

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001111

RECEIVED
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SC Court of Appeals

THE STATE,

Respondent,

v.

MACK SEAL WASHINGTON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge properly allow the jury to hear law enforcement's questions as part of Appellant's admissible statement made during an investigative interview, when the questions did not shift the burden of proof to Appellant, nor did they provide an opinion about the evidence, and when any potential error in admitting the questions was a harmless one, because they were cumulative to other overwhelming evidence against Appellant?

STATEMENT OF THE CASE

In September 2016, the Charleston County Grand Jury indicted Appellant for one count of first-degree burglary, one count of malicious injury to a house under the enhancement provision of S.C. Code Ann. § 16-1-57, and one count of obtaining goods by false pretenses under the enhancement provision of § 16-1-57. On April 17-18, 2017, a jury trial was held in the Charleston County Court of General Sessions with the Honorable Roger L. Couch, circuit court judge, presiding. Appellant was represented by Luke Joseph Malloy, III, Esquire, of the Charleston County Public Defender's Office. The Respondent (the State) was represented by Assistant Solicitor Daniel B. Poulos and Assistant Solicitor Nicholas I. Lewis of the Ninth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of all three counts. Following the verdict, the trial judge deemed both Appellant's conviction for malicious injury to a house, and Appellant's conviction for obtaining goods by false pretenses fell under the enhancement provision of § 16-1-57 and sentenced Appellant to two concurrent terms of ten years' imprisonment, as well as an additional concurrent term of fifteen years' imprisonment for Appellant's first-degree burglary conviction, resulting in an aggregate sentence of fifteen years' imprisonment. Appellant then timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On August 21, 2015, Deputy Jacob Hill of the Charleston County Sheriff's Office responded to a report of burglary at the home of Lawrence Collins on Johns Island. (Tr. 158). Hill observed signs of a forced entry on an outside door leading to the garage. (Tr. 159). Hill dusted for potential fingerprints on a stackable washer-dryer that appeared to have been moved during entry into the home and lifted a latent print from the washer-dryer. (R. 159-61). Collins testified a number of items were missing from his home, including a rifle, a pistol, and a Husqvarna weed eater. (Tr. 125, 128).

Detective Timothy McCauley of the Charleston County Sheriff's Office searched a pawnshop database and determined Appellant pawned a rifle and a weed eater the same day as the burglary. (Tr. 237). Ronald Wood of Money Man Pawn Shop identified the pawn ticket showing a rifle matching the description given by Collins was sold in his store. (Tr. 231-33). The pawn ticket bore the Appellant's name, signature, address, and date of birth. (R. 232-33). Robert Delatte, an employee of a different Money Man Pawn Shop, identified another pawn ticket showing a Husqvarna weed eater was sold in his store. (Tr. 226-27). The second pawn ticket also bore Appellant's name, signature, address, and date of birth. (Tr. 226-27). Wood testified that normally pawn shops require a customer to show photo identification before pawning an item. (Tr. 230).

The State also presented testimony regarding fingerprint analysis from two agents with the State Law Enforcement Division. Stephen Curtis was tendered as an expert in the field of latent print examination. (Tr. 191). Seraphim Haftoglou was tendered as an expert in ten-print fingerprint examination. (Tr. 182). Curtis testified he was one hundred percent certain the finger print lifted from the washer-dryer belonged to Appellant. (Tr. 207, 217).

After the State presented evidence that Appellant's fingerprint was found inside Collins' home and that Appellant's identifying information was listed on pawn tickets, McCauley testified about his interrogation of Appellant. The State and Appellant agreed to redact certain portions of the interrogation. However, Appellant objected to other portions of the interrogation based on concerns McCauley was providing improper opinion evidence which bolstered the evidence given by SLED agents. (Tr. 23-25). The trial judge redacted portions of the interview that mentioned SLED or the credibility of SLED. (Tr. 26-28). However, the trial judge denied Appellant's motion with respect to approximately eleven questions and/or statements made by McCauley. The trial judge allowed the jury to hear the following exchanges over appellant's objection:

McCauley: you threw it in the back of your truck and it stayed there for a while?

Appellant: yeah it stayed there for maybe about 2 or 3 weeks.

McCauley: That's not possible because you pawned it the same day you broke into that house.

....

McCauley: Can you explain why your fingerprint would have been inside the house?

