plead guilty even though they
21 maintained their innocence; is that correct?

22 A. Yes.

23 (Brief Pause)

24 MR. RACINE: Bear with me just a moment, Your Honor.

25 (Brief Pause)

1 Q. (By Mr. Racine) Now, is it also your understanding
2 of North Carolina-Alford that, in order for a defendant to
3 plead guilty, even though they maintain their innocence, the
4 record before the judge must contain strong evidence of
5 actual guilt?

6 A. I believe so, yes.

7 Q. Okay. So, before a guilty plea could be accepted,
8 whether or not the defendant admits -- admits wrongdoing or
9 protests innocence, there has to be a factual basis and
10 factual evidence supporting the crime to which the defendant
11 pleads; is that correct?

12 A. Yes.

13 Q. Okay. Now, again, you've been a -- a criminal
14 defense attorney for quite some time; are you familiar with
15 the differences between second degree burglary and third
16 degree burglary?

17 A. Generally, yes.

18 Q. Okay. Now, second degree burglary, with respect to
19 the nighttime element, is that used as an enhancement -- would
20 you explain the difference between a second degree burglary, a
21 nighttime burglary, and a third degree burglary?

22 MR. FILE: Your Honor, I'm going to object to this.

23 I think Your Honor is well aware, as a Circuit Court
24 Judge, of what that involves.

25 THE COURT: I'll have to sustain at this point.

1 Q. (By Mr. Racine) In -- in your opinion, should Mr.
2 Koon have been found guilty of a second degree burglary or a
3 third degree burglary, if anything at all?

4 A. Well, probably a third if they weren't able to prove
5 the nighttime element, you know.

6 MR. RACINE: Just one moment, Your Honor.

7 (Off-the-Record Discussion)

8 MR. RACINE: Just one or two more questions.

9 Q. (By Mr. Racine) When you represented Mr. Koon prior
10 to these offenses, were there any mental health issues?

11 MR. FILE: Ob -- objection, Your Honor. I -- I
12 think we're getting too far afield. He's explored all of
13 this through PCRs.

14 THE COURT: It has been -- they have been addressed
15 regardless of what the testimony would be of this witness
16 at this juncture.

17 MR. RACINE: Okay. No further questions at this
18 point. Please answer any questions Mr. File has.

19 CROSS EXAMINATION by MR. FILE: 11:12 A.M.

20 Q. Mr. Mallard, were you -- were you privy to what the
21 police may or may not have told the Defendant?

22 I'm going to cut to the chase. You said all this
23 was related to you that -- by Mr. Koon; is that correct?

24 A. Ummm....

25 Q. As far as this deal that was supposedly made?

1 A. Pretty much. I mean, I -- I think I talked briefly
2 with Harry Klein about it. And beyond that I don't remember.

3 Q. Okay. So, you don't -- you don't know what the
4 police told him, do you? You weren't -- you weren't sitting
5 in on the conversation between him and the police when he made
6 this deal, were you?

7 A. No.

8 Q. Okay.

9 (Brief Pause)

10 Q. And you also said that -- and correct me if I'm
11 wrong, but you also said you -- you don't remember whether or
12 not these burglaries occurred on the same day or different
13 days; is that right, from the others?

14 A. The burglaries I represented Mister -- Mister -- I
15 mean, the -- the charges I represented him on, the one in
16 March said the 13th and I think the other one said the -- the
17 14th.

18 It was my impression that -- you know, if -- if --
19 if those -- those dates are correct, it occurred during the
20 same nighttime, not...

21 In -- in other words, if it -- in other words,
22 between say 11:00 p.m. and whenever in the -- in the a.m.,
23 you know, the dates would be different, but it would be within
24 a one-day period.

25 Q. This is the transcript that Mr. Racine handed you

1 (indicating)?

2 A. Yes.

3 (Brief Pause)

4 Q. Now, I'm going to point you out a page. I believe
5 it's labeled 160 and Lines 15 through 17. That's part of Mr.
6 Koon's guilty plea, right?

7 A. Yes.

8 Q. All right. And what does it say there that the
9 judge asked -- asked Mr. Koon?

10 A. "All right. I believe this is Mr. Klein's case.
11 And on the 20th day of March, 1986, did you enter into the
12 Cudd-Lovelace Insurance Company without consent with the
13 intent to commit a crime in the nighttime?"

14 Q. And what was the answer?

15 A. "Yes, sir."

16 Q. Okay. And you also indicated that you had explored
17 some defenses with him, including an alibi, but that fell
18 apart, correct?

19 A. Yes.

20 Q. Okay.

21 (Brief Pause)

22 MR. FILE: Your Honor, that's -- that's all I have.

23 THE COURT: Any redirect limited to what he went
24 into?

25 MR. RACINE: Yes, Your Honor.

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1 REDIRECT EXAMINATION by MR. RACINE: 11:16 A.M.

2 Q. Do you know, if the burglaries that were purported
3 to have occurred the 13th and 14th, were discovered at the same
4 time?

5 A. Discovered at the same time?

6 Q. Yes.

7 A. I'm not sure. I mean...

8 (Brief Pause while witness reviews document.)

9 Q. If I may, maybe I can jump start your memory. Was
10 the Defendant arrested in a truck?

11 A. I believe so; I'm not sure.

12 Q. When -- when the police investigated that truck, who
13 owned the truck and where that truck was -- was from, did
14 they, then, discover the burglaries?

15 A. I think. Again, I don't -- the -- the case that I
16 represented him on, Bill Willard -- Bill Willard's truck and
17 Bill Willard's place of business -- and there was one other
18 place of business, P&G, P&G Motors...

19 (Brief Pause)

20 MR. RACINE: May I approach the witness, Your Honor,
21 with the transcript?

22 THE COURT: Yes, sir.

23 (Document shown to the witness.)

24 Q. So, when the police discovered the Defendant in this
25 truck, they would have investigated where the truck came from,

1 correct?

2 A. Yes.

3 Q. Okay. And, if this truck was alleged to have been
4 stolen from Bill Willard's...

5 (Brief Pause)

6 MR. RACINE: Just a moment, Your Honor. I'm sorry.

7 (Brief Pause)

8 MR. RACINE: May I approach the witness again, Your
9 Honor?

10 THE COURT: Yes, sir.

11 Q. (By Mr. Racine) I'm going to show you the transcript
12 again. Would you please look at Line 16 and read down from
13 there?

14 A. "Detective Harvey" (phonetic), "It was found. And
15 that's one of the reasons he was arrested, Your Honor.

16 "The truck was taken out of Willard Monument Company
17 (phonetic). These were taken inside the building in
18 Jonesville.

19 "The police found the truck and some time elapsed
20 from the time that they -- they seen the truck and the
21 prisoner appeared a short time later, they notified us they
22 had a robbery in Union County."

23 Q. Based on that is it fair to say that -- that when
24 the police discovered that truck had been stolen from wherever
25 it was stolen from -- where it was stolen from they

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1 investigated and found a burglary, so, they were discovered at
2 the same time?

3 A. Yes.

4 Q. Okay. You mentioned briefly that the defendant had
5 a potential alibi witness?

6 A. Yes.

7 Q. And that alibi witness later recanted her story; is
8 that correct?

9 A. Yes..

10 Q. What, if any, was that witness' affiliation with the
11 Gaffney Police?

12 A. Her father was a policeman.

13 (Brief Pause)

14 MR. RACINE: That's all, Your Honor.

15 THE COURT: Thank you, sir. You may step down.

16 (The witness complied with the Court's request.)

17 MR. RACINE: Your Honor, we would request Mr.
18 Mallard be excused.

19 THE COURT: Any reason why the witness cannot be
20 excused?

21 MR. FILE: No, Your Honor.

22 THE COURT: Thank you, sir. You may be excused.

23 (Witness stepped down from the witness stand and was
24 excused at 11:20 a.m.)

25 THE COURT: Is the Defense ready to call their next

1 witness?

2 MR. RACINE: Yes, Your Honor. We call Harry
3 Lovelace.

4 THE COURT: Sir, come right up here and place your
5 left hand on the Bible and raise your right hand and
6 allow me the opportunity to swear you in.

7 (The witness complied with the Court's request.)

8 (Whereupon,

9 HARRY LOVELACE

10 having been first duly sworn, testified as follows:)

11 (Off-the-Record Comments)

12 DIRECT EXAMINATION by MR. RACINE:

11:21 A.M.

13 Q. Mr. Lovelace, thank you for coming today. Would
14 you, please, state your full name for the record?

15 A. Harry McClain Lovelace (phonetic).

16 Q. And what is -- what is your occupation?

17 A. I'm an insurance agent with Coral Insurance Group in
18 Gaffney, South Carolina.

19 Q. Okay. And where -- where do you live?

20 A. I live in Gaffney. Do you want my street address?

21 Q. No.

22 A. Okay.

23 Q. That's okay. How long have you lived in Gaffney?

24 A. All of my life.

25 Q. Okay. Grew up there?

1 A. I did.

2 Q. Now, were you still living or you hadn't moved away
3 from Gaffney in -- in March of 1986, correct?

4 A. I was living in Gaffney then, yes.

5 Q. Okay. And where were you employed at that time?

6 A. At Cudd-Lovelace Agency.

7 Q. Okay. And, as of March 29th, 1986, roughly how long
8 had you been working at Cudd-Lovelace?

9 A. I had started in August of 1985, so...

10 Q. Okay. Now, did your father also work at Cudd-
11 Lovelace?

12 A. He did.

13 Q. And how was your father, then, involved with Cudd-
14 Lovelace? Just explain to the Court how -- who -- who your
15 father was?

16 A. Okay. He was the -- the -- the original partner in
17 the agency. His partner had recently retired.

18 So, at the time, that he -- he was deceased on March
19 14th, 1986 -- he was the -- the sole owner.

20 Q. Okay. I'm sorry, you said your father passed away
21 in -- in March of 1986?

22 A. March 14th.

23 Q. March 14th?

24 A. Correct.

25 Q. Okay. So, about two weeks before this burglary I

1 guess?

2 A. Yes, yes, sir.

3 Q. Now, who was the -- did you say your father was a
4 founding member of this business?

5 A. He was.

6 Q. Who was the other founding member of this business?

7 A. J.D. Cudd (phonetic) was the other partner.

8 Q. Okay. And was he still working at the business as
9 of March 29th?

10 A. He had officially retired. He was helping out. My
11 -- my father was ill, for about two and half (2 ½) months, so,
12 he was agreeable to come back in and help out with the agency
13 during that time.

14 Q. About how long had the Cudd-Lovelace Insurance
15 Agency been operating as a business?

16 A. It started in 1965.

17 Q. So, a long time?

18 A. Yes, sir.

19 Q. Would you say that it was fairly well known in the
20 Gaffney area?

21 A. Yes.

22 Q. Would you characterize your father's and -- and Mr.
23 Cudd's relationship as close?

24 A. Yes.

25 Q. They -- they had been partners for a long time?

1 A. They had, yes.

2 Q. And it would also be fair to say that Mr. Cudd and
3 -- and the other employees of Cudd-Lovelace were upset and --
4 and mourning the passing of your father, correct?

5 A. Yes.

6 Q. And that occurred two weeks prior to this burglary?

7 A. Yes.

8 Q. Okay. Now, how -- how did you first learn about the
9 burglary at Cudd-Lovelace Insurance?

10 A. As I recall, I -- I came into the office later the
11 day on -- on the 29th and was informed at -- at that time.

12 Q. What were your typical working hours at Cudd-
13 Lovelace?

14 A. The -- the office hours were nine (9:00) to five
15 (5:00). And generally we would close just a few minutes
16 before and -- and leave shortly or right at five (5:00).

17 Q. Okay. When you arrived on March 29th, who was -- was
18 there anyone present at -- at the business?

19 A. Mr. Cudd.

20 Q. And was there anyone else there?

21 A. Not that I recall. It's -- it's -- it's possible,
22 but...

23 Q. Okay. How would you describe Mr. Cudd's demeanor
24 that morning?

25 A. He was upset.

1 Q. Did he seem angry?

2 A. Yeah, angry, up -- upset I think it would be.

3 Q. Okay. What did he -- did he tell you what had
4 happened?

5 A. You know, just that, you know, he discovered the --
6 the break-in. And I -- I don't remember any other specifics,
7 but just...

8 Q. All right. Do you remember if -- if anything was
9 taken?

10 A. I don't recall that there was. I -- I -- it seemed
11 that that was one of the -- one of the comments made that we
12 couldn't discover anything, certainly of value, that was
13 missing.

14 Q. Okay. Ummm...

15 (Brief Pause)

16 Q. Did -- who were the other employees that worked at
17 Cudd-Lovelace at the time?

18 A. Jule Bolin, B-o-l-i-n.

19 Q. Anyone else?

20 A. No.

21 Q. Okay. So, is it fair to say it was Mr. Cudd,
22 yourself, and Ms. Bolin?

23 A. Correct, yes, sir.

24 (Brief Pause)

25 Q. Okay. Can you briefly describe the characteristics

1 of the building Cudd-Lovelace used as its office?

2 A. We were in a -- I guess it was actually a triplex.
3 There was our office space and adjacent to that, I think the
4 same size basically, was the Stylette Salon (phonetic). And
5 at the rear was an apartment.

6 Q. Now, did you later discover that -- or learn that
7 the Stylette business was also broken into?

8 A. Yes, I did learn that.

9 Q. And do you know if that was discovered at the same
10 time the burglary at Cudd-Lovelace was discovered?

11 A. I can't say for certain. I -- I would think it was
12 certainly in the same -- the same time period.

13 Q. Did the police ever discuss the Stylette burglary
14 with you?

15 A. Not that I recall.

16 Q. What about the employees of Cudd-Lovelace, did you
17 all discuss that burglary at the Stylette?

18 A. Amongst ourselves?

19 Q. Yes.

20 A. Yes.

21 Q. And I'm sorry, do -- do you know who discovered the
22 burglary at Cudd-Lovelace? I think I asked you that already.

23 A. J.D. Cudd.

24 Q. J.D. Cudd?

25 A. Yes.

1 Q. Okay.

2 (Off-the-Record Comments)

3 Q. Now, when -- do you recall what time the Stylette
4 business usually opened?

5 A. I think they generally opened at ten (10:00). I
6 know it was -- it was after we opened. And that was pretty
7 consistent that -- I don't think they were open every day
8 during the week, but -- but they were typically later than --
9 than we were opening.

10 Q. So, is -- is it fair to say, then, employees from
11 Cudd-Lovelace arrived at their office prior to anyone arriving
12 at Stylette?

13 A. I would think so, yes.

14 Q. And, to your knowledge, Mr. Cudd, yourself, or Ms.
15 Bolin didn't have any idea or know that any kind of burglary
16 had occurred until Mr. Cudd arrived the morning of March 29th?

17 A. Yes.

18 Q. Did you ever receive a phone call from -- well, let
19 me back up. Did you know any of the employees at the Stylette
20 business?

21 A. I did. I'm -- I'm not sure I knew them then.

22 Q. Okay. Well, did you ever receive a call from anyone
23 at Stylette saying, "Hey, we've had a -- a break-in"?

24 A. No, I don't recall.

25 Q. So, on the morning of the 29th, no one from Stylette

1 called you and said, "We've been burglarized; you should come
2 down and -- and check your business"?

3 A. No.

4 Q. And that's probably because your business opened
5 before Stylette?

6 A. Correct, yes.

7 Q. So, if there had been a burglary of both businesses,
8 it is much more likely than not that it would have been
9 discovered by someone at the Cudd-Lovelace Agency, not by
10 someone at Stylette?

11 A. Yes.

12 Q. And that's because you all got there before
13 Stylette?

14 A. Right.

15 Q. So, would it be fair to say that the burglaries of
16 the Stylette business ---

17 MR. FILE: Your Honor, I -- I would object. He's
18 leading the witness.

19 THE COURT: And I would sustain the objection.

20 MR. RACINE: Okay.

21 (Brief Pause)

22 Q. (By Mr. Racine) Do you have any conclusions has to
23 when the evidence or the discovery of the burglary was made?

24 A. (No Response)

25 Q. That was a terrible question. Let me rephrase.

1 A. Okay.

2 Q. You testified that Mr. Lovelace [sic] discovered the
3 burglary?

4 A. Mr. Cudd.

5 Q. Mr. Cudd?

6 A. Yes.

7 Q. I'm sorry. Would it be fair to say that he would
8 have also discovered the burglary at Stylette?

9 MR. FILE: Objection to the leading, Judge.

10 THE COURT: And I'll sustain the objection.

11 MR. RACINE: Okay.

12 (Brief Pause)

13 THE COURT: Do you want to rephrase the question?

14 MR. RACINE: Yes, Your Honor. Bear with me a
15 moment.

16 (Brief Pause)

17 Q. (By Mr. Racine) Do you have any opinion as to when
18 the burglaries were discovered?

19 A. At nine o'clock (9:00) on the 29th.

20 Q. So, would they have been discovered at the same
21 time?

22 A. Both locations?

23 Q. Yes.

24 A. Ummm...

25 Q. Well, let me ask this: Which one would have been

1 discovered first?

2 A. I -- I would think Cudd-Lovelace.

3 Q. Okay. Now, how old were you when -- in 1986?

4 A. I was twenty-three (23) at the time -- in March of
5 '86.

6 Q. Okay. Now, when your father passed away -- well,
7 let me back up. You testified your father was a co-founder,
8 with Mr. Cudd, of the business?

9 A. Yes.

10 Q. Prior to his death, was -- was he still a co-owner
11 of the business?

12 A. At that point, he was actually the owner. He was in
13 the process of -- of paying off Mr. Cudd. But he was at that
14 point the sole owner.

15 Q. So, he bought him out?

16 A. Correct, yes.

17 Q. So, the business was your father's?

18 A. Yes.

19 Q. Okay. Now, when your father passed away, where did
20 that business ownership interest go?

21 A. It went to my mother. I don't know if -- if --
22 within two weeks. But she was the -- the owner at that time.
23 And, then...

24 Q. So, your mother inherited it ---

25 A. Correct.

1 Q. --- from your father?

2 A. Yes.

3 Q. Okay. What was your mother's involvement with the
4 business prior to your father's death?

5 A. She was not active. She had a full-time job working
6 for the Cherokee County school districts. So, she never
7 actually was active in the business.

8 Q. But you were?

9 A. I was, yes. And through the -- the years we
10 incorporated and -- and transferred stock over the years. I
11 -- I eventually became the sole owner.

12 Q. Do you know if there was your father's in -- intent
13 to in essence pass on the family business to you?

14 A. Yes.

15 Q. And your mother never had any intent to run the
16 business herself?

17 A. No.

18 Q. Do you consider yourself a victim of this burglary?

19 A. Yes.

20 Q. And that's because, for all intents and purposes,
21 you were now the owner of Cudd-Lovelace Insurance Company?

22 A. Yes.

23 (Brief Pause)

24 Q. In 1986, did anyone discuss the prosecution of
25 Robert Koon for this crime with you?

1 A. With me, no.

2 Q. Did you receive notice of his -- of -- of any
3 proceedings?

4 A. Not prior to the trial. I think we may have
5 received some letters subsequent to all of this, but no, not
6 anything prior.

7 Q. Do you remember who those letters were from?

8 A. Just the Department of Corrections. I -- I don't
9 remember specifically who it was.

10 Q. Okay.

11 (Brief Pause)

12 Q. Do you remember if you received any communications
13 from the Gaffney Solicitor's Office?

14 A. No.

15 Q. You don't remember?

16 A. I don't remember. I -- I don't think anyone did,
17 no.

18 Q. Were you present at Mr. Koon's guilty plea?

19 A. No.

20 Q. Were you aware that he was going to plead guilty?

21 A. No.

22 (Brief Pause)

23 Q. Okay. To your knowledge, is there anyone who could
24 say, beyond a reasonable doubt, that the break-in at Cudd-
25 Lovelace occurred at night?

1 A. No, there's no one that could that I'm aware of.

2 (Brief Pause)

3 Q. Okay. And you're aware that Mr. Koon has been in
4 prison since 1986, correct?

5 A. Yes, I am, yeah.

6 Q. Based on the habit and routine of the Cudd-Lovelace
7 business, is it possible that this burglary occurred during
8 daylight hours?

9 A. Yes.

10 Q. Okay. Is it possible that this burglary occurred on
11 the afternoon of March 28th after 5:00 p.m. but before dark?

12 A. Yes.

13 Q. Is it possible that this burglary occurred on the
14 morning of March 29th between sunrise and nine (9:00) a.m.?

15 A. Yes.

16 MR. FILE: Judge, he's leading the witness. I'm
17 objecting to it.

18 THE COURT: Sustain the objection.

19 Q. (By Mr. Racine) What, if anything, do you know
20 about the crime with which Mr. Koon was charged in connection
21 with the Cudd-Lovelace Insurance Company?

22 (Brief Pause)

23 A. What do I know now or...?

24 Q. Right.

25 A. Okay. I'm sorry, what his sentence is or...?

1 Q. Well, no. Do -- do you know what -- or are you
2 familiar with what charge Mr. Koon pled guilty to with respect
3 to the Cudd Loveless Insurance Agency?

4 A. I -- I -- I know he has been convicted of second-
5 degree burglary. As -- as far as what he actually pled; is
6 that...?

7 Q. Well, you said that he -- you're aware he pled to
8 second degree burglary. Do you -- what do you -- what does
9 that mean to you?

10 A. That -- that means that there was a nighttime
11 element as part of this sentence.

12 (Brief Pause)

13 MR. RACINE: May I have just a moment, Your Honor?

14 THE COURT: (Nods affirmatively.)

15 (Off-the-Record Discussion)

16 MR. RACINE: Your Honor, may I approach the witness?

17 THE COURT: (Nods affirmatively.)

18 MR. FILE: Do I have a copy of that already?

19 MR. RACINE: You have a copy I believe.

20 MR. RACINE: May I approach, Your Honor?

21 THE COURT: (Nods affirmatively.)

22 Q. (By Mr. Racine) Mr. Lovelace, please, take a look
23 at that document.

24 (Document handed to witness.)

25 Q. Do you recognize that document?

1 A. I do, yes.

2 Q. Please, tell the Court what that is.

3 A. This is a letter that I sent to Mr. Barry Barnette,
4 the solicitor, basically requesting a reduction of his
5 sentence from second degree to third degree burglary.

6 And the rest of the information just substantiates
7 the reason for my request.

8 Q. Okay. And please tell the Court why you feel that
9 the charge should be reduced from second degree burglary to
10 third degree burglary?

11 A. I don't feel that there is sufficient evidence to --
12 that this had to have occurred at nighttime. Am I allowed to
13 express some personal ---

14 Q. Sure.

15 A. --- opinions on it? Okay.

16 MR. FILE: Your Honor, I would object. You know,
17 he's not a legal expert and -- and I don't think he has
18 -- I -- I don't think he can express an opinion about the
19 law or what the law should be in -- in this matter.

20 I think that the record speaks for itself that he
21 pled guilty of burglary second degree. And -- and I
22 don't think he is capable of testifying as to the -- the
23 elements or anything like that.

24 MR. RACINE: Your Honor, if I may ---

25 MR. FILE: And there's been no foundation laid

1 other than --

2 THE COURT: I will allow the witness to testify as
3 to the things that relate factually to what we're here
4 with because, if this witness is allowed to just expand
5 an opinion about the legal system and about the law,
6 then, this witness' credibility is going to be placed on
7 the line of being asked every crime that Mr. Koon, or any
8 other member of the Gaffney community, has ever committed
9 and whether or not that would shape the witness' opinion.

10 Because, when sentencing occurs, the State performs
11 the duty of making decisions about what do they charge
12 people with, do they go forward or not go forward with
13 the case.

14 There's more that the State takes into consideration
15 other than just the opinion of a victim. There is a
16 community interest that is also -- solicitors and
17 prosecutors have to take into place in deciding what is
18 their view of what -- what justice is.

19 And, if we allow this witness to be -- go into those
20 opinions, then, we very well could be here until next
21 Thursday on collateral issues that the State would be
22 entitled to question this witness about.

23 And I don't think that we need to go there because
24 this is a factual witness. I understand that he -- that
25 you're taking the position that he is the victim, so, his

1 opinion is -- is properly presented to the Court, but not
2 in some intangible just soapbox statement, no.

3 MR. RACINE: Okay. Thank you, Your Honor.

4 Q. (By Mr. Racine) Did you write this letter?

5 A. I did.

6 Q. Okay. And that's your signature on the back?

7 A. It is.

8 MR. RACINE: Okay. Your Honor, we would ask that
9 this be admitted into evidence.

10 THE COURT: All right. I believe that -- I believe
11 we've all seen copies of it?

12 MR. FILE: Yes, Your Honor. It's already been sent
13 to you and everybody under the sun.

14 THE COURT: All right. We will mark this as the
15 next Defense -- I put -- and, just for the record, I had
16 the court reporter mark Mr. Koon's affidavit of due
17 diligence as Defense 1. So, that will be Defense 2.

18 MR. RACINE: Okay. Thank you, Your Honor. Sorry,
19 Your Honor.

20 (Whereupon, Defendant's Exhibits 1 and 2 were marked
21 for identification and admitted into evidence without
22 objection.)

23 MR. RACINE: Your Honor, may I approach the witness
24 again?

25 THE COURT: (Nods affirmatively.)

1 Q. (By Mr. Racine) Please, take a look at this
2 document.

3 MR. RACINE: And may I approach, Your Honor?

4 THE COURT: (Nods affirmatively.)

5 (Document handed to the witness.)

6 (Brief Pause while the witness reviews document.)

7 Q. (By Mr. Racine) Mr. Lovelace, what is that
8 document?

9 A. This is a letter to Mr. File.

10 Q. And is that your signature for the back side?

11 A. Yes, it is.

12 Q. And did you submit -- did you send this letter to
13 Mr. File?

14 (Brief Pause)

15 A. I don't believe I did.

16 Q. Oh, you did not?

17 A. I had called you prior to -- I typed it. And, at
18 the time I think you were writing a brief and advised me
19 against -- against it. So -- and I don't know that we ever
20 followed up, so...

21 Q. Fair enough. Do you stand by this letter?

22 A. I do, yes.

23 MR. RACINE: Your Honor, we would ask that this be
24 admitted into evidence as I guess Defense Exhibit 3.

25 THE COURT: I thought he said he didn't sign it.

1 MR. FILE: He says he didn't send it, Judge.

2 A. I did sign it, but...

3 MR. RACINE: Well ---

4 THE COURT: Oh, okay.

5 MR. RACINE: We'll stipulate that this was never
6 sent to Mr. File.

7 Q. (By Mr. Racine) However, for the purposes of the
8 record, do you stand by ---

9 A. I do, yes.

10 Q. --- your assertions in this letter?

11 A. Correct.

12 THE COURT: All right. We'll have it marked as
13 Defense 3.

14 (Whereupon, Defendant's Exhibit Number 3 was marked
15 for identification and entered into evidence.)

16 MR. RACINE: Just a moment, Your Honor.

17 (Brief Pause)

18 Q. (By Mr. Racine) Mr. Lovelace, at some point, did you
19 provide an affidavit to Mr. Koon?

20 A. Yes.

21 Q. When -- to the best of your recollection, when did
22 you provide that affidavit?

23 A. I want to think it was maybe April of two thousand
24 -- of last year, two thousand, ten (2010).

25 MR. RACINE: Just one moment, Your Honor. I

1 apologize.

2 (Off-the-Record Discussion)

3 MR. RACINE: May I approach the witness, Your Honor?

4 THE COURT: (Nods affirmatively.)

5 Q. (By Mr. Racine) Please, take a moment and review
6 that document.

7 (Documents handed to the witness.)

8 (Brief pause while witness reviews document.)

9 A. Okay.

10 Q. All right. Please, tell the Court what that
11 document is.

12 A. This is an affidavit, a statement from myself just
13 stating what I could recall from the events of -- of that
14 time, March 28th - 29th.

15 Q. Okay. And is that your signature on this document?

16 A. It is.

17 MR. RACINE: Your Honor, we request that ---

18 Q. And you stand by the statements in this?

19 A. I do.

20 MR. RACINE: Your Honor, we request that be admitted
21 into evidence as I believe State's [sic] Exhibit 4 --
22 I'm sorry, Defense Exhibit 4.

23 MR. FILE: Your Honor, I think it's already part of
24 the record. It was admitted previously. I think that's
25 why -- one of the reasons we're here.

1 THE COURT: All right. We'll mark it as Defense 4
2 for this hearing.

3 (Brief Pause)

4 MR. RACINE: At this time, I have no further
5 questions. Please, answer any questions Mr. File may ask
6 of you.

7 CROSS EXAMINATION by MR. FILE: 11:47 A.M.

8 Q. Now, Mister Cudd [sic], let's go to the affidavit
9 first.

10 A. I'm Mr. Lovelace.

11 Q. Mr. Loveless, I'm sorry. Let's go to this affidavit
12 first. There are a few details here. First of all, is
13 your ---

14 THE COURT: Hang on a second. We never got the
15 affidavit to mark as an exhibit.

16 (Off-the-Record Comments)

17 (Document is retrieved and handed to the court
18 reporter to mark.)

19 (Whereupon, Defendant's Exhibit Number 4 was marked
20 for identification and entered into evidence.)

21 MR. RACINE: Sorry about that.

22 THE COURT: Yes, sir?

23 Q. (By Mr. File) All right. Your -- your -- it's your
24 testimony today that everything this affidavit is true, right?

25 A. Yes.

MR. HARRY LOVELACE - CROSS by MR. FILE

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1 Q. And you stand by that?

2 A. Yes.

3 Q. Okay. First of all, then, it would be true that --
4 that your recollection of the details of the break-in are
5 diminished by time; is that right?

6 A. Yes.

7 Q. Okay. And you said there is some question as to
8 when the break-in occurred, whether or not it would
9 necessarily be considered nighttime; is that -- that's
10 correct? Is that true?

11 A. Yes.

12 Q. All right. And you go on to talk about the routine
13 and -- and what you -- what -- as far as what the routine was.

14 And let's go down to last line. You said, "My
15 position is that the break-in may very well have occurred
16 during a time period other than nighttime"; is that -- is that
17 what you ---

18 A. Yes.

19 Q. --- believe? So, you don't know when -- for a fact
20 know that the break-in didn't occur in the nighttime, do you,
21 either -- either?

22 A. No, I don't know that it didn't.

23 Q. Okay. So, it's possible?

24 A. Sure.

25 Q. Okay.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 A. Yes.

2 (Brief Pause)

3 Q. And the insurance agency is no longer in business;
4 is that right?

5 A. It -- it is not.

6 Q. Okay. At some point, what did you do, sell it?

7 A. We merged with the Coral Insurance Group.

8 Q. Okay. And that's why you work for Coral; is that
9 right?

10 A. Yes.

11 Q. Okay. And at the time -- going back to your
12 affidavit did you -- at the time you were working there, you
13 were an employee; is that right?

14 A. I was, yes.

15 Q. And you did not discover the burglary; that's your
16 testimony?

17 A. I did not.

18 Q. Okay. Mr. Cudd, in fact, discovered the burglary;
19 is that right?

20 A. Yes.

21 Q. And he reported it to the police; is that right?

22 A. Yes.

23 Q. Okay.

24 (Brief Pause)

25 Q. How do you know Robbie Koon?

1 A. I received a call from him I guess in -- it's been
2 two or -- maybe three years ago where he indicated that he had
3 become aware of -- of my existence;

4 That -- he told me that, you know, through --
5 through the -- the Cudd family and that, you know, that my --
6 that -- you know, through the -- I -- I think maybe Mr. Cudd's
7 daughter-in-law had -- had given him my name.

8 So, he called me one day at -- at the office. And I
9 had never spoken with him or had any communication with him
10 prior to that.

11 Q. Okay. So, he contacted you himself?

12 A. He did.

13 Q. All right. Now, when you were working at the
14 insurance agency, would it be fair to say you kept regular
15 business hours there as far as ---

16 A. Yes.

17 Q. And -- and you went to work there practically every
18 day other than vacation or -- or when your father died; is
19 that right?

20 A. I did. Again, during that -- that time period, I
21 was coming over to the Spartanburg hospital, you know, prior
22 to that. And, then, you know, busy with some other things
23 related to his passing, but the --

24 Q. So, anyone going there, other than -- than, if you
25 were out somewhere or, you know, at the hospital, or something

1 like that, anyone going there would find you there as an
2 employee; is that right?

3 A. Going to Cudd-Lovelace?

4 Q. Yes.

5 A. Yes.

6 Q. And you -- you would have given them your name; is
7 that right ---

8 A. Yes.

9 Q. --- if they asked?

10 A. Yes.

11 Q. Okay.

12 (Brief Pause)

13 Q. So, if anybody came there wanting to talk to you
14 about the burglary, you would have been there and -- and told
15 them what you knew about it; is that right?

16 A. Yes.

17 Q. Okay.

18 (Brief Pause)

19 Q. Now, you said you had sent a letter to Mr. Barnette;
20 is that correct?

21 A. Yes, I did.

22 Q. Did you actually mail that letter?

23 A. I did.

24 Q. All right. Who wrote that letter? Did you write
25 the letter or did Mr. Koon write the letter and send it to you

1 to sign?

2 (Brief Pause)

3 A. Mr. Koon provided much of the content. I edited --
4 edited, but reading it, I wouldn't have sent it out if I
5 didn't, you know, consent to the content.

6 Q. So, Mr. Koon provided the content?

7 A. For the most part, yes.

8 Q. Okay. And you said that you were advised against
9 sending the letter to me; is that correct?

10 A. Yes.

11 Q. All right. So, if -- if you didn't send it, and I
12 got it, who would have sent that?

13 MR. RACINE: Objection, calls for speculation.

14 THE COURT: I'm going to let him answer if he can.

15 Q. (By Mr. File) Did you provide Mr. Koon a copy of
16 the letter?

17 A. I think I did mail him a copy, yes.

18 Q. Okay.

19 A. As -- as best I recollect.

20 Q. Did -- did you give it to anybody else?

21 A. Not that I am -- can recall, no.

22 Q. All right. So, it was either you or Mr. Koon would
23 have sent the letter to me; is that correct?

24 A. Yes.

25 Q. Okay.

1 (Brief Pause)

2 MR. FILE: All right. That's all.

3 THE COURT: Any redirect limited to what he went
4 into?

5 MR. RACINE: Very briefly, Your Honor.

6 REDIRECT EXAMINATION by MR. RACINE: 11:55 A.M.

7 Q. Is there anything contained in those letters that
8 you disagree with?

9 A. No.

10 Q. Okay. Would it be fair to say your father was well
11 known in Gaffney?

12 A. Yes.

13 Q. And I believe you testified you were twenty-three
14 (23) years old?

15 A. Yes.

16 Q. What -- did you go to college?

17 A. I did.

18 Q. Where did you go?

19 A. Clemson.

20 Q. How many years were you there?

21 A. Four (4).

22 Q. Okay. What age were you when you graduated?

23 A. Twenty-two (22).

24 Q. And you were twenty-three (23) when you were working
25 at Cudd-Lovelace Insurance Agency?

1 A. Yes.

2 Q. So, roughly four (4) years prior you were at
3 Clemson?

4 A. Yes.

5 Q. So, you weren't in Gaffney?

6 A. No.

7 Q. What was your father's full name?

8 A. Loyd Hames Lovelace (phonetic), Loyd with one "L."

9 (Brief Pause)

10 Q. (By Mr. Racine) After your father passed away, do
11 you have any opinions as to the consensus in Gaffney as to who
12 was the Mr. Lovelace affiliated with Cudd-Lovelace Insurance
13 Agency?

14 A. It would have been -- been my father.

15 Q. Not you?

16 A. Right.

17 (Brief Pause)

18 Q. Okay. So, if -- would it be fair to say, if someone
19 was investigating this burglary and had knowledge that Mr.
20 Lovelace passed away ---

21 A. Uh-huh (affirmative).

22 Q. --- they would assume that, that was the Lovelace
23 affiliated with Cudd-Lovelace Insurance Agency?

24 A. Yes.

25 (Brief Pause)

1 MR. RACINE: No further questions.

2 THE COURT: Anything?

3 MR. FILE: I could, but I won't. That's fine.

4 THE COURT: Okay. Thank you, sir. You may step
5 down.

6 (The witness complied with the Court's request.)

7 MR. RACINE: Your Honor, we would ask that Mr.
8 Lovelace be excused.

9 THE COURT: Any objection?

10 MR. FILE: No, Your Honor.

11 THE COURT: Thank you, sir. You may be excused.

12 (Whereupon, the witness was excused.)

13 MR. RACINE: Your Honor, it being almost noon, we
14 would request perhaps the Court would like to take a
15 lunch break.

16 We have one final witness being Mr. Koon himself.
17 And I'm afraid that testimony may drag on. So, I don't
18 know how you handle -- how Your Honor wants to handle
19 that.

20 THE COURT: All right. I would probably be inclined
21 to take a lunch break then.

22 All right. Let's get back together at one-thirty
23 (1:30)?

24 MR. FILE: All right.

25 MR. RACINE: All right. Thank you, Your Honor.

1 THE COURT: All right. We'll step down until 1:30.

2 (Whereupon, a lunch recess was taken from 11:58 a.m.

3 until 1:30 p.m.)

4 (Off-the-Record Comments)

5 THE COURT: Is the Defense ready to call its next
6 witness?

7 MR. RACINE: Yes, Your Honor. Your Honor, we call
8 Mr. Robert Koon.

9 THE COURT: Come right up here, sir.

10 (The witness stepped forward to be sworn.)

11 THE COURT: Place your left hand on the Bible and
12 raise your right hand.

13 (Whereupon,

14 ROBERT H. KOON

15 first being duly sworn, testified as follows:)

16 (Off-the-Record Comments)

17 DIRECT EXAMINATION by MR. RACINE: 1:35 P.M.

18 Q. Mr. Koon, would you, for purposes of the record,
19 please, state your full name?

20 A. I'm Robert Koon.

21 Q. And obviously you're incarcerated. Where are you
22 incarcerated at?

23 A. At McCormick Correctional Institution.

24 Q. And how long have you been there?

25 A. Since June of two thousand, eight (2008).

1 Q. Okay. Have you been in prison continuously since
2 1986?

3 A. No, sir. I was in prison from 1986 to 1993 on the
4 '86 charges. And, then, I was in prison from 1998 till the
5 present date on these charges.

6 Q. Okay. I want to direct your attention back to prior
7 to the guilty plea in 1986. How did you first meet Gary
8 Mallard?

9 A. Gary -- excuse me, Gary Mallard represented me and
10 another group of juveniles in a civil suit against the
11 Department of Mental Health dealing with the torture of
12 children at the Department of Mental Health in Columbia.
13 And --

14 Q. So, he did -- he represented you before?

15 A. Yes, sir.

16 Q. Okay. Now, with respect to the charges surrounding
17 and included in the 1986 guilty plea, did Mr. Mallard represent
18 you on any of the charges?

19 A. Mr. Mallard represented me on the -- on the initial
20 charge, which was the burglary of P&G Motors and Bill Willard
21 Monument Company and a grand larceny of a vehicle, indictment
22 number 86-GS-11-291 and 292.

23 Q. And did you have another attorney representing you on
24 charges that were reflected in the 1986 guilty plea?

25 A. Yes, sir.

1 Q. Who was that attorney?

2 A. Mr. Harry Klein (phonetic). He was appointed by the
3 Public Defenders' Office. Mr. Mallard, he was retained, but
4 Mr. Klein was appointed.

5 Q. Okay. Which offenses did Mr. Klein represent you
6 on?

7 A. Mr. Klein represented me on the Cudd-Lovelace
8 offense and the Stylette Salon offense. And -- and there was
9 another offense that was dismissed. He represented me on that
10 as well.

11 But that offense was dismissed be -- I mean, I
12 remember they had a preliminary hearing on it; that's --
13 that's the last I heard of it, so...

14 Q. So, that was not included in the 1986 guilty plea?

15 A. No, sir.

16 Q. Okay. Can you tell the Court a -- a little bit
17 about what happened when you were arrested for -- well, we
18 need to start with the P&G, Bill Whitaker -- Willard offenses.

19 Tell the Court a little bit about what happened when
20 you were arrested on those.

21 A. Well, I was arrested in the early morning hours of
22 March --

23 MR. FILE: Judge, I would object to the relevance of
24 -- of this testimony. We're dealing with the Cudd-
25 Lovelace ---

1 THE COURT: I would tend to agree that -- I don't --
2 I'll let you have some leeway if you could lay a
3 foundation for it because we don't want to go into and
4 retry all of the other criminal offenses.

5 There's got to be some nexus to it.

6 MR. RACINE: Yes, Your Honor. If you'll bear with
7 me, this relates to testimony heard from Mr. Mallard
8 regarding the routine and habit of the police in Gaffney.
9 I'll -- I'll jump to it if Your Honor will allow me.

10 THE COURT: Okay.

11 Q. (By Mr. Racine) At some point, did you find out
12 that the police had charged you with the defenses -- offenses
13 spanning multiple dates?

14 A. Well, like I said, I was arrested on -- in the early
15 morning hours of March the 14th at -- in Union County.

16 There was a truck found on the side of the road. And I
17 was approximately five (5) miles down the road from the truck.

18 And, when the Union County police questioned me,
19 they took me to the jail and asked me about the truck.
20 I said, "Man, I don't know anything about that truck."

21 They -- they -- so, I guess they ran the VIN number
22 on the truck. And they -- and it was from Gaffney.

23 So, they called Gaffney City Police. They was like,
24 "Do you know anything about this truck right here?"

25 MR. FILE: Your Honor, I -- I would object to the

MR. ROBERT KOON - DIRECT by MR. RACINE

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1 hearsay.

2 THE COURT: I'll sustain -- sustain the objection.

3 Q. (By Mr. Racine) Okay. Mr. Koon ---

4 A. Okay. Well ---

5 Q. Hold on. Do you have knowledge of the actions the
6 Gaffney Police took to investigate the crimes surrounding the
7 truck?

8 A. They came to Union and picked me up and took me back
9 to Gaffney and charged me with burglary and -- two burglaries
10 and the truck.

11 And they discovered the burglaries by tracing the
12 truck backwards. You know, in other words, they found the
13 truck and used the truck to discover the burglaries.

14 And I was charged with those burglaries. And they
15 set my bond at ten thousand dollars (\$10,000) and I retained
16 Mr. Mallard.

17 Q. Okay. So, those -- those offenses that you retained
18 Mr. Mallard for stemming from the truck --

19 A. Yes, sir.

20 Q. --- those were all discovered at approximately the
21 same time?

22 A. It was exactly the same time.

23 Q. I understand. That's because -- is -- is that
24 because one investigation led to the other?

25 A. Well, as it says -- you know, as it said in the

1 guilty plea transcript, these were buildings -- the P -- the
2 P&G Motors is -- both of them were basically on the same
3 corner lot.

4 You know, it wasn't like these places were at
5 different parts of town or anything. It was like two places.

6 It was like directly adjoining each other on Logan
7 Street. And that's at Page 4 of the guilty plea transcript.

8 And, when they went back and found the two
9 burglaries -- I mean, charged me with the two burglaries, they
10 put on one warrant that it happened on the 13th, which was Bill
11 Willard.

12 And P&G Motors they put on the warrant it happened
13 the 14th, even though they were both discovered at the same
14 time. Either they happened on the 14th or the 13th, but not
15 both.

16 MR. FILE: Your Honor, I would object again. I
17 think we're getting too far afield and he hadn't linked
18 it into anything.

19 THE COURT: All right. I mean, this stuff about the
20 13th or 14th, my understanding is that's not the offense to
21 which we're here today; is that correct?

22 MR. RACINE: Your Honor, that -- that goes to the --
23 under Rule 406, that goes to show the routine of the
24 Gaffney Police misrepresenting the facts of the case.

25 Mr. Mallard testified earlier in this action that a

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1 motivation to charge different offense dates, even when
2 offenses were discovered at the same time, is because of
3 the parole eligibility statute.

4 And, therefore, there's a -- a motive for the police
5 to attempt to increase potential penalty for the
6 defendant in order to get him to plead to charges.

7 And this testimony directly goes to the fact that,
8 even though there's no evidence to support these charges
9 actually occurring on different dates, the police charged
10 them on different dates specifically for, our allegation
11 is, to implicate the parole statute and induce this
12 Defendant, a nineteen (19) year old at the time, to take
13 a guilty plea and not go to trial

14 So, I think this evidence is supporting that theory
15 and this -- the newly discovered evidence of police
16 misconduct and misrepresentation.