Appellant: my fingerprints inside the house? I don't believe that. No way. I really don't believe that. My fingerprints inside the house?

....

Appellant: I'll tell you what. Get in contact with my boss man and see what I been at that day this happened.

McCauley: I'll call him, but how do you explain your fingerprints inside this man's house?

....

Appellant: John's Island. I don't even go over there. There's no way it could be my fingerprints man

McCauley: There's no if, and, or buts about it.

Appellant: They got to say I'm there because that's where I work at. I work everyday.

McCauley: But you can't be at work and your fingerprint be inside the house at the same time.

....

Appellant: I'm going to be honest with you but I know I was working that day, you can't tell me I wasn't working. I work seven days a week.

McCauley: Then how'd your finger print end up there?

Appellant: That's what I like to know too, how my fingerprints end up at the house. What time that supposed to be there?

....

Appellant: Okay yeah so that this, if I go working that day then what?

McCauley: You still have to explain why your fingerprints is in that man's house.

Appellant: How can I?

McCauley: And why you pawned his stolen property.

....

McCauley: I think you're giving me part of the story.

Appellant: No

Appellant: You still saying I break into the house

McCauley: Mhm your fingerprint was inside.

....

Appellant: I call breaking the man, what did I break I? How did I break into his house? What is this?

McCauley: That's your fingerprint.

Appellant: All that's my fingerprint?

McCauley: No it's in there

Appellant: My fingerprints in there?

McCauley: Mhm. That's inside the man's garage okay

Appellant: First you say I been inside the house and now you say garage

McCauley: Yeah that's part of a house, that's considered part of a dwelling. An attached garage. And you got in the house from there.

....

Appellant: I can't help you because I ain't break into a house man. I ain't gonna say I break into a damn house if I ain't break in a house.

McCauley: Well then it still doesn't explain why you're fingerprints are there and why you had a stolen gun, a stolen rifle. There was a second gun stolen, it was a

pistol, which is why I think you're trying to put the story together of a person you ran into on Bees Ferry in the parking lot of Walmart. You're trying to put some story together to justify why you had access to those.

Appellant: I ain't have access to it. Not me.

McCauley: you also pawned a weed eater.

....

Appellant: I got weed eaters to my house.

McCauley: I know I'm saying you pawned that the same day, the same day you pawned that rifle at a different pawn shop which is what people do when they're trying to spread out stuff that's stolen.

Appellant: I pawned a weed eater to a different pawn shop. I stole a weed eater."

McCauley: mhm

(Court's Exhibit 1, p. 2-6). Notably, during the interview Appellant made approximately six other references to his fingerprints being found inside Collins' home that he did not object to or move to redact. (Court's Exhibit 1, p. 2, 3, 5, State's Exhibit #41). Sarah Myers of Alternative Staffing testified Appellant did not begin working for the company until September 28, 2015. (Tr. 250). This contrasted with Appellant's explanation that he was working on the day of the burglary. (Court's Exhibit 1, p. 1).

When the trial judge instructed the jury before their deliberations, the judge clearly explained the burden of proof was entirely upon the State and the defendant was not required to prove himself innocent. (Tr. 278). The trial judge further instructed the jurors they were free to give the testimony of the two expert witnesses the weight they felt it deserved. (Tr. 285-86). Finally, the trial judge cautioned the jurors not to even consider the Appellant's decision not to testify in their deliberations. (Tr. 286-87). The jury found Appellant guilty on all three counts. Appellant then filed his appeal.

ARGUMENT

I.

The trial judge properly allowed the jury to hear law enforcement's questions as part of Appellant's admissible statement made during an investigative interview, because the questions did not shift the burden of proof to Appellant, and did not give an opinion about the evidence. Furthermore, any potential error by the trial court was harmless and the evidence produced as a result of a potential error was cumulative to evidence already presented.

Appellant contends the trial court erred in admitting portions of his voluntary statement in which law enforcement's questions allegedly shift the burden of proof to Appellant and provide an improper opinion on evidence against Appellant. However, the questions admitted were offered for their probative value to give context to Appellant's responses when law enforcement confronted him with evidence that contradicted Appellant's version of events. The statements were not improper opinion evidence, because the State had already produced proper opinion evidence through two expert witnesses. Furthermore, the burden of proof was never shifted to Appellant, because both the State and the trial judge clearly explained to the jury in opening and closing remarks that the State alone had the burden of proof (Tr. 90, 98, 105, 269, 278). Appellant's convictions and sentences should be affirmed.