17 THE COURT: That's a stretch of -- of inferences.

18 MR. FILE: Judge, it would be my position all this
19 was explored on PCR. And he's trying to litigate
20 everything he did in the PCR.

21 And he pled guilty to these charges, and -- and --
22 and it would be my position that he -- he -- he could
23 have explored this at that time.

24 And -- and I -- it's not really a part of what we're
25 hear about.

1 MR. RACINE: Actually, Your Honor, it is exactly
2 what we're here about. This is part of the newly
3 discovered evidence was this pattern of misconduct.

4 As the evidence is going to show, Mr. Koon had no
5 reason to suspect the police of misconduct until he
6 discovered additional evidence, which we'll get into, of
7 police misconduct.

8 That compiled with looking back at the facts and
9 occurrences that surrounded the police negotiating with
10 him and not his attorney, for the guilty plea, that
11 together sums to new discovered evidence which is the
12 subject of this hearing.

13 And, if that evidence meets the test, then, this
14 Defendant is -- is entitled to a new trial.

15 Now, whether that evidence comes before -- you know,
16 a smoking gun or some other type of evidence,
17 nonetheless, evidence is evidence.

18 And, in this case, it happens to be a habit and
19 routine. But, as your Honor knows, under the rules of
20 evidence, that's is admissible to show conduct in
21 conformity therewith.

22 MR. FILE: Judge, I don't believe he's shown even a
23 pattern of misconduct. Mr. Mallard only testified of to
24 something he considered misconduct if it happened the way
25 it was presented to him. And that was one instance of --

1 of anything.

2 He hasn't laid any kind of foundation for any kind
3 of testimony as far as a pattern of misconduct. And I
4 don't -- and he doesn't have any proof of any kind of
5 pattern of misconduct.

6 MR. RACINE: Your Honor, I would submit more than
7 one incident. Mr. Mallard testified not only about
8 different days for offenses discovered at the same time.

9 He testified about the false allegation that mud
10 samples were analyzed and were a match.

11 He also testified about his belief that the police
12 left out a ladder to, in essence, induce this Defendant
13 to attempt to escape.

14 Your Honor, there -- there are several things that
15 Mr. Mallard has testified to, and this witness will
16 collaborate, that support inferences of, you know,
17 misrepresentation and in essence bad conduct on the part
18 of the Gaffney Police.

19 So, we would request leeway to explore that as -- as
20 part of this evidentiary hearing.

21 THE COURT: All right. I'll give you some leeway,
22 but I -- you -- you do have a significant hurdle to
23 overcome in that there's already been all -- all of the
24 PCRs and all of those other cases have already addressed
25 some these issues. But I'll give you some leeway.

1 MR. RACINE: Okay. Thank you, your Honor.

2 Q. (By Mr. Racine) What did the -- when you were
3 charged with the Cudd-Lovelace/Stylette burglaries, two second
4 degree burglaries, what were the offense dates charged by the
5 police?

6 A. Like the Cudd -- like P&G Motors and the Bill
7 Willard, they also alleged separate offense dates, the 28th --
8 as a matter of fact, you know what I'm saying, like Mr.
9 Lovelace testified to, it was a duplex building.

10 And they said on one side it happened on the 28th,
11 but on the opposite side, they said it happened on the 29th.
12 And those were the two dates that they put forth.

13 So, you know, being a minor, you know -- you know,
14 we didn't know they were separate -- I mean, you know, we
15 didn't know they were discovered at the same time.

16 We thought they were two crimes that happened on
17 different dates. You know, we didn't have any way of knowing
18 that we had been misled.

19 Q. How old were you when this happened?

20 A. Nineteen (19) years old.

21 Q. Okay.

22 (Brief Pause)

23 Q. Now, do you remember how long you spent -- when you
24 were arrested, were you taken to jail?

25 A. Yeah.

1 Q. Okay. Do you remember how long, between the time
2 you were arrested for this crime and -- or these crimes and --
3 and the time you pled guilty? Do you remember how much time
4 elapsed?

5 A. Between the first set or the second set?

6 Q. Well, when were you first arrested?

7 A. Well, I was first arrested on March the 14th. Then,
8 I made bond on the 24th. Then, I was -- then, I was arrested
9 again on April the 2nd.

10 Q. Okay. So, from April 2nd, did you remain in jail
11 until your guilty plea?

12 A. No, not the whole time.

13 Q. Okay. You pled in June, correct?

14 A. Yes, sir.

15 Q. Okay. And you were arrested in April?

16 A. Yes, sir.

17 Q. So, roughly two months elapsed between the time you
18 were arrested for these charges and the time you pled guilty?

19 A. Yeah.

20 Q. Okay.

21 A. I wasn't in jail the whole time, but yeah.

22 Q. Okay. And in -- in between that you hired Mr.
23 Mallard to represent you on some of these charges, correct?

24 A. No, I hired Mr. Mallard before. I hired Mr. Mallard
25 on March the 24th on the first set of charges. Then, I got out

1 on bond.

2 Q. Okay. And, then, you were re-arrested for the Cudd-
3 Lovelace/Stylette incidents?

4 A. Yes, sir.

5 Q. So, Mr. Mallard was already representing you?

6 A. Yes, sir.

7 Q. On different charges?

8 A. Yes, sir.

9 Q. Now, the Court -- who appointed -- how did Mr. Klein
10 become involved?

11 A. Mr. Klein came involved when I was taken to the
12 courthouse on June the 17th was the first time I met with him.

13 And actually I met with him on June the 17th the same
14 day of the guilty plea.

15 Q. Okay. And that was the first time you ever met Mr.
16 Klein?

17 A. And the last time.

18 Q. Okay. And...

19 (Brief Pause)

20 Q. Do you know what a Rule 5 motion is?

21 A. Yes, sir.

22 Q. Tell the Court what your understanding of a Rule 5
23 motion is.

24 A. A Rule 5 motion is like a motion for discovery
25 except in a crim -- a criminal case. It supposed to be the

1 Defendant that makes the motion under Rule 5.

2 The prosecution has a duty to disclose the evidence
3 that they're going to rely upon to establish guilt I guess for
4 the crime, I mean....

5 Q. Okay. Now, when you met with Mr. Klein, did you
6 form any opinion as to whether or not a Rule 5 could have been
7 filed in your case?

8 A. I didn't form an opinion. I seen the Rule 5 that he
9 filed.

10 Q. That Mr. Klein filed?

11 A. Yes.

12 Q. And which cases was that Rule 5 applied to?

13 A. The Cudd-Lovelace and the Stylette Salon.

14 Q. So, the cases we're here today on -- or the case
15 we're here today?

16 A. Yeah, the case because the other one had been
17 reversed by the Supreme Court.

18 Q. Okay. We'll jumped to that. The -- the Stylette
19 burglary has been reversed, correct?

20 A. The Stylette burglary was reversed by the Supreme
21 Court in two thousand, four (2004) in a published opinion,
22 *Koon vs. State* because that side of the duplex, for some
23 reason, didn't allege a nighttime element.

24 So, not only did they alleged different dates, they
25 alleged one side of the building happened at night but the

1 other side happened in the daytime I guess because -

2 Q. Okay. But going back to the Rule 5 motion just
3 briefly, at the time you pled guilty in 1986, because a Rule 5
4 had been filed in this matter, did you believe the police had
5 provided you with all the evidence that they had?

6 A. Well, actually, he filed a Rule 5 and a *Brady*
7 motion, but it was like contained within the same document,
8 the one that I seen. And -- did they provide me with any
9 information?

10 Q. Since the Rule 5 motion was filed by your attorney,
11 did you believe that the police had complied with the Rule 5
12 and given you the information?

13 A. At that time?

14 Q. Yes, at that time.

15 A. To be honest with you, I didn't know a Rule 5 from a
16 Rule 55 because I was only nineteen (19) years old. I didn't
17 have any concept of the judicial system other than I was in
18 the courtroom and I had a lot of charges.

19 And they had came to the jail that morning and told
20 me without -

21 Q. Who -- who came to the jail?

22 A. Chief of Police Skinner.

23 Q. Okay. And where was he chief of police?

24 A. He -- he was the chief of police at the Gaffney City
25 Jail where I had escaped from.

1 And he basically -- he basically back there and
2 said, "Look, Robbie, you got -

3 MR. FILE: Objection, Your Honor, hearsay.

4 THE COURT: I'll sustain the objection.

5 Q. (By Mr. Racine) Okay. Without saying what Detective
6 Skinner said to you, did you take any actions based upon your
7 meeting with ---

8 A. without ---

9 Q. --- the police?

10 A. Without saying what he told me and what I did upon
11 what he ---

12 Q. Well, you -- you can tell the Court what you did
13 after you met.

14 A. Okay. Mr. Skinner came -- I mean Chief Skinner came
15 to my cell that morning, opened the door, handed me some
16 clothes my mom had brought over there, led me across the
17 street to the courthouse, into the room with Harry Klein, and
18 told me ---

19 MR. FILE: I object.

20 Q. Don't say what he said.

21 A. Okay. Led me into the room with Harry Klein whereas
22 Harry Klein began to advise me to plead guilty.

23 Q. Okay. Did Detective -- Detective Skinner hold a
24 conversation with you?

25 A. Yes.

1 Q. He did?

2 A. Yes.

3 Q. Was -- was Gary Mallard present?

4 A. No.

5 Q. Was Harry Klein present?

6 A. No. Not only was Mr. Skinner present, this happened
7 -- you know, this wasn't the first time he tried to contact me
8 without my counsel being present.

9 The first time he did, I relayed that to my counsel.
10 And my counsel sent a letter to the jail and said, "Please
11 don't contact Mr. Koon regarding the cases I represent him
12 upon."

13 But yet he came back again and conducted another
14 conversation. And that conversation led to me going across
15 the street and pleading guilty.

16 Q. Okay. Were there any kind of negotiations regarding
17 sentencing discussed in that conversation with the police?

18 A. Yes.

19 Q. What was your understanding of what would happen to
20 you if you pled guilty to these charges?

21 A. If I pled guilty to the charges, I would receive ten
22 (10) years. If I didn't, I would receive forty (40) years.
23 That the -- my understanding of the conversation I had with
24 Mr. Skinner at the jail that morning before I went to the
25 courthouse.

1 Q. Okay. Did you relay this information to your
2 attorneys?

3 A. (No Response)

4 Q. Did you tell them?

5 A. Klein?

6 Q. Either -- either one.

7 A. Well, Klein knew about it. I mean, excuse me, Mr.
8 Klein knew about it.

9 When I got into the -- I guess you call it the
10 attorney -- the attorney room, or whatever it was at the
11 Gaffney City -- County Courthouse, he advised me to plead
12 guilty.

13 And told me -- and I said, "Well, what about my
14 other attorney? Where is he at?" "Oh, we called him and he's
15 on the way from Greenville." Because Mr. Mallard is from
16 Greenville.

17 So, I said, "Well, he's on the way." He said,
18 "Yeah, by the time he gets here, we'll have everything ready
19 and you can go ahead and plead guilty."

20 Q. Okay. So, Mr. Mallard was on his way from
21 Greenville to Gaffney?

22 A. And Mr. Klein and Mr. Skinner were in the process --
23 my understanding of what was going on was to plead guilty.

24 Q. Okay. Before we get to the guilty plea, I want to
25 back up just a little bit.

1 Are you aware of any investigations Mr. Klein
2 engaged in to investigate the facts surrounding the Cudd-
3 Lovelace burglary?

4 A. See, that was the gist of our conversation when we
5 got there to the courthouse that morning during our
6 attorney/client conference when he was trying to formulate
7 some kind of I guess it was a strategy if you could call it
8 that.

9 But he was saying, "Well, this ---"

10 MR. FILE: Objection, Your Honor. I think we're
11 getting into hearsay again.

12 THE COURT: Sustained.

13 A. Okay.

14 Q. To your knowledge, did Mr. Klein attempt to
15 interview the victims of the Cudd-Lovelace burglary?

16 A. Yes.

17 Q. Okay. And what were the results of those efforts?

18 A. Well, Mr. Cudd had -- Mr. Cudd -- well, first of
19 all, Mr. Lovelace had just passed away. He said, "Well ---"

20 Q. Okay. To avoid another objection, don't -- don't
21 say what Mr. Klein said. Just tell the Court what your
22 understanding of the results of his investigation were.

23 A. The results of his investigation was Mr. Lovelace
24 would not be able to testify because he had -- was deceased.

25 Mr. Cudd would not cooperate because he was very

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1 upset and he would not talk to Mr. Klein because he was very
2 upset.

3 And the secretary, Jule Bolin, she didn't work that
4 day. So, there was only three people working at the place.

5 One had passed, one didn't work, and the one that
6 was working that morning, he would not cooperate with the
7 Defense.

8 Q. So, based on your knowledge at the time, nobody
9 would talk to Mr. Klein with respect to this burglary? Is
10 that fair to say?

11 A. Nobody.

12 Q. Okay.

13 A. That was my understanding of the conversation.

14 Q. But Mr. Klein did try to interview Mr. Cudd
15 regarding this burglary?

16 A. He did.

17 (Brief Pause)

18 Q. At that time ---

19 A. And he filed a Rule 5 and a *Brady* as well.

20 Q. That you saw in the file?

21 A. Yes, sir.

22 Q. At -- at that time, just before and at the guilty
23 plea, were you aware of any other persons connected to Cudd-
24 Lovelace Insurance Agency that might be a potential witness?

25 A. When?

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1 Q. At the time of the guilty plea, not after.

2 A. At the time of the guilty plea, I didn't know who
3 worked there and who didn't work there and who, you know ---

4 Q. But Mr. Klein had tried to find out, right, by
5 interviewing ---

6 A. Right.

7 Q. --- witnesses who refused to speak with him?

8 A. Right. Yeah, I did have that understanding where he
9 couldn't -- he tried his best to conduct a diligent
10 investigation and he was forestalled doing that by
11 uncooperative witnesses and one witness being deceased and the
12 other lady that didn't work that day.

13 Q. Okay.

14 A. So, the only evidence that basically we had in the
15 Cudd-Lovelace prosecution was the arrest affidavit of -- of
16 Detective Richard Weaver (phonetic).

17 And in -- and in his affidavit, he said that the
18 crime -- that it was broke into in the nighttime. And -- and,
19 on the other side of the building, the warrant said it was
20 broken into but didn't have a nighttime allegation.

21 So, those two affidavits and me being not cognizant
22 to what the law was at the time, I thought those affidavits
23 could be used at trial.

24 So, that's why basically I was pleading guilty.

25 Q. Okay. Now, there's been some allegations of

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1 evidence or representations regarding mud sample. Tell --
2 explain to the Court what that involved.

3 A. Well, when I was arrested in Union, the -- the
4 police officers, Richard Weaver and Marvin Harvey (phonetic),
5 they took my shoes and my jacket and brought me back to
6 Cherokee County.

7 And it was my understanding that they was going to
8 prosecute me because they said the mud on my shoes ---

9 MR. FILE: Objection, Your Honor. He's testifying
10 to what they told him.

11 THE COURT: I'm going to have to sustain the
12 objection.

13 A. Well, it was my ---

14 Q. Hold on. Based, on your conversations with the
15 Gaffney Police, did evidence regarding -- or purported
16 evidence regarding mud samples influence your decision to
17 plead guilty?

18 A. Yes, it did.

19 Q. Why did it influence your decision to plead guilty?

20 A. Because my understanding was that the mud samples
21 found at the scene of the crime -- no, excuse me.

22 The mud was supposed to be -- this was the theory:
23 The mud on the inside the truck floorboard matched the mud on
24 my shoes that supposedly matched the same type of mud at the
25 crime scene.

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1 And that's how they was linking the truck to the
2 burglary and ---

3 Q. Is that how they were going to pin it on you?

4 A. Right. And that was my understanding how they was
5 going to proceed if I went to trial on the Bill Willard and
6 the P&G Motor offenses when Chief Skinner came to the jail.

7 Q. So, you believed there was evidence -- you believed
8 there was an analysis of mud samples tending to prove that you
9 were in the truck and at the building with respect to P&G
10 Motors?

11 A. I was led to believe that, that they were positive
12 samples. But come to find out --

13 Q. Did you -- did you later find out anything else
14 about this alleged analysis of mud samples?

15 A. Well, yes, once I got convicted, in the Department
16 of Corrections or pled guilty, I wrote SLED and I asked them,
17 I said, "Can I get a copy of the SLED analysis," which I
18 believed -- I mean, which I was led to believe that was
19 conducted through my conversation with Chief Skinner and
20 Detective Weaver.

21 And come to find out no mud samples had ever been
22 even submitted to SLED even if you can test a mud sample.
23 So, however that went, but that's when ---

24 Q. Okay.

25 A. Yes, sir.

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1 Q. Okay. So, your belief that there was evidence
2 regarding matching mud samples if you will influenced your
3 decision to plead guilty to these charges?

4 A. It was -- it was I would say the lynch pin of my
5 decision to plead guilty to all these charges.

6 Q. Okay.

7 (Brief Pause)

8 MR. RACINE: Just a second, Your Honor.

9 (Brief Pause)

10 Q. Before you pled guilty on I believe it was June 17th,
11 1986, did your attorney, Mr. Mallard, advise you not to plead
12 guilty?

13 A. When Mr. Mallard came from Greenville to Gaffney on
14 the morning of the 17th, he was very irate. He was very upset.
15 He said, "Can I talk to you for a minute?"

16 MR. FILE: Ob -- Objection, hearsay.

17 THE COURT: I sustain the objection.

18 A. Well, his demeanor appeared to me to be very upset
19 as to the point of almost being red in the face upset. So, I
20 took him to be upset by his mannerisms.

21 He asked to speak to me and Mr. Klein wanted to sit
22 in on the interview, but Mr. Mallard got me in the room by
23 myself. He said ---

24 Q. No, don't -- don't ---

25 A. Okay.

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1 Q. --- say what he said. Based on your conversation
2 with Mr. Mallard, what was your impression as to whether he
3 wanted you to plead guilty or not?

4 A. So, I can't speak on what me and my attorney
5 conversated on ---

6 Q. Don't -- don't tell us what he said specifically,
7 but based on your conversation, what was your impression -- or
8 did you believe Mr. Mallard wanted you to plead guilty?

9 A. It was my impression, from his actions, that he did
10 not want me to plead guilty.

11 Q. Okay.

12 A. He was basically confused as to why would you hire
13 me and you and me go out and conduct all these measurements as
14 to when this crime happened and this and that and, then, turn
15 around and plead guilty.

16 Q. And did you explain to Mr. Mallard what had happened
17 with you obtaining an negotiated plea recommendation?

18 A. I explained to him how Chief Skinner came to the
19 jail and based on his actions I felt like it was in my best
20 interest to plead guilty since I was facing a lot of time.

21 And I was informed that I would be -- well, not
22 informed because I don't want to say no hearsay, but his
23 actions led me to believe that I would be getting a lot of
24 time unless I pled guilty basically.

25 Q. Ummm...

1 A. As the transcripts can -- as the transcript can
2 point out, during the plea I basically told the judge.

3 He said, "Why are you pleading guilty?" Well, hold
4 on a minute and let me see if I can find it.

5 (Brief Pause)

6 A. At Page 9 of the guilty plea transcript, he said,
7 "Do you have any witnesses that would tend to prove you're
8 innocent the State would be required to get them here; do you
9 understand?" "Yes, sir."

10 He said, "Do you have such witnesses?" My lawyer
11 said, "We have subpoenaed several." And he said, "What would
12 those witnesses tend to prove?" And I said, "That I wasn't at
13 the scene of the crime. I didn't do these -- I didn't do
14 these."

15 And the Court said, "And where are those witnesses
16 now?" And "The Defendant," "In Gaffney." "That you were not
17 at the scene of the crime in which case?" And, "The
18 Defendant: In all cases, Your Honor."

19 "Including the truck in Jonesville?" "The Defendant:
20 I wasn't in the truck." "When they got you?" "Yes, sir."

21 And then he said -- and, then, the Court was like,
22 "Well, why are you pleading guilty. You told me you were
23 guilty. Are you guilty?"

24 And I said, "I'm facing a lot of time, Your Honor.
25 It would just be better for me to plead guilty." So...

1 Q. So, you pled because you didn't want to risk
2 incurring a lot of time?

3 A. I pled guilty because I was led to believe that the
4 police had mud sample that could link me to that truck and
5 that burglary that it -- you know.

6 And those three charges right there carried forty
7 (40) years. And that's where the forty (40) year figure came
8 out of the air from was those three charges.

9 Q. Did you also have a potential alibi witness in one
10 of these matters?

11 A. Yes, yes, sir.

12 Q. Now, what happened with that potential defense?

13 A. That was -- that was my girlfriend Tammy at the
14 time. And she was going to come be my alibi.

15 And that was another reason that I pled guilty
16 because all of a sudden she just changed her mind. And all of
17 a sudden she was not available.

18 She had been sent to her aunt's house somewhere,
19 wherever she lived at, and she wasn't even in Gaffney anymore.

20 And that -- we was basically told -- my mother was
21 basically told -- well, I'm not even going to say that because
22 it's hearsay, but basically we were led to believe in so many
23 words that she would not be available to testify.

24 Q. Do you have any idea as to any relationship she
25 would have to the Gaffney Police?

1 A. Her father was a -- a -- a patrolman or an officer
2 or whatever.

3 MR. RACINE: Bear with me just a moment.

4 A. And her grandfather.

5 (Brief Pause)

6 MR. RACINE: May I approach the witness, Your Honor?

7 THE COURT: Yes, sir.

8 (Document handed to the witness.)

9 Q. Let's talk a minute about the actual plea. At the
10 time you pled guilty to these offenses, had you obtained a
11 recommendation from the State, a deal?

12 A. The deal was supposed to ten (10) years concurrent
13 on all the charges. And the escape charge, where they left
14 the ladder on the rec field as Mr. Mallard testified to, was
15 going to be dismissed. That was the terms of the agreement.

16 Q. Okay. And did that agreement include -- did you
17 have to plead to everything to get that deal?

18 A. Oh, it was plead to -- plead to everything or don't
19 plead or go to trial on everything.

20 Q. And ---

21 A. See, I didn't even know at the time they could sever
22 the offenses for trial. I didn't know any of this at the
23 time, so, they said, "You're either going to plead to them all
24 or we're going to try you to them all."

25 Q. And that induced you to plead guilty to these

1 charges?

2 A. Right, because that gave them four shots to convict
3 me. To my mind, I said, "Well, they've got four opportunities
4 to convict me, so, they're going to get me either way it goes.
5 So, I might as well plead."

6 Q: Okay. And is that the reason you represented to the
7 Court that you had committed all of these crimes?

8 A. Well, during the guilty plea, he was asking me
9 questions and I was, "Yes, sir," "Yes, sir."

10 And he asked me -- I was like, on the duplex side of
11 the building, you know, he asked me, he said, "Well, did you
12 break in this side at nighttime?" And I was like, "Yes, sir."

13 And he said, "Well, you broke into this building,
14 and it didn't say anything about nighttime." So, I said,
15 "Yes, sir."

16 But the nighttime -- the distinguishing aspect of
17 the nighttime, I didn't really have no aware of significance
18 of the nighttime. I -- I was thinking, "Well, I was just
19 pleading guilty."

20 And, then, halfway through the plea, I said, "What
21 are you doing? You're sitting here admitting to something you
22 didn't even do."

23 And that's when I tried to change it up. I said,
24 "Well, to be honest with you, Your Honor, I'm just pleading
25 guilty because I'm facing a lot of time. I ain't really do

1 these charges basically."

2 And that's in the transcript. And, at that point in
3 time, come to find out, under *North Carolina vs. Alford*, he
4 was supposed to make a -- he was supposed to have a -- conduct
5 an inquiry to see if the State had a factual basis for me
6 pleading guilty.

7 Had he done that, he would have realized that the
8 State didn't have any evidence ---

9 MR. FILE: Judge, I object. I don't think he can
10 testify what the judge would have done or -- or ---

11 THE COURT: All right. Well ---

12 MR. FILE: --- or anything on the facts.

13 THE COURT: Okay.

14 MR. RACINE: We'll -- we'll move on a little bit.

15 THE COURT: Okay.

16 Q. So, it was -- is it -- is it fair to say that your
17 understanding was you had to admit to these charges in order
18 for the judge to accept your guilty plea?

19 A. Well, to be honest with you, I started out admitting
20 to them, then, I changed it up in the middle of the plea and
21 told him basically, "Your Honor, I didn't even do these
22 charges."

23 But he didn't ever stop and say, "Well, if you
24 didn't do them, let me give you a jury trial." He just kept
25 right on with the show.

1 So, I told him halfway through the plea that I
2 didn't do these charges because I kind of changed my mind
3 about pleading guilty. I said, "Why are you sitting here
4 pleading guilty to this?"

5 Q. Okay. But, I mean, you did, in fact, plead guilty
6 and take the negotiated sentence of ten (10) years; is that
7 correct?

8 A. Under duress and under trickery I took it. It
9 wasn't in no sense of the word a voluntary act.

10 MR. RACINE: Okay. Your Honor, at this point, we
11 would move to introduce the transcript of the guilty plea
12 into evidence.

13 It may be in evidence somewhere else in the file,
14 however, I had to call up the Supreme Court and have them
15 dig through the appendices of various pleadings to obtain
16 this, so, I believe if we introduce it now, it'll be in
17 the record and freely available.

18 Do -- do you want to look at it?

19 (Document handed to Mr. File for review.)

20 (Off-the-Record Discussion)

21 MR. FILE: Judge, what he's got is a copy. I --
22 I ---.

23 A. Do you want the original?

24 MR. FILE: --- I don't know if it's sufficiently
25 authenticated for Your Honor or not.

1 MR. RACINE: Your Honor, I obtained this from the
2 South Carolina -- I can't remember the lady's name, but
3 the -- it was an attachment in the appendices of one of
4 the appeal briefs.

5 I can potentially get and submit an affidavit;
6 however, I don't have the original. I only have this.

7 I would request the Court accept it as an exhibit,
8 review it, and make the Court's own decision as to the
9 evidentiary value of -- of it.

10 MR. FILE: Your Honor, I have no -- no objection to
11 that if you want -- if it --

12 THE COURT: All right. We'll mark it as Defense
13 Exhibit 5.

14 (Whereupon, Defendant's Exhibit 5 was marked for
15 identification and admitted into evidence without
16 objection.)

17 THE COURT: And if the ---

18 A. It is clocked stamped.

19 THE COURT: --- if the State has a -- has another
20 copy, you can present that as well.

21 MR. FILE: I -- I don't have a copy.

22 THE COURT: Okay.

23 (Off-the-Record Comments)

24 Q. (By Mr. Racine) What sentence did you receive when
25 you pled guilty to all of these charges?

1 A. I received a ten (10) year concurrent sentence on
2 each one of the charges.

3 Q. Okay.

4 A. The two thousand -- like I said the two thousand,
5 four (2004), one of them was vacated.

6 Q. Okay. But, at the time you pled guilty, you -- you
7 pled guilty and you did receive what the police had promised
8 you, the ten years?

9 A. Yes, sir.

10 Q. Okay. Now, at the time you pled guilty in 1986, did
11 you have any knowledge that there was a man named Harry
12 Lovelace who worked at the Cudd-Lovelace Insurance company?

13 A. My only knowledge was there was one Mr. Lovelace and
14 he had passed away before my guilty plea.

15 Q. Okay.

16 A. And that's why Mr. Cudd was so upset and
17 wouldn't --

18 Q. He wouldn't talk to you -- or he wouldn't talk to
19 your lawyer?

20 A. Yeah -- yes, sir, that's what I was led to believe.

21 Q. Okay. And do you have -- did you have any reason to
22 believe that your attorneys knew of any other -- of any -- of
23 Mr. Harry Lovelace, his existence?

24 A. Well, I was led to believe that -- that one witness
25 -- I mean one victim was passed -- excuse me -- deceased. One

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1 victim wouldn't cooperate and one victim didn't work that day,
2 which was Ms. Jule Bolin and Mr. J.D. Cudd.

3 Q. So, you didn't know anything about Harry Lovelace at
4 all?

5 A. No, sir.

6 Q. If ---

7 A. The first time I learned about Mr. Harry Lovelace
8 was through a conversation with my mother.

9 Q. Okay. We'll get to that in just a second, okay?
10 What happened after you got ten (10) years? Where did you go?

11 A. I went to Perry.

12 Q. Okay.

13 A. The Department of Corrections.

14 Q. And, when you went to Perry -- once you got down to
15 Perry, did you have any knowledge about Harry Lovelace?

16 A. No.

17 Q. Okay. Let me back up just a little bit. Did your
18 family -- you or your family know the Cudd family?

19 A. Well, J.D. Cudd was my father's Sunday School
20 teacher, so, I knew of Mr. Cudd. Mr. Cudd had sponsored some
21 -- some trips for us when we was in the RA's at East Gaffney
22 Baptist Church.

23 So, my family and I knew the Cudd family. And --
24 and my mother knew them. I didn't know -- we didn't know the
25 Lovelaces, but we knew who the Cudd family were.

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1 Q. Okay. Now, when you went to prison, were you able
2 to and did you continue to investigate these matters at all?

3 A. Diligently.

4 Q. Okay. How -- explain to the Court how you did that.

5 A. Well, I first step was to write to SLED. A -- a law
6 clerk advised me to write to SLED and try to get the SLED
7 reports of the mud samples because nobody had ever heard of a
8 mud sample. And I ain't heard of one since then as a matter
9 of fact.

10 I wrote to SLED. And SLED said there was no
11 analysis. SLED led me to believe, by their letter, there was
12 no analysis done of no mud sample.

13 Q. Okay. And that contradicts what the Gaffney Police
14 had presented to you that induced you to take the guilty plea,
15 right?

16 A. And it also collaborates what they told Mr. Mallard
17 that the tests were inconclusive and they would not be used.
18 So, two people were informed -- led to believe two different
19 things.

20 My counsel was led to believe they were inconclusive
21 where I was led to believe they were conclusive. I guess that
22 was the reason he contacted me without my attorney being
23 present at the jail.

24 Q. Now, at some point, when you're in the Department of
25 Corrections -- explain to the Court how you learned of the

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1 existence of Harry Lovelace.

2 A. How did I learn of the existence of him?

3 Q. Uh-huh (affirmative).

4 A. Well, before my mother passed away, she gave me some
5 information that I was able to follow up on.

6 And by piece mill and piece mill and piece mill I
7 found him because, see, the fact was, there was not even a
8 Cudd-Lovelace Insurance Company in existence because, after
9 '86, sometime after that, they merged with the Coral Insurance
10 Company.

11 And once they merged, there was not even a Cudd-
12 Lovelace Insurance Company to investigate. But, once she told
13 me about Mr. Lovelace, I tried to contact him -- I tried to
14 contact him but his number was unlisted.

15 I couldn't -- you know, I couldn't -- I couldn't
16 find out who he was.

17 Q. Okay. How did your mother come into possession of
18 information ---

19 A. I ---

20 Q. --- regarding Mr. Lovelace?

21 A. I guess through her association with somebody she
22 knew. She knew everybody in Gaffney, so...

23 Q. Okay. Did she go to the same church as ---

24 A. She did at one time.

25 Q. Once you learned from your mother that there was a

1 man named Harry Lovelace, what -- what action did you take?

2 A. I took action to try to locate him first. And that
3 was very, very difficult.

4 Q. How did you do that?

5 A. Well, see, you got to look at the fact at where I
6 was at, at the time I was trying to locate him. I was in
7 prison.

8 Some of the times I was on -- not even on the yard.
9 I was on lock-up. So, it was very difficult.

10 I -- I wrote and wrote and wrote. And finally, I
11 said, "Well..." I -- I just started contacting -- I just
12 started calling up Lovelaces in the phone book.

13 And -- and really, I did that in a way that wasn't
14 authorized by SCDC.

15 Q. Well, let me ask you -- let me ask you this: Did
16 you, at some point, make contact with Harry Lovelace?

17 A. Did I at some point make -- yes, sir, I did.

18 Q. You found him?

19 A. It was hard, but I found him.

20 Q. Okay. Now, did you exchange correspondence? Did
21 you send him some letters?

22 A. At first I did. I didn't get any response. But
23 finally I -- I kept at it and he -- and he responded.

24 Q. Okay. What happened? Did you investigate? Did you
25 ask him things about the crime? What -- what transpired

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1 between you and Mr. Lovelace?

2 A. Well, at first, you know, I contacted him and
3 contacted him about it. And, you know, he was more like
4 asking me questions like "Why do you want to know this?" "Why
5 this?"

6 So, I explained to him, you know what I'm saying,
7 about the crime and that it was a burglary. And he was like,
8 "Well, I don't have any information about -- you know, I don't
9 have any information."

10 And, then, he said, "I don't know if it happened at
11 nighttime ---

12 MR. FILE: Your Honor, I -- I would object to --
13 he's doing hearsay ---

14 THE COURT: All right.

15 THE DEFENDANT: I apologize.

16 Q. (By Mr. Racine). At some point, did you learn -- did
17 you learn information from Mr. Lovelace that you did not know
18 at the time of your guilty plea?

19 A. Yes, I did.

20 Q. And what was that information?

21 A. That information was the -- the -- first of all,
22 that both of these crimes were discovered on the morning of
23 the 29th at nine (9:00) a.m.

24 And that -- that they were not separated by a day, a
25 calendar day or moon day or any other kind of day. They were

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1 both separate. There was no separation between the time
2 frames.

3 And I was like, "Well, how do you say one side
4 happened at nighttime and the other side didn't?"

5 Q. Okay. Is that the first time you were aware of when
6 the burglary was discovered?

7 A. Right, right.

8 Q. And is that the first time you were aware of when
9 the Stylette burglary was discovered?

10 A. Right.

11 Q. Okay. And you're aware that the Cudd-Lovelace
12 Insurance Agency was in essence next door to the Stylette
13 business?

14 A. Right, because on the warrants themselves, which I
15 would also like to enter into evidence if I could, the arrest
16 warrants. I don't know if they have that entered into
17 evidence.

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

19 THE COURT: Uh-huh (affirmative).

20 (Documents handed to the witness.)

21 A. Because they're actually arrest affidavits.

22 (Brief Pause)

23 MR. FILE: Can I see them?

24 (Off-the-Record Discussion)

25 MR. RACINE: May Mr. Racine and I approach, Your

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1 Honor?

2 THE COURT: (Nods affirmatively.)

3 (Off-the-Record Discussion)

4 Q. (By Mr. Racine) All right, Mr. Koon. You've pulled
5 these out, but please explain to the Court, again, what these
6 two documents are.

7 A. These two documents are -- the -- the first document
8 is an arrest affidavit for burglary second.

9 Q. And which -- which business is alleged on that?

10 A. It's the Cudd-Lovelace Insurance Company. And it's
11 warrant number 540173. It was signed by Detective Richard
12 Weaver on April the 2nd, 1986 in front of Magistrate James P.
13 Love (phonetic).

14 Q. Okay. And what, if anything, does that affidavit
15 allege regarding a nighttime element?

16 A. It says, "The Defendant, Robert Holland Koon, did
17 break into the offices of Cudd-Lovelace Insurance Company
18 located at 217 East Frederick Street within the city limits of
19 Gaffney, South Carolina on or about March the -- March 28th,
20 1986, by kicking..." -- let me see, "...on or about March 28th,
21 1986, by kicking a side open and entering during the nighttime
22 with the intent to commit a felony therein."

23 Q. Okay. So, your -- is it your understanding that,
24 that offense is alleged by the police to have occurred on
25 March 28th at night?

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1 A. That's what it says.

2 Q. Okay. I want to direct your attention to the other
3 document. What is that other document?

4 A. The other document says it's a -- it's -- it's an
5 affidavit; it's an arrest affidavit. It's warrant 12120
6 (phonetic).

7 Q. All right.

8 A. It just says, "By Richard Weaver." It says,
9 "Burglary second." "The Defendant, Robert Holland Koon, did
10 break into the Stylette located at 219 East Frederick Street,
11 within the city limits of Gaffney, on or about March the 28th,
12 1986, by knocking the glass from the back door and entering
13 with the intent of committing a felony therein."

14 But, it doesn't allege nighttime like the other one.
15 And, see, from the warrants themselves, you wouldn't know this
16 was a duplex either.

17 You might think that they were beside each other.
18 But actually this was one building, so...

19 Q. And were these -- these were the affi -- were these
20 affidavits available to you at the time of the guilty plea?

21 A. No, sir. Now, with regards to that question you
22 just asked me, these affidavits -- excuse me -- well, let me
23 -- let me go back. I ---

24 Q. These are the charges you pled guilty to, correct?

25 A. Yes, sir, yes, sir.

1 Q. Okay. So -- and -- and is it your understanding
2 that, based on these affidavits, the solicitor's office
3 obtained indictments against you?

4 A. Right, because on the back of the indictment it says
5 "the witness," and it's got "Richard Weaver," so...

6 Q. Okay.

7 MR. RACINE: Your Honor, we would move to admit
8 these into evidence.

9 THE COURT: Any objection?

10 MR. FILE: No objection.

11 THE COURT: Without objection it'll be 6 and 7.

12 MR. RACINE: And which one do you want to do as 6
13 and which one do you want to do as 7?

14 (Continued Off-the-Record Discussion)

15 (Whereupon, Defendant's Exhibit Numbers 6 and 7 were
16 marked for identification and admitted into evidence
17 without objection.)

18 MR. RACINE: And, Your Honor, for purposes of the
19 record, the Cudd-Lovelace I believe is Exhibit Number 6.
20 And the Stylette is Exhibit Number 7.

21 (Off-the-Record Comments)

22 THE COURT: All right.

23 Q. (By Mr. Racine) Okay. So, until -- is it fair to
24 say until you learned of and communicated with Harry Lovelace,
25 the only evidence regarding -- that you were aware of

1 regarding the nighttime element was contained in that
2 affidavit?

3 A. Yes. And I -- Yes, sir.

4 Q. What actions did you take once you contacted and
5 corresponded with Mr. Harry Lovelace?

6 A. Well, I attempted to first get his understanding of
7 the situation. And, based upon his understanding of the
8 situation, as time developed into a good period of time for
9 this to manifest itself;

10 But during the time period, after I contacted him,
11 he provided me an affidavit, which we entered into today as an
12 exhibit, attesting to the -- to -- to the fact that the
13 burglary happened sometime between five (5:00) to nine (9:00)
14 a.m. and there was no way that anybody could possibly tell
15 when the crime happened other than between five (5:00) and
16 nine (9:00) in -- in the early -- in the early spring of 1986.

17 Q. Okay. At some point, while you were in the
18 Department of Corrections, did you learn of any evidence
19 regarding police misconduct in Cherokee County?

20 A. Well, how I learned about that was through a
21 newspaper article that I read about the Riddle case.

22 MR. FILE: Judge, I would object. I don't think
23 this -- this doesn't have any relevance to what we're
24 here about today.

25 He's trying to go into another case involving

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1 misconduct. And he hasn't proven any conduct -- he
2 hasn't proven its connection to this case at all.

3 MR. RACINE: Your Honor, if I may. The connection
4 is -- is not fact specific. However, this case is
5 connected because the Defendant saw this case, saw
6 evidence of misconduct and began to question the facts
7 surrounding his own arrest and guilty plea.

8 And it caused him to realize that there was a
9 pattern -- a pattern and routine of the Gaffney Police
10 misrepresenting evidence.

11 So, this lays a foundation for his later
12 investigation into the facts surrounding his own
13 mistreatment by the Gaffney Police.

14 So, with respect to that, I think it is relevant.

15 THE COURT: You're talking about he -- he read a --
16 about the Supreme Court's decision in the *Riddle* case
17 that reversed the conviction?

18 THE DEFENDANT: Yes, sir.

19 MR. RACINE: I believe that's correct, Your Honor.
20 And I believe his testimony would show that, based on
21 that, he realized and began to question what had happened
22 to him and investigated that and discovered that, in
23 fact, that there were all these numerous steps or former
24 misrepresentations that the Gaffney Police engaged in.

25 THE COURT: The things that we've already reviewed?

1 MR. RACINE: Yes, Your Honor; the mud samples, the
2 different dates of the offenses, the ladder left in the
3 yard, the talking with him without the presence of -- of
4 his attorney before the guilty plea.

5 THE COURT: So, the -- so, his becoming aware of the
6 Supreme Court's reversal in *Riddle* goes to the element of
7 his due diligence in bringing the matter to the Court's
8 attention?

9 MR. RACINE: Yes, Your Honor. Once he saw what had
10 transpired in *Riddle*, he realized, "Hey, look, the Court
11 has already found that the Gaffney Police and the
12 Cherokee County Solicitor has engaged in these improper
13 actions," which keyed him in on the fact that maybe he
14 should take a look at what had happened to him.

15 And based on that, he's discovered that, in fact, if
16 you look at the pattern of conduct engaged in by the
17 police and -- and the State, with respect to his
18 convictions and his guilty plea, that it shows the same
19 kind of misrepresentations that occurred in the *Riddle*
20 case.

21 And, therefore -- you know, he investigated that and
22 found that the case -- and that's part of his Rule 29
23 motion.

24 THE COURT: All right.

25 MR. FILE: Judge, I think we're getting a little too

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1 far afield here. That would be our position.

2 And I think, you know, based on this case and based
3 on a case next month that might come out and he'll file a
4 motion, you know, based on that. You know, what -

5 THE COURT: Well, I -- I think he's limiting its use
6 to just this particular Defendant's actions at the time
7 as to why he -- why there was there at the time -- why
8 there was a time delay in bringing it to the Court's
9 attention. I mean -- okay?

10 I mean, I don't think I need -- if that's all this
11 is going to be used for, I don't think we need much
12 questioning of him other than when he found out about it.

13 MR. RACINE: No, Your Honor. I -- I don't intend to
14 ask him about questions about the *Riddle* case.

15 THE COURT: Because *Riddle* is a public -- I mean,
16 it's a public document. I mean, it's -- we all know what
17 it says.

18 MR. RACINE: Yes, sir.

19 THE COURT: It's a published opinion.

20 MR. RACINE: Yes, sir.

21 THE COURT: Okay.

22 Q. (By Mr. Racine) Well, let me just ask this: Are
23 you aware when that opinion came out?

24 A. It came out in two thousand, six (2006), but it
25 didn't come into my possession until two thousand, nine (2009)

1 because SCDC no longer updates the law library.

2 And it -- it came into my possession the same way
3 those transcripts came into your possession: I wrote the
4 Supreme Court and asked Janet Myer (phonetic), the librarian
5 at the Supreme Court, to send me a copy of the *Riddle* case
6 based on that newspaper article that I read;

7 That -- basically the newspaper article asserted
8 misconduct. So, I said, "Well, let me look into this."

9 So, I went to the *Riddle* case. And I said, "Well,
10 there's misconduct in his case and there's misconduct in my
11 case, and it seems to be a pattern."

12 And, based on that pattern, I contacted his
13 attorney, Diana Holt. When I contacted her, that led me to
14 believe that there was a pattern of misconduct going on. And
15 I began to investigate.

16 Once I began to investigate, and I noticed the
17 similarities between my case -- you know, the different
18 misrepresent -- there was small misrepresentations, but if you
19 stack all of these small, you know, misrepresentations up, the
20 circumstantial evidence to a chain of circumstances that would
21 show that, during the same time period, 1986, the Gaffney City
22 Police Department was engaging in such misconduct as far as
23 hiding statements in the *Riddle* case;

24 Misrepresenting the date of the offenses,
25 misrepresenting the mud samples, misrepresenting the nighttime

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1 element, misrepresent -- contacting me without my attorney
2 being present, even though they had been specifically advised,
3 "Do not contact my client without my attorney being present."

4 You know, I said, "Well, all of this..." -- you
5 know, I wrote it all down on a piece of paper. I said, "It's
6 a chain of circumstances."

7 I said, "I wonder how I can get it in." And I
8 looked in the Rules of Evidence and I looked at Rule 406 and
9 seen there was a habit and routine that they had of
10 circumventing the truth and circumventing the Defendant's
11 Constitutional Rights.

12 Q. And your investigation of these misrepresentations,
13 those misrepresentations directly contributed to your
14 accepting the guilty plea in 1986; is that correct?

15 A. Those misrepresentations rendered my guilty plea
16 involun -- see, I entered a plea, but it wasn't in no sense of
17 the word a voluntary plea.

18 It was a plea contained -- obtained by trickery and
19 deceit and misrepresentation that rendered it involuntary.

20 Q. Okay. So, did you rely on those misrepresentations
21 by the State as part of the reason -- that's part of the
22 reasons you pled guilty, right?