A. No Burden Shifting Occured

It is well settled law in this State that the standard of review for the admission or exclusion of evidence is an abuse of discretion. State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012). The trial judge did not abuse his discretion in this case by allowing portions of Appellant's interview to be played for the jury. The facts of the current case differ substantially from the lone case cited by Appellant. Appellant cites State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) as an example of the State impermissibly shifting the burden of proof to a defendant. Brewer featured a defendant being questioned by law enforcement about his role in a shooting.

During Brewer's interview, law enforcement asked several hearsay-laden questions indicating other people saw him shoot the victims. Id. at 405, 768 S.E.2d at 658. Brewer attempted to end the interview, but the interrogation continued. Id. Investigators attempted to extend the interview by bringing Brewer's mother into the interview room and told Brewer repeatedly he should "prove himself innocent." Id.

The current case differs substantially from Brewer. Here, Detective McCauley asked Appellant to explain why his fingerprint was in a house Appellant claimed he was never in. This inquiry and Appellant's responses are relevant evidence for a jury's consideration. This evidence is probative to disprove Appellant's alibi. It provides necessary context to his answers, including his claim that he was working on the day of the burglary. Introducing Appellant's statements regarding his whereabouts is particularly significant, because the State would later call Sarah Myers to prove Appellant was not working the day of the burglary. (Tr. 250).

The statements made in Appellant's interview were also important for the State to present in light of State v. Mitchell, 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998) and State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). In Mitchell this Court found error by the trial court in not granting a motion for a directed verdict when the State's only evidence in a burglary case was Mitchell's thumbprint being found on an outside window. Id. at, 622, 506 S.E.2d at 525. The State conceded Mitchell had been to the property at least twice as an invited guest. Id. Mitchell stands in contrast to Bennett where the Supreme Court ruled the State produced sufficient evidence to withstand a directed verdict. In Bennett, the State produced evidence of Bennett's fingerprint being found inside a community center along with drops of his blood. Bennett, 415 S.C. at 237, 781 S.E.2d at 354. In contrast to the facts in Mitchell, although Bennett had been in the community center before, he had no reason to be in the room where the burglary took place.

Id. Because of these similar examples, the State certainly had a probative purpose in producing evidence to show Appellant agreed there was no reason his finger print should be found in victim's house. Had the State presented only the finger print evidence and not tested Appellant's alibi, the State may have been vulnerable to a directed verdict.

The State's efforts in this case differ substantially from what law enforcement tried to do in Brewer. In Brewer, the police claimed explicitly "that many witnesses observed [Brewer] shoot both victims." Brewer 411 S.C. at 405, 768 S.E.2d at 658. The Court noted "the only effect these statements had on Brewer was to make him repeatedly deny shooting anyone. The meaning of these denials is obvious and require no explanatory context." Id. at 407, 768 S.E.2d at 659. The police also explicitly told Brewer he needed to "prove himself innocent". Id. at 405, 768 S.E.2d at 658. Here, McCauley never asked Appellant to prove himself innocent; he merely confronted Appellant with evidence that did not match Appellant's version of events.

Furthermore, Appellant's conversation with McCauley was at all times voluntary. Appellant does eventually request an attorney during a portion of the interview that Appellant and the State both agreed to redact. (Court's Exhibit 1, p.7, Tr. 23). However, each of the statements that Appellant is contesting occurred before Appellant asks for an attorney. In Brewer, the statements were played for the jury even after Brewer asked for an attorney. Id.

Additionally, the statements in Brewer were found to be hearsay by the Supreme Court. Here, the statements were not hearsay because they were not offered for the truth of the matter asserted. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001), *cert.*

dismissed 353 S.C. 538, 579 S.E.2d 318. “Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted.” State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). The State presented evidence through other witnesses proving Appellant’s fingerprints were in Collins’ house and Appellant pawned similar property missing from the house. Detective McCauley’s statements were played for the jury to provide context to Appellant’s responses. The State acknowledged this much at trial when responding to Appellant’s hearsay objection. (Tr. 26). Furthermore, unlike Brewer where Brewer specifically alleged that the State used a back door to admit hearsay evidence, Appellant does not even allege that the statements at issue here are hearsay.

Improper burden shifting has typically been found in cases where the trial judge has made an erroneous instruction to the jury. Our Supreme Court found in State v. Attardo, 263 S.C. 546, 549, 211 S.E.2d 868, 869 (1975), that a trial judge improperly shifted the burden to a defendant where the court instructed the jury: “But, normally where a person is in possession of contraband, there is a factual presumption that he knows what it is, and the burden is then on him to prove that he did not have actual knowledge.” Id. 263 S.C. at 549, 211 S.E.2d at 869. Additionally, our Supreme Court has cautioned trial courts against using any kind of language in a jury charge which creates a mandatory presumption of guilt against defendants. See Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). The United States Supreme Court has previously stated “the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” Sandstrom v. Montana, 442 U.S. 510, 520 (1979) (quoting In re Winship, 397 U.S. 358, 364 (1970)). Both State and Federal appellate courts have made it quite clear: neither the State nor

the trial judge can shift the burden of proof to Appellant in any way during closing remarks. However, in the current case, neither the State nor the trial judge shifted the burden to Appellant.

The trial judge gave clear instructions to the jury which did not contain any language shifting the burden of proof to Appellant. The trial judge explained to the jury in his opening and closing remarks that Appellant was presumed innocent and the State alone had the burden of proof. (Tr. 90, 98). Specifically in closing the trial judge said:

I told you at the beginning of the trial that the defendant has pled not guilty to those indictments. And under our system of justice, that plea puts the burden upon the State to prove the defendant guilty. A person who is charged with a crime in South Carolina is never required to prove himself innocent. It's an important rule of law that a defendant in a criminal case, no matter how serious the crime might be, is always presumed to be innocent of that crime until such time as guilt has been proven to you, the jury, that satisfies you of the defendant's guilt by proof beyond a reasonable doubt.

(Tr. 278). Here, it was clear from the trial judge's instructions that the State bore all of the burden of proof and Appellant did not bear any.

The State also made it clear to the jury in their opening statement and their closing arguments that the State bore the entire burden. (Tr. 105, 269). The Solicitor explained to the jury in closing: "the State, prosecution, has to prove each element of every crime beyond a reasonable doubt." (Tr. 269). Furthermore, in the State's closing argument, they did not tell the jury the Appellant had to explain anything regarding his whereabouts on the day of the burglary. (Tr. 263-69). The State merely highlighted that the statements voluntarily offered by Appellant did not make sense. (Tr. 266-67).

It is certainly proper for the State to point out discrepancies in a voluntary statement by Appellant. Drawing the jury's attention to discrepancies in Appellant's story is not the same thing as shifting the burden to Appellant. This is particularly true, when the State embraces its burden to prove guilt beyond a reasonable doubt, and the trial judge makes it abundantly clear

the State alone bears the burden of proof. Even if the trial judge had redacted the portions of the interview requested by Appellant, the jury still would have heard references made to Appellant's fingerprints by Appellant himself during his interview. (Court's Exhibit 1, p. 2, 3, 5, State's Exhibit #41). Appellant made approximately six references to his fingerprints being inside Collins' home that he did not move to redact. (Court's Exhibit 1, p. 2, 3, 5, State's Exhibit #41). Therefore, it is illogical for Appellant to argue that references made by the State to his fingerprints being inside Collins' home shifted the burden of proof, but his own references do not. Because neither the State nor the trial judge shifted the burden of proof to Appellant, Appellant's convictions and sentences should be affirmed.

B. No Opinion Evidence was Given

Appellant next contends the trial judge erred in failing to redact McCauley's statements of opinion from the Appellant's interview. Appellant misapprehends the nature of McCauley's questions and statements. McCauley does not offer his opinion as to whether Appellant's finger print is inside Collins' house or whether Appellant actually pawned the stolen rifle and weed eater. McCauley merely confronts Appellant with information obtained during the investigation which contrasts with Appellant's version of events. Detective McCauley never offers his opinion about the evidence or says whether he thinks it is accurate. Detective McCauley's references to the credibility of SLED and the quality of the finger print evidence were stricken by the trial judge. (Tr. 27-28). In fact, the trial judge specifically remarked pretrial: "my purpose is to try to eliminate any reference to SLED or the truthfulness of their work or trying to bolster their credibility." (Tr. 28, lines 11-13). Furthermore in direct testimony and cross examination, McCauley never offers an opinion about the finger print evidence or the pawn shop evidence (Tr.