23 A. That's the only reason I pled guilty.

24 Q. Okay.

25 A. Halfway through the -- see, I entered the guilty

1 plea but like I -- I don't want to keep saying the same thing,
2 but halfway through the guilty plea I basically changed
3 directions and asked -- and basically told him.

4 He said, "Well, why are you pleading guilty?" I
5 said, "Well, I didn't do these and I'm pleading guilty because
6 I'm facing a lot of time."

7 At that point in time, I don't know what the judge
8 should have did, but I'm sure there's case law as far as -- I
9 know he didn't establish a factual basis for the plea as
10 required by -- as required.

11 Q. Once you developed the evidence, through Mr.
12 Lovelace, and you developed evidence of these
13 misrepresentations through your investigation, what, if any,
14 action did you take?

15 A. Well, I got letters here where I wrote Klein, and
16 actually wrote -- now, this is after Mr. Klein had deceased.

17 But I had wrote his family and asked, on two
18 separate occasions, in December two -- December 7th and
19 December 28th, of two thousand and eight (2008) if I could have
20 his records or his file.

21 And they said his file had been turned over to the
22 Cherokee County Clerk of Court and the Public Defenders'
23 Office.

24 Well, when I wrote the Cherokee County Clerk of
25 Court, she said she didn't have them and to contact Don

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1 Thompson.

2 I contacted Don Thompson and he led me to believe
3 that "Don't call back here no more," is basically what he led
4 me to believe.

5 Q. Okay. So, you never got the file?

6 A. Even though I diligently continued to seek those
7 files like I diligently sought to find all this evidence.

8 See -- see there was a point where we were playing a
9 game of hide and seek. The prosecution was hiding this
10 information that they were requiring me to try to seek.

11 And the more I seek, the more they hide. And the
12 more I get close to the truth, the more these files start
13 coming up missing.

14 Just like till this day I can't even find copies of
15 the Gaffney Police reports of the crime. I can't find copies
16 of the 911 tape.

17 You know, whoever called the police, it was recorded
18 because back then they had the big reel to reel computers
19 where, you know, they was on a tape because I remember seeing
20 them myself.

21 I said, "Well, let me get a copy of the tape." I
22 mean, "Let me see when they called in and reported it."

23 "Oh, we don't have them." I said, "Well, let me get
24 the police report under the Freedom of information Act." "Oh,
25 we don't have that."

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1 I said, "Okay. Well, let me get attorney/client
2 files." "Oh, hell, we ain't..." Excuse me -- "Oh, we ain't
3 got that either."

4 So, everything they're like playing a game of hide
5 and seek trying to make me find something while they're hiding
6 it.

7 And the United States Supreme Court already spoke on
8 that; you can't do that.

9 Q. Now, when you developed this evidence and you
10 discovered this new evidence, did you file a Rule 29 motion?

11 A. Within a -- a -- as soon as -- see, hearing about a
12 piece of evidence and actually having a piece of admissible
13 evidence, as you know as a lawyer, is two different things.

14 Once I actually got my hands on the affidavit, which
15 had been the Holy Grail of this whole case, once I got my
16 hands on the affidavit, I immediately filed within the time
17 for me to go to the law library and do research because our
18 library time is very limited, especially if you're on lock-up.

19 You know what I'm saying, once I got the affidavit,
20 did a little research on the case law, *State vs. Fan*
21 (phonetic), the thirteenth juror rule, and all of that, I went
22 ahead and filed a Rule 29(b) motion in Cherokee County.

23 Now before that there had been other pleadings filed
24 that had been dismissed, but they weren't dismissed because
25 the Attorney General is consistently saying, "Oh, you don't

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1 have any evidence. You don't have any evidence," which they
2 were right; I didn't have any evidence.

3 But, once I got the actual hands on the evidence,
4 which believe me, despite being diligent, was very, very
5 difficult. Once I got my hands on that evidence, then, I
6 immediately sent a copy to -- I filed it with the Clerk of
7 Court and I think I sent a copy to Judge Hayes letting him
8 know I've got evidence to show.

9 And, then, once you were appointed, that's when the
10 pattern of misconduct was manifested into the brief. And
11 we're here today.

12 But I would like to introduce the letters into
13 evidence where I had wrote to try to get the files from the
14 Klein family.

15 MR. RACINE: May I approach the witness, Your Honor?

16 A. It's actually two letters and -- and a letter to the
17 Clerk of Court. I guess I'd like to make it just one exhibit.

18 (Documents retrieved and shown to Mr. File.)

19 MR. RACINE: May I approach, Your Honor?

20 THE COURT: Any objection?

21 MR. FILE: No, Your Honor.

22 THE COURT: And how many pages are they?

23 MR. RACINE: Four (4) pages I believe, Your Honor.

24 THE COURT: All right.

25 MR. RACINE: We would like to introduce these.

1 THE COURT: We'll mark them as one exhibit then.

2 (Whereupon, Defendant's Exhibit 8 was marked for
3 identification and admitted into evidence without
4 objection.)

5 MR. RACINE: I believe that's Exhibit 8, correct?

6 COURT REPORTER: Yes.

7 (Off-the-Record Comments)

8 MR. RACINE: May I approach the witness again, Your
9 Honor?

10 THE COURT: (Nods affirmatively.)

11 Q. (By Mr. Racine) All right. Mr. Koon, is there
12 another document you wish to discuss?

13 A. If you feel it's relevant.

14 MR. RACINE: Just one moment, Your Honor.

15 (Document shown to Mr. File.)

16 (Off-the-Record Discussion)

17 MR. RACINE: Your Honor, may I approach?

18 THE COURT: Yes, sir.

19 MR. RACINE: Okay. Just one moment, Your Honor.

20 (Brief Pause)

21 MR. FILE: Judge, for the record, it appears to be
22 some kind of memorandum of law or something that ---

23 THE DEFENDANT: I don't think it's admissible, Your
24 Honor. I don't think we should even go into it.

25 MR. RACINE: I -- I -- before we would admit this, I

1 request a conference with my client. But I don't think
2 we're going to introduce it at this point.

3 And I understand he's on the witness stand, so...

4 THE COURT: All right. Yes, you couldn't have a
5 conference with your client while he's testifying.

6 MR. RACINE: No.

7 (Brief Pause)

8 Q. (By Mr. Racine) Mr. Koon, do you feel that you were
9 duly diligent in investigating these matters to the best of
10 your ability?

11 A. I feel like I was fanatically diligent, extremely
12 diligent, more so than duly diligent.

13 I looked up actually due diligence in the law lib --
14 in *Black's Law Dictionary* and I was at least duly diligent
15 because I've looked and I've looked and I've looked.

16 Q. And you're not an attorney, right?

17 A. No.

18 Q. Okay. The -- the State had mentioned that you have
19 filed numerous actions, pleadings regarding this matter. Do
20 you believe that it was fair to convict you of second degree
21 burglary?

22 A. Well, the State's contention that I filed numerous
23 pleadings has to be looked at in the context of this
24 affidavit, and the testimony of Mr. Lovelace, which is newly
25 discovered, post dates any other filings that was filed.

1 Now, there was accusations made that it was similar
2 to this. But I -- I didn't have any evidence to support those
3 allegations.

4 Now, for the first time, I'm coming into Court -- I
5 ain't coming into Court with speculation or hearsay or
6 whatever. I'm coming into court with newly discovered
7 evidence.

8 Q. Has Mr. Lovelace ever testified for you before?

9 A. Mr. Lovelace never testified in my case before. And
10 Mr. Mallard's testimony, why he said he testified, his
11 testimony was never considered by the Supreme Court for the
12 simple reason my first PCR letter -- lawyer never filed an
13 appeal and the transcript, like every other relevant piece of
14 evidence in the case, has been destroyed.

15 He testified in 1986 that the police contacted me
16 without him being present after he told them not to. Rather
17 than my attorney filing an appeal on the PCR, he doesn't even
18 file the appeal.

19 So, those transcripts, like I said, and every other
20 piece of evidence that is relevant to this case except that
21 affidavit, has been destroyed by the police due to their
22 prosecutorial misconduct and their pattern of deceit and
23 trickery and whatnot.

24 Q. And you didn't have that affidavit prior to
25 obtaining it what, roughly a year ago from Mr. Lovelace,

MR. ROBERT KOON - DIRECT by MR. RACINE

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1 correct?

2 A. Did I have it when?

3 Q. When did you first receive that affidavit?

4 A. In the summer of last year, last summer. And I
5 filed the Rule 29(b) within -- I would have to say within at
6 least 60 to 90 days after I received that affidavit. I went
7 directly and filed a Rule 29(b).

8 And the only reason I waited that long is I couldn't
9 get to the law library like I wanted to, to even research Rule
10 29(b).

11 Q. There are certain restriction on you at the
12 Department of Corrections, correct?

13 A. Right. But I did file within a reasonable amount of
14 time after I received it as required by the Rule.

15 (Brief Pause)

16 Q. Regarding your plea in 1986, looking back on it,
17 knowing what you know now about the newly discovered evidence
18 of misrepresentation engaged in by the Gaffney Police and the
19 tendencies of the solicitor's office, do you feel that your
20 guilty plea was a knowing and voluntary plea?

21 A. Do I feel like it was knowing and voluntary? I feel
22 like it was not knowing and voluntary.

23 I feel like it was induced, like I said, by trickery
24 and deceit. And even -- even, in the middle of the plea when
25 I -- when I changed gears and realized I shouldn't sit here

1 and admit to this, and I told the judge I didn't really do
2 these, that plea, if -- if you can consider that a guilty plea
3 -- I mean, I guess legally it's --

4 I mean, for the record it was a guilty plea, but, I
5 mean, when you say at the first part of the plea, "I'm
6 guilty," and then, you change your mind at the end of the plea
7 and say you're not guilty, if -- if that's considered a guilty
8 plea, then, I pleaded guilty. But I don't think it was.

9 Q. Okay.

10 A. Not under *North Carolina vs. Alford* anyway.

11 Q. Mr. Koon, at -- at this point, do you have anything
12 else you feel you need to make the Court aware of?

13 A. Other than the fact that, like I said, I was -- I
14 feel like my attorney was very diligent. But, due to the
15 unique circumstances of my case, and Mr. Lovelace dying and
16 Mr. Cudd being upset and not cooperating, Ms. Bolin not being
17 there that day, I pled guilty based upon that arrest
18 affidavit.

19 And, in the guilty plea transcript, nowhere does it
20 advise me that I had a right to confront Richard Weaver.

21 Had I known I had a right to confront Richard
22 Weaver, which was not set forth in the guilty plea transcript,
23 I would have elected to plea -- I would've -- I would've
24 elected to confront him and probably take a trial.

25 I thought they could use these warrants. I didn't

MR. ROBERT KOON - DIRECT by MR. RACINE

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1 know you had to actually have -- me -- me being dumb like I
2 was at the time to the law, I didn't actually know that he had
3 to get on the stand and testify.

4 You know, I thought they could use these warrants
5 that he was saying that these crimes happened. And Gaffney
6 being what it is, I decided I -- I better go ahead and fold my
7 hand.

8 Q. Okay. In 1986, would you have pled guilty to a
9 nighttime burglary of Cudd-Lovelace Insurance Company if you
10 had known that, that burglary was not discovered until nine
11 (9:00) a.m. the following morning?

12 A. Of course not because anybody with common sense
13 would have known then, if the State couldn't prove the night
14 -- they -- they couldn't even establish the corpus delicti
15 that a nighttime crime even happened.

16 In order for the State to proceed -- even proceed,
17 they have to show first that the crime happened; that somebody
18 committed it.

19 And they didn't even -- based on the affidavit of
20 Mr. Lovelace showing I'm doing a life sentence for something
21 the State can't even prove happened, much less that I
22 committed it.

23 That's my understanding of corpus delicti; maybe
24 that's a misunderstanding, but that's what my understanding
25 is.

1 I mean, if you had a person doing time for a crime
2 that the State can't even say happened, then, during the
3 guilty plea, for a crime that they're not even sure happened,
4 he tells you during the plea, "Well, I didn't do these," but,
5 yet, you still accept the plea without establishing a factual
6 basis or the corpus delicti, I don't see how, by any stretch
7 of the word can make that a -- a voluntary plea especially in
8 light of the affidavit that I received from Mr. Lovelace on
9 April the 8th of two thousand, ten (2010).

10 Q. Okay.

11 (Brief Pause)

12 Q. Is there anything else you want to tell the Court?

13 A. I just hope the Court can look at this case and --
14 and see that injustice has been done. I think we meet the
15 five (5) prongs of the standard.

16 But I think also that a terrible injustice has been
17 done. And a lot of other people feel that way as well.

18 MR. RACINE: Your Honor, at this time, the Defense is
19 finished with Mr. Koon. Please any questions Mr. File
20 has.

21 CROSS EXAMINATION by MR. FILE:

2:51 P.M.

22 Q. Mr. Koon, you -- you testified that the only reason
23 you pled guilty was because of all this evidence you thought
24 was against you; is that right?

25 A. All what evidence?

1 Q. Well, you said you -- you said that they had
2 evidence against you; is that right?

3 A. No, I never said I thought they had evidence. I
4 said they had a warrant.

5 Q. Well, you said they misrepresented stuff to you and
6 that -- that was the main reason you pled guilty; is that
7 right?

8 A. Are you referring to the Cudd-Lovelace offense?

9 Q. Yes.

10 A. The only representation they made on that was a
11 warrant. The misrepresentation they made that you're -- that
12 I think you're referring to is the -- is the mud samples.

13 Q. Okay. Well, and you said that was one of the big
14 reasons you pled guilty?

15 A. On another charge.

16 Q. Okay. Well, let's start with -- did -- now the
17 State followed through on their deal, didn't they? You got
18 your ten-year sentence that day, didn't you, when you pled
19 guilty, didn't you?

20 A. Yes.

21 Q. Okay.

22 A. Yes, sir.

23 Q. All right. And I know -- I know we probably can't
24 agree on a lot of stuff, but would you agree that -- that --
25 that, if something took place on one day and, then, at

1 midnight or after midnight it would change -- something else
2 takes place, that would happen on the next day; wouldn't you
3 agree?

4 A. I suppose you could speculate that it could have
5 went like that, but you could also speculate it happened on
6 the same day. I mean, speculation goes a long way.

7 Q. Okay.

8 A. It's by whichever side of the coin you wish to
9 speculate upon I guess.

10 Q. All right. Now, you -- you keep telling the Court
11 that -- that you got over there during the guilty plea and
12 changed your mind and told the judge you didn't want to plead
13 guilty?

14 A. (Nods affirmatively.)

15 Q. Okay.

16 MR. RACINE: Objection.

17 A. I didn't ever say I didn't want to plead guilty.
18 You're mis-characterizing my testimony.

19 MR. RACINE: Objection. I think that mis-states the
20 -- the testimony.

21 Q. (By Mr. File) Well, you told the judge you weren't
22 guilty, didn't you?

23 A. Right.

24 Q. Okay. You were represented by counsel during that
25 time, were you not?

1 A. Right.

2 Q. All right. You -- you knew you could have had a
3 jury trial, didn't you?

4 A. I hadn't been informed by judge that day I could
5 have a jury trial.

6 Q. Okay. And your attorney didn't ask to withdraw the
7 plea, did he? Or you didn't talk to him about that, did you?

8 A. (No Response)

9 Q. Did you?

10 A. I -- I -- I told the judge I wasn't guilty.
11 Anything else is part of the record. I mean...

12 Q. Okay.

13 (Brief Pause)

14 Q. Are you from Gaffney?

15 A. I wasn't born in Gaffney, but I was raised in
16 Gaffney.

17 Q. Raised there?

18 A. Yes, sir.

19 Q. Okay. And your attorney was from Gaffney, Mr.
20 Klein, wasn't he?

21 A. Yes, sir.

22 Q. Okay. And the Cudd-Lovelace Insurance Agency was
23 pretty well known in Gaffney, wasn't it?

24 A. I can't speak to what nobody else knew. I didn't
25 know nothing about it because I was young enough I didn't need

1 no insurance at the time. So...

2 Q. Okay.

3 MR. FILE: All right. That's all I've got.

4 THE COURT: Any redirect limited to what he went
5 into?

6 MR. RACINE: Just very briefly.

7 REDIRECT EXAMINATION by MR. RACINE:

2:55 P.M.

8 Q. Was it your understanding that the plea deal was for
9 the ten (10) years required you to plead on all of the charges
10 and not just one or two?

11 A. Oh, it was a package deal. There ain't no doubt
12 about it.

13 Q. Okay.

14 A. Because I -- I specifically inquired; you know what
15 I'm saying? But they was like, "Nah, you got to plead to
16 everything except the escape."

17 And the only reason they didn't let me plead to the
18 escape because my lawyer was going point out the fact how do
19 you leave a ladder on the rec field and charge somebody with
20 escape?

21 Q. So, had you refused to plead guilty to the Cudd-
22 Lovelace burglary, second degree, you would have lost the
23 opportunity for the negotiated ten-year sentence? Was that
24 your understanding?

25 A. My understanding was, if I didn't take ten, I was

1 going to get forty (40).

2 Q. Okay.

3 A. Whether it be through a trial or however it went.

4 MR. RACINE: Okay. No further questions.

5 (Brief Pause)

6 MR. RACINE: Your Honor, that would be Defendant's
7 showing.

8 THE COURT: Thank you, sir. You may step down.

9 (The witness complied with the Court's request.)

10 (The witness stepped down at 2:56 p.m.)

11 (Brief Pause)

12 THE COURT: Does the State have any witnesses they
13 intend to call?

14 MR. FILE: No, Your Honor.

15 THE COURT: Okay. Let me ask you a question just to
16 be sure.

17 MR. FILE: I didn't inquire -- I did try to locate
18 Richard Weaver. Of course, he's retired and there were
19 rumors that he may -- may have been in the hospital with
20 a heart attack at the time.

21 I had two investigators from my office call and try
22 to find him and -- as late as this morning. Rick Burgess
23 in our office was looking for him over the weekend and
24 would -- didn't get any result.

25 And Greg Phillips in our office has been looking for

1 hin for a couple -- for a couple of weeks. I

2 So, I do not -- in answer to your question, I do not
3 have any witnesses to call.

4 THE COURT: Let me ask you this, just -- just to be
5 sure I'm clear now. The reason this particular offense
6 is significant to this defendant is because subsequently
7 he was convicted of another burglary that made the third
8 strike?

9 MR. RACINE: Yes, Your Honor, that's correct.

10 THE COURT: And -- and the subsequent burglary that
11 he was convicted of does not arise out of the facts that
12 form the basis of the plea of June the 17th, 1986?

13 MR. RACINE: That's correct.

14 THE COURT: So, after -- after he finished the ten-
15 year sentence -- I'm assuming he completed the ten-year
16 sentence and, then, was released. And, then, committed
17 another offense?

18 MR. RACINE: That's correct, Your Honor.

19 THE COURT: All right. And was that -- was that a
20 burglary second or burglary first?

21 MR. RACINE: Second.

22 THE COURT: Okay.

23 (Brief Pause)

24 THE COURT: All right. I will take it under
25 advisement and let you know.

1 Now, Mr. Koon, I know that you regularly submit
2 things to me. At this juncture, don't send anything to
3 me because that could be misinterpreted by the State as
4 being ex parte communications with me.

5 And, so, I will let everybody know whenever I make a
6 decision.

7 MR. FILE: Judge, I would ask too, he -- he
8 regularly sends me briefs and things and copies of the
9 same motions pro se when he has an attorney representing
10 him.

11 And I would ask the Court to -- to tell him he needs
12 to go through his attorney with those things.

13 MR. RACINE: Your Honor, if I may. I know that Your
14 Honor represented -- I'm sorry -- appointed me for -- or
15 the clerk appointed me for the limited purpose of the
16 29(b) motion.

17 But I've indicated to Mr. Koon that, if he needs to
18 file something else to -- you know, to let me know and I
19 will at least attempt to assist him with that to the
20 extent that it relates to this motion.

21 For example, if -- you know, if this -- if Your
22 Honor decides in Mr. Koon's favor, to grant a new trial,
23 Mr. Koon, through me or pro se or however that's going to
24 work, would be filing a -- a motion to arrest sentence in
25 that subsequent conviction.

1 And -- and I don't know whether my appointment would
2 extend to help him with that or not. So, I don't know --
3 in essence, I -- I think that if Your Honor could give me
4 a little guidance as to how far I can go to continue to
5 help Mr. Koon I would appreciate that because I'd hate to
6 sort of leave him hanging.

7 **THE COURT:** Well, and -- and I appreciate that. The
8 best I could tell you right now, because I would not want
9 you to do work to which you would not be able to submit a
10 payment voucher to Columbia to be paid.

11 Your assignment by the clerk is limited to this
12 particular motion. If, as a result of my ruling on this
13 motion, there is -- either through that thing that you
14 said, to move to arrest the sentence on the other one, or
15 if I decide for the State, and -- and you need to file a
16 notice of appeal for him or...

17 Or if there is a directly subsequent event that
18 needs to take place, I think that would be covered under
19 this.

20 But I would not -- I don't believe my order would
21 say that, in the event that Mr. Koon wants to pursue with
22 the arrest of the other sentence, I think there would
23 have to be some other type of order issued by the clerk.

24 **MR. RACINE:** Okay.

25 **THE COURT:** But let me take a look at this

1 information, review it, and then, let me make a decision
2 first.

3 Just right now I would say just write down -- you're
4 still his attorney.

5 MR. RACINE: Yes, sir.

6 THE COURT: If he has questions about things that
7 went on today or -- or something, I would suggest that
8 you respond to them and that would still be covered under
9 the order. And you could still submit a payment voucher
10 to Columbia, all right? Okay.

11 MR. RACINE: Okay.

12 THE COURT: Thank you very much.

13 MR. RACINE: Thank you, Your Honor.

14 MR. FILE: Thank you, Your Honor.

15 THE COURT: I believe these are your -- Mr. File,
16 the State's submissions of the copies of the things,
17 we're marking those as a group as State's 1.

18 MR. FILE: Okay.

19 THE COURT: And, then, I think we identified and
20 marked all of the Defense exhibits as they came in.
21 Okay. All right.

22 The -- the briefs that both the State and the
23 Defense submitted, be sure that the clerk of court gets a
24 copy of those over in Gaffney.

25 MR. FILE: Okay. All right.

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THE COURT: Thank you.

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(Whereupon, the proceeding concluded at 3:06 p.m.)

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REPORTER'S CERTIFICATE

I, the undersigned PAMELA FAUCETTE, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the Court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 136, were transcribed by me and represent a complete and accurate transcription of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

January 21, 2012


Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHEROKEE) SEVENTH JUDICIAL CIRCUIT

The State of South Carolina,)

ORDER
86-GS-11-289

-vs-

Robert H. Koon,
Defendant,

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2011 AUG -4 11:22
ANDY W. LOBE

This matter is presently before the Court on a Motion for New Trial pursuant to Rule 29(b), S.C.R.Crim.Procedure. A hearing was held on the defendant's motion on June 27, 2011, in Spartanburg County. For purposes of having his motion heard in a timely manner, the Defendant consented to having the hearing in Spartanburg County, although this was a Cherokee County case. The defendant was present at the hearing and represented by his appointed counsel, Russell M. Racine. The State of South Carolina was represented by Robin File, an Assistant Solicitor for the Seventh Judicial Circuit.

By way of his motion, the Defendant seeks to have his 1986 guilty plea to Burglary in the Second Degree (hereinafter "Cudd/Lovelace burglary") set aside based upon a statement obtained on April 8, 2010 from Mr. Harry Lovelace. It is uncontested that the factual element of the burglary offense which made it a burglary in the second degree, rather than a burglary in the third degree, is the allegation that the offense occurred in the "night time."

At the time of the 1986 plea, Defendant was charged with numerous offenses. He was represented by two attorneys and stated he was satisfied with their representation. Although Defendant stated that he had a witness who could establish his innocence, he admitted that he was guilty of each offense and specifically admitted to breaking into the

[Handwritten signature]

Cudd and Lovelace Insurance Company in the "nighttime." Furthermore, Defendant acknowledged that he was freely and voluntarily entering the plea as to all the charges. Given that Defendant was a repeat offender, the court indicated a preference for a 40 year sentence; however, the State recommended a ten year sentence on all the charges and Defendant's lawyers asked that the recommendation be followed. Defendant served his sentence for the Cudd/Lovelace burglary. He was released from prison and subsequently committed others crimes which eventually resulted in his receiving a life sentence. His subsequent qualification for a life sentence included his guilty plea to the Cudd/Lovelace burglary.

A Rule 29(b) motion based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence. The defendant has the burden of proof and must show: (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998).

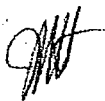
Prior to the presentation of the evidence, the State moved for a dismissal based on the prior litigation initiated by the Defendant. The Defendant has a lengthy history of litigation. Some of the litigation involves his 1986 guilty plea and the statement offered as "newly discovered evidence" in this matter. To the extent that prior matters have overlapping issues, the prior matters would govern this Court's decision in this matter. An outline of previous litigation in this case is summarized in the procedural history contained in the Order Restricting Filing of Applicant dated August 5, 2009. Included in

these prior matters are allegations of mud testing and police misconduct, among other issues.

In addition, after listening to the witness and observing the witness both as to substance and credibility, the Court holds that the Defendant did not meet his burden at the hearing.

While Mr. Harry Lovelace may not have been known at the time of the plea, this Court cannot conclude that reasonable diligence would not have located him. The evidence presented was that Mr. Lovelace (the son of one of the original owners of Cudd and Lovelace Insurance Company) was working in Gaffney at the family business at the time of the original plea. A strong inference is presented that Mr. Cudd, and not Mr. Lovelace, was the witness with whom the police dealt with in their initial investigation. Mr. Lovelace's father, the co-owner, passed away shortly before the time of the break-in. Additionally, more than 20 years have passed since the original plea. The information presented at the hearing was that no one searched for Mr. Harry Lovelace until after Defendant was released from his burglary sentence, committed subsequent crimes, and was years into serving his present life sentence. This Court finds that the present record, including Mr. Harry Lovelace's own testimony strongly indicates that Harry Lovelace could have been located with relative ease.

The materiality of the information is questionable. This Court understands the term "materiality" for purposes of granting a new trial, means that evidence must relate to the guilt or innocence of the defendant and would probably lead to a different result at trial. The obvious difficulty for the Defendant is that Mr. Lovelace was not an eye witness to the crime. His testimony only goes to the operating hours of the business and



the possibility that the break-in occurred when the business was closed during daylight hours. Thus, this evidence can be considered cumulative to factual issues not in dispute; i.e. the break-in occurred while the business was closed. The new statement does not directly establish that the burglary occurred in the daytime. The witness stated, "I cannot present evidence to refute the allegation that it occurred at 'nighttime.'" He does provide information from which a circumstantial possibility can be drawn that the break-in was discovered the morning of the 29th by the now deceased, Mr. Cudd. Mr. Lovelace's testimony would be that the break-in could have occurred anytime between 5:30 pm March 28 and 8:30 am March 29, 1986; clearly, this includes the possibility of day time and night time. Having reviewed the plea transcript in detail, the Court cannot conclude 20 years after a guilty plea was entered that testimony which can be seen as both consistent and inconsistent with the elements of the crime charged meet Defendant's burden as to the issue of materiality of the new evidence.

The Defendant claims a bad or illegal motive on the part of the police in withholding information. He uses the South Carolina Supreme Court decision of Ozmin v. Riddle as the initial thrust of his belief that he was treated similarly as the defendant in that case. The Court finds no merit in support of this particular position.

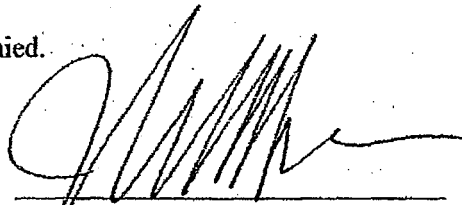
Furthermore, assuming the information now provided by Mr. Lovelace was known by the Defendant and his lawyers at the time of the guilty plea, this Court is not convinced that the Defendant would have made a different decision. The State made a recommendation of a 10 year concurrent sentence for a repeat offender, Defendant indicated he was satisfied with the work of his lawyers and admitted to the nighttime element of the break-in. The importance whether the break-in occurred during the



daytime did not become important to Defendant until after he completed his sentence and recommitted other offenses for which he received a life sentence.

Clearly, the evidence discussed at the hearing is important to Defendant because he is now serving a life sentence as a result of committing subsequent offenses after entering a guilty plea to Burglary in the Second Degree. This Court has great sympathy for the situation the Defendant now finds himself. The Defendant is very bright and has obviously worked diligently to undo his past criminal mistakes and their consequences. This Court finds that the Defendant has previously litigated this issue in some of his prior proceedings; nevertheless, in considering the testimony of the witnesses and the record presented, this Court does not find that Defendant has met his burden of proof to grant a new trial. Therefore, the Defendant's Motion is denied.

8/2, 2011
Spartanburg, South Carolina



The Hon. J. Mark Hayes, II
Judge for the Seventh Judicial
Circuit.

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

STATE OF SOUTH CAROLINA

Plaintiff,

v.

ROBERT H. KOON,

Defendant.

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

Case No.: 86-GS-11-289

**AFFIDAVIT OF DUE DILIGENCE IN
SUPPORT OF RULE 29(B) MOTION FOR
NEW TRIAL**

I, Robert Holland Koon, the Defendant in the above entitled action, hereby swear and attest to the following:

1. I am over 18, of sound mind, not under any intoxicants, and make the following statements under penalty of perjury.
2. On June 17, 1986, I pled guilty to four indictments, including 86-GS-11-289 for second degree burglary. I entered my plea of guilty not because I was in fact guilty of the alleged crime, but because I was facing the potential of a large amount of time if I was found guilty at trial.
3. The Gaffney Police told me that they had mud samples from the scene of a crime and had performed an analysis against mud samples taken from my shoes when I was arrested. The police told me the analysis showed the mud was the same. I later discovered that no analysis had been performed.
4. At the time of my guilty plea, my attorney, Mr. Cline, attempted to fully investigate the facts surrounding the incidents and to fully analyze the State's evidence against me. As part of Mr. Cline's due diligence, he filed a Rule 5/Brady motion requesting the State produce all material evidence against me and any exculpatory evidence tending to show my innocence.

A TRUE COPY
Brandy W. McBee
CLERK OF COURT
CHEROKEE COUNTY, S.C.



5. Prior to and at the time of my guilty plea, Mr. Cline attempted to interview and investigate the charges against me by interviewing Mr. Cudd, one of the victims, and other employees of the business. Mr. Cudd and the other employees refused to speak with or cooperate with Mr. Cline, and therefore my attorney was not able to fully investigate the charges against me.

6. The other owner and victim of the Cudd-Lovelace Insurance Company burglary was Mr. Lovelace. Mr. Lovelace had died twelve days prior to the burglary. It was unknown to me and my lawyer that a second Mr. Lovelace worked at Cudd-Lovelace Insurance Company.

7. The Gaffney Police never told me or my attorney that there was a second Mr. Lovelace, Harry Lovelace, who worked at Cudd-Lovelace Insurance Company at the time of the burglary.

8. The Gaffney police never told me or my attorney that the burglary was discovered at approximately 9:00 am, after closing the prior day at 5:00 pm, despite my attorney filing a Rule 5 motion. As such, my attorney never discussed a strategy to reduce the second degree burglary to a third degree burglary, which does not require the nighttime element.

9. I did not know of the existence of Harry Lovelace at the time of my plea. I did not know that the police had suppressed evidence of the time at which the burglary was discovered because they alleged nighttime and did not disclose that the burglary was discovered at 9:00 am.

10. Had this information been provided to my attorney, I never would have pled guilty to a second degree burglary because the State could not prove beyond a reasonable doubt the nighttime element required by second degree burglary.

11. My attorney at the time exercised due diligence in an attempt to investigate all facets of the charges against me. However, my attorney was unable to learn of the time at which the burglary was discovered.

12. Subsequent to my plea and incarceration in the Department of Corrections, I became aware that the police had discovered the burglary at 9:00 am. This came about through my mother who attended the same church as the Cudd family. Through her interaction with relatives of Mr. Cudd who had died, my mother learned that the burglary was not discovered until approximately 9:00 am on March 29, and that the business had closed at 5 pm on March 28.

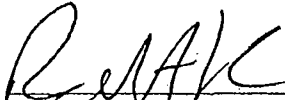
13. Once my mother relayed this information to me, I diligently began to investigate this new information. Through my investigation, I learned that there was another Mr. Lovelace who worked at the business at the time of the burglary.

14. As soon as I learned of Mr. Harry Lovelace's existence, I began to correspond with Mr. Lovelace through the mail and discovered that he possessed information critical to the facts surrounding the Cudd-Lovelace burglary.

15. I discovered that Mr. Lovelace was a witness to the matters surrounding the burglary and knew that the burglary was discovered at approximately 9:00 am. Thus, Mr. Lovelace is a witness whose testimony defeats the nighttime element of second degree burglary. Had I known of his existence and the evidence he possessed, I never would have pled guilty to second degree burglary. The only evidence regarding the time of the burglary is testimony of Harry Lovelace, and his testimony shows that the burglary could have occurred during daylight hours.

16. I have exercised due diligence over the years fighting this conviction. I have continually sought to obtain all the information and fully investigate these matters. Once I learned of and possessed the knowledge of Mr. Harry Lovelace's evidence, I filed a motion for a new trial based upon his affidavit.

I swear and affirm the foregoing is true.


Robert Holland Koon

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Sworn to signed before me this
27 day of June, 2011.



Notary Public of South Carolina

My commission expires 3-7-21



Mr. Barry Barnette, Solicitor
Office of the Seventh Circuit Solicitor
180 Magnolia Street
Spartanburg, SC 29306

Harry M. Lovelace
Gaffney, SC 29340

January 6, 2011

Re: Robert Holland Koon

State v. Robert Koon 86-GS-11-289 Rule 29 (b) SCR Crim. Pro.

Dear Mr. Barnette,

As the victim in the above referenced case, it is my sincere desire that Mr. Koon's 1986 Second Degree Burglary conviction 86-GS-11-289 Cudd-Lovelace Insurance Agency (3/28/1986) be *reduced* to Burglary Third Degree which will allow him to be sentenced to twenty years on his 1998 conviction for Second Degree Burglary 98-GS-11-650 rather than have him serve Life Without Any Possibility Of Parole (LWOP). It is clear to me that the police did not provide sufficient evidence to the magistrate that this offense definitely occurred at nighttime. See State v. Smith 493 S.E.2d 506 (Ct. App 1997).

While it is not my place to accuse the detectives or solicitor of falsely swearing under oath, a very serious allegation indeed and I would not impugn their character in doing so, the evidence in this case does indicate that the nighttime element was misrepresented (to the magistrate and the Grand Jury) as stated previously in my affidavit when I contend that it occurred between 5:00 pm on March 28, 1986 (office closing time) and 9:00 am March 29, 1986, when the break-in was discovered. Therefore, it is impossible to swear under oath that this offense occurred at night; it could have just as easily occurred in the intervening daylight hours that were available between 5:00 pm and 9:00 am. I have submitted affidavits to the Attorney General and Judge Hayes in regards to these facts.

As a victim, a citizen, and a Christian, I am very upset and opposed to the fact that Mr. Koon is in jail for LWOP based on *unsubstantiated* evidence on my behalf as the victim. Further questions arise about the reliability of the evidence in the fact that a break-in at an adjacent location (Stylette Salon), alleged to have occurred at the same time, did not allege a nighttime element and was therefore held by the Supreme Court to at most be Third Degree Burglary and was vacated by Order Koon v. State 595 S.E.2d 456 (2004). As the copies of the enclosed warrants attest, both warrants allege "on or about", but with differing dates. If the dates themselves are uncertain as stated on the warrants, how can the assertion of nighttime element not also be called into question? This *unsubstantiated* allegation of nighttime on the Cudd-Lovelace warrant resulted in Mr. Koon's "second strike" and his current sentence of LWOP would not have applied had he been convicted of the same offense as Stylette. It is my understanding that without the nighttime allegation in the Cudd-Lovelace warrant (number 540173), Mr. Koon would be eligible to receive a twenty year sentence on his 1998 conviction upon resentencing. With credit for time served, he would have already completed or nearly completed his sentence. I therefore believe that a miscarriage of justice has resulted in a LWOP sentence for a

A TRUE COPY

Brandy W. McBee

CLERK OF COURT
CHEROKEE COUNTY, S.C.

property offense with no theft included, and from my research, it is the solicitor's duty to correct this misrepresentation of the facts.

Mr. Koon has filed a Rule 29 (b) SCR.CRIM.PRO in Court of General Sessions to have this conviction reduced to Burglary Third Degree and I was referred to your office as the Rule 29(b) is on the General Sessions Court docket. Therefore, I ask that the Solicitor's office consent to this motion and allow Mr. Koon to be resentenced, in order that justice might be served. I am also requesting that a status conference between you, the Circuit Court Judge Honorable J. Mark Hayes II, Mr. Koon, and myself be held as soon as possible for the sole purpose of determining whether the 1986 Second Degree Burglary (violent nighttime) should be *reduced* to Third Degree Burglary (no nighttime) and if so, reducing the LWOP sentence to statutory maximum of twenty years. To assist with your review, I have enclosed copies of various correspondences regarding this matter.

I strongly and humbly request your urgent attention in correcting this injustice. Thank you for your time and I eagerly await your response.

Respectfully,



Harry M. Lovelace

Cc: The Hon. J. Mark Hayes, II, Circuit Court Judge
 Mr. Michael Morin, Assistant Solicitor
 Mr. Holman C. Gossett, Attorney at Law
 The Hon. Roger L. Couch
 The Hon. Gary E. Clary
 Mr. Ray E. Thompson, Attorney at Law
 Mr. Gary P. Mallard, Attorney at Law

30-11-86
 30-11-86
 30-11-86

Mr. Robin File, Asst. Solicitor
7th Circuit Solicitor's Office
180 Magnolia Street
Spartanburg, SC 29306-2359

Harry M. Lovelace
Gaffney, SC 29340

April 14, 2011

Re: State v. Robert Koon 86-GS-11-289

Article 1, Section 24 SC Constitution (Victim's Bill of Rights) and pending Rule 29
(b) SC Rules Crim.Pro.

Dear Mr. File,

I am the victim in the March 28, 1986 Second Degree Burglary of Cudd-Lovelace Agency to which Mr. Koon (based upon my affidavit) has filed for a motion for a new trial based on after discovered evidence. Rule 29 (b) SCR Crim Pro.

First, I would like to formally request, as victim per Article 1, Section 24 paragraph 11 (of Victim's Bill of Rights) "a reasonable disposition in this case", that Second Degree Burglary (Nighttime) be reduced to by consent of the Solicitor's office to third Degree Burglary (no Nighttime). As based upon the facts of this case (and my affidavit), the state did not have any evidence to even allege a nighttime burglary occurred at all. It seems the Police Detective Richard Weaver, who signed the warrant made a mistake in alleging nighttime on our (Cudd-Lovelace) side of the building while the opposite side of the duplex (Stylette) did not allege nighttime. It is clear that the break-in of both sides of the duplex occurred at the same time, yet the alleged different offense date - 28th for Cudd-Lovelace (with nighttime) and 29th for Stylette (no nighttime).

Mr. Koon should have never been charged with Nighttime offense as there was no proof Aliunde of the Corpus Delecti as required by State v. Smith 493 S.E.2d 506 (SC App. 1997) and State v. Osborne 516 S.E.2d. 201 (1999). As the victim, I believe that I have a constitutional right per Art.1, Sect. 24, Para. 11, to seek a "reasonable disposition" to have Mr. Koon's charge reduced to Third Degree Burglary 16-11-313. As a citizen, a Christian, and the victim, I believe it is my duty to request this reduction. I contend justice requires this reduction as offense occurred sometime between 5:00pm on March 28, 1986 (office closing time) and 9:00 am March 29, 1986 with no proof that it occurred at night.

Secondly, per Art. 1, Sect. 24, Para.8 of Victim's Bill of Rights, I am formally requesting "reasonable access" to Solicitor's file and evidence in regards to the March 28, 1986 break-in of Cudd-Lovelace #86-GS-11-289. Specifically, I would like to be provided with the proof that this offense occurred at night (Corpus Delecti of Nighttime Burglary). Please mail this information to me at the above address.

A TRUE COPY
Brandy W. McBee
CLERK OF COURT
CHEROKEE COUNTY, S.C.



Thirdly, per Art.1, Sect.24, Para. 3, I would respectfully request to be notified of any hearings and other proceedings in this case in writing ten days prior to the hearing. E.G. (Rule 29(b)).

Finally, I would like to formally request a conference with you to discuss the above matters at your earliest convenience.

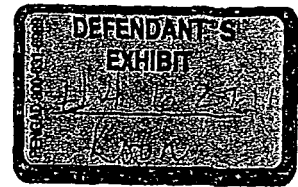
Thank you for your time, and I await your response to this letter.

Respectfully,



Harry M. Lovelace

Cc: The Hon. J. Mark Hayes, II, Circuit Court Judge
Mr. Russ Racine, Attorney at Law



AFFIDAVIT

Robert Koon V. State of SC ~~Case No. 86-11-289~~
 #86-ES-11-289

I, Harry M. Lovelace, hereby give the following statement freely and voluntarily that is true and correct, under oath:

I was an employee of Cudd-Lovelace Agency in Gaffney, SC in March 1986. I recall that a break-in occurred at the office location between the close of business on Thursday, March 28, 1986 and the opening of the office on Friday, March 29, 1986. The break-in was discovered by Mr. J.D. Cudd who was assisting the staff of the office at the time. Mr. Cudd is now deceased. My recollection of details about the break-in and subsequent investigation is diminished by the length of time since the event occurred and the fact that my father had passed away a couple of weeks before the break-in. There is some question as to when the break-in occurred and whether or not it would necessarily be considered a "night time" event. I can not present evidence to refute the allegation that it occurred at "night time"; however, I am familiar enough with the routine of opening and closing the office that I can provide a time frame which might, at the least, bring into question whether or not the break-in had to have occurred at "night". For years prior to and subsequent to the break-in, Cudd-Lovelace Agency had posted hours of operation of 9:00 am to 5:00 pm Monday, Tuesday, Thursday, and Friday, and 9:00 am to 12:00 pm on Wednesday. The staff normally arrived no earlier than fifteen minutes before opening (8:54 am), and typically closed the office no later than 5:15 pm. It would have been very unusual for an employee to arrive before 8:30 am or close later than 5:30 pm. I would confidently testify that the break-in could have occurred anytime between 5:30 pm March 28, 1986 and 8:30 am March 29, 1986. I believe that an examination of the investigation report will show an initial contact time from Mr. Cudd that is consistent with the time frame I have referenced. My position is that the break-in may very well have occurred during a time period *other than* "night time".

Further AFFIDAVIT sayeth not

Harry M. Lovelace

Harry M. Lovelace Daytime Phone: 864-838-1381

Cc: Henry D. McMaster, State Attorney General
 Hon. J. Mark Hayes II, Judge

Sworn and Subscribed before me this 8th day of April, 2010.

My Commission expires:

Sandra B. Sorrow

Notary Public

11-22-2017

A TRUE COPY

Brandy W. McBee

CLERK OF COURT
 CHEROKEE COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

STATE OF SOUTH CAROLINA

Plaintiff,

v.

ROBERT H. KOON,

Defendant.

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

Case No.: 86-GS-11-289

**AMENDED MOTION FOR NEW TRIAL
UNDER SCRCrimP 29(B)**

Defendant, by and through the undersigned attorney, hereby submits his Amended Motion for New Trial Under SCRCrimP 29(b).¹ For the reasons contained herein, Defendant respectfully requests that this Court grant Defendant's motion.

1. FACTUAL HISTORY²

In 1986, when he was only 19 years old, Defendant pled guilty to numerous charges including 86-GS-11-289 for second degree burglary and 86-GS-11-290 for second degree burglary. The second degree burglary charges were indicted by the grand jury as a second degree burglary due to the allegation that the burglary occurred in the nighttime, an essential element to upgrade burglary of a building (not a residence) to second degree. The factual basis for the charge of second degree burglary as alleged at the guilty plea was that the defendant broke into two businesses, Cudd-Lovelace Insurance and Stylette, with the intent to commit a

¹ Defendant filed an original pleading entitled "Rule 29(b) Motion for a New Trial – Based Upon After Discovered Evidence" on October 10, 2010. Defendant was unrepresented at the time and filed said motion *pro se*. As part of Defendant's motion, he requested the Court appoint him an attorney to assist with his motion. This Court appointed the undersigned attorney to represent Defendant.