235-44). The only time the jury heard McCauley commenting on any evidence was when he confronted Appellant with inconsistencies in Appellant's voluntary statement.

As an additional matter, McCauley was within his discretion as a law enforcement officer to use a variety of tactics in his interview with Appellant. The Supreme Court of South Carolina and the Supreme Court of the United States have both recognized the propriety of law enforcement techniques "including misrepresenting the existence and strength of the evidence against an accused." State v. Brewer, 411 S.C. at 406, 768 S.E.2d at 659 (2015). See State v. Von Dohlen, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996) and Frazier v. Cupp, 394 U.S. 731 (1969). Therefore, whether Appellant's fingerprint was found in Collins' house and what McCauley chose to tell Appellant about that discovery is immaterial. McCauley was free to misrepresent the evidence against Appellant in his interrogation if he chose to do so. McCauley could have told Appellant that his DNA was found inside the home as well to gauge Appellant's reaction to that evidence. The fact that Appellant's fingerprint was actually found in Collins' house and the jury had already heard evidence about this discovery from two expert witnesses further reinforces the point that McCauley did not give an improper opinion. Because the State did not introduce an improper opinion through Appellant's interview, Appellant's convictions and sentences should be affirmed.

C. Harmless Error and Cumulative Evidence

Appellant claims the trial judge erred by admitting portions of Appellant's interview with McCauley because they contained improper opinion evidence and shifted the burden to Appellant. However, even if the trial judge erred by admitting these portions of the interview, the error was a harmless one because of the overwhelming evidence against Appellant, and because the contested statements were cumulative to evidence already presented at trial.

“Whether an error is harmless depends on the circumstances of the particular case.” State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). “Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.” Thompson, 352 S.C. at 562, 575 S.E.2d at 83. “Error is harmless when it could not reasonably have affected the result of the trial.” Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E. 2d 888 (1971)). The admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). See State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978).

Here the evidence of Appellant’s guilt was overwhelming. Any error committed by the trial judge in the admission of McCauley’s statements is harmless or cumulative to other evidence presented. At trial the State produced evidence from two expert witnesses from SLED regarding the presence of Defendant’s fingerprint inside the victim’s house. (Tr. 186, 207-17). Collins testified he did not know Appellant and there was no reason for Appellant to be in his house. (Tr. 136-137). Appellant admitted that he did not know Collins and claimed he was never at his house. (Court’s exhibit 1, p. 2-3). Appellant also did not move to redact approximately six of his own references to his fingerprints being inside Collins’ home. (Court’s Exhibit 1, p. 2, 3, 5, State’s Exhibit #41). The State presented testimony from employees of two different pawn shops testifying that items matching the description of those stolen were pawned by Appellant on the day of the burglary. (Tr. 226-27, 232-33, 237). Additionally, Sarah Myers of Alternative Staffing testified Appellant did not begin working for the company until September 28, 2015. (Tr. 250).

This contrasted with Appellant's statement that he was working on the day of the burglary. (Court's Exhibit 1 p. 1).

When considering the record as a whole, any prejudice to Appellant of the jury hearing McCauley ask Appellant why his fingerprints were in the victim's house pales in comparison to the evidence against Appellant. There was abundant evidence in the record for a reasonable jury to conclude Appellant was guilty. The State submits the jury was convinced of Appellant's guilt by the presence of Appellant's fingerprint in an area that he should not have been, the existence of two pawn shop tickets showing that Appellant pawned a rifle and a weed eater on the day of the burglary, and testimony of Appellant's employer that Appellant was not working on the day of the burglary. Therefore, any error resulting from McCauley's reference to Appellant's fingerprints being inside Collins' house is harmless. Furthermore, any reference by McCauley to evidence against Appellant is merely cumulative to evidence the jury already heard. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.


Respectfully submitted,

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January 10, 2018

STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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THE STATE,

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v.

MACK SEAL WASHINGTON,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This tenth day of January, 2018.



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ALAN WILSON
ATTORNEY GENERAL

January 10, 2018

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RECEIVED
JAN 10 2018
SC Court of Appeals

RE: State v. Mack Seal Washington
Appellate Case No. 2017-001111

Dear Ms. Hackett:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Scott Matthews
Assistant Attorney General
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JSM/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services