² Defendant filed numerous motions, PCRs, and additional pleadings preceding the instant motion. For the sake of brevity, only the pleadings pertinent to the instant motion are discussed. For a more thorough discussion of the procedural history of this matter, please see Amendment to Application and Incorporated Memorandum of Law filed in the Family Court for the Seventh Judicial Circuit on September 22, 2005, in case 1993-CP-11-109, 260, and 280.

crime therein, during the nighttime. At his guilty plea, Defendant asserted to the court that he was not guilty but only pleading because he was facing a lot of time.

The Court: What would those witnesses tend to prove?

Defendant: That I wasn't there at the scene of the crime. I didn't do these.

...

The Court: Why are you pleading guilty then? You told me you were guilty. Are you guilty?

Defendant: I'm facing a lot of time; it just would be better for me to plead guilty.

The Court accepted Defendant's plea, and he received a ten year sentence on each of these burglaries, the sentences to run concurrently.

In 2004, the Supreme Court vacated Defendant's conviction on indictment 86-GS-11-290 for second degree burglary of the Stylette business. Specifically, the Supreme Court found that "the Stylette indictment fails to allege any aggravating factor, such as whether the burglary occurred at nighttime, as required by §16-11-312(A) or (B), and only alleges the elements of third-degree burglary." Koon v. State of South Carolina, Opinion No. 25798, April 5, 2004. The Supreme Court vacated that conviction because the State did not sufficiently allege the elements for a second degree burglary, instead only asserting enough for a third degree burglary. Unknown to Defendant at the time of the guilty plea was the fact that these two burglaries were discovered at the same time, approximately 9:00 am the following morning. Despite that fact, the police represented that Defendant burglarized Stylette on March 29, 1986, and Cudd-Lovelace Insurance Company on March 28, 1986, during the nighttime.

2. LEGAL STANDARD OF REVIEW

South Carolina Rule of Criminal Procedure 29(b) provides a defendant with a mechanism to challenge a conviction upon the discovery of new evidence. A successful motion will not

absolve the defendant of the crime of which he was convicted, rather a successful motion pursuant to Rule 29(b) simply grants the defendant a new trial. The state may reconvict the defendant, or the defendant may be acquitted. In essence, a Rule 29(b) motion, if successful, gives the defendant and the state the opportunity to re-litigate the case with the newly discovered evidence.

Rule 29(b) states:

(b) New Trials Based on After-Discovered Evidence. A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence; provided, however, that a motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

SCRCrimP 29(b) (As Amended through January 19, 2011).

The legal standard for a Rule 29(b) motion for a new trial based upon newly discovered evidence is well settled. "To prevail on a motion for a new trial based on after-discovered evidence, it is necessary to show that the evidence: '(1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.'" State v. Hill, 359 S.C. 301, 597 S.E.2d 822, 830-831 (S.C.App. 2004), quoting State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668-69 (S.C. 1993). See also Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (S.C. 1983); State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (S.C. 1979). Furthermore, "a motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge..." State v. Caskey, 273 S.C. 325, 256 S.E.2d 737, 738 (S.C. 1979).

In addition to the standard of review for a motion for a new trial, it is also within the Court's power to correct a wrong via granting a new trial when the court finds that justice has not been done. "In South Carolina the trial judge has a broad discretion sitting as the thirteenth juror to grant a new trial when he is convinced, as obviously here, that justice has not been done in the trial." Watson v. Town of Pendleton, 294 S.C. 155, 363 S.E.2d 234, 235 (S.C.App. 1987). See Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990) ("A trial [court's] order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law."). See also Peeler v. Town of Cowpens, 2010-UP-334 (SCCA).

In order for a court to accept a guilty plea, the factual basis for the proper charge must exist. The United States Supreme Court has stated that in a case where the Defendant asserts his innocence, a court must find a factual basis establishing the crime before a Defendant's guilty plea can be accepted. "Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)(emphasis added). "In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." *Id.* at 38. Thus, when a Defendant asserts innocence, a court must establish a factual basis for the charge. If a court fails to establish a factual basis for the charge, the remedy is a new trial. "Because Mastrapa challenged the sufficiency of the factual basis for his plea before our court and because we find that the

factual basis was insufficient, the appropriate remedy in these circumstances is to vacate the judgment and remand to the district court for a new Rule 11 proceeding.” United States v. Mastrapa, 509 F.3d 652, 661 (4th Cir. 2007); United States v. Carr, 271 F.3d 172, 180-81 (4th Cir. 2001).

3. ANALYSIS AND ARGUMENT

a. The newly discovered evidence.

The newly discovered evidence in this case is the existence of a witness/victim that was previously unknown. This witness, Harry Lovelace, provided testimony in the form of an affidavit swearing that the burglary of the Cudd/Lovelace Insurance Company was discovered at 9:00 in the morning. The significance of this revelation is that the underlying crime, burglary of a building, could not be enhanced to a second degree burglary because no evidence existed that the burglary occurred at nighttime. Mr. Lovelace swore that the business closed the prior day at 5:00 in the afternoon and the burglary was not discovered until 9:00 the following morning. This means that there were multiple daylight hours in which the burglary could have taken place. Thus, the State could not prove beyond a reasonable doubt that the burglary happened at night, and the burglary should never have gone to the grand jury as a second degree burglary. The defendant was indicted for and convicted of a crime for which the State could not establish the *corpus delicti*.

Twelve days prior to the discovery of the burglary of Cudd-Lovelace Insurance, Mr. Lovelace died. At the time, the Defendant believed that the only Mr. Lovelace who was involved in this matter was the deceased individual. The Defendant reasonably believed that the only Lovelace that was connected with the Cudd-Lovelace Insurance was the man who had died,

and had no reason to know of the younger Mr. Lovelace. Despite Defendant's Rule 5 motion, the police never disclosed to Defendant that a second Mr. Lovelace existed. Indeed, Mr. Harry Lovelace, who had just begun working at Cudd-Lovelace Insurance, had information regarding the time at which the crime was discovered – in this case a crucial, exculpatory fact.

Defendant's newly discovered evidence further consists of the findings of the Supreme Court that the Cherokee County police and Solicitor engaged in wrongful conduct during the time in which Defendant was charged and pleaded guilty to the second degree burglary. Such evidence of wrongdoing has been conclusively found by the Supreme Court in the Riddle case. In the Riddle case, the Supreme Court found that the police and Solicitor's Office failed to provide defendant Riddle with Brady information necessary to his defense. Specifically, a witness gave a second statement to police days before defendant's trial, and the statement the witness gave was inconsistent with a previous statement. Neither the police nor the Solicitor disclosed this fact to the defense. The South Carolina Supreme Court found this to be a Brady violation stating "Not only is it unrealistic to require petitioner and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what *Brady* requires. The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70, 73 (S.C. 2006). The same situation occurred in the instant case. Defendant filed a Rule 5/Brady motion, but the police did not disclose the evidence of the time at which the burglary was discovered. Moreover, the police did not disclose the existence of Harry Lovelace, a witness crucial to Defendant's case.

b. The evidence would probably change the result if a new trial is had.

Despite the fact that the State could not and did not establish the corpus delicti of the offense to which Defendant plead guilty, the court accepted Defendant's plea and Defendant was convicted of second degree burglary. "Before a defendant in a criminal case can be required to present a defense, the State must present some proof of the corpus delicti of the crime. That is, the prosecution must show the actual commission by someone of the particular offense charged. A conviction based on an extra-judicial confession by the defendant cannot stand unless corroborated by proof aliunde of the corpus delicti." State v. Smith, 328 S.C. 622, 493 S.E.2d 506, 508 (S.C.App. 1997)(citations removed). See also, State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Teal, 225 S.C. 472, 82 S.E.2d 787 (1954); State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996). In this case, the plea should have never been accepted because the State could not prove the nighttime element of second degree burglary, a necessary element.

Defendant's newly discovered evidence shows conclusively that the burglary may have been committed during daylight hours. The State has no evidence, nor has the State ever presented any evidence, that the burglary occurred at night. The only evidence that the State presented regarding the time of the offense was to elicit a statement at Defendant's guilty plea, by Defendant, admitting to committing a second degree burglary. However, Defendant also indicated to the plea court that he was only pleading because he was faced with a lot of time should he be convicted at trial. In effect, although not necessarily stated, Defendant entered an Alford plea. It is an insufficient factual basis for the State to rely on the Defendant's statement to establish the corpus delicti of the crime charged; the State must have alternative evidence. Even under Alford, when a defendant is pleading guilty, the State must present enough of a factual basis so that "the record before the judge contains strong evidence of actual guilt."

Alford at 37. As is evident by even a cursory review of the transcript of Defendant's guilty plea, the State utterly failed to establish the nighttime element of second degree burglary.

If Defendant has a new trial, the outcome would certainly be different. As with the Stylette burglary, the State has no evidence that this crime took place at nighttime. Rather, the facts that are established by the newly discovered evidence prove that there were plenty of daylight hours in which this crime could have occurred. The State cannot allege the corpus delicti of second degree burglary and can only allege the corpus delicti of third degree burglary. Thus, the State cannot get a grand jury indictment and cannot prosecute, much less convict, Defendant of second degree burglary. Where the State cannot establish the corpus delicti of a crime, the court has no subject matter jurisdiction to try a defendant for that particular crime. See State v. Smith. As such, Defendant could only be tried for third degree burglary, not second degree burglary. Thus, the newly discovered evidence would lead to a completely different conviction (if any) at trial.

c. The newly discovered evidence has been discovered since trial.

Defendant pled guilty to 86-GS-11-289 on June 17, 1986, in front of Judge McKown. Prior to the plea, counsel for Defendant attempted to interview Mr. Cudd regarding the facts surrounding the burglary. However, Mr. Cudd refused to cooperate with the Defendant's attorney. Thus, Defendant was left relying solely on the evidence provided to him by the Gaffney police regarding any interviews with Mr. Cudd. The Gaffney police did not disclose the fact that Mr. Harry Lovelace, the son of the recently deceased Mr. Lovelace, existed. The existence of Mr. Harry Lovelace did not become known to Defendant until Defendant's mother discovered Mr. Lovelace by inquiring around Gaffney. Defendant's mother spoke to members

of the Cudd family and they revealed that a Mr. Lovelace, Harry Lovelace, was still alive and had worked at Cudd-Lovelace Insurance at the time of the burglary. It was unknown to Defendant at the time of his plea that Harry Lovelace was a witness and had information regarding these events. This is due to the refusal of Mr. Cudd to cooperate with Defendant's attorney in the investigation of the matter, and the Gaffney police and Solicitor's failure to provide full disclosure of the facts of the case as required by Rule 5 and *Brady v. Maryland*.

Defendant did not discover the pattern of misconduct engaged in by the police and Solicitor's Office until much later than the guilty plea. *Riddle v. Ozmint* was decided in 2006, approximately twenty years after Defendant's guilty plea.

d. The newly discovered evidence could not have been discovered before trial.

The newly discovered evidence could not have been discovered before Defendant's guilty plea. As discussed *supra*, Defendant, through his attorney Mr. Kline (now deceased), attempted to investigate fully the facts surrounding the burglary of the Cudd-Lovelace Insurance building. However, Mr. Cudd refused to cooperate with the defense regarding the investigation. Mr. Kline did everything possible to discover the relevant facts surrounding the incident. This included filing a Rule 5/Brady motion. The knowledge of the Defendant at the time was that Mr. Lovelace, who Defendant believed to be the only Mr. Lovelace, had died twelve days prior to the burglary. Thus, Defendant did not attempt to interview Mr. Harry Lovelace, not knowing that he existed. It was unknown to Defendant that a second Mr. Lovelace had worked at the business.

It was excusable neglect that Defendant did not discover the existence of Harry Lovelace prior to the time of the plea. Mr. Lovelace, Sr., was a co-founder of Cudd-Lovelace Insurance and well known in the Gaffney area. His passing, twelve days prior to the incident, obviously

precluded any interview of him by Defendant. His son, Harry Lovelace, the newly discovered witness, had just begun to work at Cudd-Lovelace insurance and was unknown to Defendant. Moreover, Mr. Cudd refused to cooperate with Defendant, and Defendant was unable to discover that there was another Mr. Lovelace who worked at the business and had information regarding the burglary. Mr. Cudd was extremely upset over the burglary, and he refused to give a statement to Defendant's attorney. Moreover, despite efforts by Defendant's attorney, none of the victims of the burglary would discuss the matter with the defense. This left relying on the police and Solicitor as the only means of obtaining information regarding the burglary pursuant to their duty under Rule 5.

Defendant was duly diligent in his attempt to investigate the facts surrounding the burglary. Counsel for Defendant filed a Rule 5 motion seeking disclosure of evidence under the Rules of Court and pursuant to *Brady v. Maryland*. The requested Brady material should have included all notes regarding the existence of Harry Lovelace. Further, the Brady material should have indicated that the burglary was not discovered until approximately 9:00 am the following morning. The State's failure to provide this information constitutes a violation of Defendant's rights. The prosecution's failure to provide Brady material and the concealment of evidence must be considered in any analysis of due diligence on the part of the Defendant. See generally State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (S.C. 1999).

In addition to the Supreme Court's finding in *Riddle*, the Gaffney police used a false mud sample analysis to induce Defendant to plead guilty to an unrelated event. Indeed, the Gaffney police represented to Defendant that they had performed an analysis on mud samples taken from the scene of the crime and compared that to mud found on Defendant's feet. The police indicated that the analysis showed the mud was the same. However, the police never performed

an analysis. This evidence was used to convince Defendant to plead guilty to this charge which was included in the charges pled to during the June 17, 1986, plea. This further illustrates how the police at the time of this incident engaged in a pattern and habit of misrepresentation and concealment related to evidence and disclosure to Defendant.

e. The newly discovered evidence is material to the issue of guilt or innocence.

The newly discovered evidence is material to the issue of guilt or innocence. As discussed *supra*, Defendant has maintained that he did not commit this offense. Rather than risk a lengthy sentence if he was found guilty at trial, Defendant elected to plead guilty to this offense, along with several others. However, based upon the newly discovered evidence, it is clear that Defendant could not have been found guilty of second degree burglary in connection with the Cudd-Lovelace Insurance building. Indeed, the State could not establish the corpus delicti of second degree burglary. The State could only put forth evidence that the building was burglarized between the hours of 5 pm and 9 am. This means that there were several hours of daylight in which the crime could have occurred. Thus, the newly discovered evidence directly affects the issue of guilt or innocence – Defendant could not be found guilty of second degree burglary because there was no evidence showing that the burglary occurred at night. It would be impossible for a fact finder to conclude beyond a reasonable doubt that the burglary of the Cudd-Lovelace Insurance building occurred at night. Thus, the newly discovered evidence is material to the issue of guilt or innocence, in essence proving innocence of second degree burglary.

f. The newly discovered evidence is not merely cumulative or impeaching.

The newly discovered evidence is not merely cumulative or impeaching. The evidence establishes that the burglary may have occurred during daylight hours. Thus, the newly discovered evidence directly contradicts a required element of the crime. In order to find Defendant guilty of second degree burglary, the State must prove *beyond a reasonable doubt* that the Defendant entered the business a night. It cannot do so. The evidence is not cumulative because the evidence/testimony of Harry Lovelace did not exist prior to Defendant learning of Harry Lovelace's existence. Further, the evidence is not impeachment evidence; it is direct evidence that refutes a charge of second degree burglary.

4. SUBSTANTIAL JUSTICE AND FAIRNESS

Defendant was 19 years old when he pled guilty to this charge. His attorney at the time counseled him regarding proceeding to trial on multiple charges and the potential to receive a lengthy sentence. Even though Defendant maintained his innocence to this charge, he pled guilty to these charges in exchange for a recommendation by the State of a ten year sentence. During the plea, the judge asked him why he was pleading guilty if he was not, in fact, guilty. Defendant clearly stated that he was pleading guilty because he was faced with a lot of time.

Considering the newly discovered evidence it becomes clear that there are substantial constitutional issues with the State's lack of evidence to support a conviction for second degree burglary. This crime should have been charged as a third degree burglary. Evidence of misconduct on the part of the solicitor and police during the time period in which these offenses occurred further weighs in favor of a finding that a charge of second degree burglary was improper. At most, the State had enough evidence to submit a charge of third degree burglary to the grand jury.

As a result of this conviction for second degree burglary, Defendant received a strike under the recidivist statute. At a subsequent sentencing hearing on an unrelated crime of which Defendant was convicted, this conviction for second degree burglary was used by the court to enhance Defendant's sentence to life without parole. Consequently, this conviction for second degree burglary will ensure that Defendant spends the rest of his life in prison.

Defendant is not without culpability for the crimes he committed. Defendant accepted the punishments that the courts levied against him. However, when one of those convictions is called into question, such as the case is here, it is manifestly unjust not to reconsider the facts and all the evidence available. This is true for any conviction, but becomes especially important when that conviction will keep a person incarcerated for their natural life. If that conviction is in any way improper, it must be rectified. Otherwise, there can be no confidence in our judicial system.

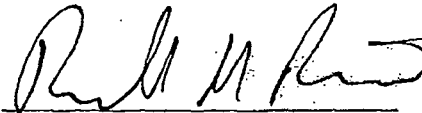
That is precisely the situation before the court in this matter. The Cudd-Lovelace burglary should never have been charged as a second degree burglary. It should have been charged as a third degree burglary. Had it been correctly charged, Defendant would not have had a strike, and would not have been sentenced to life without parole at a subsequent sentencing. This injustice must be corrected. It cannot be allowed to stand, and Defendant must get a new trial with the proper charge, third degree burglary, not second degree burglary.

5. CONCLUSION

Defendant's newly discovered evidence meets the standard to justify a new trial. The evidence clearly shows that the State did not have sufficient proof that the burglary of the Cudd-Lovelace Insurance Company occurred at night. Specifically, the newly discovered evidence

shows that the police discovered the burglary at approximately 9:00 in the morning. Therefore, there were several hours of daylight in which the crime could have occurred. The State cannot prove the corpus delicti of second degree burglary, and therefore the court did not have jurisdiction to accept Defendant's plea. Further, because no reasonable fact finder could conclude beyond a reasonable doubt that the burglary occurred at night, Defendant cannot be convicted of second degree burglary. For all the reasons set forth herein and at the hearing on this matter, and in the interests of justice, Defendant's motion for a new trial should be granted.

Date: June 25, 2011



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Attorney for Robert Holland Koon

PENGAD CO., DAYTON, N.J. 07002 • FORM 2094

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STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE
THE STATE
VS.
ROBERT HOLLAND KOON
DEFENDANT

COURT OF GENERAL SESSIONS

TRANSCRIPT OF RECORD

JUNE 17, 1986
GAFFNEY, S. C.

B E F O R E:

HONORABLE JONATHAN Z. MCKOWN, JUDGE

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

WILLIAM DUNCAN, ESQ.
ATTORNEY FOR THE STATE

GARY PAUL MALLARD, ESQ.
HARRY L. CLINE, ESQ.
ATTORNEYS FOR DEFENDANT

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2001 AUG 20 A 8:36
KATIE W. DAVIES
CLERK OF COURT

MILDRED DOBBINS
COURT REPORTER
(TRANSCRIPT PREPARED BY NORMA GORDON)

A TRUE COPY
Brandy H. McBee
CLERK OF COURT
CHEROKEE COUNTY, S.C.



RECEIVED
S. C. ATTORNEY GENERAL
DATE 1-29-92

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2

I N D E X

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1 MR. DUNCAN: May it please the court, this is the state
2 versus Robert Holland Koon. He's present in court. He is
3 represented by Mr. Mallard on one of the charges or two of the
4 charges, I believe, by Mr. Cline on the others, indictment
5 289, 290. All the indictments are for burglary in the second
6 or attempted, indictment 291, 292, grand larceny, burglary.

7 He wishes to enter a plea of guilty. The state's recom-
8 mendation in the cases on a plea of guilty is the defendant
9 serve ten years.

10 THE COURT: Well, I want the defendant to understand
11 though I don't have to accept it; I'm not bound by the recom-
12 mendation. Mr. Koon, how old are you?

13 DEFENDANT: Nineteen, sir.

14 THE COURT: You've got a pretty good record already,
15 haven't you?

16 DEFENDANT: My record? I've been twice before.

17 MR. CLINE: He has a juvenile record, too, Judge.

18 THE COURT: I know. He's got shoplifting, resisting
19 arrest, grand larceny, grand larceny. All right, Mr. Koon,
20 your lawyers are Mr. Mallard and Mr. Cline. They both represe
21 you on all these cases. Each one represents you on different
22 cases.

23 MR. MALLARD: I represent him on the first set of charges
24 the grand theft auto charges and associated two burglaries, I
25 believe, on the 13th of March. And I think Mr. Cline represen

4

1 him on 289, is that correct, Mr. Cline? That's Cudd-Lovelace.
2 Is that correct, 292?

3 THE COURT: All right, Mr. Koon, you're represented by
4 an attorney. And I assume you know when you propose to plead
5 guilty you give up the right to remain silent?

6 DEFENDANT: Yes, sir.

7 THE COURT: Well, we've got one indictment here that says
8 you on the 13th day of March of this year in this county en-
9 tered into the dwelling of P&G Motors without consent, with
10 intent to commit a crime during the nighttime. Do you under-
11 stand that charge?

12 DEFENDANT: Yes, sir, I do.

13 THE COURT: P&G Motors, wherever that is.

14 DETECTIVE: It's parallel to Logan Street. Located on
15 the corner of Frederick and Logan Street, next to the Ballenge
16 and Osment home, across from the Gulf Station.

17 DEFENDANT: Yes, sir, I just opened the door, Your Honor,
18 and went in.

19 THE COURT: You didn't find anything to steal?

20 DEFENDANT: No, sir.

21 THE COURT: But that's what you did?

22 DEFENDANT: Yes, sir.

23 THE COURT: What were you looking for?

24 DEFENDANT: I don't know, Your Honor. I was intoxicated
25 at the time. Just a real stupid thing I done. I guess I'm

1 going to have to pay for it.

2 THE COURT: This was the 13th day of March of this year?

3 DEFENDANT: Yes, sir.

4 THE COURT: All right, the other indictment says that you
5 on the 13th day of March of this year in this county entered
6 into the dwelling of Bill Willard during the nighttime, without
7 consent, with the intent to commit a crime. Tell me about
8 that.

9 MR. DUNCAN: That would be into his office. It's an
10 office. It joins the car lot there.

11 THE COURT: Was this the same night?

12 MR. DUNCAN: Same night, Your Honor. Same night, but not
13 the same -- it's two different businesses.

14 THE COURT: All right, sir, you went in the office during
15 the nighttime, without consent. Do you remember that one?

16 DEFENDANT: Yes, sir, I just went in there. I didn't
17 steal anything.

18 THE COURT: What did you find to steal?

19 DEFENDANT: Nothing.

20 THE COURT: How did they know you went in?

21 DEFENDANT: I don't know, Your Honor. I didn't tell them
22 I did.

23 THE COURT: It says here on the 14th of March of this
24 year you took off with a GMC truck worth eight thousand dollars.
25 Did you take off with the truck? Take the truck off?

6

1 DEFENDANT: Yes, sir.

2 THE COURT: What did you do with it?

3 DEFENDANT: I just drove it.

4 THE COURT: Drove it where?

5 DEFENDANT: To Jonesville.

6 THE COURT: Where in Jonesville? What did you do with it
7 there?

8 DEFENDANT: Parked it.

9 THE COURT: Did you strip it?

10 DEFENDANT: No, sir.

11 THE COURT: Strip it?

12 DEFENDANT: No, sir.

13 THE COURT: Did you tell them where it was?

14 DEFENDANT: No.

15 THE COURT: When was it found?

16 DETECTIVE HARVEY: It was found and that's one of the
17 reasons he was arrested, Your Honor. The truck was taken out
18 of the Willard Monument Company. These were taken inside the
19 building in Jonesville. The police found the truck, and some
20 time elapsed from the time they seen the truck and the prison-
21 er. A short time later they notified us they had Robert in
22 Union County.

23 DEFENDANT: I was walking down the road and they picked
24 me up and questioned me about it, and I came back to Gaffney
25 and they charged me with it.

1 MR. MALLARD: The Union County sheriff picked him up in
2 Union County and charged him, Officer Brewington of the Jones-
3 ville Police.

4 THE COURT: On the 29th day of April it says that you
5 entered the dwelling of the Stylette without consent, with the
6 intent to commit a crime. You know anything about that?

7 DEFENDANT: Yes, sir.

8 THE COURT: What is that?

9 DEFENDANT: Where is it? It's over there on East Freder-
10 ick Street, next to Shuford-Hatcher Funeral Home.

11 THE COURT: What were you looking for? Keys? Well, you
12 got the keys away from Willard's office, didn't you? To the
13 truck?

14 DEFENDANT: Yes, sir.

15 THE COURT: All right. I believe this is Mr. Cline's
16 case; that on the 28th day of March, 1986, did you enter into
17 the Cudd/Lovelace Insurance Company, without consent, with th
18 intent to commit a crime, in the nighttime?

19 DEFENDANT: Yes, sir.

20 THE COURT: What did you get out of there?

21 DEFENDANT: Nothing, Your Honor.

22 THE COURT: You was just looking. How did you get in?

23 DEFENDANT: Through the side door.

24 THE COURT: All right now, you tell me what kind of time
25 you could get for breaking into a building in the nighttime

8

1 with the intent to commit a crime. I'm not talking about some-
2 body's home; I'm talking about a building like an office.

3 DEFENDANT: Fifteen years.

4 THE COURT: Is that correct?

5 MR. DUNCAN: Yes, sir.

6 THE COURT: You know, of course, what you can get for
7 grand larceny?

8 DEFENDANT: Yes, sir.

9 THE COURT: What's that?

10 DEFENDANT: Ten.

11 THE COURT: You understand that?

12 DEFENDANT: Yes, sir, I do.

13 THE COURT: How old are you?

14 DEFENDANT: Nineteen.

15 THE COURT: Other than what you've heard in this court-
16 room, has anybody promised you anything to get you to plead
17 guilty?

18 DEFENDANT: Yes.

19 THE COURT: What?

20 DEFENDANT: A ten-year sentence.

21 THE COURT: I said other than what you heard in this
22 courtroom, has anybody promised you anything?

23 DEFENDANT: Oh, no, sir.

24 THE COURT: Has anybody threatened you?

25 DEFENDANT: No, sir.

1 THE COURT: You understand that I do not have to go along
2 with the recommendation of the solicitor?

3 DEFENDANT: Yes, sir.

4 THE COURT: Has anybody threatened you to make you plead
5 guilty?

6 DEFENDANT: No, sir.

7 THE COURT: You understand, of course, you're entitled
8 to a jury trial?

9 DEFENDANT: Yes, sir.

10 THE COURT: The state would have to prove you guilty
11 beyond a reasonable doubt.

12 DEFENDANT: Yes, sir.

13 THE COURT: You would not have to take the stand if you
14 didn't want to.

15 DEFENDANT: Yes, sir.

16 THE COURT: You understand that?

17 (Defendant nods, indicating yes.)

18 THE COURT: It couldn't be held against you.

19 DEFENDANT: Yes, sir.

20 THE COURT: You understand that? If you had any witness
21 es that would tend to prove you're innocent, the state would
22 be required to get them in here, do you understand that?

23 DEFENDANT: Yes, sir.

24 THE COURT: Did you have any such witness?

25 MR. MALLARD: We have subpoenaed several, Your Honor.

10

1 had subpoenaed.

2 THE COURT: What would those witnesses tend to prove?

3 DEFENDANT: That I wasn't there at the scene of the crime
4 I didn't do these.

5 THE COURT: Where are those witnesses now?

6 DEFENDANT: In Gaffney.

7 THE COURT: That you were not at the scene of the crime
8 in which case?

9 DEFENDANT: In all the cases, Your Honor.

10 THE COURT: Including the truck down at Jonesville?

11 DEFENDANT: I wasn't in the truck, you know.

12 THE COURT: When they got you?

13 DEFENDANT: Yes, sir.

14 THE COURT: Why are you pleading guilty then? You told
15 me you were guilty. Are you guilty?

16 DEFENDANT: I'm facing a lot of time; it just would be
17 better for me to plead guilty.

18 THE COURT: Are you satisfied with your lawyers?

19 DEFENDANT: Yes, sir.

20 THE COURT: Do you know of anything they could have done
21 for you that they failed to do?

22 DEFENDANT: No, sir.

23 THE COURT: Did you ask either one of them to do anything
24 they didn't do?

25 DEFENDANT: No, sir.

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1 THE COURT: I believe you told me you had been in trouble
2 twice before.

3 DEFENDANT: Yes, sir.

4 THE COURT: Disregarding traffic signal, disregarding
5 traffic signal, too fast for conditions, public drunk, petty
6 larceny, shoplifting, drunk and disorderly, grand larceny,
7 grand larceny, grand larceny.

8 DEFENDANT: No, sir, that's not my record.

9 THE COURT: That's your record.

10 DEFENDANT: No, sir, I never been locked up for shoplift-
11 ing or petty larceny that I can recall. Grand theft auto.

12 THE COURT: Grand theft auto down at Myrtle Beach.

13 DEFENDANT: Myrtle Beach? Yes, sir, I recall that.

14 THE COURT: Drunk and disorderly at Myrtle Beach. Grand
15 larceny, grand larceny, grand larceny. Of course, these three
16 grand larcenies were apparently sentenced all the same time,
17 I don't know. Reckless driving, assault and battery, drunk.

18 I'm convinced you know what you're doing and your plea
19 is voluntarily made and intelligently made. Mr. Cline, you
20 agree?

21 MR. CLINE: Yes, sir.

22 MR. MALLARD: Yes, sir.

23 THE COURT: I accept the pleas. Go ahead and publish the
24 pleas.

25 CLERK: Your Honor, we have indictment 86-GS-11-289, the

1 state versus Robert Holland Koon, indictment for burglary in
2 the second degree. We have a true bill, and the defendant
3 pleads guilty as charged.

4 In 86-GS-11-290, the state versus Robert Holland Koon,
5 indictment for burglary in the second degree. We have a true
6 bill and the defendant pleads guilty as charged. In 86-GS-11-
7 291, the state versus Robert Holland Koon, indictment for
8 burglary in the second degree and grand larceny, we have a
9 true bill. And the defendant pleads guilty as charged.

10 In 86-GS-11-292, the state versus Robert Holland Koon,
11 indictment for burglary in the second degree, we have a true
12 bill, and the defendant pleads guilty as charged.

13 THE COURT: Yes, sir. I reckon we'd better finish it
14 before lunch.

15 MR. DUNCAN: Your Honor, I think you've heard most of the
16 facts of the case.

17 THE COURT: He lost his right to remain silent when he
18 stood up here. Anything, Mr. Mallard?

19 MR. MALLARD: I want to point out that these cases he
20 went in but didn't actually take anything and seems to have
21 been related to his problem with alcohol.

22 THE COURT: Mr. Cline?

23 MR. CLINE: I've known Robbie. I represented him back
24 when he was about twelve years old.

25 THE COURT: I've had him in front of me before and that'

1 what irritates me. I gave him a chance, and he rewarded me by
2 stealing something the second night after I turned him loose.
3 Go ahead.

4 MR. CLINE: His mother works down at Southeastern Kusan.
5 She's here, and she's sitting back there. And I believe that
6 he had been living with his mother on East Jefferies Street.
7 And his mother and father divorced maybe a year or so ago.

8 His father has remarried, but Robbie has had this problem
9 with drinking and smoking pot. And, of course, you've got his
10 record there. I found him to be intelligent ---

11 THE COURT: There's no question about that. He's got the
12 ability to make a good citizen.

13 MR. CLINE: But we would, Your Honor, ask Your Honor to
14 accept the recommendation that we have discussed.

15 THE COURT: Frankly, I'd rather not. I'd rather give him
16 about 40 years, if I did what I'd rather do. Burglary, second
17 degree.

18 MR. CLINE: He's nineteen. I have represented a lot of
19 juveniles and when they get over in their twenties, I have had
20 some that really straightened up.

21 THE COURT: Well, it could happen. The state's agreed
22 on ten, as I understand it.

23 (Detective Harvey nods, indicating yes.)

24 THE COURT: All right. On each, ten years on each. Ten
25 years, concurrent.

14

1 MR. DUNCAN: Thank you, Your Honor.

2 MR. CLINE: Thank you, Your Honor.

3 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, the undersigned Norma Gordon, Official Court Reporter for the State of S. C., do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had on the 17th day of June, 1986, in Cherokee County, S. C., of the tapes and notes taken by Mildred Dobbins retired court reporter.

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



January 27, 1992

STATE OF SOUTH CAROLINA

COUNTY OF Cherokee

AFFIDAVIT

18

Personally appeared before me, Judge of the Court, one Inv. R. F. Weaver,
 who being duly sworn, deposes and says that Robert Holland Koon (name of defendant) did within this County
 and State on or about 3-28-86, violate the criminal laws of the State of South Carolina [or ordinance of the municipality
 of City of Gaffney] in the following particulars:

DESCRIPTION OF OFFENSE

Burglary, 2nd Degree

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

The defendant, Robert Holland Koon, did break into the office of Cudd-Lovelace Insurance
 Company located at 217 East Fredrick Street within the city limits of Gaffney, South
 Carolina, on or about March 28th, 1986, by kicking side door open and entering during the
 nighttime with the intent to commit a felony therein.

A TRUE COPY

Brandy H. McBee

CLERK OF COURT
CHEROKEE COUNTY, S.C.

Sworn to and Subscribed before me,

This 2nd day of April, 19 86

Richard Weaver

Signature of Affiant

Address Gaffney Police DepartmentGaffney, S. C.Phone: 489-8115

James T. Lane (L.S.)

Signature of Hearing Judge

Address _____

Phone: _____

STATE OF SOUTH CAROLINA

ARREST WARRANT

COUNTY OF Cherokee[or MUNICIPALITY OF City of Gaffney]

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

It appearing from the above affidavit that there are reasonable grounds to believe that Robert Holland Koon
 (name of defendant) did on or about 3-28-19 86, violate the criminal laws of the State of South Carolina [or ordinance
 of the municipality of City of Gaffney] as set forth below:

DESCRIPTION OF OFFENSE

Burglary, 2nd Degree

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



Done at Gaffney
 on April 2nd, 19 86

James T. Lane

Signature of Judge

ARREST WARRANT

WITNESSES

82

Copy of this Arrest Warrant was delivered to the following defendant:

No. B 540173

STATE OF SOUTH CAROLINA

City of Gaffney

County

(Circle one)

THE STATE

against

Robert Holland Koon

Address:

Gaffney, S. C.

Phone

SSN

Sex

M

Race

W

Height

5'7"

Weight

145

DOB

DL

Offense

Burglary, 2nd Degree

Code (or Ordinance) § 16-11-310

Date of Offense 3-28-86

Officer R. F. Weaver

Agency Gaffney Police Department

Date of Disposition

Disposition

Sentence

Co-Defendants

Name

Address

Phone

Name

Address

Phone

Name

Address

Phone

Name

Address

Phone

Name

Address

Phone

JURORS

This warrant is certified for service in

County

(Circle one)

Municipality

one)

The accused is to be arrested and brought before me to be dealt with according to law.

Signature of Judge

(L.S.)

PRELIMINARY HEARING held by

Judge

on 19

with

Attorney for Defendant

Decision:

BAIL

Date Set 19

Judge

Amount

Surety

RETURN WARRANT TO:

FILED IN OFFICE OF
CLERK OF COURT
APR 3 3 30 PM '86
KATIE W. BARNES
CLERK OF COURT

AFFIDAVIT

183

Personally appeared before me, Judge of the Court, one Inv. R. F. Weaver
 who being duly sworn, deposes and says that Robert Holland Koon (name of defendant) did within this County
 and State on or about 3-29-86, violate the criminal laws of the State of South Carolina [or ordinance of the municipality
 of City of Gaffney] in the following particulars:

DESCRIPTION OF OFFENSE

Burglary, 2nd Degree

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

The defendant, Robert Holland Koon, did break into Stylette located at 219 East Fredrick
Street within the city limits of Gaffney, South Carolina, on or about March 29th, 1986,
 by knocking glass from back door and entering with the intent to commit a felony therein.

A TRUE COPY

Bandy H. McBee

CLERK OF COURT
CHEROKEE COUNTY, S.C.

Sworn to and Subscribed before me,

This 2nd day of April, 19 86.

Richard Weaver

Signature of Affiant

Address Gaffney Police Department
Gaffney, S. C.Phone: 489-8115

Signature of Issuing Judge

Address _____

Phone: _____

STATE OF SOUTH CAROLINA

ARREST WARRANT

COUNTY OF Cherokee[for MUNICIPALITY OF City of Gaffney]

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

It appearing from the above affidavit that there are reasonable grounds to believe that Robert Holland Koon
 (name of defendant) did on or about 3-29- 19 86, violate the criminal laws of the State of South Carolina [or ordinance
 of the municipality of City of Gaffney] as set forth below:

DESCRIPTION OF OFFENSE

Burglary, 2nd Degree

Now, therefore, 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.

Done at Gaffney
 on April 2nd, 19 86



Copy of this Arrest Warrant was delivered to the following defendant:

Robert Holland Koon

on the 2 day of April, 1986

J. W. Hampton
Signature of Constable or Law Enforcement Officer

This warrant is certified for service in
County _____ (Circle one)
Municipality _____

The accused is to be arrested and brought before me to be dealt with according to law.

(L.S.)
Signature of Judge

PRELIMINARY HEARING held by

Judge _____

on _____, 19____

with _____
Attorney for Defendant

Decision: _____

BAIL

Date Set _____, 19____

Judge _____

Amount _____

Surety _____

RETURN WARRANT TO:

ARREST WARRANT

No. B 540174

STATE OF SOUTH CAROLINA

City of Gaffney County _____ (Circle one)
Municipality _____

THE STATE

against

Robert Holland Koon

Address: _____

Gaffney, S. C.

Phone _____ SSN _____

Sex M Race W Height 5'7" Weight 145

DOB _____ DL _____

Offense Burglary, 2nd Degree

Code (or Ordinance) § 16-11-310

Date of Offense 3-29-86

Officer R. F. Weaver

Agency Gaffney Police Department

Date of Disposition _____

Disposition _____

Sentence _____

Co-Defendants _____

WITNESSES:

Name _____

Address _____

Phone _____

Name _____

Address _____

Phone _____

Name _____

Address _____

Phone _____

Name _____

Address _____

Phone _____

Name _____

Address _____

Phone _____

JURORS

REFERENCING Correspondence from:
 Robert Holland Koon - 227826
 (SMU205)
 Broad River Correctional Institute
 4460 Broad River Road
 Columbia, SC 29210

8 December 2007

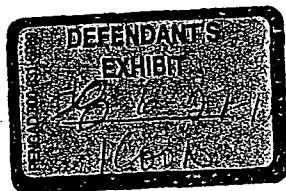
Mr. Koon 227826 (SMU205):

I am writing in response to a letter from you received from delivery by BRCI.

It is with regret that Harry L. Cline, Esq. passed away in early 1991. All of his client files were turned over to the Cherokee County Clerk of Court and the Public Defender's office who took over after Mr. Cline's passing. Mr. Cline's estate was closed in 1991.

You should contact the Cherokee County Clerk of Court's office and Public Defender's office and staff for further assistance. Please direct further and all communications to these sources.

The family of Harry L. Cline, Esq. Attorney at Law



A TRUE COPY
Brandy W. McBee

CLERK OF COURT
 CHEROKEE COUNTY, S.C.

FILED

JUN - 8 P 3 47

FILED IN OFFICE OF
 CLERK OF COURT
 CHEROKEE COUNTY, S.C.
 2007 DEC 14 A 11:05
 BRANDY W. MCBEE

REFERENCING Correspondence from:
Robert Holland Koon - 227826
(SMU205)
Broad River Correctional Institute
4460 Broad River Road
Columbia, SC 29210

28 December 2007

Mr. Koon 227826 (SMU 205):

As stated in the previous correspondence to you dated December 8, 2007, Mr. Harry L. Cline passed away in 1991. Mr. Cline maintained a file on every client and each case he tried as required by law. All of his client files were turned over to the Cherokee County Clerk of Court (1991) and her office at that time. Any files that existed at that time, that were pertinent, were forwarded by the Clerk of Court's Offices to the Public Defender's office (1991) at that time. We released all of Mr. Cline's paperwork and files to the Cherokee County Clerk of Court's Office as we closed Mr. Cline's estate. We do not have the information that you need.

The estate of Harry L. Cline was closed in 1991. All paperwork, files, and documentation was turned over to the proper offices and officials. We do not have any of Mr. Cline's files or paperwork and unfortunately there is nothing we can do to help you.

As directed in the previous correspondence, direct all of your correspondence and questions to the Cherokee County Court System, the current Public Defender of Cherokee County, and the Clerk of Court's Offices or have your current attorney research this for you.

We wish you the best in your rehabilitation and service of time.

**PLEASE REFRAIN FROM CORRESPONDING TO
THIS PRIVATE ADDRESS.**

2008 JUN 18 PM 3:47

2008 JUN 18 PM 3:47

Robert Koon
227826

CLERK OF COURT
CHEROKEE CO.

PLEASE FIND ENCLOSED A PCR APPLICATION
SIGN DATED & NOTARIZED (IN RE: 1996 CONVICTION)

PLEASE SEND ME NAME ADDRESS OF THE
(CHIEF) PUBLIC DEFENDER OFFICE CHEROKEE CO.
AND THE PHONE NUMBER

DON THOMPSON 804-487-0001

THE ONE PAGE OF DOCKET SHEET YOU SENT
DOES NOT STATE DATE OF HEARING

WEDNESDAY JAN. 16, 2008

UNDER FREEDOM OF INFORMATION ACT

WOULD YOU PLEASE SEND ME A COPY

OF COMMON PLEAS COURT CALENDAR

FOR 2008 THAT LISTS NAME OF JUDGE

DATE OF TERM I NEED THIS CALENDAR

I HAVE ALREADY SENT THIS. IT IS UNFAIR

TO THIS OFFICE. THANK YOU CHEROKEE COUNTY

TAXPAYERS TO KEEP SENDING THINGS TO

ME IN DUPLICATE. GUIT MOBERT HAS FOUNDING

THINGS TO JUDGES ETC. & KEEP YOUR COPY.

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In the future, you will need to make things directly to the

Ruben Agnew, director of the
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 of forwarding things on
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CC Public Defendant on July

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PLACE OF BIRTH: NEW YORK

THE UNIVERSITY OF CHICAGO

4/2/6

The State of South Carolina

County of Cherokee

INDICTMENT FOR

BURGLARY 2ND DEGREE

At a Court of General Sessions, convened on the 21st day of April,
19 86, the Grand Jurors of Cherokee County present upon their oath:

That Robert Holland Koon

did in Cherokee County on or about the 28th day of March,
19 86, did enter the dwelling of Cudd-Lovelace Insurance Company
without consent and with intent to commit a crime therein, entering
in the nighttime.

A TRUE COPY

*Brandy W. McBee*CLERK OF COURT
CHEROKEE COUNTY, S.C.

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

Paul H. [Signature]
Solicitor

86-G.S.-11- 289

The State of South Carolina

County of Cherokee

COURT OF GENERAL SESSIONS

April 21 Term, 19 86

THE STATE

VS.

ROBERT HOLLAND KOON

INDICTMENT FOR

BURGLARY 2ND DEGREE

HOLMAN C. GOSSETT, JR.

Foreman of Grand Jury

McCAW PRINTERS

COLUMBIA, S. C. 29305

Witnesses

Richard Weaver

Verdict

Foreman

ROBERT H. KOON
appear in my own proper person and plead guilty
to BURGLARY 2nd

count on the within Indictment

Robert Koon

WITNESS:

Kate W. Bann
O.C.C. Pls. & G.S.
6-17-86

SENTENCE

The defendant Robert H. Koon is
committed to the State Dept. of Corrections/County for a term of 10
months/years and/or to pay a fine of \$
plus \$100.00 for costs and/or payment of \$
suspended with probation for months/years.
Restitution For physical injury \$
Ycs / No property damage \$
to be paid

to clerk for

CORRECTIONS

Presiding Judge

Clerk of Court

6-17-86

Presidents

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\$

\$

subrogated.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 4th, 2012



Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT