VOL III OF IV

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

FRANKIE LEE MCGEE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002146

APPENDIX

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DIRECT EXAMINATION

BY SOLICITOR CAMPBELL:

Q Ms. Thomas, do you live here in the Columbia area?

A Yes.

Q And how long have you been living here?

A About 18 years.

Q And prior to that, where did you live, ma'am?

A In Elgin.

Q In Elgin?

A Yes.

Q Is that over near Camden?

A Yes.

Q Do you have a brother?

A Yes.

Q And what's your brother's name?

A Frankie.

Q And is Frankie here in the courtroom?

A Yes.

Q Can you point him out for the jury?

A Sitting at the table over there.

Q What's he wearing?

A A brown shirt.

SOLICITOR CAMPBELL: Your Honor, may the record reflect she's identified the defendant?

THE COURT: It does.

Q Is Frankie older or younger than you?
A Older.
Q And I want to -- where are you employed, ma'am?
A City of Columbia Police Department.
Q And what do you do there?
A Police officer.
Q How long have you been a police officer with the City of Columbia?
A Almost 21 years.
Q I want to turn your attention back to May of 2009.
Do you recall watching the news one night and seeing a video?
A Yes.
Q And tell this jury what video you saw, and, I'm sorry, this is hard.
A It was a burglary at a business and I seen a truck run through a fence.
Q And you actually saw that on a newscast?
A Yes.
Q And when you saw the video -- is that the video that was shown to earlier, here earlier today?
A Yes.
Q And when you saw that video back then in May of 2009, what was your reaction?
A I recognized the person as my brother and I was

shocked.
Q As your brother?
A Yes.
Q And that would be your brother Frankie?
A Yes.
Q And I believe you said you were shocked?
A Yes.
Q Based on your observations of the video on TV in May of 2009, what, if anything, did you do?
A I called Crime Stoppers.
Q And what is Crime Stoppers, ma'am?
A It's a, an anonymous tip line that reports whatever you're reporting to a local police department.
Q And at that time you knew it had to do with a business, but you had no idea it had to do anything with the Reverend?
A Right.
Q And did you know Reverend Eichelberger?
A No.
Q And turning your attention forward till March of 2010, after you reported what you'd seen to Crime Stoppers, did you receive a phone call from Frankie's wife?
A Yes.
Q And what is her name?
A Sophia.
Q And you can't say what she said to you, but as a result

of that phone call, did you make contact with other police officers in your department?

A Yes.

Q And who did you make contact with?

A Investigator Reece.

Q Investigator Reece who's seated back here?

A Yes.

Q And at that point did you have an opportunity to review the video again?

A Not at that point. Later on.

Q Later on. I'm sorry.

And what information did you relate to Investigator Reece about what you had seen on the video?

A Just that I have recognized the person as my brother.

Q And how do you recognize him?

You've known him all your life?

A Yes.

MS. PRINGLE: Objection. Leading.

THE COURT: All right. Don't lead the witness.

Q How long have you known him?

A All my live.

Q And how did you recognize him, ma'am?

A His build, the walk.

Q Is there any doubt that was your brother?

A No.

Q And prior to coming to trial here today, did you review the video again?
A Yes.
Q And is there any doubt that's your brother?
A No.
Q Thank you, Ms. Thomas.
THE COURT: Defense.
MS. PRINGLE: May it please the Court.

CROSS-EXAMINATION

BY MS. PRINGLE:

Q Good afternoon, Ms. Thomas.
A Good afternoon.
Q And you testified that, of course, being the younger sister, you've known Frankie your entire life, right?
A Yes.
Q And, so, you know that Frankie is, is married to Sophia?
A Yes.
Q And he's been married to her since about 1986?
A I don't know the year.
Q They're high school sweethearts?
A Yes.
Q You know that.
And they, up until this, were living together?
A Yes.

Q And you know Frankie to have gold teeth in his mouth, right?
A Yes.
Q Has crowns that where the gold outlines the front two teeth?
A Yes.
Q And is that apparent to anyone?
You know, if, if you see him, do you notice that?
A Yes.
Q And you know also that he has a fairly large birthmark on the top right side of his head?
A I didn't know it was a birth mark.
Q But you know that it's there?
A It's -- go ahead. I'm sorry.
Q But you do know that there's a very obvious spot on the top forehead on the right, correct?
A Yes.
Q And you know him to keep his hair bald like it is today?
A Cut low and bald, yes.
Q And you know he's not six feet or anywhere close to six feet tall or 6'1"?
A No, he's not.
Q He's a good bit shorter than that, about 5'8"?
A Yes.

Q With respect to this video, of course, your only knowledge of this is viewing that video, correct?
A Yes.
Q You were not there?
You didn't personally observe anything?
A No.
Q Crime Stoppers exists to assist in solving crimes obviously, right?
A Yes.
Q And being a police officer, you're somewhat familiar with Crime Stoppers independent of your tip to them in this instance, right?
A Yes.
Q And, so, you know that Crime Stoppers would keep records of tips that are called in, correct?
A I would imagine they do. I don't work with them like that.
Q Well, the point of Crime Stoppers would be to get the tip and then follow up on it, right?
A Yeah.
Q So, they would need to create some kind of a record to follow up on, right?
A Yes.
Q Being a, a police officer, you've been employed for 21 years, is that what you said?

A Yes.
Q Have you been with Columbia Police Department that entire time?
A Yes.
Q All 20 -- your entire career you worked for Columbia Police Department?
A Yes.
Q That's the same police department that Investigator Reece and Investigator Thomas work for?
A Yes.
Q Right?
A Yes.
Q And you are -- are you a uniform officer or are you an investigator like them, what---
A Uniform officer.
Q You're in uniform.
Being a police officer and having 21 years of experience, you certainly know how to report a crime, right?
A Yes.
Q You take reports of crimes from people all the time, don't you?
A Right.
Q And you would know how to directly report a burglary to the Kershaw Police Department, wouldn't you?
A Yes.

Q You are familiar with Kershaw Police Department cause you were born and raised over there in Kershaw County, right?
A No, ma'am, I'm not familiar with them. I know that they have a Sheriff's Department over there.
Q You certainly could find your way to someone there and, and could of reported this to them?
A I could.
Q Directly?
A Yes.
Q But you didn't, did you?
A No, because I called Crime Stoppers.
Q And you didn't have anybody else call and report it for you?
A No, I didn't.
Q And, to your knowledge, Frankie was never charged with this?
A I don't know what happened with it.
Q Didn't -- never followed up on it, did you?
A No.
Q And after this took place, you actually saw him and his wife?
Between May and the summer months, you would see Frankie after this happened, right?
A Occasionally.

Q But you would -- you did see him after this happened---
A Yes.
Q ---before he gets arrested for this crime, right?
A Yes.
Q And as far as you know he's never been arrested or charged with burglary relating to that incident at all?
A I don't know.
Q Did you see any video or still or photographs other than what was shown in this courtroom?
A No.
Q You didn't -- the only video that you saw that you based this on is the same one that this jury has seen?
A Yes.
Q Sorry. Just a couple more.

And you said on direct that you based that opinion, your opinion on the build of the person, right?
A Yes.
Q And the walk?
A Yes.
Q Okay. Thank you.

No further questions.

SOLICITOR CAMPBELL: Just a couple.

REDIRECT EXAMINATION

BY SOLICITOR CAMPBELL:

Q Do you know your brother?

A Yes.
Q Who is that on the video?
MS. PRINGLE: Objection. Asked and answered.
THE COURT: Overruled.
Q Who is that on the video, ma'am?
A My brother.
Q Frankie?
A Yes.
Q Who's here in the courtroom?
A Yes.
Q Thank you, ma'am.
THE COURT: Anything further?
MS. PRINGLE: No, no further questions.
THE COURT: You may step down.
SOLICITOR CAMPBELL: May it please the Court.
The State calls Sergeant Thomas.

ARTHUR THOMAS, after being duly sworn, testified as follows:

THE CLERK: Please have a seat and state your full name for the record.
THE WITNESS: Arthur L. Thomas.

DIRECT EXAMINATION

BY SOLICITOR CAMPBELL:

Q Sergeant, where are you employed?
A The City of Columbia Police Department.

Q What do you do there, sir?
A I supervise the special victims unit.
Q What do your duties include as supervisor of the special victims unit?
A To respond to crimes in that particular category, missing persons, sexual assaults, death, victim's death, elderly abuse death, child abuse, things of that nature.
Q Back in May through the Spring of 2010, May of 2009 and the Spring of 2010, were you an investigator in the major crime unit?
A Yes, I was.
Q And what do your duties include in that capacity?
A In that capacity we answer to all violent crimes in the area, robbery, homicide, high assaults, assaults to anyone, things of that.
Q And did you become involved in the investigation involving Reverend Eichelberger?
A Yes, I did.
Q And actually on the day that it occurred, back on May the 3rd into the early morning hours of May the 4th, did you actually respond to the scene that day?
A Yes, I did.
Q And who were you responding with, sir?
A At the time I responded with the DCAP Unit. I believe Investigator Pegram arrived on the scene first. Then myself

and Investigator Reece arrived on the scene.
Q Investigator Reece is back here?
A Correct.
Q In the blue tie?
A That's correct.
Q And when y'all responded to the scene, were you attempting to get information?
A Yes.
Q And did you become aware that there was a potential witness to at least someone running from the assault?
A Yes, I do.
Q And who was that?
Do you remember?
A I believe it was a David Williams.
Q The witness?
A Oh, the witness. I'm sorry. No. The witness was a Ms. Ashford I believe.
Q Ms. Ashford?
A Uh-huh. (Affirmative).
Q And we're certain -- and did you have actual contact with Ms. Ashford that night or did other investigators have contact with her?
A I believe Investigator Pegram was dealing with Ms. Ashford at the time. We were trying to actually canvas the area and check the scene and so forth when we arrived.

Q And while you were there at the scene, did you become aware that a general description had been put out over the radio?
A Yes, I did.
Q And that someone had been detained in response to that?
A That's correct.
Q And who was that, sir?
A That was David Williams.
Q Thank you.
That evening did you make contact with David Williams, you and Investigator Reece?
A Oh, yes. Myself and my partner made contact with Mr. Williams.
Q And was he detained at headquarters and actually interviewed?
A Yes, he agreed to come to headquarters to speak in reference to why he was apprehended at the time and he was cooperative.
Q And that evening, did y'all interview him?
A Yes, we did.
Q Did you also request certain items be taken from him?
A Yes, we did.
Q Was he cooperative?
A Absolutely.
Q And what, what were those items that you requested of

him?
A One was -- he had on a pair of white tennis shoes. We felt that with the crime scene as being as bloody as it was there should of been some type of blood residue or what have you on the shoes. We also asked if we could do a Buccal swab of his mouth and he gave a DNA sample.
Q He gave you a DNA sample?
A Correct.
Q And he was cooperative and did that for you?
A Completely.
Q And I want to show you what's been marked as State's Exhibit No. 115, are these the shoes you actually took from him that night?
A Yes, they are.
Q And, again, why would those of been significant do, for the DNA testing?
A There was an extensive amount of blood on the floor after Eichelberger was struck. Approximately two liters was testified to. We believe that if he was on the scene and, and wearing any type of shoes that there should of been some blood residue or something on his person or on his shoes.
Q And also that night did you also do a visible inspection of him to see if there's any possible evidence you needed to swab or get a technician to come in and swab?
A Yes, we did.

Q Was there any evidence that he had been involved in any type of assault?
A No, not, not on his person nor on the clothing he was wearing at the time.
Q I want to turn your attention to May the 6th, approximately a day and a half later.
Did you make contact with Ms. Ashford yourself at that point?
A Yes, myself and Investigator Reece did.
Q And did y'all conduct a much more extensive interview than the one initially done?
A Yes, we did. She gave a brief statement the night of the incident. She was pretty hysterical and so forth. Investigator Reece and myself decided that we wanted to do a more detailed interview with her giving her some time to rest. We decided also to record the interview so that we could get explicit, explicit details.
Q Without going into all she said to you, was she able to give you some physical description as well as some details?
A She was.
Q And did you ask her, during the course of that interview, specifically about any identification on David Williams?
A Yes, we went back and, and questioned her in reference to an identification of Mr. Williams, and during her

recorded interview she advised that that was not the guy, and that she had told officers that that was not the guy.

Q That day did you also make arrangements for her to meet with a sketch artiest from SLED?

A We did.

Q And what was the purpose of that, sir?

A So that she could speak with that agent and give us a composite of what she believed the subject that she saw on the porch to look like and the subject that she saw walking down Farrow Road resembled and she was willing to do so and did so.

Q And did she remain -- in the next ten months of your investigation, did she remain cooperative?

A Very much so.

Q Based on the information you were able to develop, were y'all able to eliminate David Williams as the person who did this?

A Yes, we were.

Q Over the course of the next several months, and I'm not gonna go into specifics, but did y'all receive a number, as you would in any, in any murder case, of tips?

A Yes, we did.

Q Explain that to the jury how that happens.

A During particularly a high profile type of case, a popular reverend in the community, you might receive a

number of Crime Stoppers tips, which we did. You also will receive a number of tips from just concerned people in the community that really wanted something done. The community itself really gathered and they tried very hard to assist us, which sometimes complicate it, but we got a number of subjects' name to look into and myself, Investigator Reece, and our team did so. Every person that came up we followed up on and we cleared.

Q And, in fact, in your -- were you aware that in early June of 2009 were certain items of evidence submitted for testing at the Richland County Sheriff's Department?

A Yes, they were.

Q And that was for DNA testing?

A That's correct.

Q And were there some known samples that you sent with them to be prepared to include or exclude certain people?

A Yes, there were.

Q And who were those samples from?

Do you remember?

A I can't recall all parties off the top. I know Mr. Williams sample was there.

Q I show you State's Exhibit No. 106, Mr. Williams.

A That's correct.

Q And I show you State's Exhibit No. 11. These are also of Michael Johnson.

A That's correct.
Q And at this point had you even heard the name Frankie McGee?
A Not at that juncture when, the samples that we entered, his name had not come up at all, and we were quite shocked that we could not identify anyone at the moment.
Q And, however, any persons of interest that you had their DNA, you submitted it for comparison as well --
A Yes.
Q -- to be included or excluded?
A Yes.
Q I want to turn your attention to June the 15th.
Did you get the results of items that had been submitted?
A I believe we did get---
Q The DNA results.
A ---some DNA results, that's correct.
Q On the initial testing?
A Correct.
Q And on Item Number 115, the tennis shoes, was there any blood or any other evidence found on those?
A There was no blood. No evidence.
Q But specifically with Item No. 107, which is the winch bar --.
A Yes, there was blood evidence on the winch war.

Q And specifically a pair of socks that was submitted?
A There was also blood evidence and DNA evidence on the socks themselves.
Q And based on the blood that was tested initially, did it -- who did it all came back to?
A All the blood evidence came back to Reverend Eichelberger on the weapon itself and on the socks.
Q During the course of that summer did you also become aware, at the end of July, that the Reverend's status had changed?
A Yes, the Reverend had passed after several months of fighting his injury.
Q And initially this was classified as an assault case?
A Yes, sir.
Q With a suspect being David Williams?
A Yes.
Q It was later upgraded to what kind of case?
A It was upgraded to a homicide.
Q As tips continued to come it, is it unusual for you to either, to include or exclude someone to include them into a photo line-up to be shown to certain witnesses?
A That's correct.
Q During the course of your investigation too, did you become aware that there was certain information that one of the neighbors had that was, might be significant in your

case?
A Yes.
Q And what was his name?
A I believe it was Mr. Harper.
Q Mr. Harp?
A Harp. Mr. Harp.
Q And specifically were you trying to show him certain line-ups?
A Yes, he was certain that he could identify the subject if he were to see him in a line-up.
SOLICITOR CAMPBELL: Beg the Court's indulgence.
A So he was one of our key targets to take line-ups to along with Ms. Ashford.
Q And Mr. Harp had given y'all information right from the get go about what he had seen that day and that he could identify someone?
A Yes, and he was quite definite in the information he provided us.
Q Moving to August the 25th, did you show line-ups I believe to Ms. Ashford and Mr. Harp, or a certain line-up, not line-ups?
A Yes.
Q And are those your notes you're referring to just to make sure you get the dates right?
A August 25th. Okay.

Q When it was shown to Ms. Ashford, was she able to identify anyone from that line-up, State's Exhibit 3?

A On this line-up she did not.

MR. STRICKLER: Your Honor, could, could we approach please?

THE COURT: Yes, sir.

(WHEREUPON, a bench conference was held out of the hearing of the jury at this time.)

THE COURT: Ladies and gentlemen, please go to the jury room.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: Yes, sir, Mr. Strickler.

MR. STRICKLER: Thank you, sir.

Your Honor, my objection was raised because my understanding is that, that the investigator was referring to some notes. We obviously have had a, a discovery process in this case. To my knowledge we have never received any notes from Mr. Thomas. We've received notes that I have before me of Mr. Reece. So, my understanding is he's referring to those notes.

First of all, there's been, prior to him referring to his notes, there's been no basis laid by the State with any need on his part to refresh his recollection with these previously recorded notes. Secondly, he's refreshing his

recollection, he's refreshing his recollection by the recollection of another individual is my understanding.

All right. Maybe Mr. Thomas can correct me and inform me that these are indeed his notes, not Mr. Reece's, and---

THE COURT: He can't correct you.

Do you want to question him?

MR. STRICKLER: Well, my only concern, Your Honor, is I don't want to be advancing a position for which there's no factual basis.

THE COURT: I understand.

MR. STRICKLER: Okay. I happen to have a good faith belief that they are Mr. Reece's notes, but, Your Honor, I'm wrong as often as I'm right. So, if I could, just so -- I mean if they're his notes, I'm wasting the Court's time, and I'll sit down.

WITNESS: Your Honor, if he has a question I can answer it.

THE COURT: No, it's an argument before the Court.

WITNESS: Yes, sir.

THE COURT: Yes, sir.

MR. STRICKLER: It's a---

THE COURT: I wish the solicitor would respond.

WITNESS: Yes, sir.

MR. STRICKLER: What I'm wanting to say, Your Honor, is the, is the document I have has Investigator Reece's name on

the bottom of the first page, and that's my understanding as to whose notes they are. So, he is -- there 's been no basis to wait, for necessity to refresh his recollection, and he's refreshing his recollection, I would contend, based on the recorded recollections of another individual. So, he's not refreshing his recollection. He's acting as a conduit for the recollection of another person. So, that would be my objection.

THE COURT: All right. Ms. Campbell.

SOLICITOR CAMPBELL: May it please the Court, Your Honor.

It's my understanding from these, puts the two acting together during the course of this, and he's referred to in all the notes. In addition to that, only one of the officers usually makes the notes. In this case it's Investigator Reece. However, he was present, and has used these notes to refresh his memory pursuant to Rule 803 Subsection 5, a recorded recollection.

Your Honor, I think it's all in -- and I'll be glad to lay the foundation. These accurately reflect what he participated in and he's referring to I believe for dates purposes, and they accurately reflect what his role was in the actual investigation.

There's nothing that I know of and I know of no case law that prohibits an investigator from referring to,

especially one of the case officers, for which he is, but from referring to other investigators notes in the entire case file. We've had that happen all the time where investigators come in and testify not only what they did, what other people did based on the investigative notes. I'm not aware of any rule that prohibits this in any manner.

THE COURT: Mr. Strickler.

MR. STRICKLER: I'm sorry. If I could please?

And, of course, Ms. Campbell moves right to the point, 803(5) is recorded recollection, and my initial basis to my objection is memorandum or records concerning the manner about which a witness once has knowledge, but has insufficient recollection that enables the witness to testify. That's the foundational element of it, which I submit the State does not fulfill.

I mean, from, from my standpoint, whether or not someone has an individual independent recollection of the events that they're testifying about is significant. If we establish that it doesn't, and he's reading from the record, then, then he can go ahead and refresh his recollection. But this jury needs to know that he's refreshed his recollection and he's not relying on his own independent memory.

THE COURT: All right. Any, anything else?

MR. STRICKLER: No, sir, nothing further.

THE COURT: Well, the record's made. I don't see any basis for me to make any ruling based on what has been said. If there's an objection to the witness' testimony, then the objection needs to be made to any particular question. I'll rule on it and your objection is he shouldn't testify, I'll rule on that. I'm not sure, exactly sure what your objection is other than you don't like the manner in which the State is proceeding with the examination, and---

MR. STRICKLER: Yes, sir.

THE COURT: Go ahead.

MR. STRICKLER: I'm sorry. Again, Your Honor, initially as to, as to this, Rule 803, is, is refreshing his recollection under 803(5). I don't believe foundational requirements have been made to enable him to refresh his recollection.

THE COURT: And you base the fact that he's refreshing his recollection on, on the fact that you saw him look at some notes?

MR. STRICKLER: I believe there was actually a question from, from the solicitor that he's referring to notes. I thought he was, but then the question was, the question was---

THE COURT: Well, I don't know. Either -- sometimes the witness is talking and then the solicitor says something, and I don't know whether it's a question or

comment or in the midst of an answer there's a comment made. You know, it's kind of hard for me to track whether there's a question or whether the witness is, the witness is responding to the question or a comment.

MR. STRICKLER: Yes, sir, my memory of the testimony was that she asked whether he was, he was looking at notes---

THE COURT: All right.

MR. STRICKLER: ---and at that point in time is when I objected.

THE COURT: Well, I'll let -- you can ask him a question if you'd like.

MR. STRICKLER: Thank you, sir.

May it please the Court?

THE COURT: Question or two.

MR. STRICKLER: Yes, sir.

THE COURT: Not much more than that.

MR. STRICKLER: I understand.

CROSS-EXAMINATION

BY MR. STRICKLER:

Q Mr. Thomas, just strictly about what we're talking about, do you have some notes up there with you?

A Yes, counselor, I do.

Q Okay. And those would be the case notes kept by Mr. Reece in this particular case?

A Yes, sir, they are, for both of us.
Q I'm sorry?
A For both of us.
Q For both of you?
A Right.
Q But, but under his name, kept by him, correct?
A Correct.
Q Okay.
A But it's both our notes.
Q Yes, sir.
And you have made reference to those already during your testimony, haven't you?
A I have looked at them, yes.
Q Okay. Looked at them in response to a question from, from the solicitor?
A Tracking of a date in question.
Q Right.
A Yes, sir.
Q All right. I think specifically the question was about August 25th and whether or not, whether or not a, a line-up was shown or something like that at that point in time?
A That was the reference, counselor.
Q You were checking the date on that and you were referring to those notes in checking that date, correct?
A That's the reference, yes, sir.

Q All right. Thank you.

THE COURT: And I don't think any witness is required to have an encyclopedic memory of everything that they testify to, and I believe in making further notes if they would like to.

All right. Let's take a couple of minutes.

MR. STRICKLER: Thank you, sir.

(WHEREUPON, a short recess was taken at this time.)

THE COURT: Bring them on.

(WHEREUPON, the following takes place within the presence of the jury.)

BAILIFF: The jury is seated, Your Honor.

THE COURT: All right. You may proceed.

SOLICITOR CAMPBELL: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY SOLICITOR CAMPBELL:

Q We were talking about State's Exhibit No. 3, which is a photo line-up that was shown to Mr. Harp and I believe Ms. Ashford.

A Yes, ma'am.

Q I believe the testimony was on August the 25th?

A That's correct. No one picked anybody out of this line-up.

Q Did Mr. Harp indicate specifically that it wasn't a person he knew in the line-up?

A Yes, he did. He, he recognized one.
Q He recognized one of the individuals?
A Correct.
Q And what did he say about that?
A He recognized that individual from the area and advised that it definitely wasn't that individual.
Q Was not that individual?
A Right, but if he saw the individual he would be able to identify him in the line-up.
Q Over the next month into September, did y'all continue to follow-up on leads and possible tips in the case?
A We did.
Q I believe on September 8th you were given that with the initial suspect in the case, David Williams?
A On the 8th, yes.
Q During the course of your investigation, was there anything significant about State's Exhibit No. 107 that, that was leading you towards anything in the case?
This is the winch bar.
A With that winch bar, we were trying to identify, one, exactly what it was, and what it was used for and---
Q And did it become associated with a certain profession as far as the information you were able to gather?
A Yeah, the information that we gathered from the Internet and people that we spoke up with at truck stops is

that it was utilized to tie down cargo, what have you, on a flat bad that used straps, and it was used to winch those straps tight enough to secure the cargo.

Q I want to turn your attention to September 30th of 2009.

Did you receive some additional information for which made you create an additional photo line-up in this case?

A Hold on one moment.

(Pause.)

A September 30th?

Q 29th or 30th.

A All right. Yeah, we've received information about a Stephon Miller.

Q Stephon Miller?

A Yes.

Q And when you received information, in order to include or exclude a person, was the line-up a typical way to do that?

A Yes.

Q And I show you what's been marked as State Exhibit No. 119.

Do you recognize that?

A Yes, that's, that's the line-up that we utilized and placed Mr. Miller in it.

Q And who did you show that line-up to that date on the

30th?
A On the 30th, this one was showing then to Ms. Ashford.
Q And was she able to identify anyone?
A She indicated two subjects advising that, that they look similar to the subject, and that was Number 3 and Number 5.
Q Moving on to October the 19th, did you, did you become aware, during the course of your investigation, that Officer Duckett had passed someone going to the crime scene that night?
A Yes, it was brought to our attention that Officer Duckett did observe a subject heading toward the Exxon on Farrow Road while going to the call.
Q And I show you what's been marked as State's Exhibit No. 117, was he able to positively identify anyone?
A He too was not able to positively identify anyone. He made notation of two subjects as well, Number 5 and Number 4.
Q Investigator, in your experience, now that you're a sergeant, is that unusual given the conditions of that night?
A No, it's, it's not unusual at all. Both parties saw this individual briefly while at different state of mind. And, so, it's not uncommon for persons to have that. They're certain features that each person look for, and they

identify with the features that they recall.
Q Did y'all continue your investigation through the end of the year into January of 2010?
A Yes, ma'am, we did.
Q Based on additional information at this point you still just have the results showing the victim's blood on these two items?
A That is correct.
Q And at this point you continue your investigation, is that correct?
A Correct.
Q And typically in a case such as this, what type of information are y'all getting?
A Again, just Crime Stoppers tips and then call in from concerned citizens that believe that an individual may or may not have been a part of this particular crime. So, we had a number, a number of names and so forth come in.
Q Okay. I want to show you State's Exhibits No. 120, 122, and 121.
Do you recognize those three pieces of paper?
A Yes.
Q And what's the dates indicated on those?
A The dates indicated here was January 22nd, 2010, on this one, and this one is January 22nd, 2010, and this is a single photo. It doesn't have the date represented at this

point.
Q And were those photos, again, shown to the eye witness---
A Yes.
Q ---Ms. Ashford?
A Yes, they were.
Q And, again, was she able to make any positive identification?
A She did not positively identify anyone. She, again, selected individuals that had similar features to the guy that she recalled on the porch and on Farrow Road, the round head and so forth.
Q And she wasn't able to positively identify anyone?
A No, ma'am, she was not.
Q Towards the end of February, did y'all have a meeting, you and Investigator Reece, and I believe Investigator Barron from the Sheriff's Department, to discuss the evidence in this case?
A Yes, there, there was a heavy concern about looking back at some of the DNA evidence. There was some talk about possibly some new technology that was developed by Richland County's DNA Department. We were excited about what we heard. Investigator Reece decided that we should revisit the DNA lab and explicitly speak to him about looking at the bar evidence and the sock evidence in this case.

Q And those two items of evidence were significant to you?
A Yes.
Q And at that point you already knew they had blood on them?
A Correct.
Q And whose blood was that?
A Reverend Eichelberger's.
Q Were those items of evidence resubmitted, specifically the socks, in this case?
A Yes, they were.
Q And that was done I believe at the end of February?
A I believe you're correct on that. February 26th I believe.
Q And then turning your attention to March the 3rd of 2010, did you get some information from the Sheriff's Department?
A Yes, on the 3rd we did receive some information or -- give me a moment.
Q March the 11th.
A Yes. On, on the 11th is when Barron had notified us that he had a match.
Q And what information were you given as far as the suspect in this case?
A At the time that Mr. Barron contacted us, he provided

us with a name of Frankie Lee McGee and a date of birth of [redacted].

Q And did he indicate which items of evidence had the actual DNA evidence on it?

A Yes, he did. He indicated that these socks, which had Reverend Eichelberger's blood on the exterior, had Mr. McGee's DNA on the interior.

Q Was that significant to you?

A Very much so.

Q And how so, sir?

Explain that.

A It, for the first time, allowed us to have a positive identification of a viable suspect. We went through about 25, 30 guys, and at this juncture we had a viable factual evidence that could lead us to someone, which was Mr. Frankie McGee.

Q And this case was reported in the press, was it not?

A Yes, it was.

Q Had you ever released any evidence about the socks?

A No, there was no broadcast -- certain things in a homicide case you do not put out to the public. We did acknowledge the bar at a certain point of the investigation, but we never acknowledged anything or gave up any information about the socks themselves.

Q And the finding of the socks, socks in proximity to the

actual murder weapon, in proximity to the Reverend's house, that was significant in this case?

A Very significant.

Q And the fact that the Reverend's blood was also on those socks, what did that mean to you?

A That meant that Mr. McGee was in proximity of the Reverend when he was struck, and that the blood evidence splashed or splattered and was on the socks as well.

Q As a result of the information you received from Investigator Barron at the Sheriff's Department, did y'all develop a photo line-up?

A Yes, we did.

Q And did you employ other investigators in your office to help you, assist you in the follow-up investigation at that point?

A Yes, we did.

Q And did they actually go and meet with the, I believe the witness across the street, Mr. Harp?

A They did meet with Mr. Harp.

Q I don't have his -- and through the course of your investigation, did you become aware of whether or not Mr. Harp was able to identify anyone from that photo line-up -- and I believe Mr. Frankie McGee was in that photo line-up?

A Yes, we tasked Mahoney and Investigator Sumter to go visit Mr. Harp. Mr. Harp was adamant, since the beginning

of the investigation, that if he actually saw the subject that he saw at Mr. Eichelberger's house earlier that day that he positively could identify him in the line-up, and out of the many line-ups shown to him, he only picked out Mr. McGee when he was shown that line-up by Investigator Sumter, of course, as the individual he saw at Mr., Reverend Eichelberger's home.

Q That same day were they also instructed to make contact with Blue Ribbon Cab Company?

A Yes, they were.

Q Why was that, sir?

A We had information that Mr. McGee attended Mr. Eichelberger's church at the Blue Ribbon Cab. They had a sanctuary in the back, and that he attended several services. We wanted to see if anyone could identify Mr. McGee as being present there or attending any services or in association with Mr. Eichelberger.

Q During this time, as part of your investigation, were you also given background information, don't say what it is, but background information on the defendant?

A Yes.

Q And as a result of that, did you make contact with a C. Ray Miles Construction Company?

A Yes, we did.

Q And why were you trying to make contact with C. Ray

Miles Construction Company?
A Due to the tool that was utilized and his connection with trucking and 18-wheelers, we wanted to see if there was a background history of Mr. McGee and employment or as a driver or what have you, and we found that to be true. That he was, in fact, employed by a trucking company in Camden.
Q And that was Mr. Miles who testified earlier today?
A Yes, ma'am.
Q That same day did you also receive a phone call, you can't say what she said, but from Sophia McGee?
A Yes.
Q Moments after completing the phone call with Mrs. Sophia McGee -- and who is Sophia McGee?
A Sophia McGee is Mr. McGee's wife.
Q Did you receive a phone call from another member of his family?
A Yes, we did.
Q Who was that?
A That is Mr. McGee's sister.
Q The next day, on the 13th, did you also attempt to see any family members of Mr. Eichelberger, of Reverend Eichelberger who were familiar with the defendant?
A On the 13th?
Q Don't say what the result was. Just if you did.
A Yes.

Q And that next day did you also show a line-up to Temika Ashford?
A Yes.
Q And who actually showed that line-up?
Do you recall?
A I believe it was Investigator Reece showed that line-up.
Q I want to show you what's been marked as State's Exhibit, I have the wrong one, excuse me, 123, excuse me, is that a line-up that was prepared in this case?
A Yes, it is.
Q In preparing a line-up in any case, are the, the pictures suppose to be similar in nature?
A Yes, we try to make them similar in nature so that there will be no prejudice in how we place the intended subject.
Q That day when you showed her that line-up, did she narrow it, able to narrow it down to anyone in that line-up?
A Yes, she was. In this particular line-up she was able to narrow it down to again two individuals. She preferenced Number 3, but also circled Number 1.
Q And whose photograph is actually in I believe the Number 3 position?
A A photograph in the Number 3 position, which was her preference, is Frankie McGee.

Q Did y'all influence her or, or cause her to pick anyone?
A No.
Q Help her narrow it down?
A No.
Q And that was based, just that she had, all the others one, what she remembered?
A That is correct.
Q On March the 15th of 2010, did you make contact with Sophia McGee?
A Yes.
Q And you can't say what she said, but without going into the substance of it, was she able to give you information that you needed prior to interviewing the defendant himself?
A Yes, she did.
Q Did y'all also get a search warrant for a pickup truck that belonged to Sophia McGee?
A Yes, we did.
Q And what were your intentions to find there, sir?
A We -- once we had information that Mr. McGee may operate that truck as well, we looked for physical evidence that may tie the truck into the homicide of Reverend Eichelberger. So, we looked for blood trace evidence, any evidence that might tie that truck to Mr. Eichelberger's murder or being in the Greenview area or being used in this

particular crime.
Q Okay. Were certain factors that had happened to the truck that prevented y'all from getting any of that evidence?
A Correct.
Q Did you also send investigators out to interview the owner's of the Camden Steel (inaudible)?
A Yes.
Q And I believe he testified earlier today also?
A Yes, he did.
Q Did your officers also make contact with an Ivan Moore?
A Yes, that was Investigator Sumter and Mahoney again.
Q I want to turn your attention to March the 17th of 2009.
Where did y'all go that day?
A On the 17th, after we had gotten the information in reference to Mr. McGee tying him into the area and so forth, we actually went to a correctional institution to interview Mr. McGee.
Q And did you make contact with Mr. McGee once you got there?
A Yes, we did.
Q And prior to doing any substantive questioning, did you feel it was best to advise him of his rights?
A Yes, as always.

Q Let me show you what's been marked as State's Exhibit No. 1.

Do you recognize that?

A Yes, this is the City of Columbia waiver of rights form. Before we interview anyone in reference to any crime we always advise them of their rights.

Q And that day, were there any recording devices with you?

A Yes.

Q And was this interview with the defendant recorded by audiotape?

A It was.

Q Including the advice of rights?

A Including the advice of rights, yes.

Q And subsequent report of the statement itself?

A Correct.

Q Did you go through his rights with him that day?

A Vividly.

Q And there is -- and we'll get to the videotape in a minute.

There's a recording that records everything you said to him?

A That is correct.

Q And ultimately did you advise him of the rights that are indicated on State's Exhibit No. 1?

A Yes, I did.
Q And did he indicate whether or not he understood his rights?
A Yeah, when I read the rights, as you look at this evidence here, I would also have him initial each line as I've read it to him to indicate that he understood exactly what that line meant individually, and, as indicated, he initialed each line that he understood his rights.
Q Who all was present during the interview that day?
A During that interview, it was Investigator Reece and Investigator Reeves and myself.
Q You, Investigator Reece, and Investigator Reeves?
A Correct.
Q And once you had advised him of his right after a discussion with him back and forth, did he ultimately sign off acknowledging his rights?
A Yeah, we had a discussion to ensure clarity of his rights and exactly what this form meant. Mr. McGee was very concerned of exactly what this whole thing meant if he signed it. He was consistent in wanting to speak with us. He just needed clarity on what it meant by signing this form and eventually he did sign the form and did speak with us.
Q Did he indicate he wanted to talk to you?
A Yes, since the beginning, correct.
Q And, in your opinion, was his waiver of the rights and

his wanting to talk to you voluntary?
A Yes, absolutely.
SOLICITOR CAMPBELL: Your Honor, at this time we offer State's Exhibit 1 into evidence.
MR. STRICKLER: Subject to previously stated objections, Your Honor.
THE COURT: It is admitted.
(WHEREUPON, at this time State's Exhibit No. 1 was received into evidence.)
Q And you had an opportunity to review the tape recording?
A I did.
Q And does it fairly and accurately represent what all was said that day between you, the investigators, and Mr. McGee?
A It does.
SOLICITOR CAMPBELL: Your Honor, at this time we'd offer it into evidence and get it marked.
MR. STRICKLER: Your Honor, subject to the previously stated objections.
THE COURT: All right. It's admitted.
(WHEREUPON, the audio recording was marked as State's Exhibit No. 137 and received into evidence at this time.)
SOLICITOR CAMPBELL: We need to approach.
May we approach, Your Honor?

THE COURT: Yes.

(WHEREUPON, a bench conference was held out of the hearing of the jury at this time.)

SOLICITOR CAMPBELL: We request permission to publish the statement.

THE COURT: You may.

SOLICITOR CAMPBELL: Your Honor, we also have transcripts prepared that we'd like to hand out to the jury at this time.

THE COURT: All right. Stand for a moment while, while this is being done.

(Pause.)

THE COURT: All right.

SOLICITOR CAMPBELL: Permission to publish, Your Honor?

THE COURT: You may.

(WHEREUPON, State's Exhibit No. 137 was played for the jury at this time.)

THE COURT: Yes, ma'am.

SOLICITOR CAMPBELL: Please the Court.

Q That interview took -- and that was the extent of the interview that y'all conducted that day?

A That's correct.

Q As a result of some of the information that he told you, did y'all follow-up whether or not there had been any pistol whippings in the Greenview area around that time?

A We tried to pull reports to see if we could corroborate anything that he'd given us and we could not.
Q You could not?
A No, we could not.
Q We've heard him refer to a Coronet Motel.
Tell this jury, is that in close proximity to Reverend Eichelberger's house?
A Oh, yes.
Q And where is it located?
A It's somewhat the sixty some hundred block of Main Street, which is several blocks away from the Greenview area.
Q Several blocks away?
A Yes.
Q And would that be within walking distance?
A Yes, it would be.
Q And during the interview you referred to several people personally pistol whip other people that could corroborate his whereabouts on whichever night he's talking about.
Were you able to ever get any corroboration of those?
A We could not corroborate anything that he'd given us during the course of that interview. As you can hear, as we tried to lock him into specific names, specific locations, he remained very vague. So, we could only tap into a minimum amount of resources. So, at least try to look for

the pistol whipping that he alleged and we could not find one.

Q And were arrest warrants procured for the defendant's arrest in this case?

A Yes.

Q On what charges?

A Burglary first and murder.

Q The defendant, when he was talking about leaving his socks, he first mentioned a gas station, is that correct?

A That's correct.

Q And where is this gas station located?

A The gas station is approximately three blocks away from the Eichelberger's residence. It's actually off of Farrow Road right at Farrow and Wilkes. If I recall correctly his initial statement was the socks were in a dumpster. Then he changed his statement, which was very critical, he changed his statement advising that he left the athletic foot socks near a light pole where we recovered it during our search for this person and the evidence in this crime.

So, that piece of information became quite critical along with the blood sample and the DNA recovered from the socks. It was recovered in a light, near a light pole in the middle of a vacant field.

Q Which was a different place where he first said he left the socks?

A Which was a different place from where he initially said near a dumpster near the Exxon.
Q But it happened to be your light pole near where whoever murdered him dropped the socks?
A Correct, and they were, in fact, white and gray sweat, basketball socks as he described in his own statement.
Q Were you able to determine -- he mentions seeing a boat that day when he was over there.
Did the Reverend have a boat in his yard?
A Yes, I believe he did have a boat in his yard as I can recall.
Q And there's also the mention of the Blue Ribbon Cab Company before, the Coronet Motel, and the Reverend's house.
Are those all located in the same approximate area?
A Yeah, they're all in close proximity of one another, within several blocks, a half a mile or better.
Q And, in fact, where is the Blue Ribbon, Ribbon Cab Company where the Reverend has a church located in reference, in reference to the Coronet Motel?
A Only a few blocks. Maybe two or three blocks tops. You can walk from the Coronet in a matter of two or three minutes tops.
Q Back when this occurred y'all had made contact with Sophia McGee, the defendant's wife?
A Yes.

Q And was she somewhat cooperative then?
A She was.
Q Is she now?
A She is not.
Q The person that you interviewed that you gave that information about not stealing the truck, the light pole, all that, is he here in the courtroom?
A Yes, he was.
Q Can you identify him for the Court?
A He's the gentleman in the burgundyish brown shirt sitting between his three attorneys.
Q Thank you.
A Mr. McGee.
Q I don't have anything further.

THE COURT: Cross-examination.

MR. STRICKLER: Your Honor, may we approach?

THE COURT: Yes, sir.

(WHEREUPON, a bench conference was held out of the hearing of the jury at this time.)

THE COURT: Let's break for the day and start back at 9:30 tomorrow morning. Please do not discuss the case. Thank you-all for your corporation.

Leave the exhibits, those transcripts in the courtroom.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: Yes, sir.

MR. STRICKLER: Your Honor, I won't say you were reading my mind, but that's precisely what I was going to ask the Court.

THE COURT: No, I was just reading whether you're, whether you were going to be short or long, but I---

MR. STRICKLER: Well, I was, I was going to explain the -- I would say at least as long as what the State's gone through.

THE COURT: I wasn't reading your mind, but to that extent I was.

All right. So, we'll start back at 9:30 tomorrow morning.

Obviously, investigator, you're not to discuss your testimony with anyone over the night.

WITNESS: All right. Thank you, Your Honor.

(WHEREUPON, Court was in recess for the evening.)

Tuesday, August 9th, 2011

THE COURT: All right. Investigator, you want to resume your spot?

THE WITNESS: Yes, sir.

THE COURT: Bring the jury.

(WHEREUPON, the following takes place within the presence of the jury.)

BAILIFF: The jury is seated, Your Honor.

THE COURT: Thank you.

Good morning. Welcome back.

Mr. Strickler.

MR. STRICKLER: Please the Court.

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. STRICKLER:

Q Good morning, Mr. Thomas.

A Good morning.

Q You are the chief investigator on this case?

A Investigator Reece and I both were chief investigators on this case, sir.

Q Co-chief investigator?

A Correct, sir.

Q And various parties in law enforcement have various duties in the investigation of the case, correct?

A In this case, yes.
Q I mean you'll have -- you've seen, in this case, you got a first responder, and that's usually a line officer, right?
A That is correct.
Q They assess the scene, contact dispatch, and based on their assessment, initial assessment of the scene, other people may be sent out, correct?
A That is correct.
Q And those other people could include investigators such as yourself or Investigator Pegram, correct?
A That's correct.
Q Investigator Reece, could be crime scene officers, CSI---
A That's correct.
Q ---such as we've heard from in this case?
Could be additional patrol officers to handle the scene and to assist in, in evidence collection or whatever else is needed, correct?
A That is correct.
Q And as an, as an investigation goes further, then a chief investigator or a co-chief investigator would be, in addition to whatever aspects of the investigation personally conduct, a clearinghouse, if you would, for all the information in the case, correct?

A Correct. You orchestrate and put in order everyone you just mentioned prior in assuring that everybody does their tasks correctly. We organize it and then we set the case.
Q Okay. Now, during the course of this investigation, you-all did not obtain a confession from the commission of the crime, correct?
A Oh, you listened to a confession on yesterday.
Q Okay. We listened to the confession, which we're gonna go through this --
A Certainly.
Q -- which he indicated he did not do it?
A Correct.
Q Okay. But didn't do it is a confession I take it?
A Giving pertinent facts that only the killer could know is a confession.
Q You did not receive, get an identification of Frankie McGee as the person who committed the crime, correct?
A Yes, we did. DNA evidence indicates that Frankie McGee committed the crime.
Q We're gonna talk about that too. I'll refine my question then.
You didn't get an identification by a person who observed Mr. McGee commit the crime, correct?
A We, we have identification by a person who corroborated and observed Mr. McGee in the area.

Q So, the answer to my question which was a person who identified him as the person committing the crime would be no, we do not have that, correct?
A We have Ms. Ashford who picks Mr. McGee, along with another subject, as the subject she saw on the porch.
Q We'll talk about Ms. Ashford's---
A Certainly, sir.
Q You do not have an identification of Mr. McGee as being on the scene of the crime at the time of the incident?
A Again, Ms. Ashford's identification partially in the photo line-up is the closest that we have, yes, sir.
Q Okay. Her selection of him or another person combined with her other possible people reflected in this, this post-line-up we have --
A Yes, sir.
Q -- your contention is that that is an identification?
A Again, as I've stated earlier, it's a partial identification. She was more strongly on Mr. McGee than any other subject that she chose in the line-up.
Q Don't have any DNA in the house, correct?
A Mr. Eichelberger's DNA only.
Q You got Mr. Eichelberger's DNA in the house?
A From the blood.
Q What blood from the house was sent for testing?
A No, not for testing, sir.

Q Okay. By no means I'm saying that's not Mr. Eichelberger's blood. I understand that. But none was sent for testing.

Don't have any fingerprints from the house, correct?

A Not to the fact that the socks would hinder any prints being left in the house, sir.

Q So, the answer's no, you don't have any fingerprints from the house, correct?

A No, sir, no prints.

Q You have a partial footprint, correct, and, and blood on the kitchen floor?

A Yes.

Q Now, when you spoke with Mr. McGee in February of 2010, that was what, February 14th?

A One moment.

Q It was the 17th.

A I think -- was it February or was it March?

Q Oh, excuse me. March 17th.

A Okay. If that's what you have in your notes, then let me locate that.

What's your question, counselor?

Q You spoke with Frankie McGee March 17th, 2010?

A Are you talking about our interview with you?

Q Yes, sir.

A Okay. Let me check on the date. That is correct,

counselor, March the 17th.
Q Okay. And at that point in time your interrogation of Mr. McGee took place while he was at Wateree Correctional Institution?
A I don't interrogate, counselor, I interview, but the interview did take place at that institution.
Q And that is a part of the South Carolina Department of Corrections, right?
A Yes, sir.
Q Okay. And, Mr. McGee, the Department of Corrections has medical facilities I, I assume at their institutions?
A I'm really not astute on what they provide at that institution. They just provided us a room to interview Mr. McGee.
Q Okay. During your follow-up subsequent to the interview of Mr. McGee --
A Yes, sir.
Q -- did you obtain any records from the Department of Corrections, medical records from the Department of Corrections, to check as to whether or not Mr. McGee had an ongoing case of Athlete's Foot?
A No, I did not.
Q It was my understanding of the interview was that y'all maintained to Mr. McGee that your job was to clear---
A Or implicate.

Q ---or implicate?
A That is correct.
Q And during the course of your interview of Mr. McGee, he certainly maintains that he shed the socks in question that we have in evidence here somewhere --
A Yes, sir.
Q -- because of a case of Athlete's Foot, correct?
A He most definitely did and he placed them in an area that only the murderer would know.
Q Okay. Now, what -- let's talk about what you don't have.

You don't have any proof, sir, that the bar in question was, this, this chrome bar in question, was taken from that red Peterbilt truck, correct?
A The information we obtained is that that truck would obtain such a bar. The owner could not be specific if the bar in question was taken from the truck, but he could also not state that it was not taken. He, he advised if it would of been, it would of been replaced instantly cause of the need of it.
Q So, the answer to my question, sir, is that you do not have any proof that it was taken from the truck, correct?
A Again, the answer I just give, counsel, is my answer to that.
Q You certainly don't have an admission from Frankie that

he took the truck?

He denied that, correct?

A As you heard in the statement, counselor, when we mentioned the truck, his fingerprints, DNA being in the truck, Mr. McGee would give an explanation of moving it for a total stranger who he just so happened to see in the neighborhood, who just so happened to park it in the area where law enforcement might of observed it. So, out of the kindness of his heart he moved the truck to another location so that it won't be so obvious.

Q So, he had --

A So, each time we confronted him he had an excuse for why evidence would be in certain areas dealing with this murder.

Q He moved a Mack truck, correct?

A He moved a red truck which he called a Mack truck, which the actual factory is something else. But most people who see those types of truck think of Mack before they think of any other product because it's an 18-wheeler. That's just instinctive.

Q Well, I mean you're, you're talking about a man who your contention was has a CDL license and I assume would be familiar with, with different brands of tractors and trailers, correct?

A I agree. But he also claimed not to be familiar with

the winch bar.
Q You have not placed Frankie in possession of anything from Mr. Eichelberger's house?
A Are you mentioning property, sir, or the blood on the socks?
Q I'm mentioning property, sir.
A There was no evidence of any property, no, sir.
Q Okay. Now, as I discussed with Mr. Barron, you don't have any explanation for this allele on Number 10, which is the scrapings from the sock, this 14 allele on Number 10, which Mr. Barron agreed with me was not from Frankie and was not from Mr. Eichelberger?
You don't have any explanation for the presence of that allele, do you?
A Due to that I'm not the professional that Mr. Barron is on DNA, I can't address that allele in any regard.
Q Likewise, on Items 6.2 --
A Yes, sir.
Q -- the blood from the bar, not only is there not any of Mr. McGee's on it, but, as Mr. Barron testified, what you don't have, sir, is an explanation for this Allele 21 at D2S1338, which, according to Mr. Barron, it does not belong to Mr. McGee or Mr. Eichelberger?
Explain that, sir, from your investigation.
A My response is the same as the earlier response. I do

not have professional ability to explain any of that to you, sir.

Q This allele, this is Item 4.2.2 --

A Yes, sir.

Q -- this is, according to the testimony, a cutting from one of the socks that they tested through the presence of Mr. Eichelberger, well they, they ran DNA on, and they determined that there was a blood spot from Mr. Eichelberger.

Do you remember that, correct?

A I recall.

Q This was actually the initial testing in the case back in Spring/Summer of 2009, correct?

A Post-test.

Q And at D21S11, what you do not have is an explanation for this allele, 34, which is present and which belongs neither to Mr. Eichelberger or Mr. McGee, correct?

A My answer's the same as the previous DNA. I can not respond to anything in the DNA lab.

Q 4.1.2, which is the cutting from the other sock.

A Yes, sir.

Q Okay.

SOLICITOR CAMPBELL: Objection, Your Honor. I think he's been pretty clear about this.

THE COURT: Objection's sustained.

SOLICITOR CAMPBELL: Thank you.
Q Well, suffice it to say, sir, that you can't explain the presence of alleles that don't belong to Mr. Eichelberger or to Mr. McGee on those items?
A I feel that the DNA specialist did an adequate job in explaining every allele that you questioned, sir. I can do no more.
Q Okay. Now, what you don't have is any DNA associated with this case from that Peterbilt truck, correct?
A No, sir.
Q No, sir, not correct or no, sir, you don't have?
I'm sorry.
A I don't have any DNA.
Q All right. You don't have any prints from that Peterbilt truck associated with this case, correct?
A As I recall, the statement given by Investigator Reeves, he said what if I told you we had DNA, what if I told you we had fingerprints, and then your client elaborated from that point. But, no, we do not have any of that.
Q Okay. So, the answer is no, you don't.
And you don't have -- you talked with his employer, Mr. Miles, correct?
A Correct.
Q And what you don't have is any testimony from him that

Mr. McGee actually drove 18-wheelers, correct?
A Again, as I recall the testimony is that he drove the vehicles that that company supplies, which is a variety of the vehicles. I can't be specific in his testimony, sir.
Q Okay. So, you have evidence that he drove 18-wheelers?
A Again, I can't be specific in his testimony. He testified before the jury. They'll have to make that determination. I can't recall what, what all he stated.
Q We have a whole series of these line-ups that have been testified about, correct?
A Yes, we do, sir.
Q State's 119, correct?
A Yes.
Q Dated 9/30/09, correct?
A 9/30/09, that is correct.
Q With Pictures 3 and 5 circled by Temika Ashford, correct?
A That is correct.
Q Okay. Neither one of whom is Frankie McGee, correct?
A Neither.
Q We've got State's 120 dated 1/22/10?
A That is correct.
Q Also a 6-pack viewed by Ms. Ashford --
A That is correct.
Q -- with Number 3 circled, correct?

A That is correct.
Q We have 123, 3/13, by Temika Ashford in which both one and three are circled?
A That is correct. Your client and Number 1.
Q Correct.
We have State's 122.
A Correct.
Q Another six person photographic array in which Number 2 is circled by Temika Ashford?
A That is correct.
Q In which one of these photographic arrays is there a picture of David Williams for Ms. Ashford to review?
A As we stated early, actually you stated, counselor, our job is to implicate or clear. David Williams was cleared upon his interview and his cooperation in this investigation, and upon Ms. Ashford's additive statement that he was not the person she saw on the porch that evening.
Q But to answer my question, his picture doesn't appear in any of those, correct?
A They do not.
Q All right. Now, what you have in this matter is a description by Ms. Ashford to Ms. Goff, the composite artist from SLED --
A That's correct.

Q -- which was based on her best opportunity to see the person she saw that night, which I believe the testimony was, was when they saw him or she saw the person walking down the road, correct?

A I believe the testimony was walking down Farrow Road, which was her best opportunity to see the subject in the lited (sic) area described.

Q And what we have from that is a person, from her description, six feet tall and 180 to 200 pounds, correct?

A And I believe in her testimony she said, because she was short in the distance that she saw the individual in, she can only imagine that he was approximately six feet tall, but she was not certain on that night.

Q All right. What we have here, State's 134, which is a photograph of Mr. McGee, correct?

A Yes, it is, sir.

Q Okay. And it's a photograph from November 25th, 2008, that relates to the most recent CDL license that he received?

A That is correct, sir.

Q Okay. And as part of that photograph, it reflects a height and weight of 5-feet 8-inches tall and 230 pounds, correct?

A That is correct.

Q Now, November 25th, 2008, is going to be a little over

five months prior to the incident?

January, February, March, April, this is May 3rd.

A Approximately.

Q December?

A Approximated.

Q About five months before this.

This reflects his hairstyle at that point in time, correct?

A Yes, round face, receding hairline, with a little peak at the top. It's Number 2 view composite.

Q Then we have State's 135, which I believe has been testified to was taken September 9th, 2009, correct?

A I'll take your word for that, counselor. I know it was somewhere in that vicinity.

Q Okay. Some, you know, four months after the incident, correct?

A Correct.

Q Okay. Now, each and every one of these folks that Ms. Ashford circled their picture looked to her like could be the person she saw, correct?

A Each person she selected had similar features that matched the composite, including your client, which she was a little more certain on than others.

Q Well, sir, March 13th, 2010 --

A Yes, sir.

Q -- when this, State's 123, composite with Frankie's picture in it --
A Yes, sir.
Q -- was shown to Ms. Ashford, you weren't part of the people who showed it to you, to her, were you?
A Investigator Reeves showed that particular line-up if I recall.
Q You weren't present?
A No, I was not present on that.
Q So, you have no personal knowledge whatsoever as to whether she was more certain about that picture than she was about any of these other pictures?
A The notation on the line-up itself I believe, as indicated by Chief Investigator, Investigator Reeves, is, is actually what she stated at the time, and I believe she also stated on the stand---
Q A witness, a witness says subject saw 5/3/09 could be Number 3 and Number 1. She picked Number 3 first, but stated both resembled the suspect because of the head shape and body build.
A That is the notation made.
Q But what we do have is a number of people, per Ms. Ashford, who matched the description?
A Ms. Ashford did the best she could as a witness under those circumstances and I think she did an excellent job in

what she did as a victim going through that type of trauma. So, yes.

Q What we also have are these two items, State's 127, State's 126, indictments for burglary in the second degree, which reflect Frankie McGee pleading guilty to burglary in the third degree according to the testimony of Clerk of Court for Kershaw County, and according, according to these sentencing sheets attached to the indictment, correct?

A To my recollection that's what she stated on the stand, yes.

Q You're aware that there's a set of initials engraved on this bar?

A I'm aware of that.

Q No one from Camden Steel identified that bar as being from their business based on the initials that are engraved into it, correct?

A My recollection is that they have a number of those bars and could not positively identify the bar.

Q Was that bar, that particular bar, shown to anyone at Camden Steel?

A I believe a photo of the bar. We did not carry the bar around, but I believe a photo of the bar was shown.

Q Now, what you do have is a sufficient description of the person who was seen by Ms. Ashford, description by Ms. Ashford of the person she saw, sufficient to have your

expert witness do a composite drawing, correct?
A As I stated earlier, Ms. Ashford did a tremendously good job in her description of Mr. McGee to the sketch artist under the conditions for which this crime was committed.
Q And the statement that Ms., by Ms. Ashford to Agent Goff that she'd be able to recognize the person again?
A And she did. She picked Number 3, which was Mr. McGee along with Number 1 that had similar features.
Q Now, to Ms. Ashford, I believe your testimony on direct yesterday, yesterday that, was that she gave a brief statement the night of the incident that she was hysterical?
A I believe on the stand on yesterday her personal statement was that.
Q I'm sorry?
A I believe on the stand that was her personal statement, that she was hysterical, she was really upset, she just wanted to go home.
Q I'm talking about your statement.
A I think I -- again, we stated whatever she stated on the stand to my recollection, counselor.
Q Now, her statement does contain the following, I did get in the police car to identify the guy, and he was the one who I saw with the gloves and the long object in his hand.

You have that piece of information, don't you?
A I do and I think she corrected that information on the stand on yesterday.
Q Well, the plain fact is that her initial statement to you was to the effect that she came up on the scene as someone was leaving the scene, correct?
A That is correct.
Q And subsequent to that -- that's a statement on May 3rd, 2009. It was not until May 6th of 2009 when you sat down with her at the police station and recorded an interview with her that she provided you with the information that she was inside the house, correct?
A Correct. If you read her statement, her statement advises that she pulls up and she observes an individual outside of the Eichelberger's house, but then as she gets into the base of her statement, she indicates that she heard Mr. Eichelberger scream out and heard a noise at the door. She was trying to take herself out of the home, but still give great detail to what she heard. She could not of heard that information unless she was actually in the house.
Investigator Reece and I are very astute and we picked up on that immediately after reading her statement. Therefore, she came out with the truth of the matter where she was actually in the house with the intent to pick up money for a water bill and that she heard what she heard,

scared her to death, and she fled, and called 9-1-1.
Q And after she was over her hysteria later on the 4th, she promptly contacted the police and corrected that statement?
A She did, in fact, correct the statement.
Q On the 4th?
A Not on the 4th.
Q On the 6th.
A On the 6th as you just mentioned. The interview was with myself and Investigator Reece.
Q And she contacted y'all and, and indicated that she needed to come down to the police station and correct that statement, right?
A Again, as we took over the case for Investigator Pegram, we reviewed the evidence, we reviewed the statements, and we decided that we needed to reinterview Ms. Ashford again. We picked up on the fact that she's hearing a breaking in, she's hearing some scream, and there's no way she can hear that from her car outside of the home. We needed to ensure that we'll clarify on exactly where she was, what she was doing, and what was transpiring in that home. So, we called her in.
Q Okay. So there's the answer. No, she didn't contact you about coming in, y'all called her in, right?
A Yes, we did.

Q Now, we heard from Mr. Pegram referring to Defendant's Exhibit 1, Ms. Ashford's statement.
A Yes, sir.
Q Mr. Pegram didn't actually take the statement, did he?
A It would appear in this statement that it has a W. Odom police officer.
Q It has who?
I'm sorry.
A I believe that's an Odom.
Q Odom?
A Yes, sir.
Q Mr. Pegram witnessed Ms. Ashford's signature at the bottom of the statement, correct.
Q Yes, and I can explain that. Sometimes when statements are started, patrol officers, particularly if it's taken on the scene, they actually initially -- they pretty much just hand the paper over to them and he will fill out the initial, the top portion because he's giving her the documentation, but Investigator Pegram is overseeing the statement. He reviewed the statement, and then swore her in on the statement.
Q He testified here, Mr. Odom did, didn't he, correct?
A Odom, I don't believe I saw Odom. I saw a number of officers. I don't recall Odom. But Investigator Pegram did. I did hear him testify to the fact of taking that

statement, particular statement is my recollection.
Q Now, you do have one positive identification in this case, and that would be by Mr. Harp, correct?
A The neighbor, that's correct.
Q Who saw -- who he's identified as, as Frankie McGee outside of Mr. Eichelberger's house, correct?
A That is correct.
Q Saw him pacing back and forth, and then later, in the afternoon, saw him with some food?
A And he also saw him on the phone, which was corroborated by your client during his confession statement.
Q Now, the latest point in time that Mr. Harp indicates he saw who he identifies as Mr. McGee, there was -- his rough estimate was 5:30 in the afternoon?
A Approximately.
Q Correct?
A Approximately, yes.
Q Point in fact, in that stack of line-ups is one containing a picture of Stephon Miller, correct?
A Give me a moment, counselor.
(Pause.)
A You can proceed.
Q I'm sorry. Is that correct?
A Yes, sir.
Q Okay. And on September 30th, 2009, that line-up was

shown to Ms. Ashford and she picked Photo Number 5, Stephon Miller, and also picked Number 3?

A That was the photo. I believe she selected two photos.

Q Right?

A Correct.

Q Number 5 and Number 3?

A That is correct.

Q And Number 5 being Stephon Miller, correct?

A I would have to look at the actual line-up to answer that correctly. But she did pick two.

Q Also, on September, on October 14th, this line-up was shown to Officer Duckett with your department, correct?

A Correct.

Q He was the initial responder, correct?

A That is correct.

Q And he picked Mr. Miller as matching the description of the person he saw when he was driving down Farrow Road?

A He did exactly what Ms. Ashford did and said that that individual looked similar to the subject that he glanced out on his way responding to that type of call. But he could not positively identify him.

Q Now, your testimony on direct was that Mr. McGee was in proximity to Mr. Eichelberger when he was struck because Mr. Eichelberger's socks were on, blood was on the socks, correct?

A That is correct. The DNA evidence shows that the socks that Mr. McGee said he placed under the light pole, which were recovered under the light pole in the direction of the getaway of the murder suspect, did obtain Reverend Eichelberger's blood---

Q Well---

A ---as well as Mr. McGee's DNA.

Q And we're gonna go through his statement, but what Mr. McGee told you initially was he took them off at the store at the GazBah, correct?

A Correct.

Q By a dumpster, correct?

A Correct, and then he changed his statement on his own with no efforts from myself or Investigator Reece, and said no, I had them by the light pole.

Q By a light pole?

A Correct.

Q The GazBah is what type of establishment, sir?

A It's a gas station.

Q A 24-hour a day, 7-day a week gas station?

A That would be correct, sir.

Q A well lit 24-hour a day 7-day a week gas station?

A That would be correct as well.

Q Figure there might be some light poles there?

In fact, you know there are light poles at the GazBah?

A There's lighting at the GazBah. I can't speak to any pole I know of.

Q Now, you have your notes before you.

Towards the end of your testimony yesterday --

A Yes, sir.

Q -- you indicate that subsequent to y'all's interrogation/interview---

A Thank you, sir.

Q ---of Frankie that you could corroborate what he had told you?

A We could corroborate, from Mr. McGee's statement, the facts that we had in this murder case. The facts that he had DNA that matched his person in socks that were recovered from the murder scene. All right. We corroborated that he, in fact, was in the red truck in Greenview and he admits himself to operating it. He explains it differently than the facts that we have in the case. But all of that is corroborated that he's our murder suspect by evidence, circumstantially and factually, show that.

Q Okay. And your testimony was that you couldn't corroborate what he told you.

You interviewed him March 17th, 2010 --

A March 17th is correct, sir.

Q -- right?

You closed your case here on March 22nd, 2010, correct?

A That is correct, sir.
Q Five days after you interviewed him?
A Well, I wouldn't say closed. I believe we served warrants on him.
Is that what you're saying?
Q I'm sorry?
A Are you saying that we served warrants on him around that time when you say close?
Q Yes, sir.
A Okay.
Q Actually served warrants on him---
A Well---
Q ---around that---
A ---to answer that, cases are never closed. Evidence may come in later, facts may come in later, witnesses may come in later. So, this case was never closed.
Q All right. But refer yourself please to Page 27 of the, the investigative notes in the case, sir.
A Page 27, sir?
Q Yes, sir.
A One moment.
(Pause.)
A I'm there.
Q What's your last notation in this case?
A Case cleared by arrest.

Q Dated?
A March 22nd, 2010. Now, what that means is we've made an arrest in the case and that's all. But it's not closed. It didn't say closed. It said clear. That means we found our man, the evidence and the facts that led us to, and that's why we're here today, sir.
Q Okay. The sum total of actions taken by the police as reflected in these case notes is the service of or, or securing arrest warrants on March 18th, sum total, subsequent to interviewing Mr. McGee?
A Okay.
Q Obtaining arrest warrants March 18th?
A Yes, arrest warrants was secured, sir.
Q Serving those warrants on Mr. McGee on the 19th?
A That is what is indicated.
Q Serving search warrant for Sophia and Frank McGee's home on the 22nd?
A That's correct.
Q And clearing the case by arrest?
A That is correct.
Q Okay. So, you were first informed on March 11th by Mr. Barron that there had been --.
A That there had been a DNA hit---
Q -- match?
A ---on Mr. McGee, that is correct, sir.

Q And you clear the case by arrest and have nothing in your file reflecting any more action on this case on March 22nd, correct?

A That is correct.

Q Okay. So, as far as your involvement with Frankie McGee in this case as a suspect, it took 11 days?

A Well, it took the entire year of this investigation to get to Mr. McGee. Once we have identified Mr. McGee by DNA it took 11 days to corroborate the fact that Mr. McGee, one, was from or visited the Greenview area, which we were able to corroborate, two, that they had transportation to that area, which we corroborated with the video that you saw, the stolen truck, to get to the Greenview are.

All right. Three, that he would be in association with people in that area to hang around long enough. Four, that he would be in association with Mr. Eichelberger by, one, attending his church, two, receiving food, monies, or whatever Mr. Eichelberger may have offered and that he, at some point, would be at Mr. Eichelberger's home for some reason, which in his confession/statement he also corroborates.

So, it took 11 days to corroborate the facts that the DNA match was correct.

Q Now, at some point subsequent to March 11th, but before March 17th, in other words, at some point in time after you

had Frankie's name --
A Yes, sir.
Q -- you determined that he was in the Department of Corrections, is that correct?
A That is correct.
Q So, we knew what we -- we knew where he was when we needed him. We just needed to corroborate that evidence.
Q And you or someone working with you contacted Wateree, had him pulled from the general population and placed in isolation, correct?
A No, sir, we did not. We notified the institution that we would be coming down for an interview. They inquired on what type of charges because this was a minimum security facility. When we advised him of what the charges would be, they took what they considered the appropriate action and placed him in isolation because it may change his mannerisms for that institution as he finds out what his charges may be.
Q Okay. He's locked down for a period of several days prior to your arrival?
A I am, I am uncertain what that institution executed. I would imagine that they put him in a place they felt safe so that he wouldn't try to escape.
Q Now, you've been a police officer for how long?
A I've been with the Columbia Police Department for 21

years.
Q Is that your first job in law enforcement?
A First job, stayed with it.
Q Okay. And you have been an investigator with CPD for how long?
A Approximately 11 years.
Q And you've received training in police work during the time you've been working as a police officer?
A On a variety of training, yes, sir.
Q And what training have you received?
A Anything from interviewing to basic investigation, advance investigations, criminal profiling, a barge of different things, whatever I felt would be needed to sharpen my skills. I try to solicit the city to pay for it.
Q Define for me please, sir, interviewing.
A Interviewing. It's when parties conversate in reference to a common interest to get the facts. That's my definition of it and truth is what I focus on during my interview.
Q And what does it mean when, when someone is interrogated?
A I really wouldn't know what interrogation means in that regard, sir, cause I don't do that. But when I hear interrogation, I think of torture, and torment, things of that nature. It's, to me, a very harsh practice.

Q All right. When you show-up, when you -- by you I mean, when you, Mr. Reece, and Mr. Reeves show up at Wateree on the 17th --

A Yes, sir.

Q -- you were put in contact with Frankie McGee, correct?

A Yes, the persons at the institution gave us an area that we could speak to Mr. McGee in.

Q And those were the three people from CPD who went to talk with Frankie McGee, right?

A Reeves, Reece, and myself.

Q Okay. And this place at Wateree was a private room?

A It appeared to be some type of office area. I, I can't really say. I don't know what that institution facilitates off this. So --.

Q Was it an enclosed space?

I mean y'all have a door on it that you could shut?

A We have a door.

Q Right?

A That is correct. It was sufficient for all parties that were present.

Q How large?

A I, I couldn't really not tell you. It was large enough that all of us could fit there comfortably.

Q And had a table in it?

A From my recollection, yes, sir.

Q And chairs?
A That is correct.
Q Three investigators?
A Correct.
Q And Frankie McGee?
A That is correct.
Q You are familiar with the Reed technique of interrogation, aren't you?
A I've heard of the Reed technique of interrogations, but I have not studied any such techniques, sir.
Q Okay. Do you have a copy of the transcript?
A I do not, sir.
Thank you.
Q Yes, sir.
Your Honor, if we could please, the jury does not have their copies of the transcript.
Do we have access to them?
They were collected at the end of the day yesterday.
THE COURT: What do you want?
MR. STRICKLER: I'd like them to have the access to the transcripts so that I could make reference to them.
THE COURT: That's fine with me.
Q Now, have you got a copy in front of you?
A I do, counselor. Thank you.
Q The three of y'all show up and this conversation is

being tape recorded, correct?
A It was.
Q In fact, there were two tape recorders going, correct?
A They were.
Q In one point in the recording there's some jumbled noise, and that's actually when the second tape recorder takes over?
A Well, actually the jumbling noise occurred quite frequently because it was attached to Investigator Reeves, and as he looked for paperwork that we requested to show Mr. McGee you could hear them rumbling of trying to go into the file. So, that -- that's that motion that you could hear.
Q Okay. Now, you did inform Mr. McGee that you were recording him, correct?
A The law doesn't require that, sir.
Q So, the answer is that's correct, you didn't inform him, right?
A That's correct.
Q And despite what you-all say to him, y'all lied to him frequently during the course of the interrogation, didn't you?
A I don't recall lying, but the Supreme Court said we could if we did.
Q Yes, sir, I'm, I'm not implying you did anything not

legal, sir.

A Yes, sir.

Q So, I'm just gonna go through this. Won't play the, won't play the tape again --

A Thank you, sir.

Q -- or the recording, right?

A Yes.

Q On Page 5.

A Page 5.

Q And -- yes, sir, and Line 13.

Mr. Reece. All right. We're down here about a homicide case. We're homicide, homicide investigators.

Mr. McGee. Un-huh. (Affirmative).

I think you got an idea now. You got an idea now. That's Mr. Reece.

A That's correct.

Q Frankie McGee. No, sir.

Correct?

A That's correct.

Q That being Line 18.

So Mr. McGee's first statement to y'all is he has no idea why you're talking to him?

A That's quite common when you talk to murder suspects.

Q Page 7.

A Page 7, yes, sir.

Q Lines 15 through 17.

Now, y'all are going through what's called the advice of rights with Mr. McGee at this point, correct?

A Fifteen through seventeen?

Q Yes, sir.

A Yes, sir.

Q Okay. And this is you at this one time. Okay. And, again, cause you're in custody, we have to do so. We're not gonna violate any rights of anyone. Okay.

That's your statement?

A That is correct.

Q Line 9.

A Line 9 of the same page, sir?

Q Oh, excuse me. Page 9.

A Page 9. Okay.

Q Line 20. Mr. Reece to Frankie. Can you do me a favor?

Frankie. Yes, sir, what is it?

Correct?

A That's correct.

Q Frankie didn't raise his voice at that point, point in time, correct?

A Not to my recollection.

Q Frankie didn't raise his voice during the course of this entire one hour interrogation, did he?

A I don't recall many voices being raised, sir, during

the entire interview, interview.
Q Okay. We've got the recording of the interview though, correct?
A Yes, sir.
Q You're going through this waiver of rights with him and Page 11?
A Page 11.
Q Lines 23 through 25. This is Mr. Reece. By signing the, signing the waiver, but you'll talk with us without signing the waiver.
Oh, yes, I will.
Correct?
Q Yes, he was adamant about speaking with us. He just needed clarification on what he was signing and we were glad to clarify that for him.
Q We all heard yesterday the description of the rights among which is your right to remain silent, right?
A That's correct.
Q Your right to ask for an attorney before you talk with anyone, right?
A Right.
Q Your right, during the course of an interrogation, if you change your mind and want to be quiet, then your right to invoke your right to remain silent even though he's talked, started talking with the police, right?

A During the course of an interview, that's correct.
Q Right?
A Yes.
Q At no point in time did he invoke his right to remain silent, correct?
A Correct.
Q At no point in time did he ask for an attorney to help him out, correct?
A Not at any point in time, sir.
Q And during the course of the interview he didn't later change his mind and then ask for an attorney or ask to terminate the interview, correct?
A I think that was quite clear in his confession that he did not ask for an attorney or terminate the interview.
Q Now, Page 12.
A Page 12, yes, sir.
Q Mr. Reeves on Line 17.
A Seventeen.
Q We're talking -- the three of you are talking with him, with him about his rights.

Reeves. You know what I'm saying.

So, you're saying we're going to court, is that what you're saying, about the homicide? That is Mr. McGee's response.
A That's correct.

Q Page 13. Mr. Reece is still speaking with him about signing this.
A Okay.
Q Lines 2 and 3.
Mr. McGee. Well, why am I being accused of a homicide, it says Greenville here, I believe it's actually Greenview, but the recording will speak for itself.
Why am I being accused of a homicide, right?
A That's what's shown, yes.
Q Then we get 4 through 6. You ain't being accused of anything. We just came down here to question you-all, right. My job is to clear or implicate.
A That is correct, and that's what we did.
Q Page 15.
A Fifteen.
Mr. McGee, Line 21, still going, still going through advice of rights and still going through whether or not he signed it, whether or not it's initialed, or whatever?
A That's correct.
Q Right?
A That's correct.
Q Line 21. Frankie. I didn't have no homicide with nobody.
Correct?
A That is correct.

Q Now, Page 18, and this is, I'm sorry, a page over from the previous page. This is you, Mr. Thomas.
A Okay.
Q Beginning on Page 17, Line 25. And, so, it's not saying yeah, I did this, I'm guilty of anything, we're still going through these advice of rights at this point.
A Yes, sir.
Q At Line 7, your statement, that's pretty much what it is, but that's not saying yeah, I did this or I committed a homicide. No, none of that. There's no trickery here.
Correct?
A That is correct.
Q Now, not telling him that he's been surreptitiously recorded doesn't constitute trickery, correct?
A No, it does not. It's quite legal and that's why we did it.
Q Page -- let's see. Y'all are starting to talk a little bit about why you're there. You've already told them you were there for a homicide.
A Through the door we have told him what we were there for.
Q Page 19, Lines 3 and 4. McGee. Hu, a murder. A homicide's a murder, murder. Somebody got shot.
Right?
A I see that.

Q And a little further on 19, this is Mr. Reece, Lines 8 through 10. Before we start the conversation, in fairness to you now, I'm going to tell you I'm one of the fairest investigators you're ever gonna run into.

Right?

A That's correct.

Q Now, Page 21, beginning at Line 12, McGee, this is Frank to y'all. I don't know. I just like don't want to incriminate myself no further in something because the reason why I'm saying this is because I've had situations in the past with, not saying that it's you, but I've had situations in the past with other officers and they pretty much railroaded me.

Correct?

A That's correct.

Q Mr. Reece goes on to apologize for those other officers and says that that's unprofessional.

Right?

A Correct.

Q And then indicates, Line 22, you ain't gonna find that on me.

A Correct.

Q All right. Denies that he'll railroad him?

A Correct.

Q Page 22, Line 1. Fairly explicit. Okay. I ain't gonna

railroad you.

That's from Mr. Reece, right?

A That's correct.

Q And, again, on Page 24, Line 18 through 22, Mr. Reece, with me I'll be able to go home and sleep peacefully cause I know in my heart I did the right thing, and you can't, when you get out of this place here, you can't go no where and say Reece, Thomas, and Reeves was like those other cops and they railroaded you.

Right?

A Correct.

Q And Page 25 --

A Twenty-five.

Q -- Line 5, sir.

All right. This is Mr. Reece again.

All right. Now, I'm just gonna cut to the chase. Okay. I ain't gonna try -- I ain't going to try to bull shit around and take you through the hoops and shoot and try to trick you into telling me jack shit.

Correct?

A That's correct.

Q That's Mr. Reece. No tricks.

Page 26, Line -- oh, let me find it. Page 26, Line 3. Mr. Reece to Frankie. I ain't talking about no shooting.

Right?

A That's correct.
Q So, at this point you-all have informed Mr. McGee that the homicide you're looking into does not involve a shooting, correct?
A That is correct as stated.
Q Page 27, Line 9, this is Mr. Reece.
Mr. Reece does a lot of the talking in this interview, interview, correct?
A Correct.
Q You're involved secondarily and Mr. Reeves is only involved on probably a couple of occasions, correct?
A That's correct.
Q Page 27, Line 9, Mr. Reece. Let's deal with this honestly.
A Okay.
Q From Frankie. Mr. Reece. Because sometimes shit happens, man. You find yourself in the middle of stuff.
Right?
A That's correct.
Q Now, at this point in time Frankie hasn't put himself in the middle of anything, right?
A Not at this juncture, but later he will.
Q Then further down to the conversation about this, Page 27, Lines 20 through 22. Reece. You know, that's better then lying and waiting on somebody and then doing shit to

them. You fell me?

Correct?

A Okay.

Q Right?

A That's it.

Q Okay. So, sometimes you find yourself in the middle of stuff. It's different from laying in wait.

Right?

A Correct.

Q So, now you've informed Mr. McGee that you're not dealing with a shooting.

A Uh-huh. (Affirmative).

Q You have offered Mr. McGee an opportunity to go ahead and lessen his involvement. Sometimes stuff just happens, and that's different than laying in wait for someone, correct?

A That statement's subject to interpretation.

Q Well, in your training on interviewing, as opposed to interrogating, your training on interviewing, one of the techniques you do is start slipping facts in for the person being interviewed to adopt, correct?

A Throughout this interview we gave specific facts. I think Investigator Reece referred to them as whammies during his statements to him, and then each whammy your client would implicate himself.

Q Okay. So, you're saying part of interviewing techniques is not to supply facts to someone?
A No, it's not. That's correct.
Q And -- no, that's correct what?
A That you will put facts in.
Q You will put facts in?
A That's correct.
Q And part of interviewing techniques is to offer the person being interviewed several paths to take to offer the person being interviewed the opportunity to lessen his culpability by admitting to it. Sometimes stuff just happens. It's not like lying in wait for someone.
You're saying latch on to the sometimes stuff just happens and tell me about it, right, cause that's easier to talk about?
A Well, we're actually asking them to tell the truth about what happened there and that's what we're seeking.
Q All right. Page 28, y'all are starting, y'all are starting to get into it at this point?
A Yes, sir.
Q Mr. Reece, Line 9. Okay. Tell me what you know.
Frankie. What I know is what I read in the newspaper.
Right?
A Right.
Q Read in the paper.

Page 31 please. This is Mr. Reece starting at Line 16. I want to have a clean slate. Now let's start at Line 14. Mr. Reece. And when I meet the maker --

Uh-huh, from Frankie.

I want to have a clean slate. I don't want to carry none of this garbage before God and have to deal with it. I'd rather deal with it here in this world than go somewhere else and have to deal with it, right?

And you know, like I said, sometimes you find yourself in a situation and you have to make those snap decisions and it happens so fast it wasn't, you wasn't even in control of yourself.

Right?

A Correct.

Q Just in a situation, not in control, that is another example of giving the person being interviewed, in this case, Frankie, giving him the opportunity to say yeah, stuff does just happen. I'm not that bad. I'm not that kind of person. Stuff just happens cause it's easier to confess to than being a cold blooded killer, right?

That's the theory, that's how you'll go about it, right?

A Gives him an opportunity to tell the truth.

Q That is an interrogating/interviewing technique, isn't it?

A That is how we interviewed this gentleman that day.
Q Now, Page 32, Line 5. Mr. Reece. I know you do. So, I think before I write down any fabrication --
Mr. McGee. Uh-huh --
-- or allow any set of bull shit that you're telling me --
Uh-huh.
-- so now that, that -- the point of that term, that's Mr. Reece using that term, right?
A Which term?
Q Bull shit.
A Okay.
Q Right?
A Yeah, he uses that term.
Q Right. Further down, Line 15, it ain't good if you waste your time. It ain't good if I waste your time because I'll be out there doing other stuff, working on other cases rather than come down here to try to bull shit you into talking to me.
That's him again, right?
A That is.
Q Page 33, sir, Line 11. Mr. Reece. Tell me what happened. I know you're about to go there again.
Frankie. Listen, listen, sir, I've got enough to deal with in prison as it is.

Mr. Reece. Absolutely.

Mr. McGee. And I don't know how my name came up or where it came up, but it did come up, that's the thing.

Okay. Doesn't know how his name came up, correct?

A That's correct.

Q Line 21. Reece. Okay. Good. I'm glad you brought that up. Let me ask you this. Why do you think it came up?

Frankie. I have no, honest to God, I have no earthly idea.

Right?

A Correct.

Q Page 24, Line 3. Mr. Reece. I'll give you a first name. You give me something. I'll give you something else. You give me something.

This is -- he's gonna start telling him things about the case, right?

A That's correct.

Q Page 12, or excuse me, Line 12. Mr. McGee. Fair enough.

Thirteen. Mr. Reece. You were up there in the area that night. You were spotted by people that night even that day.

Right?

A Correct.

Q Page 35, Line 11. Mr. McGee. I can't remember when I

went there.

Reece. Was it daylight out?

Frankie. It was daylight.

Well, Reece, in-between, was a question?

Frankie. In-between daylight, yeah.

Right?

A Correct.

Q What time is in-between daylight?

A Depends on the season, sir.

Q Okay. All right. How about on May 3rd then?

A I would imagine around six o'clock when he was sighted by the neighbor across the street.

Q In-between daylight would be about dusk time, is that correct?

A Interpretation, sir. But go ahead.

Q That's not what that means to you?

No?

A It means in the evening.

Q Frankie, Page 35 still.

A Okay.

Q Mr. Reece rather, Line 16. Okay. All right. What did you do?

Frankie. I used his phone to call my wife.

Right?

A Correct.

Q So, he told you the truth about that as far as you're concerned, right?
A The neighbor observed him using a telephone.
Q Right.
A That corroborated some facts that we had. So, that was, was a truth.
Q Page 35, Line 24, or 22, Mr. Reece. What phone did you use, his cell phone, house phone?
Mr. McGee. I used his cell phone to call my wife.
Right?
A Right.
Q Tells us again, Page 37, talking about the church or the place that Mr. Eichelberger had at the Blue Ribbon Cab Company, right?
A Okay.
Q Line 3. I was told to go there to give out, hm, on Monday and Wednesday to give out grocery gifts I believe is what you -- I'm not certain what all a missionary does. I'm just inquiring on. Yes, I been down that way.
Right?
A Right.
Q So, prior to that you had not given him any facts about you being, he being spotted at that mission?
A No, but he corroborated again the facts that we had in the case that he had gone to Reverend Eichelberger's church

and his missionary.
Q So, he told you the truth again, right?
A He corroborated the facts, yes, sir.
Q Line 15. You. So, you just went there for the services?
Frankie. I went there -- I went to their services, but I never went in. I went up there with my wife, but I never went in.
So, he, he indicates that he was there with his wife, correct?
A Correct.
Q And the information you have was that he was seen there with a woman on one occasion anyway, correct?
A Correct, which was a corroboration but slash a lie because he stated he didn't go in, but the witness on the stand advised that they both came in to the service.
Q Page 37, sir, Line 23, all right, you used your cell phone to call your wife.
Over on to 38, yes, I did.
So, again, he admits to calling his wife on the cell phone, right?
A Yes.
Q Now, Page 40, Line 16. At this point in time y'all are talking with him about being at Mr. Eichelberger's house earlier on the 3rd and early on a day.

And Mr. Reece. What did you -- what did he give you? I'm referring to Mr. Eichelberger.

He gave me a, um, ah, um, a cup of water, a sandwich, and a cup of water and a sandwich.

Right?

A Yeah.

Q How long was this interview after the incident, ten months?

A Approximately.

Q Sir?

A Approximately ten months.

Q May 3rd to March 17th, the following year?

A Right.

Q Okay. Further down Line 22. Mr. Reece. All right. And then when -- do you remember what time of day it was?

Now, he's already told you what time of day it was, but Mr. Reece asked him do you remember what time of day it was.

McGee. Uh, I don't. I don't recall the correct time. I don't, but I know it was after 12:00.

Right?

A Correct.

Q November 2nd, October 2nd, 2010, what did you have to eat for lunch?

A Are you questioning me, sir?

Q October 2nd, 2010, some ten month ago, what did you

have to eat for lunch?
A If you're asking me that question I can't answer that question.
Q Very good, sir.
And on October 2nd, 2010, when did you eat lunch?
A You're asking me that question and I can't answer that for you either.
Q All right. It continues though, Page 41, Mr. Reece, after 12:00 in the day.
Frankie. Yeah.
And it's daylight.
Uh-huh.
Mr. Reece. All right. So, between 12:00 and 1:00, is that fair to say or 12:00 and 2:00?
McGee. Yeah, about that area, right.
All right. Do you remember the date this was?
Frankie. No, sir, I don't remember.
Right?
A That's correct.
Q And do you remember the month?
No, sir, I don't remember the month.
Mr. Reece. All right. But this was -- um. Was it the same day that you heard on the news about Eichelberger?
Frankie. No, I heard about it about maybe a month, a month and a half, or two months later.

Right?
A That's what he said.
Q Page -- let's see. Beginning on Page 41, Line 25. Mr. Reece. Okay. Because I thought we just shook on the --
Uh-huh.
-- truth for truth and that kind of shit.
That's Mr. Reece then, right?
A What page are we on here now?
Q We're -- that was the -- we're on to Page 42.
A Okay.
Q I just read Lines 3 and 4.
A All right.
Q So, Page 42, Line 6, Mr. Reece. All right. So, let me give you another truth. See if you can get some more truth out of you because what you just did now, what you just did just now was you lied to me. You tried to take me down the road again.
Right?
A Correct.
Q So, he accuses him of lying.
Now, that's an interview or that's interrogation?
A That's an interview.
Q Now, that's a confrontational statement, isn't it?
A No, that's calling him a liar.
Q Right.

Mr. McGee's response, Page 42, Line 15 and 16, I told you everything, the truth just now.

Right?

A Yes.

THE COURT: Ladies and gentlemen, I'll have you go to the jury room. Please do not discuss the case.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: We'll take ten minutes.

(WHEREUPON, a short break was taken at this time.)

THE COURT: Bring the jury.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: You may continue.

MR. STRICKLER: Thank you, sir.

Please the Court.

CONTINUED CROSS-EXAMINATION

BY MR. STRICKLER:

Q Mr. Thomas?

A Yes, sir.

Q We're still going through this statement here. It's Page 43.

At this point you-all are speaking with Frankie about being in the area, correct?

A That's correct.

Q Now, Mr. Reece. Go past 12:00 in the day.
Uh-huh.
Let's go to around let's say 6:00.
Uh-huh.
Okay. Mr. Reece. Because you're still in the area.
A Uh-huh. (Affirmative).
Q Frankie. Yes, I was.
Reece. All right.
Uh-huh.
Reece. Well, can't we go till around 9:00. You're still in the area.
We can. We can, yes.
We can go up to 11:00.
Uh-huh.
You're still in the area?
Right.
We go to 11:30
Right.
Still in the area. You're still in the area around Eichelberger's house. Okay. I'll just give you the truth. The truth is you're still in the area around Eichelberger's house?
Correct?
A Correct.
Q Page 44. Frankie. Okay. Give me something else now.

What was you doing---

THE COURT: Madam Court Reporter, can you keep up with the fast reading?

COURT REPORTER: Yes, sir.

THE COURT: You can?

COURT REPORTER: Yes.

THE COURT: All right.

MR. STRICKLER: I'll slow down. I'm sorry.

Reece. Give me something else now. What was you doing in the area at 11:30 around Eichelberger's house?

McGee. Okay. To tell you the truth, yes, sir, I was not around Reverend Eichelberger's house at 11:30. This is 11:30 at night.

Reece. Okay.

McGee. At 11:30 at nighttime.

Okay. McGee. I was still up there in that area when you go down Farrow Road.

Now, Farrow Road, we've got overheads and all that. This is, Issac Street. This is Farrow Road right here.

So, he is saying to you that he's in the area, but not Mr. Eichelberger's house, correct?

A That is the statement he made at that moment, yes.

Q He tells you he's in a different area, correct, sir, is what he says?

A He's on Farrow Road. It was a few blocks away from

Eichelberger's house.

Q Got you. We'll make some progress here. Page 49.

Okay.

A Great.

Q Asked about having a CD, CDL license.

A Uh-huh. (Affirmative).

Q Line 17/18. Frankie, you got a CDL license?

Indeed, yes, I do.

Correct?

A Correct.

Q Tells the truth, doesn't he, correct?

A Correct.

Q Page 50. You all discuss the winch bar with Frankie, is that correct?

A Which line are you referring to?

Q Well, I'm getting right to it.

A Okay.

Q This is Mr. Reece at Page or Line 14. Frankie, look at this for me, now. Do you know what it is, right?

A Okay.

Q McGee. It's, it's a tool.

Yeah, what kind of tool?

A pry bar.

A pry bar?

Uh-huh.

What does it pry?

Sir, I don't know what. I mean I know you're trying to build a case on me and everything.

No, I'm not trying -- I'm trying to build a case. Not necessarily on you.

Okay?

A Okay.

Q And then we're over on 51.

Told you my job, told you my job is implicate you or clear, right?

A That is correct.

Q Well, the plain fact of the matter is, when y'all came in there, you knew that you were gonna charge him with this homicide, right?

A As we stated to him, and I related to you, our job was to implicate or clear him. We wanted to offer him an opportunity to be truthful or to give us any kind of facts that would lead us in another direction. He could not do so. He actually implicated himself.

Q All right. I notice that the interview we have begins on Page 4. You actually were recording your conversations prior to speaking with Frankie, weren't you?

You had that tape recorder out before then, right?

A We had the tape recorder on I believe when we entered the institution, that's correct.

Q Well, you had a conversation, I don't know whether it was with the warden or someone else, in the institution before you went and talked with Frankie, right?
A What I can recall, yes.
Q Okay.
A I don't believe the jury's privy to that.
Q Well, isn't it true that Mr. Reece, in your presence, told this individual in the institution, prior to speaking with Frankie, I'll tell you right now, warden, it looks like we're gonna be charging him based on what we've got so far.
A Looks like we're going to be charging him based on what we have so far.
Q Right.
A But we've not spoken to McGee and he did not implicate himself further at that juncture.
Q Then at Page 2, Line 23, male speaker. All right. Line 24, Mr. Thomas, and so definitely he'll be charged.
Y'all knew you were going to charge him when you went in there?
There's nothing about clearing anyone here?
It was all implicate, right?
A It was either clear or implicate. We could not clear, he was implicated, and then later charged due to the facts and the evidence presented.
Q Very well, sir.

Back to Page 50, you're talking about Frankie says the pry bar. Then you're trying to build a case on him.

Fifty-one.

A Fifty-one?

Q Yes, sir. Just to get a little context, Line 14, Mr. Reece. Okay. I'm showing you Lance, and that's -- Lance is Mr. Reeves, is that correct?

A That's correct.

Q Okay. Lance, I'm showing Frankie what's called a winch bar, to you, a photograph we took from the winch bar. Don't you recognize that as a winch bar?

McGee. No, I don't. I recognize that as the same thing he said as a pry bar, right?

A Correct.

Q So, he doesn't recognize the winch bar.

We had Mr. Miles testify here earlier, right?

A Correct.

Q Frankie's boss?

A Correct.

Q And Frankie's not the only person who doesn't recognize that as a winch bar, but even Mr. Miles says they don't use that kind of winch bar.

A But he recognized it as a winch bar.

Q Right.

A And we felt that Mr. McGee should of been able to do so

as well working with that same company.
Q Frankie told you exactly what kind of winch bar he's familiar with, didn't he?
A I don't recall.
Q Well, turn to Page 52 then.
A Fifty-two?
Q Line 4, Mr. Reece, didn't you have a chance to use those kind of tools down at C. Ray Miles.
Mr. McGee. No, sir, we didn't have those.
Exactly what Mr. C. Ray Miles himself said, correct?
A He stated they had winch bars that looked different from that if I recall correctly, but he did have winch bars.
Q What he said about C. Ray Miles using those winch bars agrees completely with what Mr. Miles said, correct?
A Again, Mr. Miles recognized the winch bar immediately. He just described his to be shaped differently.
Q All right. Now, we've established -- you've established early on that, in, in your preliminary conversations with Frankie, that he didn't graduate high school, correct?
A If my recollection he went to the 12th grade.
Q Went to the 12th, did not graduate?
A That's correct.
Q In your follow-up investigation of Frankie, between March 17th and March 22nd when you quit doing anything, did

you collect his educational records?
A No, we went for what he recalled his educational level to be. I don't normally check. They say they finished school, they finished school. They say they did not, they did not. But that's why we require him to read the very last paragraph so that we can ensure that he can read and articulate and comprehend the language in that. So, he reads the entire statement and then we have him read the last paragraph aloud, and he did quite well.
Q Page 52, talking about the winch bar.
A Go ahead.
Q When you drive -- this is Line 17. Mr. Reece. Well, to drive an 18-wheeler, won't you know what that is, man? Come on now. You told me you would be honest. Let's be --
Mr. McGee. I'm being honest. I don't --
Mr. Reece. You're not being.
Mr. McGee. We don't use those kind right there. We use long pry bars. He even calls a winch bar a pry bar. Uses long pry bars with the screwdriver tips on them.
Right?
A That's correct.
Q Mr. Reece. With the screwdriver tips?
Yes.
Mr. Reece. You know what that is?
No, I don't know what that is.

Now, you feel, you-all felt that he should know what that was, correct?
A Just as his boss did.
Q Right.
A Right.
Q Your feeling is that he should of known?
A Correct.
Q Testimony from anyone, please, who can say that yes, he did know. I'm not talking feelings.
A No one testified to that effect.
Q All right. Page 53, sir, and this is Mr. Reece, Line 6. I'm hoping you'll give me some truth.
McGee. Okay. All right.
Mr. Reece. Okay. How about you stole a truck, an 18-wheeler, and came up there that day before maybe? How about that? That's true, isn't it?
Now, prior to that point in time Frankie McGee had never told you he'd taken a truck and come up there, right?
A That's correct.
Q Okay. So, you have now supplied Frankie with your version of the facts in the case, right?
A We did supply him with an additional fact.
Q Okay. And Mr. McGee's reaction to that is, Page 53, Line 11, no, sir, that's not.
Right?

A Well, that was his initial, but it soon changed.
Q We'll get there. His initial is he denies taking the truck?
A That's correct.
Q Right?
A That's correct.
Q Mr. Reece, you're on video.
Well --
Mr. Reece. You're on fucking video doing it.
That's Mr. Reece, right?
A Correct.
Q Frankie. I don't know if I'm on video or not, but I didn't steal an 18-wheeler that day I went up there.
He denies again, right?
A (No response.)
Q You didn't?
Well, what about the day before, because y'all's theory is not that it was taken on the day of the incident, that it was taken the day before the incident, right?
A That video evidence proved that it was taken on the 2nd.
Q All right. McGee. The day before. It's Line 21.
Mr. Reece. Yes, sir.
Mr. McGee. No.
So, one, two, third time he's denied taking that truck?

A Not uncommon, counselor.
Q Well, the other possibility is he's telling you the truth?
A The evidence didn't show that, counselor.
Q Page 54, we're still talking about the truck, Line 3.
Matter of fact, Kershaw County Police or Camden Police, one of them, weren't they talking to you about this?
Frankie's response is no.
Correct?
A That's correct.
Q You got someone in Kershaw County whose spoken with him about it?
Police, Kershaw County Police spoke with Frankie McGee?
Who's your witness that did that?
A No one testified to that effect.
Q So, if he's denying no one's spoken to him, that would be the truth, right?
A I can't speak on that truth or not.
Q Okay. Page 54, Line 12, Mr. Reece. Okay. Tell me about how you got in that truck and you knocked down a damn fence and you drove up to Columbia. Tell me where you parked the truck at when you got to Columbia now because I'm still under the impression you're gonna be honest and straight forward with me because that's the way I'm being with you.

Now, you would deny that at that point in time Mr. Reece is raising his voice to Mr. McGee?

A Again, I'm not certain what the consideration of raising a voice would be for you or I. Our interviews go differently with different people. So, with the interview that I heard on yesterday, it is quite calm compared to some interviews that we've had. So, it's, again, your interpretation, sir.

Q Page 54, Line 23, Mr. Reece. And I don't want to do that. I really would like to say that you're an honest man and you own up to what you've done, and whether it's a mistake or whether you meant to do it. Now, I would like to say shit happens so fast that it was all a mistake.

And, again, y'all are offering him the opportunity to minimize his involvement by it, but confess by admitting to it being a mistake, not an intentional or conscious act on his part, aren't you?

A Again, we're trying to solicit some sense of truth from Mr. McGee in reference to his action.

Q All right. Now, at this point in time your role and Mr. Reece's role are pretty well defined. Mr. Reece is the bad cop in this situation and you are the good cop, isn't that true?

A No, we are investigators that are seeking the truth about Reverend Eichelberger's murder. That is all.

Q Y'all don't play good cop/bad cop?
A I take my job very seriously. I don't play at all.
Q Pardon me for my choice of words.
You don't employ that technique good cop/bad cop at all, correct?
A We just interview, sir.
Q During your interviews you don't employ that technique?
A We seek the truth --
Q Okay.
A -- With dialogue.
Q So, when Mr. Reece is raising his voice at Frankie then, and you're calming yours with Frankie then, that's not good cop and bad cop?
A Actually my voice and Reece's voice are different tempos. I tend to speak in this manner throughout most of the interviews. That's just my tone and my mannerisms.
Q Yes, sir.
Page 56, this is you, beginning at Line 8. What I'm telling you is it's already deep and we're trying to put a face on it. All right. We're trying to see if it was just an opportunist thing that happened, one was surprised, and one acted in a certain way, and you didn't mean it to go down like that. You understand me? That's what we're trying to see, you know, rather than it seems like might be a monstrous type scenario where there's all intentions of

killing somebody or beating somebody. You understand me? That's what we're after.

You said that, right?

A That is correct.

Q And, again, here's the opportunity. I'm not a monster. It was just an opportunist thing. You didn't mean for it to come down like that.

You give him the opportunity to agree with that, right?

A Yes, he was.

Q But that's not a technique, is it?

A No, that was just a statement made by myself.

Q Bottom of the page, 56, Line 21. Mr. Reece, the truth. I don't think it's something that to do. Together since you're sitting -- I sit down in front of you. I think it this was one of those spur of the moment things.

It's just, as I understand it, it just happens that the conversation takes place this way, that you repeatedly offer him an opportunity to minimize his involvement by agreeing with you and start the process of confessing. That's just how the conversation occurred. It's not employing an investigative technique.

A It is employing an opportunity to get the truth from a murder suspect.

Q Page 57, sir, if I could, please, Line 5, Mr. Reece. I from these -- It was one of those spur of the moment things.

You do shit and you don't even have time to think about it. I'm convinced in my heart that that's the way it happened, but I can't get to that point which I believe may be the truth if you insist on sitting there and lying to me. Spur of the moment thing. Again, spur of the moment.

But that's just, that's just the random conversation and how it comes about, is that correct?

A Again, seeking the truth from Mr. McGee.

Q Now, middle of the page, 57.

A Okay.

Q Line 12. By Mr. Reece. Now, breathe. Let's move beyond your fabricated version of this and give me the truth, and then let's see if the truth jives with what I've got because what I've got is enough to hurt you real bad.

And at that point in time you're gonna deny that Mr. Reece's voice was being raised, that he was getting confrontational with, with Frankie?

A Again, it's a -- that's an interpretive thing. We've worked together for approximately ten to eleven years in investigation. To me that wasn't a raised voiced, but to someone else it may have been.

Q Well, we got enough -- it was enough to hurt you real bad. The only way you can get hurt any less is by the truth. I know goddamned well that you understand what it is I'm saying.

Again, Line 23, man up. It's been out there too long. You been out there too long. Man the fuck up and deal with this shit now.

This is Mr. Reece spoken, speaking with him, right?

A That is correct.

Q And those are the kind of words that are typically delivered in a low key conversational sense or are they delivered in an accusatory and intimidated sense?

A It was delivered the way Investigator Reece communicated it, and how that may be interpreted by the jury or yourself is up to you guys.

Q Yes, sir.

Now, Page 58, please, Line 9. Mr. McGee. No, you can, you can, you can curse at me as loud as you want, but whatever it is that you want to do, and whatever it is that you're out to do, do whatever it is you want to because if I did something I'll man up to it. If I didn't do it I'm not going to man up to it.

So, Mr. McGee certainly thinks someone was being lied to him, correct?

A And as I said earlier, that's interpreted by the individual and the environment and what they heard.

Q Well, if the individual that you're interviewing thinks you're cursing at him---

A He did curse.

Q Pardon me?
A There's no question he cursed.
Q And coming at him in a loud voice, that's not interrogation, that's just interviewing?
A That is just an interview, sir.
Q All right, sir. Now, Mr. McGee said because if I did something I'll man up to it. If I didn't do it I'm not going to man up to it. We've got a couple of examples right here on these two indictments that are in evidence of him manning up to two burglaries, correct?
A Yes, but murder is quite different than burglary, and it's not uncommon for a murderer to deny his actions during an interview.
Q All right. Page 58, Line 25, Mr. McGee. You come in here to -- I didn't go to college, and I know you did, but you come in here to bulldoze me in a mental way or to try to get me to coerce myself into saying something or doing something that would put me in jeopardy, but I know for a fact I'm not worried about none of that.

That's what he says, right?

A Uh-huh. (Affirmative).
Q So, Mr. McGee, over the course of the last few pages, makes it clear that he feels that he's being, that y'all are here trying to bulldoze him, right?
A I don't know if he made it clear of that, but he said

he's not going to be.
Q Then Line 6, Mr. Reece, why not?
Line 7. McGee. Because when you was out looking for whoever did that, and then you started coming up with information, with information looking for somebody else to -- it's like the other police. They also come back to somebody who, who got a record like me, got a record. So, let's, let's go after him, after him.
Correct?
That's what he says?
A That's what he said, sir.
Q Now, I'm gonna go back to the page and line you remember early on in the conversation and y'all are still talking with him about, about deciding the waiver of rights. He expressed reservations because he, I believe, termed it his rights and had been in the past being railroaded?
A By other investigators, that's correct.
Q Right.
And y'all told him you wouldn't railroad him?
A And we did not. We just implicated him in his murder through his confession.
Q And that's what you tell him, Page 60, Line, Line 6. All right. We're talking as men here, you understand. You know, when you start talking about railroading and coming up with things off of that nature against these two

investigators, all right, he's, he's picking up on what we do, all right, what we don't do, my brother, is railroad anyone.

So, you claim that y'all don't railroad anyone?

A That is correct.

Q Bottom of 60, Mr. Thomas, Page, Line 22. Well, I can choose from where I wouldn't have to ride the fuck out to Wateree and interview you, sir.

You said that, right?

A I most definitely did. I was referring to him being incarcerated and choosing persons who are incarcerated.

Q Page 61. This is you again. Line 18.

All right. We have a saying, a saying that we will not do anything that a man, woman, or child from eight to eighty-eight without looking them in the eye and giving them an opportunity to talk to us, right?

A Correct.

Q That's kind of like y'all's motto?

A Correct.

Q So, while we're doing that, we will lie to them, right?

A The Supreme Court says we can.

Q That would be yes, you feel at liberty to lie to them, correct?

A If need be.

Q You will supply them with facts, correct?

A If need be.
Q Sixty-two. Because whatever they may have that -- whatever they may have led them to you, we got warrants and shit on you. You feel me.
Now, at this point, better back up and put that in context, Your Honor.
Sixty-one, bottom of 23, that's why we're here. That's the only reason because we have a code about what we do. This is not everybody. You understand that you're differentiating yourself with the techniques you employ for officers who such and sos Mr. Thomas feels or Mr. McGee feels that railroaded him in the past, right?
A Correct.
Q Do you understand me. Some people will send papers down here wanting to see -- they want to know what you like, what you look like, but because, whatever they may have led them to you, you got warrants and shit on you, shit on you, right?
A That's correct.
Q Okay. Then you're back at Line 6 back to this eight to eighty-eight will sit in front of you, correct?
A Correct.
Q Page 62, Line 18, and this is you again, Mr. Thomas. All right. Ask you to be truthful with those questions so we can decide exactly what went on here. Is it, in fact, an

incident or an accident, do you understand me?
Right?
A Correct.
Q So, again, an opportunity to admit that you're involved in something while terming it an accident.
All you want him to do is admit that he was involved in something, right?
A All I wanted him to do was tell the truth about his actions in the murder of Eichelberger.
Q Page 63, Line 15 to 16. We prefer not to ride out in this damn country and stay in the city and do what we got to do. Okay.
That was you, right?
A That is correct.
Q Now, at this point, beginning at 63, Line 25, Mr. Reece, have you ever been to Reverend Eichelberger's house?
Uh-huh.
Q Right?
A Yes.
Q Mr. McGee, Page 64, Line 2. I've been on the porch before.
Right?
A He told the truth because that's where the witness saw him standing after murdering Eichelberger.
Q He told the truth in the porch part.

Uh-huh.

Is that where you met Reverend Eichelberger at, in the porch part of his house?

McGee. No, sir. No, sir, I met him in his yard.

Now, Mr. Harp, who testified earlier, indicated that Mr. Eichelberger was in his yard at the time that Mr. McGee was eating the food that he had, right?

A That's correct.

Q Okay. So, he says he met him in his yard?

A That's correct.

Q Page 65, Line 10. Mr. Reece. At this point in time he is raising his voice again, isn't he?

I'm not asking for a lie. I'm not asking for a bunch of fucking confusion.

That's Mr. Reece speaking at that point in time, and he's raising his voice then, isn't he?

A Again, that's an interpretation by whomever is listening.

Q Sixty-five, Lines 24 and 25. Now we're getting to the confession part.

Mr. Reece. Did you hit Reverend Eichelberger? Did you ever attack Reverend Eichelberger?

Sixty-six, Line 1, Mr. McGee. No, sir, I didn't.

That, I assume, sir, would be a confession on his part as you turn this, termed this interview?

A No, that would be another lie.
Q Mr. Reece. All right. Why in the world then would you find your fucking DNA in a pair of socks?
How about this goddamned sock that you, that you wore that night when you hit Reverend Eichelberger with that tool that I just showed you?
Now, that's the whammy.
Mr. McGee. That's not a whammy.
Well, that's the whammy.
That's not the whammy.
Well, give me your whammy. You hit him back on a whammy, hit me back on a whammy.
Mr. McGee. Those same socks, and if you did your investigation proper, now you -- now you're talking. Tell me what I should of done.
Socks that you got. You did find them socks right there by that store, that GazBah. Right there by that store, by that, by that -- I think it says dumpster right there. It says indistinct here. We've got the recording.
A That's where the---
Q Because that's where I took them off right there. Cause you know you took socks, socks off at the store by the dumpster.
A Go ahead.
Q That's where they're taken off right there. Left them

right, because when you're walking, you got Athlete's Foot, you take, and your feet is like my feet are right now, like these socks on I got right here, when I take these, it says -- when I take these socks off, as long as I had them on, I'll be throwing them away too.

So, you're taking your socks off and you threw them away?

Yes.

Did that intentionally cause of the Athlete's Foot?

Y'all didn't follow-up on anything to see whether or not -- I mean there's a, whether there's any factual basis for him claiming to have Athlete's Feet, did you?

A No, sir, we did not.

Q Okay. Then you say, this is you speaking, 67, Line 11, we're trying -- you're trying to tell me the sock you recovered with your DNA on it, that came from the side of the light pole?

Yes.

Now, it doesn't say the light pole on Issac Street or the light pole next to whatever it was, [redacted], it doesn't say that.

He tells you clearly, doesn't he, that he took them off at the store next to, and it's in the statement that you can hear, this dumpster, and he left them there next to the light pole?

Your interpretation is and what you're telling people he said is he left them next to the light pole in some, on some of these pictures here?

That's not what he said, is it?

A What he said initially is he left them in a dumpster. As we continued to talk to him, he changed it to I left it near a light pole. Again, none of that information was put in the media. No one knew where those socks were recovered. So, only the murder suspect would know where they placed their socks at after killing Eichelberger, which was near the light pole.

Q Near a light pole, right?

A As stated.

Q State's 116.

A 116?

Q Right?

A Yes.

Q Socks?

A Socks.

Q Light pole?

A Light pole.

Q Which picture of the GazBah show the shirt on the light pole there?

A Again, I can't reference the GazBah having a light, but I do know they have lights.

THE COURT: Next question.

MR. STRICKLER: Yes, sir.

Q Page 71.

A Seventy-one?

Q Yes, sir.

A All right.

Q Line 17, Mr. Reece. Listen to this. I'm gonna hit you with a what if.

Well, this is another set of facts that you're going to supply Mr. McGee.

Uh-huh.

Reece. Okay. What the fuck if, before you slid your socks on your hands, you touched that bar, your DNA got on that.

Right?

A That's correct.

Q You have no testing indicating that Mr. McGee's DNA is on that bar, correct?

A That is correct.

Q So, that's a lie?

A That was a what if.

Q Very well, sir.

Page 72. Mr. McGee, Line 10. I'm going to be truthful with you. If you want to go ahead and charge me with this, like you already did, go ahead and charge me. But as far as

being honest and knowing what I did, that I did that, I didn't do that. I did not do that.

So, I would interpret that as him denying doing something. You'd interpret that some different, some different way, right?

A I interpreted it as a lie.

Q Who did it? I want to know who did it.

I didn't have nothing to do with it.

That would be another denial.

Mr. Reece, Line 18. All right. Put yourself in my position. What would you do?

If you were the police and, and I was you, what would you do?

Would you believe any goddamned thing I said to you, would you?

That's what Mr. Reece says to him, correct?

A Correct.

Q Page 73, Mr. McGee. Now we're getting into his interpretation of what's going on. Line 4. Mr. McGee. Matter of fact, if you have an individual that's telling you what he did, and that's what I did, and then you're going to team up, and you jump on me, then you jumped on me for, for me to say that I took a bar and went down there and killed Reverend Eichelberger, which I did not do, I did not do that.

So, evidently, sir, your conversation is leaving him with the impression that the three of you in this room are ganging up on him, right?

A In terms of jumping on him about certain facts.

Q And, again, didn't do, didn't do.

You, Line 11, I got a question for you.

McGee. But let me finish. I'm not guilty for murdering Reverend Eichelberger or a homicide.

Right?

A That's correct.

Q I've been in other situations, but not this one.

Correct?

A Correct.

Q Page 74, he admits on 74 that he hit somebody, right?

Page 74, Line 2.

A Right.

Q Or Line 3. I did hit somebody.

Right?

A That's correct.

Q Sixty-four, talk about who got hit, Line 21, one of the drug dealers at the house that night.

Right?

A Correct.

Q All right. Then his conversation go on about drug dealers.

Page 76, Mr. Reece, Line 5. And is that what happened after you hit him with the raw fucking bar?

That's what he said, right?

A Which line are you on?

Q Then further down, Mr. Reece, at Line 11, well, I want to give you a description of yourself.

Okay.

You, sir, are an evil person.

Okay.

And you're a fucking liar.

Right?

A Correct.

Q That doesn't sound accusatory to you?

A That's Investigator Reece interpretation of the person that we're interviewing at that juncture. His actions can be perceived as evil and his lies can be considered as lies.

Q Page -- well, Line 22. And that wasn't no son-of-a-bitch that picked up your dirty ass, funky ass socks off the ground and put on it. You knew Reverend Eichelberger wouldn't be home. At least your ass thought when you broke in that man's house after he did every fucking thing he could to help you, and he confronted you in the house, and you hit that man with that bar and you fucking ran like the coward that you are.

Now, this is Page 77, Line 5. Now, 3:00 in the

morning, you use the phone, it's a funny fucking thing about those goddamned telephone towers.

Line 9. They follow your ass wherever you go because you tapped into one of them that night, and you called your wife, and you made her come all the way from Camden to pick up your sorry ass where you ran to.

Cell phone tower records or was that a lie?

A There were no cell phone tower records. He used a pay phone to call his wife.

Q So, that would be a lie, right?

A If you say that. There are no records. He used a pay phone from the Piggly Wiggly.

Q Page 79. Mr. Reece. Okay. Oh, Line, Line 11. I'm sorry. Okay. I'm listening with all fucking ears.

Frankie. That night that my wife says she picked me up in Piggly Wiggly wasn't, wasn't the night I got into it with the guy. That was the day I had, I had let him use my truck. I was suppose to wait there for him at the same house I told you about.

Right?

A Right.

Q Page 81. Cause you gone -- you talked with him about the incident with Mr. Eichelberger. You talked with him about where there's been a conversation about or an incident with another individual that got struck.

You, to Mr. McGee, Line 9, the day you caught a ride to Camden when all this transpired, that's the day you were, you were staying on. I want to stay on that day.

McGee. I, I, I, I don't honestly remember.

Right?

So, all this round and round gets very confusing about, about what days you're talking about. Frankie says I don't honestly remember.

Eleven months after the fact, right?

That's what he says?

A That's what's stated there.

Q All right. Page 82. You. Line 8. We're still talking about a conscious. All right. A Reverend's dead. All right. If it was an accident, well, let's talk about it. That's where we are right now.

And you're back to giving him an opportunity to minimize his involvement, right?

A Again, giving him an opportunity to tell the truth about his actions in this murder.

Q Just right down below, uh-huh, Line 13. Thomas. All right. If you didn't mean to do it, let's talk about it to get your true side of this thing.

A Correct.

Q All right. Page 83, Line 9. This is you again. That's the day, that's the day you rode up in there in that

18-wheeler from that construction company?

McGee. No, sir, that's not what I'm talking about.

Mr. Reeves would be -- Line 22. Well, in the truck to find out who it belonged to, maybe a phone number or somebody who belonged to maybe because you thought it was stolen, right? That's why your prints might of been on the tool box.

Y'all don't have any prints, right?

A No.

Q From the truck?

A No prints from the truck.

Q Okay. And your DNA might be on the tool box from inside the cab of the truck.

Don't have any DNA again from the tool box or in the cab of any truck, right?

A No, we do not.

Q Now, 84, you, Line 14. What kind of truck was it?

It was a Mack. It was a Mack, a Mack.

That's what Mr. McGee says, right?

A Correct.

Q What color?

You just said it was a red truck, right?

A Correct, and he could of changed the color if it was any color different since he said he got in it and moved for that friend of his---

Q But y'all -- I'm sorry. Go ahead, sir.
A I'm just saying he could of changed the color of the truck he said he moved if it was any different color than red.
Q You supplied him with the red truck?
A And he did not change the color.
Q Well, he changed the brand of the truck, right?
A Right.
Q From a Mack, from a Peterbilt to a Mack?
A Again, a Mack truck is most commonly stated on the average. When people see an 18-wheeler, they think Mack. I don't even know what a Peterbilt is.
Q Okay. So, as I understand it, your contention is that since he has a CDL license he should know everything about every variety of winch bar it is, but he shouldn't know the difference between two very common varieties of tractor/trailer trucks?
A Well, obviously he didn't because he said Mack instead of Peterbilt.
Q He also said -- well, read, Line 20, a Mack.
Twenty-one, McGee, a Mack tractor trailer.
Correct?
A That's correct.
Q Tractor trailer is the cab portion of the truck and the trailer behind it?

The Peterbilt that was taken was the cab only, right?
A Correct.
Q Eighty-six, you're back again, Line 5, so that would explain why your DNA or anything's on the steering wheel.
Again, there's no DNA on the steering wheel, right?
A No, there's not.
Q Okay. Line -- Page 87.
A Eighty-seven?
Q Mr. Reece. Yes, 87, Line 16. I didn't know if you killed Reverend Eichelberger, but I'm convinced that's not something you intended to do. You didn't intend to do that. And then let you know that you did it. What I'm trying to do is offer your ass a way out.
Mr. Reece even admits that he wants to offer Frankie a way out. He admits he's giving him a chance to admit to his involvement and minimize his involvement, but that's not a technique you employ?
A And he's giving him an opportunity to tell the truth once again.
Q Eighty-eight, Line 21, Mr., Mr. Reece. You're the captain of that ship and your ass is sinking real fucking fast. And once that ship goes down, you know and you know it's under water, it ain't no swimming back up. It's too late -- and you ain't, and you ain't going to be like them fucking rats that leave a sinking ship.

That's what Mr. McGee said, isn't it?
A That's correct.
Q All right. Page 89. Line 17. Mr. Reece. If you meant to do it, just say. Reece, Thomas, Reeves, I picked the fucking bar up and I beat the hell out of him. If you didn't mean to do it, just tell me how it went down.
Right?
A Correct.
Q Again, an opportunity to go ahead and minimize his involvement by confessing?
A An opportunity to tell the truth, sir.
Q Page 90, this is you, on Line 13. And like I said, your eyes are talking, screaming at me right now. Let's talk about this, this. Was it an accident?
Not an opportunity to minimize, an opportunity to tell the truth?
A Yes, sir.
Q Right?
A As stated previously.
Q Line 17, striking Eichelberger in the head like that, was it an accident? Did you intend to kill this man? I don't think so. Did you?
So, again, accident.
Frankie, Page 90, Line 23. I'll talk to you all you want and tell you everything you can that I possibly can

tell you about me and what I, next page, about me and what I did.

Okay.

But I did not kill Reverend Eichelberger and I didn't have nothing to do with killing Reverend Eichelberger.

Did you strike him?

No, I didn't strike Reverend Eichelberger.

All right. Page 93. Let me ask you this. Did you even know there was a second person -- this is Line 7. I'm sorry. Let me ask you this, did you know there was a second person in the house?

McGee's response. Second person in that house?

He doesn't have any idea what you're talking about, the second person, right?

A Because when he saw her she was is her car observing him on the back porch.

Q All right.

A She wasn't in the house at the time.

Q Page 97, Line 20. Mr. Reece. Well, that's fine. When you heard this about Reverend Eichelberger being that Reverend Eichelberger helped you out that very same day, why didn't you come forward to the police or call us on the phone and say listen, I was at Reverend Eichelberger's house that day. I need to talk to y'all.

Hu?

Why didn't you do that, said Mr. Reece.

Frankie. Because had I would have did that, the first thing would of happened, the first thing that would of happened, they would of said well, he did it, he did it, yeah, he did it, yeah, he did it cause if you call in and say this about something or whatever, yeah, he did it, he's the one, there's our man right there.

That's what it says, right?

A Correct. He did it.

Q All right. Now, Page 100, Line 22. Frankie's question to y'all. Well, why are you cursing, cursing?

Mr. Reece. Because I'm bringing myself down to your level.

Now, point out the time during this one hour interrogation that Frankie McGee cursed at anyone?

A I can't recall him cursing at anyone --

Q Right.

A -- during our interview.

Q 101, Line 17. How deep do you think this is going?

Frankie. I'm not the man that you want. I'm not the one that you want.

Right?

That would be a denial, right?

You'd say that'd be a lie?

He lied?

A That would be a lie, correct.
Q All right. In -- just a couple more questions and I'll be done.
A Certainly.
Q There was a cell phone recovered from---
A Outside the Eichelberger's home.
Q ---the roadway outside the house?
A That's correct, sir.
Q And that's reflected -- actually show you State's 75.
A That's correct.
Q Okay. And there's another one in here. It's pulled back a little bit. You can see it a little bit more in the roadway.
A Yes, sir.
Q That item -- that's at the crime scene, right?
A It was.
Q Those photographs were taken that evening at the crime scene, right?
A They were.
Q The crime scene is a secure area, right?
A Correct.
Q That phone at the crime scene was returned to a member of Mr. Eichelberger's family later, is that correct?
A It was returned to a female member of the family that when they rushed to the scene apparently she dropped it in

an attempt to head toward the house. Apparently they were turned back and she dropped her phone.

Q Did you get the phone number off that?

A Off that phone, no. It was (inaudible).

Q Did you determine, through independent, independent witnesses, when that phone ended up on the crime scene?

A I believe, upon return of the phone, the young lady explained to us what happened, that she dropped it.

Q You just took her word for it, right?

A That is correct.

Q And Mr. Eichelberger had a land line phone in his house, right?

A He did.

Q And you-all got the phone records relating to that land line, correct?

A As I recall, yes.

Q Okay. And you actually decided to check the phone records for Mr. Eichelberger's house, his land line, on March the 12th, 2010, is that correct?

A If that is what the documents before you have, then I must agree.

Q Okay. Let me show you a document and ask if you recognize this, sir.

A Looks like a search warrant for AT&T.

Q For?

A Ask the question.
What is it?
Q What phone?
A It's for phone number [redacted]. That what's in the affidavit itself.
Q Okay. Referring to the affidavit portion down there --?
A House phone, requesting assistance, is that what you're referring to?
Q Yes.
A Yes, sir.
Q It's the house phone?
A Correct.
Q Okay. And the date on which this was, the search warrant was taken out?
A This one shows a date of March 12th, 2010.
Q Mr. Eichelberger had his cell phone?
A He did.
Q Do you have his cell phone records?
A To be honest I can not reference, but I believe they may of had that in discovery.
Q I'm sorry?
A I said I can't reference it right now, but you may of had it in the discovery. I'm not certain. But if you show me documents I can look at it like you've just done.

Q This is the phone that was supposedly used by Frankie McGee, if I understand the testimony in this case correctly, right?
A Per McGee's statement.
Q All right. Thank you, sir.
A Thank you.
MR. STRICKLER: Just a second. Beg the Court's indulgence one moment.
(Pause.)
Q Just to be clear, that last little bit with the search warrant, you agree with me then that the search warrant for Reverend Eichelberger's home phone was drawn up March 12th, 2010, correct?
A Per the document that you showed me.
Q Per the document. Thank you, sir.
THE COURT: Any redirect?
SOLICITOR CAMPBELL: Yes, Your Honor.

REDIRECT EXAMINATION

BY SOLICITOR CAMPBELL:

Q He asked you some specifics about the statement and the fact that it was recorded, and do you record it so that later on down the line it can be played for the jury so they can actually judge themselves what happened?
A We find that recording is more specific than a written hand statement, and we decided years ago that we would start

recording our defendant's statements so you have more accurate accounts of what they actually said.

Q And the pertinent parts of that statement have been published here in court, is that correct?

A They have been.

Q And that accurately reflects the tone, what was said, and what, what happened that day?

A Vividly, yes, ma'am.

Q It is unusual for a person to commit a murder and lie about it?

A Quite consistently.

Q He also asked you specifically about, and I won't go through the whole thing again, but in that statement he's talked about how, when you informed him there was a second person in the house, he was surprised?

A Correct.

Q He said there was a second person?

A Correct.

Q Let me ask you this.

When you informed him that a pertinent piece of evidence in this case was, was the DNA on the socks, what was his reaction?

A He asked no questions. He just admitted that the socks were his.

Q Was he surprised at all you were asking about socks?

A He was not surprised, which definitely gave us indicators that he was our man. He didn't ask what socks. He just jumped into an alibi of Athlete's Feet for the socks that we recovered for Eichelberger's murder.
Q And he denied knowing what a winch bar was?
A He did.
Q He changed the make of the truck?
A He did.
Q But who's -- was it -- who actually first said, referenced the truck as being a red truck?
A I would have to look back at that statement to be accurate on that, but I think Lance Reeves brought the truck up if I---
Q But the fact that it was red was brought up by who?
A Mr. McGee I believe.
Q Thank you. And you also asked him specifically about some cell phone or for a time period of 3:00AM in the morning.

During the course of your investigation, did y'all interview the defendant's wife?
A Yes, we did.
Q And at the time she was cooperative, is that correct?
A Yes, sir.

MR. STRICKLER: Objection. That's been asked and answered on direct testimony, sir.

THE COURT: Objection's overruled.

SOLICITOR CAMPBELL: Thank you.

Q She was cooperative, right?

A Yes.

Q And did she give you certain information about 3:00AM in the morning?

A Yes, she did.

MR. STRICKLER: Objection. She's asking for hearsay at this point.

THE COURT: Objection's sustained.

Q Without going into what she said to you, based on information you got, was the 3:00AM time---

MR. STRICKLER: Objection, Your Honor. Now that's just back dooring. That is still hearsay.

THE COURT: All right. Speaking responsive, speaking objection.

MR. STRICKLER: I apologize, Your Honor.

SOLICITOR CAMPBELL: Your Honor, he was the one that made the issue about the 3:00AM time period and where he was, where he was picked up. We were just explaining why they were exploring that, that it just didn't come out of no where. It was based on their investigation, and I offer it not for the truth of the matter asserted, but to show why they did what they did.

THE COURT: Objection's overruled.

Q You can answer.
A Yes, he gave specific times he mentioned.
Q He also asked you if you ever followed up on whether or not this defendant had Athlete's Foot?
A Correct.
Q When is the first time you made contact with this defendant?
A Around March 17th in the institution itself.
Q Are you aware of any testing that could of been done ten months after the fact that would of shown whether or not he had Athlete's Foot ten months after?
A I'm not aware of anything of that nature, no.
Q And is whether or not he had Athlete's Foot relevant to your investigation?
A No, his DNA being inside the sock that carried Reverend's Eichelberger's blood on the outside is what was relevant to me and my partner in this investigation.
Q He also asked you on direct examination a question about whether or not this defendant actually was able to drive a tractor trailer I believe at one point early in his cross-examination?
A Correct.
Q What class is reflected on this driving record of CDL that you have?
A Give me one moment. He has a CDL Class A.

Q He also asked you if you went back and showed Temika Ashford a line-up with David Williams in it.

Would that be proper after showing a line-up?

A No, that is not our protocol. Williams was taken into custody. He was in handcuffs and he was standing outside of a vehicle. A light was placed on him for identification. When that type of identification, identification is done, we do not come back with a six pack line-up. That is the identification that's used throughout the investigation.

Q And he also asked you about the defendant being incarcerated at the time you spoke to him.

Did y'all specifically check and make sure or to see if he was incarcerated in May of '09 when this occurred?

A Correct.

Q Was he incarcerated when this occurred?

A No, he was not.

Q I skipped -- a lot of pages he skipped. One line at the end.

Do you recall, right as y'all were leaving this interview, the defendant commenting on well, did you catch me in a lie or something to that effect?

A On a---

Q What page is that?

A This is Page 102.

Okay. You want me to read that portion?

Q What, what did he indicate about whether or not he lied?
A In this area here he's saying that if I don't answer then all the way completely, to your T, and you go back and say I will, I lied about this, I lied about that, it's not that I lied. It's just that I did not remember what you and then it goes into --
Q So, at that point he's explaining to you why he may, he lied?
A Correct.
SOLICITOR CAMPBELL: I have nothing further, Your Honor.
THE COURT: Anything further?
MR. STRICKLER: No, sir, thank you.
THE COURT: All right. Thank you, sir. You may step down.
WITNESS: Thank you, Your Honor.
THE COURT: All right. Ladies and gentlemen, that is it for this morning. It's one o'clock. We'll start back at 2:00. Have a good lunch.
(WHEREUPON, the following takes place outside the presence of the jury.)
THE COURT: Any matters before we break?
SOLICITOR CAMPBELL: None from the State, Your Honor.
MS. PRINGLE: Your Honor, may, may I inquire as to,

just for scheduling purposes, if the State can say, if I can inquire as to how much longer they believe their case will go?

I just got people on hold trying to---

THE COURT: Is that direct and cross-examination?

MS. PRINGLE: ---planning. If they can give us an idea of their direct, I can probably guess on our cross-examination.

THE COURT: All right. What says the State?

SOLICITOR CAMPBELL: Your Honor, we may not be able to say anything based on -- I would never have thought we would of spent the entire morning on cross-examination on Investigation Thomas. So, I can't say. I would assume if it goes quickly we can finish this afternoon.

THE COURT: All right.

SOLICITOR CAMPBELL: I think that's best for her to assume that.

THE COURT: Uncertain.

MS. PRINGLE: Okay. Thank you.

THE COURT: All right. We'll break for an hour.

(WHEREUPON, Court was in recess for the lunch break.)

THE COURT: Anything before the jury comes in?

SOLICITOR CAMPBELL: Nothing from the State.

MR. STRICKLER: No, sir.

THE COURT: Bring the jury.

(WHEREUPON, the following takes place within the presence of the jury.)

BAILIFF: The jury's seated, Your Honor.

THE COURT: All right. Very good.

Next witness.

SOLICITOR CAMPBELL: May it please the Court?

THE COURT: Yes.

SOLICITOR CAMPBELL: The State would call Investigator Kevin Reece.

KEVIN REECE, after being first duly sworn, testified as follows:

THE CLERK: Please have a seat. State your full name for the record.

WITNESS: My name is Kevin Reece.

DIRECT EXAMINATION

BY SOLICITOR CAMPBELL:

Q Sir, where are you employed?

A Columbia Police Department.

Q And how long have you been in law enforcement?

A I've actually been in law enforcement since 1978.

Q 1978?

A I've worked at two different agencies.

Q And back in 2009 were you an investigator in the major crimes unit?

A Yes, ma'am.

Q And is that still your position?
A Yes, it is.
Q I want to turn your attention to May the 3rd, that evening, and the early morning hours of May the 4th.
Did you respond to an area of town known as Greenview?
A I did.
Q And specifically to an address on Issac Street?
A I did.
Q Can you describe that area for the jury?
A The Issac Street area or the Greenview?
Q Greenview/Issac Street area.
A It's basically an area where older retired adults live. Certainly it's a nice quiet neighborhood. Some parts of the, of Greenview area, in particular next to this incident location where the Eichelberger's house is a large church, church. Across the street is a field that belongs, a vacant lot that belongs to the church. There's a couple of -- I think in that block that Mr. Eichelberger lives in, if I recall right, it may be two or three houses and then the church.
Q And in other areas of Greenview though, I guess you generated somewhat of a (inaudible), certain areas in the Greenview area?
A Generated.
Q Uh-huh. (Affirmative).

A Absolutely. I did, but it's no different from any other places in Columbia, you know, you got some of the up-scale houses and then right across the other side of the highway you may have some of the more dilapidated, dilapidated houses.

Q That evening, did you respond to the Issac Street address?

A I did.

Q And when you got there, was Investigator Pegram I believe already on the scene?

A Pegram.

Q Pegram. I'm sorry.

And once you got there, tell the jury what you did.

A The, the first thing I did was -- when I have got the call, I was at home asleep, and being that our unit is the major crime scene unit, what we do on major crime scenes, we're, we're called B-CAP Unit, crimes, violent crimes against persons, and that is exactly what we do. We investigate violent crimes against persons.

Normally my unit does not investigate a burglary. We will investigate a burglary if there is an assault in that burglary. Of course, this is the situation in Reverend Eichelberger's case. The reason that everyone on my team was called out was because Reverend Eichelberger had been assaulted, and it wasn't one of those ordinary kind of

assaults. He, he didn't look good. So, we treated it as burglary, and, of course, and an assault with the mind set that it was not gonna turn out very auspicious to Reverend Eichelberger or his family.

Q Once you responded to Issac Street, did you make contact with a man -- well, with your teammate and a man named Larry Harp?

A Yeah, Investigator Pegram did.

Q And does he ever give you just certain information about the person he'd seen that day?

A He said on the paper that he said that he saw a black male earlier in the day in Reverend Eichelberger, Eichelberger's yard, and he told Pegram that the gentleman that he saw appeared to be eating something and, and talking on the, on the telephone.

Q There that night at the scene, was there also another witness, Ms. Temika Ashford?

A Yes, ma'am.

Q Did she also give a short statement to the police that night?

A Yes, she did. I didn't see Ms. Ashford that night, but I knew that there was a female involved in this, and that the investigators had spoken with her.

Q That evening, back at headquarters, did you come in contact with a David Williams?

A I did. I think when I saw him out there with Pegram before we went to headquarters.
Q Saw him on the scene as well?
A Uh-huh. (Affirmative).
Q He was, he was then transported back to headquarters to be interviewed?
A He was.
Q And upon making contact with Mr. Williams, you mentioned that the nature of this assault, was there certain evidence you were looking for the presence or the absence of?
A Absolutely.
Q And what type of evidence were you looking for when you first made contact with Mr. Williams?
A Actually I was looking for a number of things. Clothing. I was looking for maybe some blood on, on his clothes or his shoes. Looking for sweat, looking for a different kind of clothing, that kind of thing. Looking for a moderate build, hairline.
Q And did you actually interview him that evening?
A Huh?
Q Y'all actually interviewed him that evening?
A Yes, we did.
Q And did you also collect certain items from him?
A Yes, we did.

Q Including -- what exactly did you collect from him?
A Those shoes that you got there.
Q State's Exhibit No. 115?
A Right.
Q 115?
A Yes.
Q As well as did you also obtain a sample of his DNA?
A Yes, we did, and the way we got the DNA, one of two ways. We get a Court order or we just simply ask your permission. Giving your permission means that you cooperate. We asked him during the interview and he submitted to it. He didn't -- he said he didn't have any problems with it. There was no reason why we wouldn't, indicate that we would think he had a reason to deny us that.
Q That night did you also become aware of two essential pieces of evidence that were found near the crime scene?
A I did.
Q And what pieces of evidence were those?
A One was the winch bar that y'all been hearing about the past couple of weeks. I didn't, I didn't know what a winch bar was. We had to, had to look it up on the Internet. As a matter of fact, none of the investigators in our office knew what it was, and the other, the other thing was a pair of white socks.

Q And those were colleted by crime scene personnel with the appropriate method for you to do it, and not for you to do it, right?
A That's right.
Q And that was done that night?
A It was.
Q And based on the information that you got as part of your investigation, did those appear to be, have some relevant evidence on them that would corroborate not only the eye witness, but as to what happened?
A Yes, ma'am.
Q I want to turn your attention to May the 6th.
Did you and Sergeant Thomas actually interview Temika Ashford?
A We felt that it would be necessary as well as prudent to interview her.
Q And---
A The reason for that was there were some things in the original statement that were called into question by Thomas and myself.
Q And specifically were you trying to -- it is unusual for you to have to follow-up on a statement taken from a person who may have been traumatized?
A No, it's, it's not unusual.
Q And you did that in this case?

A Yes, we did.
Q And was she able to give you a pretty detailed description of the person?
A Yeah, she did. She gave us a little more information because we spent a little more time with her.
Q And did she indicate whether or not she had observed the person the police stopped, David Williams, that night?
A Not -- as a matter of fact she kept saying to us that it was not him, and that the clothes that he had on did not match the person that she saw coming out of the, of Reverend Eichelberger's house.
Q That day did you also make arrangements for her to have a, to meet up with the sketch artist at SLED?
A I did.
Q And did that take place?
A Yes, ma'am.
Q Over the course of the next several days, did y'all continue to receive information, tips, about people who claim to have knowledge of what might of happened?
A Yeah, we received an enormous amount of information. More than we expected, but, yeah, we did.
Q And specifically during the course of that period of time, did you locate the victim's cell phone, Reverend Eichelberger's cell phone?
A Yes.

Q And on May the 11th, specifically, did you -- were you able to obtain that cell phone from someone?
A Yeah, I did. I got it from one of Reverend Eichelberger's daughters.
Q One of his daughters?
A That's right.
Q And then was it submitted for further testing as far as records within the phone?
A Or at some point after receiving the phone I personally took it out to the South Carolina Law Enforcement Division to their, one of their forensic units and to have them to dump, what's called dump the phone. By dumping the phone, we're simply trying to find out what kind of information we can retrieve from that, that phone.
Q And were you able to retrieve any information from the dump on that phone for this case, in this case?
A No, we only received his contacts, names of people that he have and phone numbers in his phone.
Q Did you also make arrangements for the two items we talked about, the winch bar and the socks, to be submitted to the Richland County Sheriff's Department for testing?
A I did.
Q And what kind of testing are you requesting?
A Basically I was -- you're talking about the first time?
Q Yes, sir, the first time in June requesting.

A DNA testing on those items.
Q And I believe, on June 15th, did you actually receive the first report in this case on the DNA testing?
A I did.
Q And did that indicate whose blood were on those two items?
A It indicated that, that the, that the red substance we saw on the items was, in fact, blood and that it was the blood of Reverend Eichelberger's and nobody else's.
Q I want to turn your attention to that Summer.
During the course of the Summer, did what started out as an assault charge, did it get upgraded to murder?
A Yes, it did.
Q And the Reverend in this case I believe actually died in the end of July, is that correct?
A I think I've got the -- let me check. July the 31st I believe.
Q Is when you got the information?
A When I got the information. The phone call from Thomas.
Q During the course of that Summer, did you continue to follow-up on the leads and the information that was being given to you?
A Absolutely. You -- I -- this -- there -- when you have a case like this that is protracted, goes so long, there are

periods when things go cold, and you don't have anything to work on, to follow-up. So, generally just because we have a case like that doesn't mean we're not assigned cases. So, I was working other cases. This case here never left my desk. So, every time something came in, no matter how insignificant it may of seemed, we followed up on it.

Q In this case did you become aware of a person named Stephon Jacobs?

A I did.

Q And based on the information, did you then develop a photo line-up?

A I did.

Q And I'm gonna show you what's been marked as State's Exhibit No. 3.

Is that the photo line-up you developed with Stephon Jacobs in it?

A Yes.

Q And why was -- well, why is anyone put into the line-up?

A You, you -- you're put into a line-up to -- if there are any witnesses, then hopefully the ideal situation is for that, would be for that witness to look at the line-up and point to you and say that I'm positive this is the person. Sometimes it happens, sometime it don't. But you use a line-up based on information that you have gotten.

You'd actually be negligent if you got a person's name, somebody gave me a name to, like this person had something to do with it, your incident, and, and you did not put him in a line-up, you know. That wouldn't be a prudent thing to do.

Q So you can include them or exclude them?

A It can include or exclude, yes.

Q And, and when you got this line-up, did you show it to two of the witnesses in this case?

A I did.

Q And who were they?

A I believe Temika, Temika Ashford and Mr. Harp, Larry Harp.

Q And did any of them pick anyone in the line-up, Mr. Jacobs or anyone else?

A Ms., Ms. Ashford couldn't pick out anybody by what is written on it. Mr. Harp looked at it and went directly to Stephon Jacobs, and he said now this is not him because I know him, and this is not him.

Q So, he was specific about it wasn't him?

A Yeah, he was. And a matter of fact, Thomas and I are familiar with Mr. Jacobs, but we still put him in the line-up.

Q As time continued, did you continue to follow-up on leads in this case?

A Yes, I did.
Q Interview family members?
A Uh-huh. (Affirmative).
Q Acquaintances of the victim?
A Right.
Q Trying to get information that might, might be pertinent in this case?
A Anything we could come up with.
Q Turning your attention to the end of September, September the 29th of 2009, did you develop another photo line-up?
A September 29th?
Q Yes, sir.
A Yes, I did.
Q And I believe you actually showed it on the 30th. I'll show you State's Exhibit No. 119.
A Okay. Yeah, I developed this line-up. Well, I had someone develop in for me, but it was developed for this case.
Q And who is the person of interest in that line-up?
A Marvin Magazine.
Q And the line-up on the 30th?
A On the 30th?
Q September 30th. I'm sorry. September 30th. Page---
A Right, Adrian, Adrian Stephon Miller.

Q Mr. Miller?
A Right.
Q And did you show that line-up to anyone?
A I showed this line-up to Temika Ashford.
Q And what, if any information, was she able to give you when she was shown that line-up?
And, again, when you're presenting line-ups, say even if it's to the same witness, do you take steps to ensure you don't influence them in any way?
A Absolutely.
Q And was this line-up shown properly as all of them are?
A Yes, it, it was. What I do, as a practice, is before, before I even present the line-up -- the person knows what I'm there for. In this case, Ms. Ashford did. We talked with her some more, and I let them know that I have a line-up I'd like to look at, let them look at. But before I present the line-up to them, I don't even turn it over or let them see what the colors on the line-up. I explained to them that the person in question may or may not be in this line-up. If you see the person that you saw leaving Reverend Eichelberger's house that night, the night in question, point him out.
Q And was Ms. Ashford able to make any positive identification in this case?
A No, she wasn't.

Q Was -- she give you any information that's reflected on that line-up?
A She picked out two, two of the photos, Number 3 and Number 5.
Q And what did she indicate about those?
A She just simply stated that it looks like Number 3 and Number 5.
Q And that was all the information she was able to give you?
A That's right.
Q All right. Later, on October 14th, 2009, did you also show a photo line-up to Officer Duckett?
A I did.
Q And was he able to identify anyone?
A Not positively.
Q And, again, did he just narrow it down to the ones that are similar?
A That's right.
Q During the Fall did you continue to follow-up on leads in this case?
A I did.
Q And information that was given to you?
A Uh-huh. (Affirmative).
Q And in January, specifically January 22nd of 2009, did you show another series of photo line-ups to someone or

photos and photo line-ups?
A What, what was the date again?
Q January 22nd of 2010.
A I did.
Q And I'm gonna show you what's been marked as State's 122, 120, and 121.
Do you recognize those items?
A Yes, ma'am, I do.
Q And, again, who did you make contact with?
A I made contact with Temika Ashford again on these line-ups.
Q And when you showed her each of those, again, was she ever able to positively identify any one of these?
A She was never able to positively identify anybody, but she was always consistent with what she said.
Q And what she said, I notice in the spot on State's Exhibit No. 120, is that what she said basically about the, the three people she said were similar?
A Right, she just spoke about body build on a person, and the only thing she could see is from this part up, and head shape, and the receding hairline.
Q And specifically in State's Exhibit No. 121, she said it didn't even look---
A No, now that wasn't put in the line-up. I just needed to know whether she knew that guy and I needed to know if I

could put him in the area. So, that wasn't a line-up done.
Q And then 120 and 122 she wasn't able to positively identify?
A No, she wasn't.
Q I want to turn your attention to the end of February of 2010.
Did you set up a meeting with Investigator John Barron with the Richland County Sheriff's Department?
A I did.
Q And why did you do that, sir?
A Because, through, through the trainings and seminar, some, some, somehow -- I knew I'd been to a training seminar where it was mentioned about a new technique of extracting DNA. I, I guess you could say that it was probably because of the Eichelberger case being unsolved at that point and period of my interest and the job that I'm, that I'm in. I have to pay attention to it.
So, I learned a little about it, thought it would be a good idea to go sit down and talk with John Barron about what could be done, what I needed him to do, and what I was looking for on some of those items that he had.
Q And you, in fact, met with him and discussed this?
A I did.
Q And as a result of that, did you instruct Investigator Nelson to resubmit certain items to the lab?

A I did.
Q And what items were those?
A Based on our conversation, it would have been more advantageous to resubmit the socks because of the technique of touch DNA.
Q Okay. And I show you State's Exhibit No. 104.
Those were the socks you collected and submitted---
A Yes.
Q ---and actually resubmitted?
A Yes, it was. It is.
Q I'm going to turn your attention to March the 11th, 2010.
Did you get contacted by Investigator Barron?
A I did.
Q And what information was he able to give as far as, that involved your investigation?
A Basically told me he had done what I had asked him to do, but I already knew that he was doing it. But he told me he came up with a match of some DNA that was found inside those socks.
Q And was he able to give you any identifying information as far as the person whose DNA matched those socks?
A He did at first, but I don't think he gave it to me right off the bat. He needed to, as per their procedure from what I'm understanding, contact agents from the State

Law Enforcement Division, some of their scientist as well, and get them to check over, sort of like a check and balances kind of thing, and verify the information that he had. Once that was done, he notified me and let me know.

Q At that point did you develop another photo line-up?

A I did.

Q And who was in that photo line-up?

A You are talking about after?

Q Uh-huh, State's Exhibit No. 123.

A Based on that information I developed a photo line-up that included Mr. McGee.

Q At that point had you confirmed generally that his general build, physique, and everything was consistent with what the eye witness had reported?

A I did.

Q On May the -- excuse me. March the 12th, did you get some of your other investigators in your department to help you in showing the line-up I believe to Mr. Larry Harp?

A Yes, ma'am.

Q And during the course of your investigation, did you become aware of whether or not State's Exhibit No. 4 had been shown to Mr. Harp and whether or not he recognized anyone?

A I did. I asked Investigators Sumter and Mahoney to take this photo line-up out and show it to Mr. Harp. Larry

Harp was one of the people.
Q And that day did Investigators Sumter and Mahoney also go and show a single photograph to Michelle Perry?
A Right.
Q And why was she shown a single photograph versus a photo line-up?
A Well, in, in respect to Mr. Harp, Mr. Harp had seen an individual in Reverend Eichelberger's yard earlier that day. We still didn't know at that point whether the defendant had been over there with any connection, and what, what happened. Ms. -- what's, what's the lady's name, Ms. Perry?
Q Michelle Perry, yes.
A Or is an employee at the cab company in which Reverend Eichelberger I believe was a part owner of, but the cab company also houses -- one side is a cab company and another part of the building is the church. I needed to -- well, first of all, I, you know, based on what we got, we, we couldn't simply just seek an arrest warrant for Mr. McGee, but we chose not to do that. We chose to investigate it first, and one of the things we needed to do was to be able to put him in Green, the Greenview area at a specific time, and make him familiar with Reverend Eichelberger or vice versa.

One of the places we found it most prudent to start at was, would of been the church and cab company. I sent them

there to see if they could find me anybody at the cab company/church that would recognize Mr. McGee and tell me how they, tell us how they recognized him and that's what they did.

Q And that's where they got information, from Michelle Perry?

A That's right.

Q That day, did you also get certain information about Frankie McGee's driver's license that was significant in your investigation?

A Another thing we had to do, yes, I did, was after we came to the realization of what that tool was, the significance of it, we needed to determine if this person had a, a CDL license and we were able to do that.

Q Later that day, turning your attention to a C. Ray Miles Construction Company, based on information you developed, you can't say what it is, but did you go and then meet with C. Ray Miles Company?

A I'm getting, getting mixed up with the two companies that we visited that day.

Q This is the one where he use to work.

A Yeah, we were in contact with, with two of them, two places.

Q And did you ask them specific information about a winch bar?

A Right.
Q And his -- without -- you can't say what they said, but without going into any, going there---
A I'm sorry?
Q And he was employed there?
A He was.
Q Then on March the 12th did you also instruct another investigator in your department to do a search warrant for the victim's phones?
A I had Investigator McCracken. I did.
Q That day, did you receive a phone call from a Sophia McGee?
A I did.
Q And were you able to identify her relationship with Frankie McGee?
A Yes.
Q And what was her relationship to Frankie McGee?
A His wife.
Q His wife?
A Right.
Q Moments after hanging up with Sophia -- you can't say what she said.
Moments after hanging up with Sophia McGee, did you then receive a phone call from another family member of Frank McGee?

A I did.
Q And who was that?
A That was his sister, Sandra Thomas.
Q And had you known Ms. Thomas prior to this?
A I been knowing her for a long time. Ever since she's been working at the police department.
Q And prior to her call did you know anything about the business in Camden being burglarized?
A No.
Q That next day, I believe on the 13th, did you make contact with family members of the Eichelberger's?
A On the 13th of---
Q March.
A ---March?
Q Yes, sir.
A Yes, I did.
Q And that day did you also make contact with Temika Issac, Ashford?
I'm sorry.
A I did.
Q I'm gonna show you what's been marked as State's Exhibit No. 123.
When you made contact with Ms. Ashford on that day, did you present that photo line-up?
A Yes, ma'am.

Q Again, did you do anything to influence her during or down or did you do anything in that, in that case?
A No, I didn't.
Q And when she showed the line-up -- when you showed her the line-up, tell this jury what she indicated to you.
A I wrote notes on the bottom of it, and they -- it simply says witness stated that the subject she, she saw on May the 3rd, 2009, could be Number 3, could be Number 1. She picked out Number 3 first. Number 3 is Mr. McGee. She picked out Number 3 first, but stated both subjects resembled the suspect that she saw, and she based that on head shape and body build.
Q Moving your attention to March the 15th, did you actually meet with Officer Sandra Thomas?
A I did.
Q And was she able to give -- you can't say what she said.

Was she able to give you information that was pertinent to your investigation?
A She did.
Q That day did you also go over to Sophia McGee's house and interview her?
A We did.
Q And was, was she able to give you---

MR. STRICKLER: I object. Seeking to elicit hearsay

and violate confrontation clause.

THE COURT: All right. Solicitor.

SOLICITOR CAMPBELL: My only question is gonna be was she able to give you information pertinent in this case, and I'm not going any further with that. I understand the hearsay issue.

MR. STRICKLER: Then I'll withdraw my objections since it's---

THE COURT: All right. Restate the question please.

SOLICITOR CAMPBELL: Thank you, sir.

Q On the 15th, that day, did you also go and interview, you and Investigator Reeves, I believe, went in and interviewed Sophia McGee?

A Yes.

Q At her residence?

A Right.

Q And was she able to give you information that was pertinent to your investigation?

A She did.

Q That day did you also make contact with a detective in the Camden Police Department?

A I believe it was, it was Investigator Reeves.

Q I'm sorry. Investigator Reeves did that.

And was he able to obtain a copy of a video that has been shown here in court?

A Yes.
Q Moving on to March the 16th, did you actually execute a search warrant at Sophia McGee's home?
A I did.
Q And at this point have you been able to determine where the defendant himself was in March of 2010?
A I did.
Q And was he at the Wateree Institute?
A No. I'm sorry?
Q McGee.
A In March, yeah.
Q Yes, 2010.
A Yeah.
Q We're to, at this point.
A I'm sorry. Yeah.
Q But were you able to determine where he was in the Wateree Institute or any other institute in May of 2009?
A No, he was not there in May 2009.
Q When you executed the search warrant at Sophia McGee's residence -- and where was that located?
A The address or the city?
Q The city or the area.
A It was Camden and Lugoff, Lugoff Camden.
Q That area?
A Uh-huh. (Affirmative).

Q What type of evidence were you looking for?
A Anything that could link him to the circumstances or anything physical, socks that match these kind of socks, clothing that might have resembled anything that he was wearing in the, the video, any shoes that we might have deemed to have blood on it, those kinds of things. CDL---
Q And this was ten months later?
A ---driver's license?
Yes.
Q Were you successful?
A No, we, we just got -- we got some socks and some, some clothing, but nothing to sink your teeth into.
Q That was similar in nature, but not the actual clothing?
A That's right.
Q On the 16th also did Investigator Reeves go and interview the owners of the Camden Metal and Steel where the 18-wheeler had been stolen?
A Yes, in our questioning he did.
Q The next day, on the 17th, did Investigator Sumter and Mahoney follow-up with an Ivan Moore?
A Yes, they did.
Q And I believe he was an acquaintance of the defendant?
A That was my understanding.
Q That day did you and Investigator Reeves and

Investigator Thomas go to Wateree Institute, Correctional Facility to interview Frankie McGee?

A Uh-huh. (Affirmative.)

Q And was that interview recorded?

A Recorded, yes, it was.

Q And we aren't going through it again.

That's what has been played during court today?

A Right.

Q The transcript?

A Right.

Q What was the purpose of you going to interview the defendant prior to charging him?

A To ascertain any kind of information he may have had concerning this case.

Q And when you got there, of course, he was advised of his rights?

A Right.

Q And did he want to talk to you?

A He gave every indication that he would, he did, yeah.

Q And that's recorded and what's been played here in court?

A Right.

Q There have been some questions about the initials that were on the winch bar in this case.

Have you had an opportunity to look at those?

A I did.
Q And what are those initials?
A C-A-B, CAB.
Q CAB?
A C-A-B.
Q There's also been a question about a phone that was found at a crime scene, outside the crime scene actually. There was a photograph. I'll show you State's Exhibit No. 75.
A Yes, ma'am.
Q Whose phone was that?
A That turned out to be Reverend Eichelberger's cell phone.
Q Or a family member?
A Well, let me see. I'm sorry.
What date?
Q This was collected that night outside the---
A It was a family member, it was a family member's phone. I'm sorry.
Q And as indicated, an assault -- or his family members responded to the scene?
A Yeah.
Q There was also further mention of a hat that was found inside the residence.
A Uh-huh. (Affirmative).

Q Were you able to determine who the hat belonged to?
A Reverend Eichelberger.
Q And during the course of your investigation with Frankie McGee, did you determine whether or not he had a twin, an identical twin?
A No, he does not have a twin or an identical twin.
Q These's also been some testimony in this case about a Crime Stoppers Tip or information that was relayed to another agency during a Crime Stoppers tip.
That would not have come to your agency, would it?
A No, it would not of.
Q And it wasn't until after you talked to Sandra Thomas that you even realized the relation between the stolen truck and what happened to Reverend Eichelberger?
A Right.
Q And then when you followed up on the stolen truck---
MR. STRICKLER: Objection to the leading, Your Honor.
THE COURT: I haven't heard the question.
Q Did you follow-up on the stolen truck?
A We did.
Q And was it recovered?
A It was.
Q And where was it recovered?
A It was Token Street in the Greenview area at Happy Dad's Towing Service, his yard.

Q And during the course of your investigation, did y'all interview Mr. Brown who was Happy Daddy's Towing?
A Right.
Q And he was able to give you the information and the dates it was recovered?
A Right.
Q And as far as being able to retrieve the Crime Stopper tip ten months later, you were not able to do that?
A No, we couldn't do that.
Q The night that this occurred with Reverend Eichelberger, other than he and Temika Ashford being in the home, were any of his sons, daughters, or any other of his relatives in the house that night?
A No, there -- it was my understanding that there was nothing else (inaudible) -- that those two were the only people in the house.
Q There's also been some questions from, about a cell phone that was used and seen by Mr. Harp, that the defendant was using.
A Right.
Q Were you able to corroborate that from some phone records you received from Sophia McGee's cell phone or---
A Right.
MR. STRICKLER: Objection, Your Honor. Hearsay.
THE COURT: Objection sustained.

Q During the course of that -- in your experience in interviewing people who commit violent crimes, which is what you investigate, right?
A Right.
Q Is it unusual for a person to deny the violent act itself?
A No, you can pretty much expect them to deny it.
Q In this case though you indicated the defendant wanted to talk to you?
A Right.
Q And is that an issue?
A No, but if they gonna deny -- you know, sometimes you -- we, we -- this, this case here is one, you know, of those classic who done it. When you get on the scene, you don't know who did it. So, you got to find out who did it.

There are other cases where we get, that we have, when you get on the scene of a homicide, you have the perpetrator standing there. He's like this and saying Reeves, Thomas, Reeves, okay, I did it, there's the weapon right there, this is why I did it.

This case is quite different. So, generally, in a situation like this when the person you suspect is, is actually guilty of what you are accusing them of, then they're gonna want to talk to you because they want to explain the story in a different way than it actually

happened. It happens all the time.
Q Then there was some talk about during the course of that interview you had with them, it's all recorded, when you mentioned that there was a second person in the house, he seemed surprised?
A Totally.
Q When you mentioned the socks, what was his reaction?
A When we mentioned the socks his reaction was to come up with some kind of excuse about the socks because just the mere mention of the sock to him meant that we had an item---
MR. STRICKLER: I'm gonna object to him testifying as to what anything meant to Mr. McGee. That's pure speculation, Your Honor.
THE COURT: What says the State?
SOLICITOR CAMPBELL: Your Honor, I think he is talking about what he observed.
THE COURT: The objection's sustained.
Q Was he surprised?
A He was surprised, yeah.
Q I want to ask you, first of all, do you see -- let me clarify that.
He was surprised when you mentioned the second person?
A Right.
Q But was he surprised when you mentioned the socks at all?

A I didn't get the sense -- I -- the sense I got was that he knew about the socks. It didn't phase him any.

Q Okay. Let me show you what's been marked as State's Exhibit 136.

Does this show the Greenview area including Issac Street?

A Yes, it does.

SOLICITOR CAMPBELL: Your Honor, at this time we'd offer it into evidence.

MR. STRICKLER: Without objection.

THE COURT: So admitted.

(WHEREUPON, State's Exhibit No. 136 was received into evidence at this time.)

Q You can step down for a second.

A (Witness comes down from the stand.)

Q Come over to this side and speak up.

Does this show Farrow Road on there?

A Yes, it does.

Q And can you point it out for the jury?

A This is, this is Farrow Road, which runs north and south.

Q And Issac Street, is it shown on here as well?

A Yes, it is. Issac.

Q It's actually upside down. This is upside down.

A This is Issac Street here.

Q And this big yellow road would be Farrow Road?
A Farrow Road.
Q And then where would the Reverend's house be?
A If you're going northbound on Farrow Road toward I-20 or the mental hospital, and you make a left turn, it would be in that first block about right here.
Q About that far?
A That's right.
Q And as far as Mr. Harp's house, where would it be in conjunction?
A Mr. Harp's house would be across the street. This, I believe, would be the church next to Reverend Eichelberger's house, the parking lot, and Mr. Harp's house is right across the street.
Q And there's been reference to a gas station that's further down on Farrow, on Farrow Road I believe on Fontaine.
A This is Fontaine. This is Farrow Road. This is the tracks here, and the gas station would be right here on this corner.
Q On that corner there?
A Uh-huh. (Affirmative).
Q And then I believe Token Street is further down here?
A It's Token Street here.
Q And then where it intersects with Bryant Road?

A Right, parallel to Farrow Road.
Q And all this is accessible from Farrow Road, is that correct?
A Absolutely.
Q Thank you, sir.
A (Witness returns to the stand.)
Q The people that interviewed Frankie McGee that day, did Investigator Thomas?
A Say that again.
Q Was Investigator Thomas with you?
A Thomas and Reeves.
Q And where is Reeves located?
A Right there sitting behind Thomas.
Q Right behind him?
A Yes.
Q And it was the three of you that interviewed him?
A Yeah.
Q And the person that y'all interviewed that day, do you see him here in the courtroom?
A Yes, I do.
Q And where is Mr. McGee?
A Sitting there at the defendant's table with a brownish cranberry colored shirt on.
SOLICITOR CAMPBELL: Your Honor, may the record reflect he's identified the defendant?

THE COURT: Yes.

SOLICITOR CAMPBELL: That's all I have.

THE COURT: Cross-examination.

Mr. STRICKLER: Please the Court.

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. STRICKLER:

Q Good afternoon, Mr. Reece.

A How you doing, Mr. Strickler?

Q Passing. Fair.

Just a few things actually. I'm not gonna go through everything all over again.

All right?

A Cool.

Q Ms. Campbell just spoke with you about Mr. McGee's reaction when he was informed, informed about a second person being in the house.

A (Witness nods affirmatively.)

Q Okay. I show you Page 93 of this transcript. I don't know whether you have a transcript. Yeah, you do, right up there.

A What page?

Q Page 93.

A Got that.

Q Page 93, Line 7. This is by Mr. Reeves. Not Mr.

Reece, right?

Let me ask you this. Did you even know there was a second person in that house?

That's what we're talking about, right?

A Uh-huh. (Affirmative).

Q Okay. Frankie's reaction. Second person in what house?

That's what his reaction is, right?

A Yeah.

Q Okay. And y'all then informed him that the house you were asking him about was Reverend Eichelberger's house, right?

A Well---

Q That's, that's Mr. Reeves' next statement, right, Reverend Eichelberger's house?

A Being that we had been there, you know, for a good while with him talking about the incident with Reverend Eichelberger and what happened at Reverend Eichelberger's house. As a matter of fact, we're way on Page 93. He knew what house we were talking about. He couldn't of been talking about anything else.

Q Well, sir, what you're testifying to is it's your opinion he knew what house you're talking about?

A You asked the question. I gave you an answer.

Q Right, cause that's -- and the nature of the answer is

that it is your opinion that he knew that, what house you were talking about?

A It's my opinion, but it's also logic that there was nothing else, no other house we were talking about especially in that context.

Q Now, you and Mr. Thomas responded to the scene on [redacted] on May 3rd, 2009, correct?

A Right.

Q And you entered the scene and spent a grand total of four minutes inside that house, correct?

A Where did you get that from?

Q Well, correct or not correct, and then we'll talk about where I got it.

A I don't think that is correct, no.

Q When -- was the document kept by the police called a crime scene log?

A Yeah, I am.

Q And that's a document that's used to help ensure the integrity of the crime scene, correct?

A True.

Q Okay. And you go ahead and someone's put in charge of the crime scene log, and they record the arrivals and the departures of various people into the crime scene, correct?

A Okay.

Q That's correct, isn't it?

A Yeah.
Q Okay. It's not something unique to this case, right?
A Right.
Q It's standard operating procedure, right?
A Right.
Q Okay. I show you a document and ask if you recognize that, sir.
A It's a crime scene log.
Q Okay. Does it indicate what case it's associated with?
A Reverend Eichelberger's case.
Q Okay.
A [redacted], Columbia, South Carolina.
Q And the last notation, last person noted as coming into the crime scene?
A Investigator Reece.
Q That would be you, correct?
A (Witness nods affirmatively.)
Q Time in 01:38?
A 01:38.
Q Time out, 01:42?
A Well, to be honest with you, that document doesn't mean anything to me. I could have walked out at 1:42, turned around and walked back in, and the, whoever took the log there was not even aware of me walking back in or walking back out. You asked me a question and I'm telling you I

spent more than four minutes in the crime scene.
Q Does the crime scene log reflect you leaving the crime scene at 01:42?
A That is what the crime scene log reflects. You asked me a question, if I spent four minutes in the crime scene, I'm telling you no, I spent more than four minutes.
Q And this crime scene log does not reflect Mr. Thomas ever even entering into the crime scene, correct?
A Well, then that right there -- I'll let you know that that's not accurate because he was definitely in the crime scene.
Q Well, let me ask you, sir, if you can answer my question.
Isn't it true this log does not reflect him even entering the crime scene?
Is his name on there anywhere?
A It does not show that he entered the crime scene, but still, it's not accurate.
Q Now, it's fair to say that you-all talked with lots of people in the course of this investigation, right?
A (Witness nods affirmatively.)
Q I'm sorry, yes?
A That's fair.
Q Okay. You just have to respond verbally so the young lady behind you can get it written down, sir.

And among other people, you interviewed one Louise Taylor, correct?

You personally, I believe, interviewed one Louise Taylor?

A Can you give me a date so we'll be on the same sheet of music?

Q Yes, sir. Yes, sir.

A My case notes?

Q Okay. Case notes?

A Uh-huh. (Affirmative).

Q Sure.

That would be September 14th, 2009, Page 9 of your case notes, sir.

A Yes, sir.

Q All right. So, you interviewed Louise Taylor, correct?

A Right. I believe Thomas and I both would of interview her.

Q Okay.

A It's just got interviewed Louise Taylor, right.

Q And she was Mr. Eichelberger's girlfriend, correct?

A I would say that's pretty fair, yeah.

Q And she told you she had been---

SOLICITOR CAMPBELL: Objection, Your Honor. Anything she's said is hearsay.

THE COURT: How about that, Mr. Strickler?

MR. STRICKLER: I will rephrase my question, sir.

THE COURT: All right. The objection's sustained.

SOLICITOR CAMPBELL: Thank you.

Q You developed information from her regarding Mr. Eichelberger's, Eichelberger's whereabouts on the date of the incident?

A Right.

Q You testified about getting the, Mr., Mr. Eichelberger's cell phone and carrying it out to SLED yourself, right?

A Yeah.

Q And they dumped the contents of the address book or whatever, right?

A Right.

Q And what we know from that is that Frankie McGee's name was not in that address book, right?

A That would be right.

Q Okay. And that was -- when did you take that off to SLED?

A If you'll give me a minute I'll maybe tell you. I think it was August the 27th or something like that when we -- August 27th, 2009.

Q August 27th?

A Uh-huh. (Affirmative).

Q Okay. Some three and a half months after the incident?

A Yep.
Q And I believe you testified that when you put this six pack, this line-up together with Frankie's picture in it, State's 123 --
A Uh-huh. (Affirmative).
Q -- right, that he was consistent with the information you had from Ms. Ashford?
A Yeah.
You mean the description?
Q Yes.
A Uh-huh. (Affirmative).
Q And I heard you---
A That's not why I put him in the line-up because it was consistent. That's not the only reason.
Q She testified that his physical description was consistent though?
A But that's not the only reason. He was no longer able to fly under the radar. That's why he was put in the, in the line-up. His name came up. Everybody's name came up, counselor, and we did a photo line-up.
Q Yes, sir, I understand that. My question to you was not why you put him in the line-up or have, or testify to that.
The question was is your testimony earlier was that he was consistent with the description provided by Ms. Ashford

or you're now testifying that his, his appearance was not consistent with that provided by Ms. Ashford?

A I'm not saying that. You know I'm not saying that. His appearance is, in fact, consistent with everything Ms. Ashford was telling us. He was put in the line-up because his DNA came back on those socks. Now, if he happens to fit the description like everything else she's been saying, there it is.

Q Okay. So, your testimony is that someone that's 5'8" and 230-pounds is consistent with someone who is 6-feet tall and 180 to 200?

A Well, you know, when Ms. Ashford---

Q Is that or is that not the information?

SOLICITOR CAMPBELL: Objection, Your Honor. He has the right to---

THE COURT: The objection's sustained.

You may answer the question, sir.

A When Ms. Ashford saw him, Mr. McGee, first of all, she was in a panic. She's sitting in her car and she's on the move and so was he. You can't really expect her to get his height, weight, and anything else perfect, which is what happened. She wasn't perfect. She did everything she could possibly do in identifying this person. That's why she was so consistent with all the photo line-ups.

Q Okay. So, does that mean that 6-feet is the same as

5'8"?
A No, I was just trying to explain to you how she could get it mixed it. I don't know if 5'8" means 6'1" or 6'5" to her. I'm telling you what she told us.
Q Well, 230 on a 5'8" frame is the same as 180 to 200 on a 6-foot frame?
Is that your testimony?
A That's not my testimony.
Q Now, you indicated on your direct testimony that you did a search warrant for Mr. Eichelberger's telephone, correct?
A Which phone are you talking about?
Q The -- well, that's what I'm trying to clear up.
Which, which phone of his did you do the search warrant from?
A We did the search warrant on the, on the home phone.
Q Is that the land line phone, right?
A Yeah.
Q That was done March 12th of 2010, is that right?
A That's right.
Q Okay. And when did you do the search warrant for the call records for Reverend Eichelberger's cell phone?
A We never did one for his cell phone.
Q Now, you testified regarding Ms. Ashford viewing this six pack line-up, No., State's 123, the one with Mr. McGee's

picture in it, right?
A Yeah.
Q And your testimony is just what you wrote down. Witness states subject she saw on 5/3/09 could be Number 3 and Number 1, right?
Picked Number 3 first, but stated both resembled the subject because of the head shape and the body build, right?
A Right.
Q Okay. Pretty consistent with what she said when she circled those picture on the other line-ups that were shown, right?
A Right.
Q Okay. So, no substantial difference between her reaction to that line-up, and I'm not gonna go through, go through everyone, and the four or five other ones that she was shown where she said one or two of them looked like the guy, right?
A She was consistent if that's what you're asking me.
Q Now, you recorded this statement with Frankie out at Wateree Correctional Institution.
You recorded other statements in this case too, did you not?
A Right.
Q Temika Ashford?
A Right.

Q You told her you were recording her, right?
A Uh-huh. (Affirmative).
Q Louise Taylor I just asked you about, you recorded the, the interview with her, didn't you?
A Right.
Q Told her you were recording it, right?
A Yeah.
Q David Williams, you recorded him?
A Yep.
Q Told him you were recording it, right?
A Right.
Q A woman named, a name that hadn't come up, but a woman named Amber Lewis that you interviewed, you recorded statements from her, right?
A Right.
Q And told her you were recording her?
A Right.
Q Thank you, sir. That's all I have.
THE COURT: Redirect?
SOLICITOR CAMPBELL: I don't have anything further, Your Honor.
THE COURT: All right. You may step down, sir.
WITNESS: Thank you, Your Honor.
THE COURT: Next witness.
SOLICITOR CAMPBELL: Your Honor, may I check one thing?

THE COURT: All right. Ladies and gentlemen, I'll have you go to the jury room for a break at this time. Go to the jury room.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: All right. You want to check anything?

SOLICITOR CAMPBELL: Your Honor, if you'll just let me check and make sure all the evidence is in.

THE COURT: All right.

(Pause.)

SOLICITOR CAMPBELL: Your Honor, this should not go into evidence. I was wrong about that. 137 is the redacted version that should go into evidence.

THE COURT: All right.

SOLICITOR CAMPBELL: We agree?

MR. STRICKLER: What's the---

SOLICITOR CAMPBELL: Two is the provisional---

MR. STRICKLER: Right.

SOLICITOR CAMPBELL: ---we handed up to the Court.

MR. STRICKLER: Right.

SOLICITOR CAMPBELL: So, it can not go into evidence.

MR. STRICKLER: Right.

SOLICITOR CAMPBELL: The redacted version is 137.

MR. STRICKLER: Okay.

SOLICITOR CAMPBELL: The 132 is in also. 132 and 137

and No. 2 is for ID only. I messed that up. These are Exhibits 19, Your Honor.

(Pause.)

SOLICITOR CAMPBELL: Your Honor, in a review of the evidence, everything is in. We've reviewed the autopsy photos, which were not in.

At this time the State would rest, Your Honor.

MR. STRICKLER: (Inaudible).

THE COURT: All right. And with respect to the photographs, the various photographs, I guess the blood photographs, were any of them admitted or not?

SOLICITOR CAMPBELL: No, sir, as far as the autopsy photographs?

THE COURT: No, the -- at the scene.

SOLICITOR CAMPBELL: Those were all admitted.

THE COURT: They were admitted?

SOLICITOR CAMPBELL: Yes, sir, they were admitted.

THE COURT: Okay.

SOLICITOR CAMPBELL: Did you want to review those?

THE COURT: No, you---

SOLICITOR CAMPBELL: Everything's admitted.

THE COURT: My second thought is they weren't admitted, but since they've been admitted.

Defense ready?

MR. STRICKLER: Could we have just one minute to confer

with my client?

THE COURT: All right. Would you like for me to speak with him before or at some point regarding his right to testify or not testify?

MR. STRICKLER: Yes, sir, I'm literally -- if I could have literally one minute. This is all taken---

THE COURT: All right.

MR. STRICKLER: We've had this conversation.

(Pause.)

MR. STRICKLER: I've conferred with Mr. McGee. It's my understanding that he does not wish to testify in this regard. If Your Honor would like to go ahead and, and ask him the pertinent questions.

THE COURT: All right. If you'll come right in front of me there.

(WHEREUPON, the parties comply.)

THE COURT: Swear him for me please.

(WHEREUPON, the defendant was placed under oath at this time.)

THE COURT: Mr. McGee, at this time I'm going to explain to you certain of your rights. If you do not understand anything that I say, please let me know. I'll be happy to explain it to you in more detail.

You understand?

DEFENDANT: Yes, sir.

THE COURT: We've now reached the stage of the trial where you may present your defense. As part of presenting your defense, should you, your or your lawyer, you and your lawyer could elect to present a defense. You have the right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States. This amendment states in part that no person shall be compelled in any criminal case to be a witness against himself. This means that you can not be required to testify in this case.

You do, however, have the right to testify on your own behalf if you would like to, but no one can make you testify. This is a personal right and no one can waive this right except you. If you decide to testify, you will be subject to the same rules that govern other witnesses, and you may be examined and cross-examined on any relevant issue in this case.

In addition, the State may be able to use any crimes you've committed involving dishonesty, false statements, or crimes punishable by more than one year, the State will be able to use those crimes to impeach your credibility if I determine that the probative value of admitting this evidence outweighs its prejudicial effect to you.

Now, if you decide to testify, this decision must be a free, voluntary, and intelligent decision made by you with knowledge of the protections given to you by the Fifth

Amendment as well as the consequences of your decision to testify. If you decide not to testify, I would instruct the jurors that they can not give the fact that you did not testify any consideration whatsoever, and that there is to be absolutely no prejudice to you because you did not testify. It is, it is left entirely up to you whether or not you testify.

You may certainly speak with your lawyers, your family members, friends, and anyone else you would like to speak to you. However, it was indicated that you-all have spoken about it and you've made a preliminary decision. You may speak with them all again if you'd like to. But the final decision will be left entirely up to you.

Do you understand what I've explained?

DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about what I've explained to you?

DEFENDANT: No, sir.

THE COURT: Would you like to talk to your lawyers anymore or anyone else about whether or not you should testify?

DEFENDANT: No, sir.

THE COURT: Have you made a decision about whether or not you're gonna testify?

DEFENDANT: Yes, sir, I have.

THE COURT: And what's that decision?

DEFENDANT: I wish not to testify.

THE COURT: All right. Thank you very much.

DEFENDANT: Yes, sir.

THE COURT: Do you have other witnesses to present, other defenses or any other defense you'd like to offer?

MR. STRICKLER: No, sir, the defense will rest.

THE COURT: All right. Well, we'll take about five to ten minutes and then we'll come back and talk about where we are. So, we'll be in recess for ten minutes.

(WHEREUPON, a short recess was taken at this time.)

THE COURT: All right.

SOLICITOR CAMPBELL: Your Honor, at this -- are we arguing and charging?

THE COURT: All right.

SOLICITOR CAMPBELL: Arguing or are we doing something with the jury?

THE COURT: Well, let's see what the schedule is and then we'll -- what kind of schedule do y'all want to be on and then we'll know what's next.

SOLICITOR CAMPBELL: If possible, Your Honor, just that those participating, going through the day, I still have stuff to do on-line upstairs. It is 20 till 4:00. I don't -- I really prefer to close in the morning if at all possible.

THE COURT: All right. What says the defense?

MR. STRICKLER: Again, one of the rare times there's complete agreement. No claim to referee. For different reasons.

THE COURT: All right. That sounds good to me as well. So, we'll let the jury go to---

SOLICITOR CAMPBELL: Do we go ahead and rest in front of them?

THE COURT: Oh, yeah, we'll do all that.

Now, has the defense put in any evidence?

SOLICITOR CAMPBELL: Yes, sir.

MR. STRICKLER: The boards with DNA.

THE COURT: The State opens and close---

SOLICITOR CAMPBELL: Yes, sir.

THE COURT: ---closes?

MR. STRICKLER: Yes, sir.

THE COURT: So, we'll have them come out and then the State will close, recognize the defense, and the defense will rest, and then all that -- we'll have the jurors go and come back at 10:00 tomorrow morning for closing arguments.

All right. Bring them on.

(WHEREUPON, the following takes place within the presence of the jury.)

BAILIFF: The jury is seated, Your Honor.

THE COURT: For the State, Ms. Campbell, or

Ms. Simpson?

SOLICITOR SIMPSON: May it please the Court, Your Honor, at this time the State rests.

THE COURT: All right. Ladies and gentlemen, the State has rested. That means you've heard the State's case. Now the defense's turn.

From the defense?

MR. STRICKLER: Thank you, Your Honor.

At this point in time the defense rests also.

THE COURT: All right. Ladies and gentlemen, the defense has rested. That means we have now heard all of the testimony and you've now seen all of the evidence in this case. The next thing that will come up will be closing arguments where the lawyers will give summations regarding what they believe the evidence has shown, and shown and what you, what they think your verdict should be.

Due to the time being almost four o'clock, and also the time that it takes to do all of that, you will get home quick today, at a quarter till 4:00, how about that and we'll need you-all back tomorrow morning at 10:00 a.m, 10:00 a.m. tomorrow morning. Please remember not to discuss the case and we'll see you-all then. Ten o'clock.

What time tomorrow?

(All jurors respond ten o'clock.)

THE COURT: Ten o'clock. All right. Have a good day.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: Any motions on behalf of the State or the defense regarding the evidence?

From the defense?

MR. STRICKLER: Your Honor, I suppose we moved just a little faster, but I, I needed to make a directed verdict motion at the end of the State's case. I think the jury, from a procedural standpoint --

THE COURT: Yes, sir.

MR. STRICKLER: -- I, I ask Your Honor note that as being made at that point in time and renew, at this point in time, simply on the basis simply being that the evidence was taken in the light most favorable to the State fails to submit a, a question for the, a jury question, and Your Honor should direct a verdict of not guilty on a, specifically, we submit on the evidence submitted during the State's case on the issue of identity of the person who did the killing in this case does not rise to the level from which a jury could find, beyond a reasonable doubt, that Mr. McGee committed this killing.

I submit on the Jackson versus Virginia, that's the appropriate standard to use in judging the evidence in this particular case. So, I'd move for a directed verdict at the end of the State's case and renew it now at the end of the

defense case on that ground.

I would also, Your Honor, renew my previously stated motion for mistrial which Your Honor declined to grant and ask Your Honor to revisit your, your ruling. I have no additional bases to add in that regard. We just ask Your Honor to revisit the ruling and the Bender ruling granting my motion for a mistrial in that regard.

I'd refer back to the motions, pretrial motions as far, in support of my motion for a directed verdict. The motion, specifically motion regarding the alleged identification on the part of Ms. Ashford from the show-up line-up or rather the, the photographic line-up and the motions to suppress Mr. McGee's statement.

To the extent that those matters support or supply support for finding there was a sufficient evidence regarding the identity of the alleged perpetrator in this, this case, I would submit that Your Honor's, in all due respect, that Your Honor's rulings should be revisited and, and revised, and with that in mind, and will consider that, and Your Honor grant the motion for directed verdict in this case and the renewal of that motion at the end of the defense's case.

THE COURT: All right.

MR. STRICKLER: Thank you, Your Honor.

THE COURT: All right. I would note that the motion

was timely made. The Court did the, the record sequence of the events as the State's closed, and recognize the defense, for the defense about, without defense, without the jury being sent out. So, the motion is timely made and recognized by the Court as being timely made both at the end of the State's case, and at the close of the evidence.

What says the State?

SOLICITOR CAMPBELL: Your Honor, respectfully we disagree. With -- that evidence in this case is overwhelming as to identity and clearly -- I mean I don't think there's any (inaudible) burglary in the first degree and for murder, and respectfully would ask you to deny the motion.

THE COURT: The issues governed by Rule 19 of the South Carolina Rules of Criminal Procedure, which states that on motion of the defendant or on its own motion the Court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed if there is a failure of competent evidence tending to prove the charge and the indictment. In ruling on the motion, the trial judge shall consider only the existence or nonexistence of the evidence and not its weight.

In this case, there is a vast amount of direct evidence connecting the defendant to the crime and even a greater

amount of circumstantial evidence placing the defendant at the scene of the crime, and there's scientific evidence on which the jury could conclude that the defendant committed the crimes. All of this evidence is for the jury to weigh and decide based on, pursuant to Rule 19. It's not for the Court to decide, and based on all of that, I respectfully deny the motion for directed verdict. With respect to the other motions made, the Court denies those motions based on the same reasons given earlier.

MR. STRICKLER: Thank you, sir.

THE COURT: All right. With regard to charging, charges, what's the charges?

What do you have?

SOLICITOR CAMPBELL: Your Honor, we did submit some up.

Does the Court have them or do I need to hand them up?

THE COURT: No, I have what the State submitted.

SOLICITOR CAMPBELL: In anticipation that there may be some evidence of voluntary intoxication, I don't think there has been --

THE COURT: All right.

SOLICITOR CAMPBELL: -- so I would withdraw that one.

THE COURT: All right.

SOLICITOR CAMPBELL: And the rest of them we would stand by the request. I think I submitted two on voluntary intoxication. We would withdraw anything on that.

MR. STRICKLER: That's, that's what I was just checking on.

SOLICITOR CAMPBELL: Yes.

MR. STRICKLER: There were two on voluntary intoxication --

SOLICITOR CAMPBELL: There were two, Your Honor.

MR. STRICKLER: -- which were the only two I had direct problem with, Your Honor. The -- as to the State's request to charge implied malice, the law also allows the jury to infer malice through homicide is proper direct result of a felony. You can imply that malice existed in the person in the commission of the felony at the time of the deadly blow.

As to any inference, I would submit that it's appropriate for the Court to charge that an inference is merely an evidentiary fact or the inference charge used as to deadly weapon, which clearly leads to the determination as to whether, whether to, whether to, whether to employ the inference makes it clear that that is a matter for the jury and the jury alone to decide. So, I would additionally charge use of a deadly weapon, which I'm sure Your Honor has that in the charge that you use.

THE COURT: All right. Well, the, the charge on all these issues, for the most part, are part of the standard charge, which are charges which are typically used in criminal cases, that malice may be inferred from a conduct

showing a total disregard of human life. They may also be inferred when the deed is done with a deadly weapon, and where an instrument is a deadly weapon depends on the facts and circumstances in each particular case. The -- let's see.

I think what you're seeking to ask is that the inference can be accepted or not accepted?

MR. STRICKLER: Yes, sir, I believe it's, I believe it's State v. Elmore that, that I'm thinking of. I might be wrong --

THE COURT: All right.

MR. STRICKLER: -- which was the law that changes the charge, Your Honor, from says it relates to the use of a deadly weapon inferring malice from the use of a deadly weapon.

THE COURT: And then with regards to felony murder inference, that one intentionally kills another during the commission of a felony, the inference of malice may arise. In that regard, burglary is a felony proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction. This inference will, would simply be an evidentiary fact to be taken into consideration by you along with all other evidence in the case, and you may give it whatever weight that you, you decide it should receive.

MR. STRICKLER: Yes, that is the Elmore I am referring

to.

THE COURT: Okay. And -- all right. Anything else from the defense?

MR. STRICKLER: No, sir.

THE COURT: With regard to the length of the argument, how long does the State plan to go?

SOLICITOR CAMPBELL: Your Honor, this has been a lengthy case, the combination of both should be around about an hour.

THE COURT: All right. The defense?

MR. STRICKLER: I won't be more than an hour, Judge. I promise.

THE COURT: 10:00, 11:00, 12:00, I'll say the jury should have the case around lunchtime.

All right. Anything else before we break camp for the day?

SOLICITOR CAMPBELL: Okay. Thank you, Judge. That's all.

MR. STRICKLER: No, sir, nothing further from us.

THE COURT: All right. Then we'll---

MS. PRINGLE: Judge, I'll just remind the Court that I will not be present tomorrow because of my previously scheduled private --.

THE COURT: I understand.

Okay. We will reconvene then tomorrow morning at 9:45.

Be ready for the jury to come in at 10:00.

SOLICITOR CAMPBELL: Yes, sir.

THE COURT: All right.

(WHEREUPON, Court was in recess for the evening.)

Wednesday, August 10th, 2011

THE COURT: All right. Do you have anything before the jury comes in?

SOLICITOR CAMPBELL: Nothing from the State, Your Honor.

MR. STRICKLER: No, sir.

THE COURT: All right. Anything about the indictment that's relevant?

Any reason why I shouldn't send them to the jury, to the jury room?

MR. STRICKLER: Let me take a quick look, Your Honor.

(Pause.)

MR. STRICKLER: No, sir.

THE COURT: All right. Well, we'll send the indictments to the jury room to write the verdict on the indictment.

(WHEREUPON, the following takes place within the presence of the jury.)

BAILIFF: The jury's seated, Your Honor.

THE COURT: All right. Good morning.

Now, ladies and gentlemen, you've now heard all of the testimony and you've received all of the evidence. It's now time for closing arguments. If you'll give the lawyers your attention.

First from the State, Ms. Campbell.

SOLICITOR CAMPBELL: Thank you, Your Honor.

Good morning.

The first thing I wanted to do, on behalf of the citizens of Richland County, on behalf of the Eichelberger family, who's been here over the course of this trial, is to thank you for your service in this case. I know, when you showed up, ten days ago, you might of imagined what type of case you would be on and perhaps you didn't envision one such as this. Because this case, ladies and gentlemen, is very simply a home invasion that turned into a murder case.

The evidence that's been brought before you has been hard to look at, distasteful, but I think, as you have heard the evidence evolve, you understand the reason that we have to bring this before you because the burden is on the State of South Carolina to prove this defendant's guilt, as it should be, beyond a reasonable doubt.

Now, you're gonna hear from me. I will talk to you a little bit about the law in the case, and then the defense is gonna have the opportunity to get up here and argue their version of what happened that night, and then I'm gonna have the opportunity to reply and talk to you a little bit more about the facts.

But the sole judge of the law in this case is Judge Newman. As I'm talking about the law, if I misquote, it's

not intentional. If he tells you something different, you take the law as he gives it to you. Again, it's not intentional because he is the sole finder of the law in this case, and in that same vane, if either sides mischaracterizes the facts, you remember them because the roles in this courtroom are designed for a reason, and very simply the prosecution has the opportunity to bring before you any and all relevant and admissible evidence for you to consider as to what happened that night on May the 3rd, that night that cost Reverend Eichelberger his life. And the role of the defense is to defend their client to the best of their ability. The Judge's role is to determine what's admissible, what you can hear, what's relevant, and then, ultimately, to charge you on the law, to explain the law to you that you must apply.

But the most important role in this courtroom, ladies and gentlemen, by far, is yours. Because once you have been charged, each of you individually and, then once you get back in that courtroom, in that jury room collectively, you must determine what happened back on May the 3rd, and then you must apply the law as the judge gives it to you. Your role is, by far, the most important. This system, some may argue, it's the best system in the world and your role is part of that system.

Now, you have heard all the evidence upon which you

must base your verdict.

What is evidence?

It's the sworn testimony that you have heard. You saw each witness came before you, swore an oath to tell the truth. It's the physical evidence which we will, you will have back in the jury room. Those things which are admissible and will go back with you. What is not evidence, ladies and gentlemen, are questions by the lawyers, speculation, innuendo, conjecture, or just plain wishful thinking that it wasn't what it was. That is not evidence.

Now, I want to tell you something from the beginning. If over the last week and a half, if we have done anything to offend you in anyway, at times by questions that are unartfully, then objections, we're clumsy, not well stated, please don't hold that against Reverend Eichelberger and his family. It is not intentional. If we've done anything to offend you, please don't hold that against justice in this case.

Now, in criminal cases, they're somewhat unique because a defendant has, as he should, the absolute right to confront each and every witness against him. That's in our Constitution. It's survived the last several hundred years. The right to confront each and every witness. You saw each expert, whether it be a doctor, a DNA expert. And the reason that, ladies and gentlemen, is very simply because,

in a criminal case, the defendant has the right to cross-examine.

You heard about reports that were referred to, medical reports, DNA reports, that weren't actually admissible. The person has to actually come in here and testify before you so that you can understand what their provocations are, so that you can understand what their testimony, the basis for it, so that you can judge their credibility.

You've heard police reports being referred to. You've also, at times, heard about some witnesses, more witnesses being at the crime scene that weren't brought in, and the reason for that, ladies and gentlemen, is we simply can't bring in the same person to say the same thing over and over. It's called cumulative evidence. We can bring forth witnesses who have something to add as far as your explanation as to what happened on that night. In that same vane, you've heard from a number of witnesses and I know you were wondering what we were doing when we talked about the chain of evidence in this case.

But because before something is admissible in testing and results such in this case, DNA, can come before, we must prove that no one altered or tampered with the evidence in this case, and in this case, in this courtroom, there's absolutely no evidence that any of the evidence was tampered with or altered or changed or contaminated in anyway, and in

order for you to be able to have the results, we must prove that, and that's the reason you have to hear from that lengthy number of witnesses.

Now, the burden of proof. We must prove that Frankie McGee, on May the 3rd of 2009, murdered and burglarized Reverend Eichelberger. The burden of proof is upon the State. It is the highest level of proof, and, ladies and gentlemen, in this case that is a burden the State welcomes, perhaps more than any other, because the evidence in this case, the reasonable competent reliable evidence is overwhelming.

Now, the Courts have made an attempt to define what is reasonable doubt, and listen to the judge when he explains this to you, and the most -- the simplist way to define reasonable doubt, and I'm gonna talk to you about the law in the case for a minute, is the type of doubt that would make a reasonable man hesitate to act. But the Courts have gone a little bit further in defining what reasonable doubt is, and what you may consider when determining what Frankie Lee McGee did back on May the 3rd, 2009. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.

There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If,

based on your consideration of the evidence, you are firmly convinced that the defendant's guilty of the crime charged, you must find him guilty. If, on the other hand, you think there's a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Proof that leaves you firmly convinced, the law recognizes, we can't overcome perhaps every possible doubt. But we only have to make sure that you are firmly convinced.

I submit, ladies and gentlemen, when you look at this case and look at it in its entirety, all the evidence, which I'll talk about in a minute, the proof overcomes every possible doubt. But the only level we must reach is proof that leaves you firmly convinced, and listen to the judge when he explains that to you.

Now, you're going to have two indictments and that doesn't mean, in this case, that there were two separate events because often, when people commit crimes, they may commit more than one crime. There may be an armed robbery and assault and battery. There may be a strong armed robbery and an assault. In this case, the two indictments that are before you are murder and burglary in the first degree.

Now, murder, our case, you've heard murder in the first degree, second degree. In South Carolina, we have murder. You will not be hearing from the judge that any lesser

included offenses apply in this case. Your consideration are gonna be on two, guilty or not guilty of burglary in the first degree, and guilty or not guilty of murder. Because of the facts specific to this case, there are no lesser included.

So, what is the definition of murder?

In South Carolina, the definition of murder is perhaps the shortest definition in our Code of Laws to describe the most heinous offense that can be committed in our state or at least one of them. The killing of any person with malice aforethought either expressed or implied. That's the definition that we must meet and I want to talk to you a little bit about those terms.

The killing of any person with malice -- and before I go on, either express or implied, and I submit, ladies and gentlemen, no one is gonna get up here and argue to you that this wasn't a murder or this wasn't a burglary first. But we still have the burden, and I want to go through them, of showing you what those elements are and how we have met them.

Now, malice, the judge will define to you.

What is malice?

When can you infer malice?

Because, very simply, when you've heard those terms inferred or implied versus express malice, it doesn't mean

they're two different ways. But the law recognizes that very seldom in life is someone going to have express malice. It's called laying in weight.

And as you listen to the Judge's charge, listen carefully because we don't have to prove some things that some people may think to come to murder. Such as premeditation. Its not part of the Judge's charge. Such as motive. That is not part of the Judge's charge. Although, in this case, the motive is obvious. He broke into the house and it wasn't just to say hello.

In this case, do we have premeditation?

I submit, in this case, we actually do cause he was casing that joint that afternoon not knowing that Mr. Harp was paying attention.

So, express or inferred malice or implied malice, what's the difference between those two. Express malice is things such as lying in weight, or if I were to walk up to you, another person, look them in the eye and say I am going to kill you, and then pull out a gun and shoot them, that's express malice. But the law recognizes, in very few cases, where you're gonna have that. So, you can infer malice from actions of the defendant, from what he was doing that night, things of that nature, and I'm gonna go through with several examples of that in this case. And, again, I submit nobody's gonna argue that this wasn't murder.

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon, and I submit, ladies and gentlemen, when you take a crow bar, a winch bar, and swing it like a baseball bat hitting an 87-year old man in the head, that's malice. Just because he interrupted your burglary of his home, that's malice.

But the law goes further and explains other ways in this case because there's so many different examples in this case of how you can infer malice or reach that malice exists. The law goes a bit further. It recognizes that malice can be transferred to another person. It does not signify, necessarily impart, ill will towards the individual injured. We don't have to prove that that night he went in there to kill Reverend Eichelberger. All we have to prove is that when he was in there he did it. When Reverend Eichelberger came out from the room, surprised him, and then he decided to make sure he got away and was not held responsible, which almost happened, that he acted with malice.

Malice does not necessarily impart ill will towards the individual injured, but it signifies rather a general malignant recklessness of the lives and safety of others or condition of mind which showed a heart regardless of social duty and fatally bent on mischief, and if that doesn't sum

up this case, ladies and gentlemen, nothing does.

The word malice itself, the easiest way to think about it, were his actions malicious?

That comes from the word malice. A heart regardless of social duty and fatally bent on mischief.

The law goes further in this case, well it implies it in this case, there's a concept called felony murder. The judge will instruct you that felony murder is the commission or attempted commission of a felony that creates any substantial foreseeable human risk and actually results in the loss of life. This includes but not limited to felonies which are inherently dangerous to life. Breaking into someone's home with a winch bar in the middle of the night to rob them is inherently dangerous to life. The law recognizes that, and the judge will go further and charge you on this concept.

It allows the jury to infer malice if you conclude the homicide was the proximate and direct result of the commission of a felony, and for that regard, burglary would be a felony under our law. You can imply that malice existed if a person in the commission of a felony at the time of the fatal blow and no one is gonna get up here and argue that it wasn't a burglary that was ongoing when the fatal blow was struck.

Now, malice aforethought.

What does aforethought mean?

Does it mean you have to form malice, as we talked about earlier, a specific intent to go in there and kill them?

No.

The law recognizes that malice can be conceived at the very moment the fatal blow is struck. Malice need not exist for any appreciable period of time before the act of killing occurs. Malice may be conceived the very moment the fatal blow is given.

But in this case, ladies and gentlemen, once he made the choice to commit a burglary, malice was in his heart. Once he entered that home, malice was in his heart. There's nobody that's gonna get up here and argue that there was no malice in this case.

Now, the second indictment that is going to be back there for your consideration -- and the Judge will instruct you, you must consider the elements separately and make the decisions separately on each one, and then all 12 of you agree to whatever your verdict is. Burglary in the first degree, and you will have the indictments actually back with you and the elements are actually, in both crimes, are on the indictments, is a person's guilty of burglary in the first degree if a person enters a dwelling without consent and with intent to commit a crime in the dwelling, and

either, when effecting entry or while in the dwelling or in immediate flight, he or another participate in the crime, so either while he's inside or going in or leaving, is armed with a deadly weapon or explosive.

And as I go through these aggravating circumstances, we don't have to prove each aggravating circumstance. We just have to prove one of these exists, but this crime is so heinous that it has many aggravating circumstances that apply, that he causes physical injury to a person who is not a participant in the crime, that he uses or threatens the use of a dangerous instrument. If you think the winch bar wasn't a deadly weapon, I submit it caused his death, that makes it a deadly weapon in and of its own definition, threatens the use of a dangerous instrument or uses or the burglary is committed by the person with a prior record of two or more convictions for burglary or house breaking or a combination. That's the reason you heard that evidence. It wasn't just to muddy his character. It was to show that that's an aggravating circumstance which takes a burglary not from just burglary in the second degree, but up to burglary in the first degree. That's the difference.

Any one of these one, two, three, four, five different aggravating circumstances is enough to make it burglary in the first degree.

And, finally, the entering or remaining occurs in the

nighttime. The legislature understands that when people break into people's homes, these are not dwellings. The -- they're -- not about a business, but dwellings, that's different.

But that is inherently dangerous to life, and, therefore, is a more egregious offense, and, again, nobody's gonna get up here and argue that this wasn't burglary in the first degree.

Now, the judge will instruct you that in considering your verdict, you can consider evidence and there are two different kinds of evidence you can consider. He will tell you one's not better than the other. It's just how we simply term them or relate them. It's direct evidence or circumstantial evidence.

And what is direct evidence?

Direct evidence is eye witness ID's. It's what a person sees or perceives through their senses, touch, feel, sight, hearing. That's direct evidence.

You heard from Ms. Ashford, even though she was in the next room and didn't actually see, what she heard is direct evidence.

You heard from Mr. Harp. He was across the street, but he saw the person. That is direct evidence.

But there's also circumstantial evidence. Circumstantial evidence is proof of a chain of facts or

circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case, and after weighing all the evidence, you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty. If, on the other hand, you are convinced he's guilty, you must find him guilty.

So, in this case you've got both. Some cases are only direct evidence, only one eye witness sees what happens, come in and testifies, or they're other cases where all you have is circumstantial evidence. The stealing of the truck on the evening near a house given the winch bar being in the truck, that's circumstantial evidence.

In this case, ladies and gentlemen, there is a abundance of both direct and circumstantial evidence, and what is good in this case is you have direct evidence, which is totally corroborated by the circumstantial evidence. So, you have both. But in every case it's important to look at all the evidence before considering this defendant's guilt. Not just one piece.

Now, the Judge will also instruct you that there was a statement or confessions that was introduced in this case by

the defendant. The exception to any statements coming in, such as you heard about statements that are referred to by Ms. Ashford and other things, those aren't admissible. Only the defendant's statement is admissible and it came in this case and was actually recorded.

In considering whether or not you can consider the statement and using it as far as the defendant's guilt, the Judge will instruct you, although he made a preliminary decision whether or not it's admissible, you too must decide whether or not he wanted to talk to the police that day (inaudible), and in considering that you consider his background, his level of intelligence, and, in this case, it's really nice because you actually hear him on the videotape, on the audiotape. Excuse me. And consider that he's the one that uses words like I don't want to incriminate myself. He comes up with those words. It's his level of intelligence.

Was he under the influence of any drugs or alcohol?

Those are all things you can consider, his background, he got to the 12th grade before dropping out. Things of that nature.

And important in that consideration for a person where the statements gonna be used against them is whether or not he was read his rights, and they're called Miranda rights, that's advice of rights, and you have them recorded. These

officers jumped through all the hoops they were suppose to. They did their job by the book. It's on tape.

They not only just went through his rights, they didn't say oh, whatever, let's move on, they made sure he was advised of his rights. They went back and forth. At one point they even said if you just want to stop talking to us at any point you tell us. You stop talking. Nobody's here to railroad you. You stop talking if you want to. They did their job.

There is no question he was advised of his rights. There is no question that, after considering his pros and cons, that he wanted to get his version of the facts out there, and he signed off on the waiver, which he didn't even have to do, he just had to be advised, but that he did sign, and that's an important consideration.

Now, the Judge will also instruct you and he's already, I think, given you some instructions on expert witnesses. But expert witness is different from a lay witness or a regular witness. I could not come in here and be an expert witness because I don't -- I'm not an expert. An expert witness is someone whose had specialized training and education, and then must be qualified by the judge in order to come before you and give an opinion as to any testing or other information they have.

In this case you heard from a number of expert

witnesses. You heard from a DNA expert. You heard from medical experts. You heard from pathologist, and the list goes on. And the reason that they're allowed to come in here is only because the judge qualifies them as an expert because of their specialized training. You judge the credibility of the experts the same way you do anyone else.

And that brings me to that last thing I want to talk to you about as far as the law in this case. Credibility. Because this case, as in every other one, it boils down to credibility.

What is credibility?

Believability.

The Judge will tell you, you can believe part of what a witness says, some, none. It's totally up to you. You can believe one witness against many, many against one. When considering whether or not to believe a witness, consider if they have a bias or prejudice. They may have something to gain or lose by testifying to what they know.

Was it pleasant for them to come in here and testify?

Was it their demeanor?

You can consider is their testimony consistent with other testimony and other evidence?

Those are all factors, and in that same vane, as you heard, whenever any witness gets up here and chooses to take the stand, and they have a prior record, it can come and be

used against them. The purpose of that is just so that you can consider that in determining credibility, but in that same vane, if that witness is corroborated by other witnesses, that's another factor in determining credibility. It's totally up to you.

And that gets me back to the final prong, the most important role in this courtroom, ladies and gentlemen, is yours.

All we ask is for justice. Justice for Reverend Eichelberger, for the Eichelberger family, and for the citizens of Richland County.

Thank you.

THE COURT: Counselor.

MR. STRICKLER: Please the Court?

THE COURT: Yes, sir.

MR. STRICKLER: Madam Forelady, ladies and gentlemen of the jury, an answer for everything. Tuesday of last week we started this case, and that's what you were informed, that Frankie McGee has an answer for everything, an answer for everything, and what I'd like to talk with you about today is the folks who have an answer for everything in this proceeding sitting right over there.

I'm going to cover with you what's been proven in this case, and what is not been proven in this case, and then I'm gonna ask that you (inaudible).

Ms. Campbell and I, this is probably the last time I'm gonna agree with her, are in complete agreement. There was a burglary in the first degree at Mr. Eichelberger's. Mr. Eichelberger was assaulted and died as a direct result of that assault, and that assault was a murder.

Okay. There's no question about it. She then gets up and talks about muddying the waters and implies that's my job. You need to understand, I'm clearing things up. You have things that you have to consider. You'll have a job that you have to do, but I'm gonna clear things up right off the bat. It was a murder and it was a burglary in the first degree.

So, what's left that you have to determine?

Who did it, that's what you got to determine.

You got a bunch of stuff here from the State, and I call it stuff. Some of it's evidence. It's all admitted as evidence. Some of it's stuff.

You have -- I have no idea of how many pictures of the outside that were entered into evidence. Hundreds. One of them might be evidence of the scene. The rest of them are stuff. I mean if you're looking for the general scene, right there, this overhead. I got a picture of Mr. Eichelberger's house, a picture of where the socks are, a picture of where the rod is, and, here, if you needed to know that, there's one that covers it all.

So, these, that's just stuff. This, if you need to orient yourself, that covers it. But this wasn't put three or four pieces of evidence in and talk about the massive evidence that they have. No. One does it. All the rest is stuff. You have pictures of the interior of the house that shows what occurred there. Lots of stuff.

As I said, I'd like to talk to you (inaudible). So, let's talk. And in talking about that, you need to reference some of the witnesses.

So, what's been proven?

What's been proven is that Reverend Eichelberger's blood is on this rod.

Which part?

All right. On one with the subject name David Williams on it. It's collected. It's reflected in one of many of these photos. Okay. So, that's what I'm talking about.

You want to talk circumstantial evidence, I mean there's also testimony that it's consistent with what (inaudible). Circumstantially, witness -- circumstantially, it's reasonable to infer. That was used to pry the door open, strike -- there's blood on it. It's reasonable to infer that he was hit.

Okay. So, that's been proven.

What's been proven?

Been proven that a Peterbilt truck, okay, was recovered

a number of blocks away from Mr. Eichelberger's, and that it had been stolen the day before Mr. Eichelberger dies and was assaulted, Reverend. Mechanical. That's been, that's been proven.

All right. We have the opinion of one person, sister of, of Frankie, that he took the truck. That has not been proven.

You have the video. You need to look at the video. You got Frankie (inaudible) 5'8" inches tall, 230 pounds. That's in evidence. There's a driver's license somewhere with that information on it. 5'8". 230.

Now, he's going to the person in that video and see if that comports with your opinion as to what a person looks like who is 5'8" and 230. Okay. I submit to you it doesn't look like that at all.

So, the truck was taken.

Have they proven that this bar, the bar -- what piece of evidence have you heard that says the bar came from the truck?

Okay. Now we need to talk about the difference between evidence and speculation, proof and theory, cause what you've got is largely theory. You got a theory from the part of the State. Okay. Theory is stolen truck, came to Columbia, took the bar off the truck, committed the assault.

What proof, we'll start with the bar, is there that the

bar came from that truck?

The answer is none.

You've got the person who owned the company where the truck was from.

Yeah, they used those kind of bars.

Was it missing from the truck?

No idea. No idea. You can buy those bars in any truck stop in America. They're all over the place. Common as can be.

Did he check to see whether it was missing?

No.

Had any idea whether it was missing?

No.

But Frankie knew about those bars. Frankie knew about those bars.

Really?

You have his boss came here and testified. Did not get the answer -- Ms. Campbell did not get the answer that she expected.

Are you familiar with this?

Yeah.

Use it?

No, we use smaller ones with, without a metal bracket.

Let's talk about what some of the tools you can employ in seeking out the truth cause that's what your job is here,

to seek out the truth.

Is something corroborated?

Okay. Well, you know, we'll get around to what Frankie just said or his wife, but what he has to say in just a minute. They questioned him. You got his testimony, his interrogation. Interrogation. Not interview. You have this testimony. I don't know what they show the pictures of. (Inaudible).

So, which one?

We didn't use winch bars like that. We used the ones with the screwdriver ends on them as his boss testified about. Smaller. No box end on it.

So, Frankie told you that. Their intention is that's a lie, and you heard Mr. Thomas testify about that yesterday. That's a lie.

Well, it's a lie with which a completely impartial witness happens to agree. So, I'd submit no, it's not a lie. That's the truth. He doesn't know anything about that cause he never used one like that, and he's licensed to drive an 18-wheeler. His boss hadn't never drove an 18-wheeler to have experience with any kind of winch bar in his capacity of loading or unloading of the job sites. He didn't drive an 18-wheeler.

We're on a journey here is what we're on, and the journeys have been phrased from where we're going, which

I've always liked. It's called Crown Cooper Land. That is a place where black is white, where up is down, where interrogations are interviews, where corroborated truth becomes lies, and where repeated, repeated, repeated denials that you're involved in anything, repeated denials that you're involved with anything become a confession. That's Crown Cooper Land, and that's where the State is taking us.

Now, what's been proven?

It's been proven that that was found on the scene, and I submit it's been proven that it's used to (inaudible). Nothing in the truck.

What's been proven about the person who committed the crime?

Well, it's proven that the person that's on trial now 5'8", 230 pounds. It's been proven or it's been testified to by Temika Ashford that the person's tall, 6-feet tall, medium to heavy build, blue jeans, and a white shirt.

Now, if you believe Mr. Harp saw Mr. McGee pacing around outside earlier that day in his cutoff baggy jeans shorts, not blue jeans, baggy jean shorts, and an athletic jersey like there's testimony today, and he says he recognized him ten months after the fact, ten months after the fact.

If you choose to believe him, I don't know, this man who is out stealing trucks and driving him over here is

carrying his change of clothes with him, his, to change from his baggy shorts to straight blue jeans, and changing from, you know, this athletic jersey that he's wearing to a t-shirt, and that's the 230.

But what do they have to support that theory?

Absolutely nothing. Goose eggs, zip, nada, nil, nothing. Speculation, theory. That's it. That's what they have.

What do they have to have?

What is the standard that has to be employed here?

And that is proof beyond a reasonable doubt. Proof that came off that truck with no questions left.

Well, that's not proof. Didn't prove anything.

Socks. They have proven that those socks were warn by -- proof. DNA is all over them. I admitted that to Mr. Barron when he was testifying on the stand and he got snapped back at oh, now you're testifying. Well, no, I'm agreeing with you. That's fine. But you need to remember things like that because, as you evaluate the credibility, the believability of witnesses, you are allowed to consider their demeanor, how they appear on the stand, whether they are forthright in response to questions, or whether they're evasive in their response to questions.

Mr. Barron, when did you set up the DNA lab along with Mr. Amick at the Sheriff's Department?

2004.

When was the first time you did this touch DNA testing?

Oh, I -- excuse me?

You set up the lab. You got all these folks. I don't know when the first time was.

Well, when was the first time you personally used it?

Oh, I don't know.

Is that forthright or is that evasive?

That's all a rhetorical question. That's as evasive as you can get. That man knows when the first time it was used. I don't know when the first time -- was it this case or some other case?

I do know that they wouldn't answer my question. I'm gonna talk about the DNA. What they bring in to you, as far as DNA, are these nice little summary charts, which do summarize their conclusions. Each witness' opinion. And they do it that way, I submit, saying you don't have to deal with any of the nuances. It's just plain this day. Nothing you can question about it.

Well, that's one we had to blow these things up and got all technical and I don't apologize for that. I don't apologize if we were contentious with a witness.

Okay. This place, this place, this courtroom right here is sometimes referred to as The Crucible. The Crucible, a crucible is a term from metallurgy. You put two

different kinds of metal in there, you subject them to heat, you subject them to pressure, and you get a different metal. (Inaudible) Tin, bronze, copper, and zinc, brass.

Okay. This is a crucible. You get different people talking, different testimony, and they are subjected to heat and pressure and that's my job, to apply the heat and pressure, and let you see how they react. Mr. Barron reacted by telling me basically that it's a (inaudible).

All right. Now, the proof. Those (inaudible). They don't bring in to show you, I didn't make this up, I'm talking with both Mr. Barron and Mr. Amick about it. 6.2. The blood from this bar, this bar, these have blood on it. That the blood agrees with Mr. Eichelberger's.

Okay. Right here, these wooden arrow, wham. I didn't put that in there. Mr. Barron didn't even put that in there. The machine puts that in there, and Mr. Barron confirms that it matches what they have to have in order to call it a real allele.

Well, what's the testimony?

That is a real allele that does not match Mr. Eichelberger, and it does not match Mr. McGee. It's real, doesn't match Mr. Eichelberger, it's not Frankie. This is not muddying the waters. That's there and they need to explain why that's there.

Explanation. Early on Mr. Barron talked about getting

real small samples, mixed samples, got more of one sample, Mr. Eichelberger's, less of someone else's sample. They both get amplified. So, you get big pikes, spikes right there, and then you get the smaller ones consistent with the smaller sample. Okay. DNA from someone else. Not DNA from Frank.

I put this in. This is Frankie. You can compare it. It's not hard. I mean the science is involved reading these, tenth grade biology. I can read these. It ain't that hard. They're (inaudible). This is another sample.

Okay. That's a cross sample right there, and he explained why it's a cross sample. But you got that, the one from Mr. Eichelberger. All you do is just light them up, just the same, and see where they are. You can see. Then you can get a ten. Socks that were scraped.

Okay. This first one right here. Talked about these being consistent with David Williams and they agreed they were. But more importantly, I then talked with them about the fact that Number 14 right here does not match Mr. Eichelberger. It does not match those two people.

I mean if they're gonna ram away about David Williams. I don't know whether David Williams did it or not. I know he's identified as doing it initially. But I don't know whether he did it or not and that's not my job.

It's this doesn't belong to Frankie. This doesn't

belong to Mr. Eichelberger. This is present on that sock. Where it comes from, please explain, the people who have the burden of proof, that's what it's called, the burden of proving guilt beyond a reasonable doubt.

Where did this come from?

If not from another person, where did it come from?

Well, it came from another person. It's not something degraded. Mr. Barron got started on it. Degraded stuff just won't show up. Okay. That's a real piece of DNA, belongs to someone. Doesn't belong, doesn't belong to Mr. Eichelberger.

4.2.2, that's one of the socks. This is from the (inaudible). Okay. 4.2.2, right here. 34. 4.1.2. 136, once again, this is Mr. Eichelberger's blood. You can compare it. Check this -- this six and eleven, that's him. You can check it with, with the chart on Mr. McGee.

That's not him. That's not him right there. That's not Eichelberger. That's not McGee. That's someone else entirely.

Who?

It's mixed in with the blood. He obviously witnesses that. It actually shows up on a ten the second time.

So, what is proved?

Proven that they're Frankie's socks.

Okay. They have Mr. Eichelberger's blood on it.

Is there a problem with that?

Well, what is the problem with that?

Because they have other peoples DNA's or other person or persons, person's DNA on it, and you have Frankie's sample. I kicked those socks off at the store, at the, the GazBah by a dumpster.

Okay. You got an overhead, and there's the cap. Okay. See. GazBah.

Now, you listen to Mr. Thomas. Then he changed it to light pole.

Okay. One thing y'all don't do when you come in here is check your common sense at the door. All right. It's one of the reasons you're sitting here. You don't check your common sense at the door. Everyone in this room has been to a 24-hour convenience store. That's the GazBah. May not of been to that one. But you've seen one, you've seen them all, and they all got lights all over the place.

Well, this man who -- I'm not gonna count them and I'm not gonna make you sit through all of them again. But this man, who in the beginning, early on, saying he didn't do it, and who time and again says he didn't do it, and yet time and again more says he didn't do it, just decides to tell oh, yeah, it wasn't by the light pole, by the yard.

Well, he doesn't say that. Doesn't say anything like that. He says he took them off at the store by the dumpster

and left them by the light pole. Same place, dumpster, store, light pole, one of the same, one in the same thing. That's what he says.

They (inaudible) believe that he admitted to leaving it at the light pole right by, across the street from Mr. Eichelberger's house. But he said no such thing. That's their theory. That's not a fact. That's their theory. That is not something's that's proven. The socks were found in the yard close, close to a house. Right here. It's close to that house as it is the light pole. They're in the middle of a field. But their theory is that he has confessed to it.

Well, this is Crime Tookie Land right here, right now.

How many times, how many times he said I did not do it, I did not do it, I did not do it, I did not do it?

How many times you go through that?

How many times you have to say it?

How many times you have to say it and still be yelled at and cursed at before you start thinking hey, you're getting railroaded, which is what he's concerned about in the beginning?

Should of shut up because whatever you say, whatever you say, they have an answer for everything.

He's lying. Simply telling the truth. He told the whole truth about using the phone. He's lying about other

things. Truth, they pick and choose the truth to help them. They have termed the other things lies because it doesn't match what they have.

What basis do they have for that?

These are people who say that we don't interrogate people. We interview them. I interview people all the time. People looking for a job. You know, I don't cuss them out. I don't tell them that they're evil people. I don't get in their face. We talk. That's an interview.

This is an interrogation. Nothing's wrong with it. It's an interrogation that I kept the running tally on the various techniques that are employed.

Here, let me feed you some information about the crime so when you break, and tell us, you'll know the right things to tell us. That's a technique. Both of us know. We just talked with him. Encourage him to speak the truth.

Well, you got some lake front property in the Sahara for you guys if you choose to buy into that. And if, if you don't, then that's not credible testimony and you need to take that into, into account as you consider whether or not you believe what you're told.

It's an interrogation, and what you have in an interrogation, it's from start to finish denial, and he did not do it. The point is did not. Slightly cursed at him, vilified by people who interrogated him, who then have the

nerve, the absolute gall, in response to cursing him, because I'm trying to get down to your level. A person who never raised his voice, never used anything other than polite language with the people. To that level. Trying to get down. You need to go up to get to that level. But, you know, white is black, up is down. Denial is confession.

Now, reasonable doubt, move on to reasonable doubt. 6.2. Fourteen.

Reasonable doubt?

Remove those reasonable doubts with evidence and speculation, not theory, not conjecture. Remove this.

Other reasonable doubts. The guy was 6-feet tall. 5'8". 180 to 200 pounds. This is to the person who did the sketch, Mrs. Goff, who did the sketch. 180, Ms. Ashford, Temika Ashford. 180 to 200 pounds. 230. Reasonable doubt.

Not the same person. The person was wearing white t-shirt and blue jeans. The person was wearing baggy jeans, shorts, and a wet sweaty shirt. Reasonable doubt.

Here's the other thing. You have the composite that's in evidence. You also have a slew of these what we in police call six packs. Six photograph line-ups.

Okay. You have, I don't know, four or five of them shown to Ms. Ashford. Certainly looks like him, certainly looks like him, looks like him, looks like him, one of which is Frankie, the last one. Doesn't say it is him. Doesn't

say it looks any more like him than any of the other ones that she's heard.

He's the one that she's saw. Now, Mr. Thomas tries to go ahead and portray that as, no, she was more sure about that than she was. Well, you wasn't even there. Ms. Ashford or Mr. Reece was there. He wrote it down, what she said.

Okay. Less than one -- I don't know who they are. Certain between all those, half dozen. More than that.

So what?

What's that prove?

She recognizes him?

No, it does not.

Well, you got one person who claims to recognize him in, in the area, and that's Mr. Harp. And the last time, best guestimate on his part, the last time he recognized him in the area is 5:30 in the afternoon. Six hours before that happened. (Inaudible).

Well, they say great, put himself there. You can listen to, to the recording. Frankie puts him there at some point in time.

When you first heard about it?

The paper, two months after it happened.

What did you have for lunch ten months ago?

I don't know. That's Mr. Thomas.

Well, of course, you don't know.

Where did you eat lunch?

I don't know.

No reason to know. That's what Mr. Thomas says.

Now, I'm not gonna spend a lot of time talking about the law. I listened to everything Ms. Campbell said about the law. That is the law of the State of South Carolina. His Honor is gonna charge you on the law. (Inaudible) all one part of the law, and that's what your job is. Right here, right now, your job. What the law says your job is. Not me. What the law says.

The law says that you didn't show up here, sign our board, and go ahead and convict someone. That's not what your job is.

Okay. Your job is to determine what the facts are, determine what facts have been proven to your satisfaction beyond a reasonable doubt, and that's your job. And then apply the law as His Honor charges it to the facts as you find them. That's your job.

The law says your job here -- and you don't have any friends to reward. Y'all aren't here because you have any enemies to punish. Those are not your job. Your job is just what it says. Determine what the facts are beyond a reasonable doubt. Determine what they are beyond a reasonable doubt. Apply the law as His Honor charges it to

the facts and arrive at a verdict if you can.

Verdict comes from two Latin words. Veris, true. Dicto, to speak. Combine them together, their word, veridicto, to speak the truth. That's what you're suppose to do. It's actually a little further than that here cause a verdict here means to speak the truth beyond a reasonable doubt. Beyond a reasonable doubt.

Each of you needs to consider the evidence that you've seen, that you've heard, that you'll have back there with you, and decide what's been proven. You should speak about your feelings with your fellow jurors. You don't have to change your mind for anyone. You are responsible to yourself to arrive at a verdict that speaks the truth beyond a reasonable doubt.

Now, I'm not going to get back up here again. Ms. Campbell is. She will say things with which I am sure I will disagree entirely. You've already heard the only area we agree we have. I won't be able to respond.

As you discuss the case in your jury room, I'd ask that someone inform you in response to claims made by her, that someone, doesn't have to be the same person, y'all are, after all, seeking the truth, what explanation is there for this DNA, for this DNA, for this DNA, for 6-feet rather than 5'8", for 180 to 200 rather than 230.

Okay. How have these things been explained away?

How has the State made, convinced you, beyond a reasonable doubt, that denial is confession?

Denial is confession?

It's basic.

Okay. You have no friends to reward. You have no enemies to punish. You're sworn to do your duty. You don't own anyone anything. If you're not convinced, you are asked to sit in judgment on another human being. By your verdict, if you find guilt beyond a reasonable doubt, brand him as a murderer, that's your job here. That's what you're being asked to do.

All right. But the law says that proof has to be made beyond a reasonable doubt. It needs to be made for the law. It needs to be made for the victim in the case. It needs to be made for Frank McGee, and you need to be comfortable in the verdict you arrive at. If the verdict is guilty, you need to be comfortable in that verdict. You need to be comfortable beyond a reasonable doubt in arriving -- if you aren't, then you vote not guilty.

There's nothing, last thing, makes you stop -- three forms of verdict, guilty, not guilty, and not proven. We don't have three in this state. We just have guilty and not guilty. If it's not proven, then it's not guilty, and you don't have to change your mind and say anyone else. You have to arrive at a reasoned decision and a conscious

decision supported by your view of the facts and the law, and I submit to you if you do that, if you take your oath to find, if you hold the State to its burden of proof, then you-all will return a verdict which does speak the truth, and that verdict is not guilty.

Thank you.

THE COURT: Ladies and gentlemen, we'll take about a five minute, about a five minute break. Please go to the jury room. Do not discuss the case.

(WHEREUPON, a short recess was taken at this time and the following takes place within the presence of the jury panel.)

BAILIFF: The jury is seated, Your Honor.

THE COURT: Ms. Campbell.

SOLICITOR CAMPBELL: May it please the Court?

THE COURT: Yes, ma'am.

SOLICITOR CAMPBELL: In preparing for trial you always try to anticipate what the defense may be or the defense theory is going to be in each and every case. Typically, a murder case, especially one as heinous as this, a defense, you can't convict, there's no DNA linking to the scene. You can't convict, you can't prove the cause of death. You can't convict because the description doesn't match or the defendant didn't give a statement.

But where the evidence that's overwhelming, we fall

back to the most ancient and oldest defense in the book. Admit to some of the underlying facts that don't hurt you, and just attack the ones that do. Attack the evidence, the DNA. Attack the police, their conduct. Accuse them of bullying, railroading his client.

And as I listened to the defense get up here and do just that, it's as if Frankie McGee is a victim. He is a victim according to them. Railroaded.

The defense has spent the last five minutes getting up here and telling you not to believe anything I've said. I'm not asking you to believe what I say. I'm asking you to believe the evidence, the cold hard evidence that even Frankie McGee, and we'll get back to that statement, couldn't explain away, the overwhelming evidence in this case.

They talk about how we can't prove that's the pry bar from that truck. That's not an element of the offense. I submit we have proven that it came from that truck.

They said that somebody referred to the truck as a Peterbilt versus a Mack.

So, you can't convict because he wants to call it a Mack?

And notice, we go into his statement, it's what he does say as much as he denies. He says it's a Mack. Not a Peterbilt. He distances himself from the actual facts.

It's a pry bar. Not a winch.

Ladies and gentlemen, we aren't getting up here and saying just because he calls this a pry bar and not a winch bar that makes him guilty. Oh, no. And the defense does this to keep you from looking at the overall picture, the overall overwhelming evidence of one man and my man alone, and then he said you would be branding him a murderer.

No, ladies and gentlemen. The only person in this courtroom that decided that Frankie Lee McGee was a murderer was Frankie Lee McGee. All your job is, and the Judge will tell you this, is to come to a verdict that speaks the truth, the truth about what happened.

And their final theory of the case is they got, is he's denied it over and over, and there is no doubt about that. Because the very first thing he said, if you go to that statement, is I don't want to say anything to incriminate myself. Those are his words because if he just nods, according to the defense theory, no murderer could deny what they did could be convicted, that would be a rough world.

I want to talk to you and take this opportunity to talk to you about the facts, the cold hard facts that are hard to get around, and what it does prove in this case, what evidence was credible, and which you must decide, and I submit, ladies and gentlemen, when you look at all the evidence in this case, there is but one verdict, and it is

the verdict that speaks the truth.

They talk about David Williams. David Williams was caught there at the scene. They talk about the pressure they had to solve this case. Well, they just got there to just randomly pick people like they picked Frankie McGee out of a machine at SLED.

Wouldn't David Williams be an easy target?

He's there. And according to them, and no matter how many times he said it, he wasn't identified.

Well, why not just identify him?

That's easy.

It's done. It's over.

They did their job and they want to twist it and turn it against him?

They relied on the credible evidence in order to come here before you, to go to a Grand Jury, to get an indictment, to come here before you, and to ask you to convict the real killer in this case.

Now, I want to talk about a lot of the evidence they didn't talk about. Because in every case, as a juror, you individually and then collectively look at all the evidence and the overall picture that evidence paints. You look to another person, a number of witnesses in this case, and the first is Larry Harp, and he's important cause he said from day one that this person was across the street. He noticed

it because it was unusual, and they tried to say that oh, people were in and out of the Reverend's house all the time.

He noticed it that day because the guy was, remember -- and you remember the testimony, and I suspect, and I ask you, I beg you, judge Mr. Harp.

What does he have to gain or lose?

All right. Is his credibility in question?

What does he notice?

He notices them on two occasions earlier in the day and then late in the day.

And what is the defendant doing outside Reverend Eichelberger's house?

Pacing back and forth. Going back and forth.

He sees him at one point with a sandwich or something in his hand.

I submit, ladies and gentlemen, is that premeditation?

Is that casing the place, looking to see if this burglary would be an easy one?

Reverend Eichelberger was 87 years old. Larry Harp told the police from day one I saw that person, he looked suspicious, I can recognize him again. They showed him a line-up, and I submit this makes his ID even more credible with other people, similar. He says no, he's not in there. I even know one of them and I know it wasn't him. But I can recognize that person again.

And Larry Harp, ten months later, came forward and shown and identified the person he saw, and they're saying that it can't be him because the clothing is different?

The defendant, in his own statement, says he was staying in town with friends, he had some kind of fight with his wife, at the Coronet which is like four blocks from here.

Did he have time to change into his burglar clothes, which are more generic, easier to spot if you're running from a scene?

Is that credible evidence?

Is it believable?

So, at this point, with this very first witness, Larry Harp, he puts him in the scene that day.

A victim?

And you heard from Temika Ashford. Temika Ashford was 30 years old when it happened. She was over at the Reverend's house that night. He was helping her. He helped people in his community. He looked after his fellow man. He didn't pray on others.

Temika Ashford, and I -- judge her credibility.

What does she have to gain or lose?

It was very pleasant for her to come to this courtroom and testify to what she did that night?

Why did she have anything against Williams, McGee, or

anybody?

She told you the vantage point. This is what makes her credible. It's not that the police just got her to then point to Frankie McGee. They did their job. They were fair. This is real life. This isn't some movie or made up TV as much as he wishes it was. She gave you a description, and they want to say you can't convict because her description is off by a few inches.

Ladies and gentlemen, I submit that's what makes her description credible. She was in her car sitting down.

And do you remember what she said was so telling?

I don't know if he was bigger than me. That's what I thought. That's what makes her credible. If she -- if they make up some description and it fits him to a tee, it's gonna be (inaudible). Some people are better at estimating height. Some people are better at estimating weight.

Well, what did she tell you that is so telling?

It was a black male, 5'8" tall, 180 to 200 pounds was her estimate from where she was sitting that day. Light to medium complexion. Late 30's and early 40's. He was 43 when this happened. Receding hairline. Round head. They been talking about triangles and stuff, but if you look at the pictures and then you look at him right here now, although he's shaved his head now so you can't see the receding hairline.

Guess what?

Receding hairline and round head, a pot belly, heavy set, body build, a white T-shirt, sweating in the neck, and blue jeans.

Composite. She wasn't sure about certain features such as those, and I submit, ladies and gentlemen, they talked about the composite. Look at it. The hairline may go down a little lower than it was, but it's dead on. It's dead on. The body build, everything, to a tee.

And their position is you can't convict because she was off a couple inches?

I submit, ladies and gentlemen, that's what makes her credible.

She told you what happened that night, what she heard. The last thing Reverend Eichelberger said, how did you get in here, and then thump. She ran because she knew something bad was going down. She comes around and luckily, I guess unluckily, back in the vehicle, she came back around, she stayed around, and she saw him leave, and she got a look at him then, and then she got a look at him after. He dumped the bar and he dumped the socks and he made his escape. Cool, calm, got away from the scene to make sure that the police didn't put out the BOLO, that he wouldn't get picked up.

David Williams.

And another thing about David Williams, if he committed the crime, wouldn't he just go in his house and hide?

Would he just be wondering the neighborhood smoking marijuana?

Does that make any sense?

As much as they wished that David Williams is a viable suspect, he wasn't and the police did their job eliminating him a long time ago.

You heard from Michelle Perry.

And what's significant about her?

They wanted you to know (inaudible) before. And she got up here and she was cross-examined like every single witness was cross-examined vigorously.

And what did she tell you?

Yes, she'd seen him before on two occasions with the Reverend. He had access.

He's a victim?

And remember, they don't know who Frankie McGee is. The police have no radar on Frankie McGee until ten months later.

And it just happens that all this is true?

Let's go further. Sandra Thomas, his sister, and it wasn't easy. I felt awful for her to come in here and have to testify. But she did the right thing. As hard as it was for her to do, and then her reward is to get questioned

about how could you recognize him?

You can't see good enough?

She knows him.

It's like if you see someone from the back that you've lived with all your life, you can recognize them. Their walk, how they hold their head. She knows him.

Do you think that was easy for her?

And she even, back when it happened, did the right thing. She called Crime Stoppers to report it.

Was it easy for her to come in here and tell you that?

No.

Was it the right thing?

Yes.

Did it cost her?

Yes.

And I submit, ladies and gentlemen, that's what makes it credible because if she wasn't sure, she wouldn't do it. And when she reported this back in May, she had no idea, no idea the connection that proved so vital between the truck stolen from Camden, Frankie Lee McGee, and Reverend Eichelberger. I beg you to judge her. Judge her credibility. They didn't talk about that, and then they asked her something about some gold around one of his teeth.

Ladies and gentlemen, I submit Temika Ashford never said that the defendant, Frankie McGee, come out of the

house smiling. We've been here all week. I haven't seen his teeth yet.

Ivan Moore.

Again, what is significant about him?

The police approach him.

Do you know him?

And this is information. Remember. They're doing their job. They're getting hard evidence before they go around accusing people like they so freely accuse Mr. Williams.

What is significant?

Yeah, he puts him in the area. He comes to town. Ivan is an acquaintance of him, and I don't know why they talk about him. Maybe his prior record because that's it. And we don't pick the witnesses. He knows him. He rents out his car sometimes. His wife drops him off sometimes, and I submit -- cause later they talked to his wife.

What else?

They go back.

Earl Lee Brown, what was he able to tell you?

He owns Happy Daddy Towing. He finds that truck on the 3rd where it's left. The truck just happens -- oh, he talks about how we can't put that winch bar, and I submits that's what makes Mr. Kline credible is one exactly like it. But he didn't do an inventory. So, he couldn't get up here and

in good faith tell you that's the bar. But he looked at it and remember he stood over it and he said that's it, that's just like it. But he has other winch bars.

He told you that he found the truck, and this is all stuff the police put together ten months later. That's what makes this so credible. And that's he can't.

He made a big deal about Mr. Miles not being able to tell you that's the same one. No, but he did say it was a winch bar. That's just not the ones we use to use.

And why is it significant and why are we dwelling on whether or not he calls it a winch bar or a pry bar?

Because he's distancing himself.

The police, early on in their investigation, remember that testimony. They didn't even know what kind of bar this was. They had to do research because it's unique to the trucking industry. The trucking industry, which just happens to be his area, and at one point in one place he says you can't prove that he, that he drove an 18-wheeler. That's what he does for a living or was suppose to anyway.

The evidence is overwhelming. You heard some other evidence and the key to the case, according to, is the DNA. And, yeah, ladies and gentlemen, the DNA was (inaudible) because it wasn't until the hit on the DNA, and you heard from a number of the people. We'll talk about it.

You heard from medical personnel about what Reverend

Eichelberger went through, how long, how hard he fought to live. But eventually succumbed. No one is gonna get up here and say the cause of death is something else. You heard from Christine Barrickman and Teresa Hines and then John Barron and Gray Amick.

Well, ladies and gentlemen, as the Judge will tell you, expert witnesses. They give an opinion because of their training. You have heard all the expert testimony you can consider in this case.

I am not an expert. No one else in this room was an expert other than John Barron and Gray Amick, and they got up here and they gave their opinions, and Barron and Gray Amick concurred, agreed, it eliminated as much as they're trying to point.

And then they say you can't convict because there's an extra half of an allele or whatever they're called in one of them?

They explain that. These test are sensitive. It's like if someone else had handled it briefly, then their DNA might be on it. It's small. Like folding clothes I believe is how John Barron (inaudible).

The only expert testimony you have is that the evidence in this case on those socks were two people. It excluded the person they keep pointing to who is wearing those tennis shoes, which we excluded from the crime scene, and had no

blood on them, and look at these.

You think that the person there could have some blood bath on blood?

Look at the droplets.

Would it have been on David Williams?

That's their theory?

You can't believe it because there's half an allele, according to them. The expert testimony that you can rely on in this case says unequivocally that the two people DNA, the blood belongs to Reverend Eichelberger, and the only other one, there's a mixture with the third allele like which would be consistent with someone having a brief encounter.

In their opening statements she talked about how she had a hat and it got lost and her DNA could still be there months later.

Well, ladies and gentlemen, I submit that if someone else could of gotten those socks and put them over their hands, which they aren't disputing, and gone into Reverend Eichelberger's house, and they wouldn't leave any DNA and they wouldn't leave any fingerprints, and then assaulted, with this item, an 87-year old Reverend while holding and having to swing it -- remember the pathologist testimony. That the DNA comes from sluffed cells, and they want to say that that person would only leave one-half of one allele

that's so microscopic they can't even use the numbers?

That's their theory?

You think that wouldn't cause DNA to roll off. The manner in which he had to open the front door with the square in it?

You think that wouldn't cause someone else's DNA to be present because let's get one thing straight. The only full profiles you have in this case are Reverend Eichelberger and the defendant, and I submit, ladies and gentlemen, we don't have to explain a stray allele, but we have.

Be weary of the DNA testimony, that was their opening argument. I submit they wish you would be weary of the DNA testimony because the testimony alone from this sock and this bar convict Frankie Lee McGee and no one else. Only that. But in this case, ladies and gentlemen, there is so much more.

You heard from other people. We put in the evidence of his prior record, and things of that nature. Attack the police. It's the oldest defense in the book. Try and make him explain.

Ridicule, make fun of what they did.

That's the defense in this case?

You heard from each and every officer who had something to contribute in this case, and I submit, ladies and gentlemen, in this case, in this courtroom, this was not

just good police work. This was great police work. This was thorough police work. This was police work that eliminates any doubt as to who killed the Reverend.

This wasn't police officers who rushed to judgment. They did their job. They relied on the testimony. This isn't a case where oh, you can't convict, there's no DNA. This isn't a case where oh, you can't convict, there's no identification. He doesn't fit the description.

This is as good as it gets. This is real life.

You heard from Duckett, Paul Nelson, where they recovered the socks, and you will see the nighttime pictures. Remember he came back in the daytime to take those. So, we can see the area which just happens to have this light pole which they're trying to distance themself from as quick as they can because that's where Frankie McGee slipped. He over-thought it. You can almost think about it. He over-thought it.

First he said oh, left them by the trash can. I think he referred to it as a dumpster at the gas station. But Frankie knew that's not where he left them and he wanted to give himself credibility. He didn't think it through enough.

They say he didn't change. You listened to it. He was very specific at first. The gas station at the trash can of the dumpster. You remember it. Oops.

Did that occur there?

He said over and over in his closing argument he didn't change it, he didn't change it, you be the judge. He didn't refer, after that first time, to it being at the dumpster, to anything of that nature, at that point.

You heard from other officers who went to the hospital, who were there at the scene to detain a suspect as they should, who was cleared, from Sumter, from Goff, from the two investigators, and then you talked about the statement, and, ladies and gentlemen, I submit the reason that there was four hours of cross-examination on the statement, which speaks for itself, they talked about how he didn't know he was being recorded.

Thank goodness they did record it. You judge. You think. They got up in opening argument and said they slammed their hands. They were yelling. I submit, there's been more yelling in this courtroom by lawyers then there was on this tape. He was railroaded.

Really?

The statement, and let me go through it briefly, and I promise I won't talk long.

What's significant?

Within the first 30 seconds, we're here, we're down here about a homicide case. We're homicide investigators.

Misleading, railroading?

That's why they're there. The first thing they tell him, before they even advise him of his rights, the first thing.

He's advised of his rights and you remember this.

And what's the first reaction he has about whether or not he wants to?

Well, I, I don't know what really to do because I don't want to incriminate myself.

This is a person they're bullying, that is intimidated by them cussing?

He doesn't want to incriminate himself, but he wants to talk to them because he knows what's out there. He knows what he did, and then the whole cross-examination in that, those, those pages that he wrote, wherever they went, he does deny it repeatedly.

I submit, ladies and gentlemen, people who commit violent heinous acts tend to deny them. I don't want to incriminate myself, nothing of it, or get in any kind of trouble because that's the first thing on his mind. But he knows it's out there, and he wants to know what the police want.

Remember the whole statement. Again, Page 21.

Well, I don't know. I just don't want to incriminate myself no further in something. Don't want to incriminate myself no further.

This is before they (inaudible). This is before they make accusations on him. He's trying to say, oh, are we talking about some shooting, and he knows he's not in the shooting. But when they tell him they're there to talk about a homicide, even though he never admits, and I'll get back to that, that he knows he was there that day, and they're saying it wasn't on the same day, he does change that up. He doesn't say what, and they first tell him, have you ever been to Greenview.

They're there on a homicide. They said well, ask you about Greenview and he doesn't say oh, you're here about Reverend Eichelberger, which he admits he knew about it, and he admits he knew he was a witness. But he didn't come forward until after the fact.

The reason I'm saying this is I've had situations in the past, not saying it's you, but I've had situations in the past where I've been railroaded and he goes on because sometimes, ladies and gentlemen, you can tell more from what they deny and what that choose to admit. Then he was not smart enough to figure it out.

The part about the tools, it's a tool. He doesn't want to admit it's a winch bar, that he doesn't know what it is. He doesn't want to say he's ever seen that one before. That would be an admission in his mind, and that's the only significance as far as that.

What else?

He knows he took the truck, the truck that he later admits he got in and moved, but remember the testimony. The credible testimony from Mr. Hines when he went to pick it up. They had to cut off the gate that was still underneath it wrapped around the axle.

Did this just happen to be a truck he went in and asked the man about a job?

No, we don't get that.

How did you get to Columbia?

He's not gonna admit to anything cause he knows he used that truck to get to Columbia, and remember too what was significant when he was first being asked what it's about, is this about my sister, Sandra, because she knew who took the truck. It goes on and on.

The 18-wheeler, stole the truck. You're on the video. I don't know if I'm on the video or not. But I didn't steal an 18-wheeler that day.

What about the day before?

No.

He denies anything from which he could be held culpable.

Confronted. Some of the clothes. Also two people looked at the video and identified who was the person in the video.

No, it's not me.

If you did this all at Reverend Eichelberger, which is what you're saying, did you ever hit Reverend Eichelberger?

Did you ever attack Reverend Eichelberger?

No.

Because he's consistent about that in fact.

Remember the part, and I'll be brief, about when he's confronted with the socks. He knows they're there. He knows they're talking about Reverend Eichelberger. There's never been any mention of any socks being involved in the press or any other way. No.

So, he's being asked about whether Reverend Eichelberger, what's going on, and the next thing they ask him is about DNA on a pair of socks.

How about the guy doesn't stop before that night?

That's the whammy.

No, that's not a whammy.

Well, give me your whammy. Hit me back.

Those same socks.

Now, if you had done your investigation properly. Not what the socks have to do with this.

How are socks involved in this?

He's already thought it through, if I'm ever confronted, I'm gonna say I just left the socks out there because he knows the socks are important. Because he knows

he wore the socks on his hands to kill the Reverend.

It's not like when asked about, you know, is there a second person in the house?

What second person?

It's not what socks.

What do socks have to do with this?

Well, ladies and gentlemen, he knows the socks are significant and listen to the whole thing. You have listened. There's not a mention of socks. His reaction when confronted about what would appear to be a non issue is let me tell you about the socks if you'd just done your investigation properly. I could tell you about that. Not what socks, why are you mentioning socks.

He goes on. First the socks. By the socks -- by the store. By that, that trash can or something because that's where I took them off. Right there.

Well, if he takes them off by the trash can, why wouldn't he put them in the trash can?

Well, he's thinking this through.

Well, might not work. Better go move back.

So, then -- and these are his words, his voice, not anybody beating anything. You took the socks off and threw them away because you have Athletes Foot that came from beside the light pole. That's McGee.

Thomas question. They came from the side of the light

pole?

That's the first time he's heard that. That's from McGee.

He changes his story. As much as they get up here and talk about how he didn't change his story. He did. Because suddenly he's thinking oh my, God, I've got them in the wrong place. Maybe I better put them, you know, where they were found. He didn't think it through.

Because that's where you took them off?

Yeah, right here, where I was. I took them off because my feet were stinky.

Does that even make sense?

Is that bologna even credible?

He took off his socks because he had swollen stinky feet so he could then either walk around bare foot with swollen stinky feet or put the shoes back on that were swollen and stinky too?

Does it even make sense?

That's the best he could do.

And it goes on. You willingly pulled your socks off and put them at a light pole or something you're trying to tell me. I'm sitting here. You were sitting at the light pole and I took them off. Not another mention of a dumpster. Not another mention of anything. And the reason they attacked him so much in closing is because it's

telling.

It goes on. To the socks. Finally, you'll switch up a little bit trying to clear yourself. Go ahead. You can't do that, sir. All right. Got to come straightforward with us. There's no way Reverend Eichelberger's blood was on your socks and he agrees. He has no explanation for how Reverend Eichelberger's blood would end up on his socks.

Then confronted with conversation police got from a conversation with Sophia McGee. She gave them information. They confront him with what she told them.

What if I told you that I spoke to someone. They don't even ask. He knows what he said. They said you asked something and had something in your heart in the frame of what if I told you I hurt someone. I did hurt somebody or hit somebody. I did hit someone, and you wanted to get that off his heart. This is what he was explaining about.

All right. Didn't want to hear what you -- she didn't want to hear what you had to say.

Did that conversation ever happen like that?

That was the extent of the conversation.

Yes, with my wife, and video on how he pistol whipped some unknown drug dealer, and nowhere in any of this did he talk about people he was with, where he was, and all this, did he ever have a name for anyone. He gave a vague description at some point. He never had a street name. He

didn't have a regular name. He didn't even know the name of the people he was staying with at the Coronet Motel according to him because they don't exist. There are no names.

The drug house where I was that night. Couldn't explain it, didn't know it existed, had no names. There were no reports, they checked, of any drug dealer being assaulted by Frankie McGee or anybody else. They then confronted about how he went to the Piggly Wiggly parking lot and got picked up by his wife. He, he even explains that away. His wife wouldn't tell the truth.

The night my wife says she picked me up at Piggly Wiggly wasn't, wasn't the night. I got into it with a guy. That was the day I had to let him use my truck and I was suppose to wait there for him at the same house I told you to, and I'm almost through.

So then they asked him about the 18-wheeler, and he hadn't thought this through either. They confronted him.

What if you're saying you didn't steal it, it could be possible that you saw it, and you're a concerned citizen and you went up to talk to somebody, and that's how you find evidence.

So, all of a sudden he knows uh oh, maybe I need to explain that truck and it goes further.

What kind of -- in the Greenview area down by the drug.

I recall a truck being left there by a gas station. Well, not a gas station. A pool hall. I recall a truck.

What kind of truck was it?

It was a Mack.

What color?

You just said it was a red truck.

Now he knows it's a red truck. He's the first one who mentions a red truck. But he's trying to distance himself from the type of truck it is. Then he goes on with the story, and I'm not gonna go through it, about how he told the guy that he wanted a job. He was talking about employment. Then he got into the charge, and the guy had to go to the, a drug house, and then the truck was hanging out on the street. It's not good. Police could come by when you're hanging out in the street in a truck. I guess with the wire underneath it. So, he moved it, and that would explain how his DNA got in there, but he didn't steal it because remember it's called the art of confessing.

Try to explain away why evidence might be there for you, but don't admit to the crime. And I submit, ladies and gentlemen, when you look at this statement overall, it's not just an admission and it goes on.

When he's confronted, the second person in the house.

What second person?

Finally, I guess got a song for that. He admits

Reverend Eichelberger helped him. Reverend Eichelberger was a good person.

And when they asked him well, when you heard about Reverend Eichelberger, that helped you that very same day, why didn't you come forward to the police or call us on the phone and say listen, I was at the Reverend's house that day, and I need to talk to you.

His answer is why did you do that?

Because if I would of did that, the first thing that would of happened, the first thing that would of happened, she said well, he did it, he did it because he did.

If I said something earlier when you were questioning me, and I got it mixed up, cause he knows he's caught in lies, these three people were asking me questions. I understand that (inaudible). It's been five or six months now. But the questions you're asking me, if I didn't answer them all the way and completely to a tee, and you double back and said well, I lied about this and I lied about that, he's even acknowledging he lied, it's just that I didn't remember it, what you asked.

And Investigator Reece summed it up. With all due respect to you, you're not a stupid person.

Ladies and gentlemen, it's what's in the statement. It's what's in his (inaudible), and the evidence in this case says well, I submit if you look at just the DNA

evidence alone, and this isn't a case where there's no DNA. This case is there's full DNA, a full profile. Frankie McGee. Reverend Eichelberger. That alone is enough to convict in this case. Right there you are beyond a reasonable doubt.

There's no other reasonable explanation than that the person that killed Reverend Eichelberger with that winch bar wearing those socks on his hands was Frankie McGee, but you don't have to stop there in this case cause then you have Mr. Harp. I beg you to judge his credibility.

What does he have to gain or lose?

He ID'd the defendant casing the joint that day.

But more, Ashford, her description, the receding hairline, pot belly.

Ms. Perry ID'd him as going into the church.

Sandra Thomas ID'd him on the video in the trial, which he just says he moved later.

The truck's found on Token Street. Six blocks. You got the maps. And by the way, this is all evidence. That's why the judge admitted it.

Ivan Moore, his acquaintance, his friend, who puts him in the area frequenting the area, renting out his truck. His wife would come and pick him up.

C. Ray Miles, the employer, was even familiar with trucks. Used a similar bar. Not the same one.

Mr. Kline, that's the winch bar that would of been in that truck. Just like it.

The CDL license, the photos showing his receding hairline cause he didn't shave his head back then.

The statement.

All the State asks is you don't deem to believe us, or believe them, all we ask is for you to believe the credible overwhelming evidence in this case that led to one person and one person only. You heard, there were hundreds of leads in this case following that eliminated one-by-one.

The police did their job. As much as they don't like it, they did their job, and they did it by the book. All his rights were observed. Everything was protected for him.

And by the way, the only evidence that they come up with, and once they put in evidence, he said he -- we didn't want you to see this. We're the ones that gave it to them. We're the ones that created these documents, and we're the ones that put forth the credible expert testimony as to what it all means. It's not up to me. It's not up to them.

Reverend Eichelberger was 87-years old. He lived in the community that he cherished. He lived there for a long time. He had a business which he ran successfully or part of it, and he worked. He was 87-years old. He was vibrant. He was actually in the prime of his life. Active.

He contributed to his community. He looked out for the

poor. He looked out for those less fortunate. He helped people. He grew a garden in his backyard so he could give food away. If anyone needed something, they could call him because that's the type of person he was, and he deserved to be that person, and give back and make our community better. That's all he wanted to do.

And on the night in question, he's in this house, in a different part of the house, and the house is kind of L-shaped when Frankie Lee McGee broke in.

And remember what sound -- what did Temika Ashford say he said when he confronted the person. Not who are you. It's how did you get in here. The person he recognized from that day. How did you get in here.

And Reverend Eichelberger, for all this giving, and he would of given him anything. He would of helped him just like he had helped him earlier that day, and he would have helped him because that was Reverend Eichelberger. But Reverend Eichelberger's last moments that were conscious or which were purposeful in his life, the last thing he saw was Frankie Lee McGee picking this up and swinging it repeatedly at least two times into his head, into his shoulder.

The last thing he saw was his murderer and he should of died there on the spot, but Reverend Eichelberger was truly a unique individual and he wanted to live. He fought for three months to live, to live so he could go back and be an

important part of this community.

Frankie Lee McGee ended that. He took that away from Greenview, from Columbia. All we ask is justice for Reverend Eichelberger.

What is just to have a family we do that, go back there and you consider the evidence in this case, to render a verdict that speaks the truth, a verdict that is just, and a verdict that holds him responsible for his choices and his decisions. Find Mr. McGee guilty for what he did.

Thank you.

THE COURT: Madam Forelady, and members of the jury, you've heard the testimony, the evidence, and arguments of the State and the defendant. I will now explain to you the law that applies in this case.

Under the Constitution and laws of South Carolina, you are the finders of the facts in this case. I do not have the right to pass upon the facts or even to express any opinion I might have as to them because this is a matter solely for you to, the jury, to determine.

As jurors then, it is your duty to determine the fact, the value, the weight, and the truth of the evidence presented during this trial. You are also the judges, the sole judges of the credibility, that is the believability, of the witnesses who have testified and the evidence which have been presented in this case.

In passing upon the credibility, you may take into consideration many things such as the demeanor or manner of testifying, whether the witness have a reason to be biased or prejudiced, whether a witness' testimony was contradicted on the one hand, or supported and corroborated on the other hand. You may believe a small portion of a witness' testimony and disregard the larger or vice versa. You may believe one witness against many or many against one. All these things you will consider bearing in mind that you should give the defendant the benefit of any reasonable doubt. It becomes your duty, as jurors, to analyze and to evaluate the evidence and determine that evidence which convinces you of its truth.

The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses.

A witness, who by education and experience, has become expert in some art, science, profession, or calling may state an opinion as to relevant and material matters in which the witness claims to be an expert, and may also state the reasons for the opinion. You should consider any expert opinion received in evidence in this case like any other evidence. Give it the weight you think it deserves.

If you decide that the opinion of an expert is not

based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you're not required to accept an expert's opinion even though it is not contradicted.

A person who has a past criminal record is competent to testify during a trial. A past record does not affect the ability of that witness to testify. The past record may be considered by you, if at all, in determining the witness' believability. Remember you are the sole judges of the facts in this case and of the believability of any and all other witnesses.

There are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of the fact such as an eye witness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred.

Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in this case. After weighing all the evidence, if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

As the trial judge, it is my responsibility to preside over the trial of this case and to rule upon or pass upon the admissibility of the evidence offered during this trial. You are to consider only the testimony which has been presented from this witness stand together with any exhibits which have been made part of the record. I have the additional duty to charge you the law applicable to this case, and as the presiding judge, I am the sole judge of the law of this case.

It is your duty to, as jurors, to accept and apply the law as I now state it to you and then reach your verdict. And, finally, I charge you in this regard, that you should not be concerned with what you think the law ought to be, but what I charge you the law is.

Now, the fact that the defendant was arrested, charged, and indicted is not evidence in this case, and can not be

considered by you as evidence of guilt in this case. Nor does it create any presumption or inference of guilt. These indictments are simply the formal written instruments which contain the charges made against the defendant, and an indictment is a formal document by which this case is brought into Court.

The defendant has pled not guilty to the charge in each indictment and that plea places the burden on the State to prove the defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you that it is an important rule of the law that a defendant, in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be not guilty of the crime to which for the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence does not end when you begin your deliberations, but it accompanies the defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant which remains with the defendant until it has been striped from the defendant by evidence satisfying you of the

defendant's guilt beyond a reasonable doubt. The presumption of innocence is not a mere legal theory. It's not just a legal phrase. It is a substantial right to which every defendant is entitled unless you, the jury, are satisfied from the evidence of the defendant's guilt beyond a reasonable doubt.

The State must prove the defendant guilty beyond a reasonable doubt.

So, what is a reasonable doubt in the law?

A reasonable doubt is a doubt which makes an honest, sincere, conscientious juror, in search of the truth, to hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. Proof beyond a reasonable doubt can also be described as proof that leaves you firmly convinced of the defendant's guilt.

There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced of the defendant's guilt of the crime charged, you must find him guilty. If, on the other hand, you think there's a real possibility that he is not guilty, you must then give him the benefit of the doubt and find him not

guilty.

Now, I instruct you and emphasize that the fact that the defendant did not testify is not a factor to be considered by you in anyway in your deliberations, and in your consideration of the question of the guilt or the innocence of the defendant. It must not be considered by you in any manner whatsoever. A defendant has the Constitutional right to remain silent, and the assertion of this right must not be considered by you in your deliberations.

I repeat, under your oath, you are to draw no conclusion whatsoever from the fact that the defendant in this case did not testify. The fact that this defendant did not testify should not even be discussed in the jury room. The burden of proof, as I have stated to you, is on the State. The defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

Now, a statement alleged to have been made by the defendant has been admitted into evidence in this case. While the Court has determined that the statement is admissible, I instruct you that you make the ultimate decision of whether or not the defendant made the statement. If the defendant did make the statement, you must determine whether the statement was made by the defendant voluntarily

and of his own free will. This means that the statement was not caused by pressure, force, fear, threats, coercion, or intimidation, or by hope or a promise of leniency or of a reward of any kind.

In determining whether the statement was voluntary, you should consider both the characteristics of the defendant and the details of the questioning. Some of the findings you must consider are the age of the defendant, the defendant's education, or lack of education, the defendant's mental ability or capacity, the defendant's IQ or intelligence, the defendant's background and environment, the place and length of detention, the nature of the questioning, and the advice or lack thereof to the defendant of his Constitutional rights, and including, but not limited to, the right to remain silent, that any statement could be used against him in a Court of law, the right to have a lawyer present, and that if he could not afford a lawyer, that a lawyer would be appointed to represent him without any costs, and that he could stop making a statement at anytime.

You must carefully consider all the surrounding circumstances before you give any weight to an alleged statement. The State has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary. If you determine that it was, you may give the statement any

further consideration that you deem proper. You must decide what weight, if any, should be given to the alleged statement. If you determine that the alleged statement was not the free and voluntary statement of the defendant, you should not consider the statement at all.

The indictments in this case allege that the defendant committed two separate offenses. The charges are murder and burglary in the first degree. Each indictment charges a separate and distinct offense. You must decide each indictment separately on the evidence and the law applicable to it uninfluenced by your decision as to any other indictment. The defendant may be convicted or acquitted on any or both of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty for each indictment.

The defendant is charged with murder. The State must prove, beyond a reasonable doubt, that the defendant killed another person with malice aforethought. Malice is hatred, ill will, or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before

and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be expressed or inferred. These terms express and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is, either by direct evidence or by inference from the facts and circumstances which are proved.

Express malice is shown when a person speaks words which express hatred or ill will toward another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts in preparation going to show that the deed was within the defendant's mind would be express malice.

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

If one intentionally kills another during the commission of a felony, the inference of malice may arise. In that regard, burglary is a felony under our law, and if facts are proved beyond a reasonable doubt sufficient to

raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with all other evidence in the case, and you may give it the weight you decide it should receive.

The defendant is charged with first degree burglary. The State must prove the, must first prove, beyond a reasonable doubt, that the defendant entered a dwelling without consent. A dwelling is any building or portion of a building in which a person ordinarily sleeps. The State does not have to prove that force was used to gain entry.

Next, the State must prove, beyond a reasonable doubt, that the defendant intended to commit a crime, either a felony or misdemeanor, at the time of the entry. The mere entry into a dwelling without consent is not burglary. If the intent to commit a crime is formed after the entry it's not burglary. On the other hand, if the defendant intended to commit a crime at the time of the entry, it is a burglary. Intent may be shown by acts and conduct of the defendant and under circumstances from which you may naturally and reasonably infer intent.

Finally, the State must prove, beyond a reasonable doubt, that entering, while in the dwelling, or when fleeing, the defendant was armed with deadly weapon. And, again, a deadly weapon is any article, instrument, or

substance which is likely to cause death or great bodily injury. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. Ordinary objects may become deadly weapons when the facts show that they have been used to inflict serious bodily harm or death or, while in the dwelling, the defendant caused physical injury to anyone not participating in the crime or, while the dwelling, the defendant used or threatened to use a dangerous object or the defendant has a prior record of two or more convictions for burglary and/or house breaking.

Evidence of prior offenses committed by the defendant was not offered to prove the defendant had, has a bad character or to prove that the defendant committed burglary on this occasion. The prior convictions may be considered by you only for the purpose of determining whether or not it satisfies that element of the offense and based it first degree burglary. Before you could even consider the evidence of defendant's prior burglary and/or house breaking conviction, you must first find that the State has proved, beyond a reasonable doubt, that a burglary was committed by the defendant.

If you find, beyond a reasonable doubt, that a burglary was committed, then you must, you may consider the evidence of the prior convictions as evidence of one of the circumstances which would make a burglary first degree

burglary. If you do not find, beyond a reasonable doubt, that the defendant committed these alleged prior offenses, then you can not return a verdict of guilty based on this particular aggravating circumstance or the defendant entered or remained in the dwelling in the nighttime. Nighttime is the period between sunset and sunrise during which there is not enough daylight to recognize a person's face except by artificial light or moonlight.

Madam Forelady, and members of the jury, you have been selected by both the State and the defendant to be fair and impartial jurors. It is your duty then, in joint deliberations, to determine the truth in this case giving the defendant the benefit of every reasonable doubt on each and every issue, and from the facts that you determine to be true, you take and apply the law which I've just given you and thus arrive at a verdict which speaks the truth of this case.

I've told you the standards you have to apply to the charge of murder and burglary in the first degree. I will give you a copy of these instructions in written form. During your deliberations, you may refer to these instructions to guide your decision making. You must consider the instructions as a whole and not follow some and ignore others. Please return the instructions to the Court at the time your verdict is rendered.

You've heard the evidence and now you've heard the law. Whatever your verdict as to each charge, Madam Forelady, you will indicate by writing the word guilty or not guilty on the back of the indictment under the word where it says verdict. Then you will sign and date it. Be certain there's no significance in the wording, which I state. The verdicts, simply one must be stated first.

Remember that although the foreperson is the only juror who writes the verdict, it is not hers alone. The verdict has to be a unanimous verdict.

And, Madam Forelady, you're not authorized to write the verdict until all of you have agreed as to what the verdict should be.

Now, ladies and gentlemen, at this time I'm going to send you to your jury room. All of you accept the two alternates unless there is one of the first 12 who can not continue with the deliberations.

As it relates to the first 12 jurors, if you are capable, able to continue with the deliberations, please let me see by show of hands, by raising your hands in the first 12 jurors selected, you can continue with the deliberations?

Is the other lady still with us?

Juror number -- if you're able to continue with the deliberations, please let me know now by raising your hands.

(WHEREUPON, all jurors raise their hands at this time.)

THE COURT: All right. Thank you. That means that the alternates will not return to the jury room. The first 12 jurors will go to the jury room.

I'll ask that you go to the jury room at this time, and do not begin to discuss the case until you have received a copy of this jury charge, the verdict form, and the exhibits. Once you received these things, that will be your signal, signal to begin your deliberations, and once you begin your deliberations, you will deliberate until you have reached a verdict at which time you will knock on the door, advise the bailiff, and we will bring you out and receive your verdict. Please go to the jury room at this time.

Madam Forelady, you will preside over the jury deliberations.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: The two alternates, I'll speak with you all in just a moment.

But as relates to the jury charge, are there any additions or exceptions to the charge by the State or the defense?

SOLICITOR CAMPBELL: No exceptions.

MR. STRICKLER: No exceptions, sir, to the jury charge.

THE COURT: All right. So you-all confer and make sure all the exhibits are in order that go to the jury room so

they can begin deliberating.

(WHEREUPON, the two alternate jurors were dismissed at this time.)

(WHEREUPON, the jury began deliberations at one o'clock and returned with a question at 2:10.)

THE COURT: The jury sends, the jury sends a note saying request the transcripts of the interview.

What says the State?

SOLICITOR CAMPBELL: Whatever the Court deems appropriate. We have no opposition or objection to the transcript.

THE COURT: What says the defense?

MR. STRICKLER: And we would object to the transcripts being sent back with the jury relying on State versus Gullage, 277 SC 268, 287 S.E.2d 488, case from 1982.

THE COURT: All right. The -- I don't know what State versus Gullage says, but I know that the transcript is not in evidence. So, the -- I can't send anything back to the jury room that's not in evidence, but they can listen to the, to any evidence. The oral statement is in, and evidence. They can listen to it if they would like to.

So, bring the jury please.

Do you have any device that you-all can agree, that you-all agree for submitting to them to listen to it in the jury room?

SOLICITOR CAMPBELL: I have this computer.

MR. STRICKLER: I'll have to review it, what you intend to send back to the jury room.

THE COURT: Assuming it's only -- that's the only monitor, do you object to them, to that?

MR. STRICKLER: No, sir, if that's the only thing on it.

THE COURT: All right.

(WHEREUPON, the following takes place within the presence of the jury.)

BAILIFF: The jury is seated, Your Honor.

THE COURT: All right. Madam Forelady, members of the jury, you sent a note requesting a transcript of the interview.

As I stated to you during the jury instructions, you received the -- you've heard the testimony, you've received the evidence, and that you must decide the case based on the testimony and the exhibits. The exhibits include oral recording of the statement, of the oral statement of the interview. It does not include a transcript. So, if you would like to listen to the interview, the -- we can provide you with a computer to play the disk on if you listen to it that way or it can be played in the courtroom and you can listen to it here in the courtroom. So, whatever your preference is, send another note and let me know. I'll be

ready to send it in along with something for you to listen to it on. You already have the CD. We'll send something for you to listen to it on or we'll have you come out and play it in the courtroom.

Does that answer your question?

FORELADY: Yes, sir.

THE COURT: All right. Thank you. Please return to the jury room.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: All right. Any exceptions, exception to the charge?

SOLICITOR CAMPBELL: No, sir.

THE COURT: They are---

MR. STRICKLER: No, sir.

THE COURT: All right. We'll be at ease awaiting the jury.

(WHEREUPON, the jury began deliberations again at 2:10 and returned with another question at 2:15.)

(WHEREUPON, the beginning of the Court's statement was not on the audio recording.)

THE COURT: -- listening to the recorded version of the interview since the print version is not admissible in the jury room. So, they want to hear it in the jury room.

What do we have to give to them?

SOLICITOR CAMPBELL: Your Honor, we may actually need to get the disk and try it and see if it will work on this computer before sending it back if it's possible. Whichever is best for Your Honor.

THE COURT: Y'all said you had something to send to them, and that's what they want to hear.

SOLICITOR CAMPBELL: It should work on that, Your Honor. The computer we actually used in the courtroom is my computer, and I don't think you want that to go back. So, we've gotten this computer that doesn't have anything accessible on it. I just assume -- it's an older computer. I just want to make sure it plays, but we can just send it back and let them figure it out.

THE COURT: All right. If you're ready for it to go we'll send it back, and make sure it works. I would assume you want to make sure it works.

(Pause.)

THE COURT: Do you have any volume on it, Mr. Strickler?

I can't, I can't hear anything.

MR. STRICKLER: I haven't tried that far down yet, Your Honor.

THE COURT: Okay. All right. Mr. Bailiff, I think we need to get that exhibit out of the jury room so we'll know if it works the disk. If it's suitable to send back it

shouldn't be so complicated.

Do we have an uncomplicated machine to send back there to play it on?

MR. STRICKLER: I'm sorry, Your Honor. I was just checking to make sure that there weren't any immediately accessible documents on there.

THE COURT: Yeah, that's what I mean. It would seem that the State would have a computer with no other documents on it.

MR. STRICKLER: Well, and apparently they do, Your Honor. I'm just double-checking on it.

THE COURT: Well, do y'all have another machine?

SOLICITOR CAMPBELL: That one doesn't have anything on it.

THE COURT: I don't want to wait until Mr. Strickler looks through every document on the computer.

(Pause.)

MR. STRICKLER: All right. Your Honor.

THE COURT: All right. So, it's fine for that to go to the jury now?

MR. STRICKLER: Yes, sir.

THE COURT: All right. What kind of instructions do they need to have?

MR. STRICKLER: Might want to ask if anyone knows how to work it. It's up and ready to go. All they have to do

is click the envelope.

(WHEREUPON, the following instructions given by the Court were not on audio recording.)

THE COURT: Is everyone satisfied, the State?

MR. STRICKLER: No, sir.

THE COURT: The defense?

SOLICITOR CAMPBELL: Yes, sir.

THE COURT: All right. Back at ease.

(WHEREUPON, the jury began deliberations again and returned with a question at 3:15.)

THE COURT: This note says one juror wants to know if you can see or hear the testimony of Officer Duckett.

What says the State?

(WHEREUPON, Ms. Campbell's response was inaudible.)

THE COURT: Defense.

MR. STRICKLER: Can't see it, but definitely can hear it, Your Honor.

THE COURT: All right. You will -- when the jury is ready to come in, tell them we're waiting, waiting on them.

BAILIFF: They're ready, Your Honor.

(WHEREUPON, the following takes place within the presence of the jury.)

BAILIFF: The jury's seated, Your Honor.

THE COURT: All right. Thank you.

Madam Forelady, members of the jury, this note says one

juror wants to know if he can see or hear the testimony of Officer Duckett. You can't see the testimony because it occurred last week. You can hear the testimony, and, and the court reporter will play back the testimony. So, if that's what you want, we can do it. We can have the court reporter play back the testimony of Officer Duckett.

Is that what you want, Madam Forelady?

FORELADY: Yes, sir.

THE COURT: All right.

(WHEREUPON, a portion of the testimony of Officer Duckett was played back for the jury at this time.)

THE COURT: All right. Madam Forelady, if at any point in time you've heard as much as you want to hear, let me know, we'll stop it. If you want to hear the entire testimony, that's fine as well.

All right.

(WHEREUPON, another portion of the testimony of Officer Duckett was played at this time.)

THE COURT: Stop it please.

Is that all you want to hear, Madam Forelady?

FORELADY: Yes, Your Honor.

THE COURT: All right. Thank you. Resume deliberations.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: Is there objection or exception by the State or defense?

SOLICITOR CAMPBELL: No, sir.

MR. STRICKLER: No, Your Honor.

THE COURT: All right. Be at ease.

(WHEREUPON, the jury began deliberations again at 3:30 and returned with a verdict at 3:40.)

THE COURT: All right. Understand that there is a verdict, and I want to caution everyone that it is important that order be maintained in the courtroom at all times, and that there be no outburst or any reaction to the verdict.

If y'all bring the jury please.

(WHEREUPON, the reading of the verdict and polling of the jury was not on audio recording.)

MR. STRICKLER: We'll move for directed verdict in this, in this regard or rather at this point in time grant a new trial upon reconsideration of the previous ruling. No additional bases. Your Honor, I'm just renewing my motions.

THE COURT: All right. Thank you.

Response by the State before sentencing, Ms. Campbell?

SOLICITOR CAMPBELL: Your Honor, just ask you abide by your earlier rulings and respect the verdict of the jury.

THE COURT: These matters were addressed during the course of the trial. You had hearings prior to and during the trial regarding various issues, suppression, and the

Court ruled. With regard to the statement given by the defendant, the Court ruled that statement be admissible in that the jury would have to find beyond a reasonable doubt and that the statement was, statements was free and voluntary statement. Obviously the jury made that finding. But prior to that the Court ruled that the matter was substantially, was a voluntary statement, and that the State followed the Constitutional rights of the defendant.

With regard to mistrial motion, after the State elicited some testimony that the defendant was in a drug area, the Court denied that motion in part because of the parties including the defendant stipulated to certain portions of the statement that I admitted, and that certain portions of it should reference the area as described by the defendant being a drug area.

Further, the reference to the drug area included a great number of redactions by the Court which referenced the defendant being in the drug area and purchasing and/or using drugs. All of that was excluded by the Court, did not go to the jury, and I find no basis for the Court to change my ruling with regard to that.

With regard to the directed verdict, which were, directed verdict motions, which were appropriately made at the end of the State's evidence and at the close of the case, in applying the rule, which is Rule 19 of the Rules of

Criminal Procedure, where the evidence was appropriate to be submitted to the jury for the jury to weigh the evidence and determine the facts of the case, it becomes a jury issue and not an issue for the Court. I find that the, there's an abundance of evidence, both direct and circumstantial, indicating the defendant to be guilty of both crimes. Those issues were submitted to the jury and the jury found, find, found him guilty.

I find that the verdict is supported by an overwhelming amount of evidence, and I respectfully deny that motion and all other motions by the defense.

MR. STRICKLER: Thank you, sir.

(WHEREUPON, the jury was dismissed at this time.)

SOLICITOR CAMPBELL: Beg the Court's indulgence.

THE COURT: Yes, ma'am.

(Pause.)

THE COURT: Ms. Campbell.

SOLICITOR CAMPBELL: May it please the Court, Your Honor.

First if we could address his prior record, the extent of it.

THE COURT: Yes.

SOLICITOR CAMPBELL: His first conviction for attempted strong armed robbery started back in 1994. He did receive a probationary sentence on that charge.

His next conviction was for strong armed robbery, excuse me, attempted strong armed robbery in 1997 for which he received an active sentence. At that time his probation from the first strong armed robbery was revoked.

Moving onto 2006 and seven, he was convicted of burglary in the third degree, grand larceny, malicious injury to personal property, burglary in the third degree, grand larceny, and another count of burglary in the third degree. Those were all in Kershaw County.

That same year, in Richland County, he was convicted of breach of trust with intent to defraud and burglary in the second degree for which he did receive an active sentence. He was also put on a probationary sentence at that time, and then, in the Fall of 2009, his probation was revoked on those charges.

Your Honor, I believe there are members of the family, at the appropriate time, would like to address the Court on behalf of Mr. Eichelberger if the Court would permit that.

Is now appropriate?

THE COURT: Yes, be happy to hear from any and everyone.

SOLICITOR CAMPBELL: If you can state your name prior to talking and relationship you had with the victim.

MRS. JOHNSON: Mary Eichelberger-Johnson, the daughter of Reverend Tryon Eichelberger, Senior.

THE COURT: Yes, ma'am.

MRS. JOHNSON: First, I'd like to thank the prosecutor and investigators for the fine job that they did, and to renew our faith in that our system does work. We are pleased with what took place here, and as a family, as a family of ministers, we do understand that, regardless, we have to walk in love and we have to be healed, and I'd like to thank the Court, Your Honor, for this opportunity to speak.

THE COURT: All right. Thank you, Mrs. Johnson.

MR. EICHELBERGER: I'm Ken Eichelberger, the oldest son of the late Reverend Tryon Eichelberger. I'm his look alike. God be the glory that we seen justice bring on this week.

Thanks to all of you, your hard works, your effort, tireless hours when I gave up on our Court system. I told him to his face that he wasn't doing his job, but he was on his job, and we just thank all of you.

Jurors, thank you.

Solicitor, thank you.

Everyone that helped and the one that helped us cheer upon the ledge or slope. Thank all of you and we appreciate all, Dear God.

Justice reigned here in this courtroom. Thanks.

UNIDENTIFIED SPEAKER: And to God be the glory, great

things He has done.

THE COURT: Thank you.

SOLICITOR CAMPBELL: Your Honor, on behalf of the family we have discussed a variety of possible punishments in this case. This was a potential death penalty case. However, I think, on behalf of the family, they would respectfully ask, request a life sentence due to the very nature of this crime.

THE COURT: Ms. Simpson.

SOLICITOR SIMPSON: Nothing further, Your Honor.

THE COURT: Anything further from the investigators?

INVESTIGATOR: No, Your Honor.

INVESTIGATOR: No, Your Honor.

SOLICITOR CAMPBELL: Thank you, sir.

THE COURT: All right. Anything else from the State?

SOLICITOR CAMPBELL: No, sir.

THE COURT: All right. To the defense.

MR. STRICKLER: Thank you, Your Honor.

Please the Court.

Very briefly, Frankie's 46, born and raised in Kershaw County. As you've heard---

THE COURT: Have Mr., Mr. McGee come around.

MR. STRICKLER: All right.

THE COURT: Yes, sir.

MR. STRICKLER: Beg the Court's indulgence one moment

please, sir.

(Pause.)

MR. STRICKLER: Thank you, sir.

As I was saying, Your Honor, Frankie is 46 years old, born and raised in Kershaw County where his wife still resides. He is the father of three. He has two adult children, and he has one five year old child. The five year old's residing with, with his mother, with, with Frankie's wife in Kershaw County.

As you've heard he's been through the, to the 12th grade. He served in the United States military, and has been employed, as you also heard, in some jobs relating to mostly the construction industry in various capacities.

I've know him since, I guess since a couple days after his arrest at which time I met him. Of course, I do not and would not take issue with the finding of the jury. I will, however, tell you that Mr. McGee has maintained his innocence to me from the very first time I spoke with him. This is not been a course of action we've taken because of any other reason in this trial, any other reason than he's maintained that he is not guilty of this, and that's what I can tell you.

I'll make no particular pleas for our sentence. I would just note for the record that we have already advised Mr. McGee regarding the appellate process, and we will be

filing the necessary paperwork within the ten day period to initiate that.

THE COURT: Ms. Davis.

MS. DAVIS: Nothing, Your Honor.

THE COURT: Mr. McGee, anything you'd like to say?

DEFENDANT: On behalf of the family, for what they went through, I apologize for their loss, but I just want to say that I'm not the person that committed that crime, and there's nothing I can do about me being sentenced today, but I just want everybody to know that justice has not been served because I'm not the one that did it, Your Honor.

Thank you.

THE COURT: All right. Well, I'm not sentencing you based on your being innocent. I'm not sentencing you based on your proclaiming your innocence.

You met with the officers. You made the same claims with them. Of course, it's rare that I find anyone in your position who comes and stands before me after being found guilty and confesses that they thought to be sentenced particularly right after the lawyer said that we'll be filing a notice of appeal within the ten days. So, I didn't expect you to come and confess prior to being sentenced.

My experience in dealing with murder cases is that people who commit murder have an amazing ability to just blot it out of their minds, and just kind of create a,

create within themselves a different person than the person who committed the crime. So, I'm not surprised at all as to anything that you have said.

I can tell you this, the State has expended a tremendous amount of resources in defending you. The State, as you stand here today, with three lawyers. The Fifth Circuit Public Defender, head of the Richland County Public Defender, Ms. Pringle, Ms. Davis, an attorney, and you've had the benefit of very aggressive, competent, and efficient defending in addition to other resources expended by the State in, in your state paying for you to have investigators to investigate the investigator's work, and other resources expended by the State, and all of that culminated into a jury trial this past week in which the State has put up this evidence, and you've had the right to offer anything that you might of wanted to offer in your defense, and you have been defended.

But I have no qualms whatsoever with the jury's verdict, and if I'd been on the jury, I would be one of the first ones to vote guilty because the evidence has proven that you are guilty of murder and you're guilty of burglary in the first degree, and what makes it worse than anything else that you would choose to commit murder and burglary on someone who sought to help you, and it seems to be abundantly clear that you were strung out on drugs,

wondering around, prowling around in that neighborhood, up to no good, and this is the end result of your actions.

So, for you to stand here and blame the jury, and blame the system, claim that justice hasn't been done, now those are hollow words to me cause justice is what the jury has spoken it to be. That is, you're guilty of both of these crimes. If there's anything that occurred during the course of the trial that prevented the jury from deciding this case guilty, then someone will review that. But a great amount of time and effort has been taken into giving you the benefit of what you did not give Reverend Eichelberger.

This is burglary in the first degree. You committed it with a weapon. You committed it in the nighttime. You committed it after being convicted of multiple burglaries before, and the -- you're facing a, a sentence of up to life on the burglary alone, and on the murder charge you're facing 30 years to life. I don't know whether you're on parole at this time.

Is he on parole?

Did he max out whatever sentence he was---

MR. STRICKLER: Yes, sir.

THE COURT: ---during that time they served these warrants on him?

MR. STRICKLER: Yes, sir.

THE COURT: Does he have any outstanding probation

cases?

MR. STRICKLER: Not that I'm aware of, no, sir.

THE COURT: All right. Mr. McGee, for burglary first degree, the Sentence is 30 years.

For murder, the Sentence is life.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on the 8th, 9th, and 10th day of August, 2011, as reported by April Herron and transcribed by myself to the best of my ability.

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

January 12th, 2012

Pamela E. Green

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FRANKIE LEE MCGEE,

APPELLANT

APPELLATE CASE NO. 2011-197606

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF FACTS

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The neighbor, Larry Harp, testified that on the day of the assault he saw appellant in the Reverend's yard once at 3:00 PM talking on the phone and again at about 5:00 PM with a plate and cup in his hand. (R. pp. 274-276; p. 290, lines 1-25). The neighbor testified that appellant was wearing an athletic jersey and denim shorts. (R. p. 292, lines 6-18).

In July of 2009, the Reverend died as the result of complications of a subdural hemorrhage due to blunt head impact. (R. p. 890, lines 18-23). In March of 2010, officers showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of appellant and asked her if she recognized him. (R. p. 671, lines 23 – p. 672, p. 673, lines 1-14). According to Perry, she recognized appellant because he came to one of the Reverend's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23).

On May 2, 2009, the day before the assault, a truck was stolen from the Camden Steel and Metal Company in Camden, South Carolina. (R. pp. 845 – 847). Video surveillance captured the theft. (R. p. 847, lines 13 – p. 848, lines 1-21). Sandra Thomas, a City of Columbia Police Officer and the appellant's sister saw the video on the news and testified that she recognized her brother in the video. (R. pp. 902 – 904). According to the sister, she called crime stoppers. (R. p. 904, lines 8-18). The truck was found on May 3, 2009, next to

Happy Daddy Towing Service, about a mile away from the Reverend's home. (R. pp. 646 - 652). There was no forensic evidence linking appellant to the truck and no evidence that a winch was missing from the truck.

On March 17, 2010, officers interrogated appellant while he was incarcerated on an unrelated offense at Wateree Correctional Institution. (R. p. 957, lines 22 – p. 958, lines 1-4). Appellant denied assaulting the Reverend and explained that he had taken his socks off and left them at the store by a dumpster because of his athlete's foot condition. (R. p. 1028, lines 21 – p. 1029, 1030, lines 1-8; State's Exhibit #137).

ARGUMENT

1. The trial judge erred in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable.

At trial appellant moved to suppress any in court identification made by Michelle Perry because of the unduly suggestive identification procedure and the resulting unreliability of the identification. (R. p. 928, lines 12 – 929, lines 1-14). The judge denied the motion to suppress. (R. p. 929, lines 15 – p. 930, lines 1-6). The judge erred.

On March 12, 2010, Investigator Sumter with the Columbia Police Department showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of appellant and asked her if she recognized him. (R. pp. 949-951). Perry testified at trial that she recognized the appellant he came to one of the Reverend's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23). At trial Perry identified appellant as the person she identified from the single photo shown to her by the police. (R. p. 938, lines 5-24).

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977)

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*

In State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S. Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S. Ct. 375).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely

condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

The single photo of appellant shown to Perry was unduly suggestive. Under the totality of the circumstances and a review of the Biggers factors, the identification was not so reliable such that there was no substantial likelihood of misidentification. As argued by appellant, she had only two brief opportunities to view the appellant almost 14 months earlier. (R. p. 929, lines 4-14). Perry admitted that she knew why the investigator had come to see her and show her the photo of appellant. (R. p. 939, lines 7-13).

2. The trial judge erred in admitting evidence in regard to the theft of a truck in Camden when the theft does not meet an exception pursuant to Rule 404(b) and is not sufficiently linked to the charged crime to constitute *res gestae*.

Pre-trial, counsel for McGee moved to exclude evidence in regard to the theft of a truck in Camden. (R. pp. 71 – p. 90, pp. 165-169; Court's Exhibits #3 and #4, Motions, R. p. 1330 and p.1336). The trial judge denied the motion stating:

> I find the evidence of the tractor trailer theft is admissible as part of the res gestae in the case. I think circumstantially it's intimately interconnected and explanatory of the crime.
>
> It is places, the theft of the truck, the discovery of the tool and placing the defendant at the scene of the crime puts it all into context, and the admission of that testimony is necessary for the State to present a complete unfragmented case. So that's my ruling on the issue.

(R. p. 166, lines 16-25). In reference to defense counsel's argument that the evidence was inadmissible pursuant to Rule 404(b), the trial judge ruled, "Well, to the extent that it is a Lyle issue, I find the probative value outweighs any prejudicial effect." (R. p. 169, lines 16-

18). The trial judge erred. When the State sought to introduce a video of the truck theft, counsel for McGee renewed the previously made objection.

The State failed to establish that the theft of the truck was part of the res gestae of the assault. In State v. Gilmore, 396 S.C. 72, 83, 719 S.E.2d 688, 694 (Ct. App. 2011), the South Carolina Court of Appeals wrote, "Our courts have recognized that the State may prove the actions of the defendant when those actions are part of the crime, not separate. *See* State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) (stating "the *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred"), *overruled on other grounds by* Gentry, 363 S.C. at 106, 610 S.E.2d at 501." In the present case, the State failed to establish that the theft of the truck was an integral part of the assault.

A truck was stolen from the Camden Steel and Metal Company in Camden, South Carolina on May 2, 2009. (R. pp. 845-847). Video surveillance captured the theft. (R. p. 847, lines 13 – p. 848, lines 1-21). Sandra Thomas, a City of Columbia Police Officer and the appellant's sister saw the video on the news and testified that she recognized her brother in the video. (R. pp. 902– 904). According to the sister, she called crime stoppers. (R. p. 904, lines 8-18). The truck was found on May 3, 2009, next to Happy Daddy Towing Service, about a mile away from the Reverend's home. (R. pp. 646 – 652). There was no forensic evidence linking appellant to the truck and no evidence that a winch was missing from the truck.

In State v. Adams, 354 S.C. 361, 379-380, 580 S.E.2d 785, 794-795 (Ct. App. 2003), the South Carolina Court of Appeals wrote:

> Our Supreme Court discussed the *res gestae* theory in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996):
>
> > One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged."And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."
>
> *Id.* at 122, 470 S.E.2d at 370–71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980)). Under the *res gestae* theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999).

The State failed to establish that the theft of the truck was "so intimately connected with and linked to the assault such that one cannot be fully shown without proof of the other. The owner of the truck could not identify a winch, the purported murder weapon, as specifically coming from his truck although winch bars were used in his trucks. (R. p. 855, lines 16 – p. 856, lines 104). The truck owner also admitted that he did not inventory the truck once it was returned and made no indication that a winch bar was missing from the truck when it was returned. (R. p. 856, lines 5-22). The theft of the truck should not have been admitted as part of the res gestae of the assault.

The trial judge failed to analyze the evidence as prior bad act evidence under Rule 404(b) SCRE. Instead, the judge went straight to the Rule 403, SCRE analysis finding

that the probative value of the truck theft evidence outweighed any prejudicial effect. The trial judge erred.

In State v. Smith, 391 S.C. 353, 361-361, 705 S.E.2d 491, 495 (Ct. App. 2011) (cert. granted August 24, 2012), the South Carolina Court of Appeals wrote:

> However, Rule 404(b) recognizes exceptions to the bar against using the evidence to prove propensity. When the evidence is offered for one of the five purposes listed in the second sentence of Rule 404(b), evidence of other crimes, wrongs or acts "may ... be admissible." The five listed purposes are "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.
>
> In order to introduce evidence of some other act of the defendant under one of these exceptions, the State must lay the proper foundation. First, unless the act is the subject of a criminal conviction, the State must prove by clear and convincing evidence that the defendant committed the act. Fletcher, 379 S.C. at 23, 664 S.E.2d at 483.
>
> The second element of the foundation requires the State to articulate the logical connection between the other act and at least one of the five purposes listed as exceptions in the rule. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). In order to meet this element, the State must explain how evidence of the other act will assist the judge or the jury in understanding some material issue in the case related to one or more of the Rule 404(b) exceptions. When the State adequately explains how the evidence of the other act logically connects to an issue in the case, it demonstrates how the judge or jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime. *See* State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Stated differently, evidence which is logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." (internal citations omitted)).

First, the State failed to establish that the theft of the truck was admitted to show motive, identity, the existence of a common scheme or plan, the absence of mistake or

accident or intent. Second, the State failed to prove by clear and convincing evidence that appellant McGee stole the truck. The theft of the truck was not logically relevant to establish an element of the assault charge. While the truck was ultimately found a mile away from the Reverend's home, there is no evidence that McGee drove the truck to that location. The judge erred in admitting evidence in regard to the theft of the truck.

CONCLUSION

Based on the above arguments, appellant McGee's convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of June, 2013.

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APPELLANT

APPELLATE CASE NO. 2011-197606

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of June, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of June, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and 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."

June 13th 2013

Kathrine H. Hudgins
Appellate Defender

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KATHRINE H. HUDGINS
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Officer Duckett continued to search the scene around the Reverend's house. Officer Duckett found a steel rod in Larry Harp, one of the Reverend's neighbor's yard. (R. p. 240,

lines 8 – p. 241, lines 1-2). Officer Duckett also found a pair of white tube socks on a path about 25 – 30 yards from the steel rod. (R. p. 241, lines 11-20). Both the rod and the socks appeared to have blood on them. DNA analysis initially only determined that the blood on the rod and the socks belonged to the Reverend. (R. pp. 539-546). Subsequent DNA testing, however, indicated that appellant's DNA was also present on the socks. (R. pp. 547-558).

The neighbor, Larry Harp, testified that on the day of the assault he saw appellant in the Reverend's yard once at 3:00 PM talking on the phone and again at about 5:00 PM with a plate and cup in his hand. (R. pp. 274-276; p. 290, lines 1-25). The neighbor testified that appellant was wearing an athletic jersey and denim shorts. (R. p. 292, lines 6-18).

In July of 2009, the Reverend died as the result of complications of a subdural hemorrhage due to blunt head impact. (R. p. 890, lines 18-23). In March of 2010, officers showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of appellant and asked her if she recognized him. (R. p. 671, lines 23 – p. 672, p. 673, lines 1-14). According to Perry, she recognized appellant because he came to one of the Reverend's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23).

On May 2, 2009, the day before the assault, a truck was stolen from the Camden Steel and Metal Company in Camden, South Carolina. (R. pp. 845 – 847). Video surveillance captured the theft. (R. p. 847, lines 13 – p. 848, lines 1-21). Sandra Thomas, a City of Columbia Police Officer and the appellant's sister saw the video on the news and testified that she recognized her brother in the video. (R. pp. 902 – 904). According to the sister, she called crime stoppers. (R. p. 904, lines 8-18). The truck was found on May 3, 2009, next to

Happy Daddy Towing Service, about a mile away from the Reverend's home. (R. p. 646 - 652). There was no forensic evidence linking appellant to the truck and no evidence that a winch was missing from the truck.

On March 17, 2010, officers interrogated appellant while he was incarcerated on an unrelated offense at Wateree Correctional Institution. (R. p. 957, lines 22 – p. 958, lines 1-4). Appellant denied assaulting the Reverend and explained that he had taken his socks off and left them at the store by a dumpster because of his athlete's foot condition. (R. p. 1028, lines 21 – p. 1029, 1030, lines 1-8; State's Exhibit #137).

ARGUMENT

1. The trial judge erred in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable.

At trial appellant moved to suppress any in court identification made by Michelle Perry because of the unduly suggestive identification procedure and the resulting unreliability of the identification. (R. p. 667, line 12 – 668, lines 1-14). The judge denied the motion to suppress. (R. p. 668, lines 15 – p. 669, lines 1-6). The judge erred.

On March 12, 2010, Investigator Sumter with the Columbia Police Department showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of appellant and asked her if she recognized him. (R. pp. 688-690). Perry testified at trial that she recognized the appellant he came to one of the Reverend's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23). At trial Perry identified appellant as the person she identified from the single photo shown to her by the police. (R. p. 677, lines 5-24).

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

In State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S. Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S. Ct. 375).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely

condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

The single photo of appellant shown to Perry was unduly suggestive. Under the totality of the circumstances and a review of the Biggers factors, the identification was not so reliable such that there was no substantial likelihood of misidentification. As argued by appellant, she had only two brief opportunities to view the appellant almost 14 months earlier. (R. p. 929, lines 4-14). Perry admitted that she knew why the investigator had come to see her and show her the photo of appellant. (R. p. 939, lines 7-13).

2. The trial judge erred in admitting evidence in regard to the theft of a truck in Camden when the theft does not meet an exception pursuant to Rule 404(b) and is not sufficiently linked to the charged crime to constitute *res gestae*.

Pre-trial, counsel for McGee moved to exclude evidence in regard to the theft of a truck in Camden. (R. pp. 71 – p. 90, pp. 165-169; Court's Exhibits #3 and #4, Motions, R. p. 1330 and p.1336). The trial judge denied the motion stating:

> I find the evidence of the tractor trailer theft is admissible as part of the res gestae in the case. I think circumstantially it's intimately interconnected and explanatory of the crime.
>
> It is places, the theft of the truck, the discovery of the tool and placing the defendant at the scene of the crime puts it all into context, and the admission of that testimony is necessary for the State to present a complete unfragmented case. So that's my ruling on the issue.

(R. p. 166, lines 16-25). In reference to defense counsel's argument that the evidence was inadmissible pursuant to Rule 404(b), the trial judge ruled, "Well, to the extent that it is a Lyle issue, I find the probative value outweighs any prejudicial effect." (R. p. 169, lines 16-

18). The trial judge erred. When the State sought to introduce a video of the truck theft, counsel for McGee renewed the previously made objection.

The State failed to establish that the theft of the truck was part of the res gestae of the assault. In State v. Gilmore, 396 S.C. 72, 83, 719 S.E.2d 688, 694 (Ct. App. 2011), the South Carolina Court of Appeals wrote, "Our courts have recognized that the State may prove the actions of the defendant when those actions are part of the crime, not separate. *See* State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) (stating "the *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred"), *overruled on other grounds by* Gentry, 363 S.C. at 106, 610 S.E.2d at 501." In the present case, the State failed to establish that the theft of the truck was an integral part of the assault.

A truck was stolen from the Camden Steel and Metal Company in Camden, South Carolina on May 2, 2009. (R. pp. 845-847). Video surveillance captured the theft. (R. p. 847, lines 13 – p. 848, lines 1-21). Sandra Thomas, a City of Columbia Police Officer and the appellant's sister saw the video on the news and testified that she recognized her brother in the video. (R. pp. 902– 904). According to the sister, she called crime stoppers. (R. p. 904, lines 8-18). The truck was found on May 3, 2009, next to Happy Daddy Towing Service, about a mile away from the Reverend's home. (R. pp. 646 – 652). There was no forensic evidence linking appellant to the truck and no evidence that a winch was missing from the truck.

In State v. Adams, 354 S.C. 361, 379-380, 580 S.E.2d 785, 794-795 (Ct. App. 2003), the South Carolina Court of Appeals wrote:

> Our Supreme Court discussed the *res gestae* theory in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996):
>
> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged."And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."
>
> *Id.* at 122, 470 S.E.2d at 370–71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980)). Under the *res gestae* theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999).

The State failed to establish that the theft of the truck was "so intimately connected with and linked to the assault such that one cannot be fully shown without proof of the other. The owner of the truck could not identify a winch, the purported murder weapon, as specifically coming from his truck although winch bars were used in his trucks. (R. p. 855, lines 16 – p. 856, lines 104). The truck owner also admitted that he did not inventory the truck once it was returned and made no indication that a winch bar was missing from the truck when it was returned. (R. p. 856, lines 5-22). The theft of the truck should not have been admitted as part of the res gestae of the assault.

The trial judge failed to analyze the evidence as prior bad act evidence under Rule 404(b) SCRE. Instead, the judge went straight to the Rule 403, SCRE analysis finding

that the probative value of the truck theft evidence outweighed any prejudicial effect. The trial judge erred.

In State v. Smith, 391 S.C. 353, 361-361, 705 S.E.2d 491, 495 (Ct. App. 2011) (cert. granted August 24, 2012), the South Carolina Court of Appeals wrote:

> However, Rule 404(b) recognizes exceptions to the bar against using the evidence to prove propensity. When the evidence is offered for one of the five purposes listed in the second sentence of Rule 404(b), evidence of other crimes, wrongs or acts "may ... be admissible." The five listed purposes are "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.
>
> In order to introduce evidence of some other act of the defendant under one of these exceptions, the State must lay the proper foundation. First, unless the act is the subject of a criminal conviction, the State must prove by clear and convincing evidence that the defendant committed the act. Fletcher, 379 S.C. at 23, 664 S.E.2d at 483.
>
> The second element of the foundation requires the State to articulate the logical connection between the other act and at least one of the five purposes listed as exceptions in the rule. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). In order to meet this element, the State must explain how evidence of the other act will assist the judge or the jury in understanding some material issue in the case related to one or more of the Rule 404(b) exceptions. When the State adequately explains how the evidence of the other act logically connects to an issue in the case, it demonstrates how the judge or jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Stated differently, evidence which is logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." (internal citations omitted)).

First, the State failed to establish that the theft of the truck was admitted to show motive, identity, the existence of a common scheme or plan, the absence of mistake or

accident or intent. Second, the State failed to prove by clear and convincing evidence that appellant McGee stole the truck. The theft of the truck was not logically relevant to establish an element of the assault charge. While the truck was ultimately found a mile away from the Reverend's home, there is no evidence that McGee drove the truck to that location. The judge erred in admitting evidence in regard to the theft of the truck.

CONCLUSION

Based on the above arguments, appellant McGee's convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,

Susan B. Hackett for
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of September, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FRANKIE LEE MCGEE,

APPELLANT

APPELLATE CASE NO. 2011-197606

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Amended Final Brief of Appellant in the above referenced case has been served upon J. Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of September, 2013.

Susan B. Hackett for
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of September, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this amended Final Brief of Appellant complies with Rule 211(b), SCACR, and 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 9, 2013

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2011-197606

THE STATE,

Respondent,

v.

FRANKIE McGEE,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable?

2. Did the trial judge err in admitting evidence in regard to the theft of a truck in Camden when the theft does not meet an exception pursuant to Rule 404(b) and is not sufficiently linked to the charged crime to constitute *res gestae?*

STATEMENT OF THE CASE

On May 3, 2009, at 11:00 p.m., appellant Frankie McGee burglarized the home of Reverend Tryon Eichelberger located in Richland County and murdered Reverend Eichelberger. McGee was arrested months later on March 19, 2010 after an extensive police investigation. In April of 2010, the Richland County grand jury indicted Appellant for murder and burglary in the 1st degree. (2010-GS-40-0121). Appellant proceeded to trial on August 1, 2011 before the Honorable Clifton Newman and a jury. Attorneys Douglas Strickler, Elizabeth Fielding Pringle, and Jennifer C. Davis represented appellant. Assistant Solicitors Kathryn Luck Campbell, Dolly Justice Garfield, and Nicole M. Simpson prosecuted the case for the State. On August 10, 2011, the jury convicted appellant of murder and burglary in the 1st degree. Judge Newman sentenced appellant to life imprisonment for the murder of Reverend Eichelberger and thirty (30) years for the burglary of his home.1 (R. pp. 1, 231-65, 272-447, R. Aug. 3rd pp. 492-640, 646-53, 670-706, R. Aug. 8th pp. 722-43, 747-841, 845-79, 886-94, 897-951, 953-1053, 1055-1102, 1204-07, 1211-14). This appeal followed.

1

At sentencing, appellant's criminal record was provided to Judge Newman. Appellant was convicted in 1994 of attempted strong armed robbery, in 1997 of attempted strong armed robbery, in 2006 and 2007 of burglary in the 3rd degree, grand larceny, malicious injury to personal property, burglary in the 3rd degree, grand larceny, and another count of burglary in the 3rd degree. In the same year, he was also convicted of breach of trust with fraudulent intent and burglary in the 2nd degree. (Tr. pp. 502-03).

RESPONDENT'S STATEMENT OF FACTS

The victim, Reverend Tryon Eichelberger, was 87 years old at the time of his murder. Reverend Eichelberger lived on Isaac Street off Farrow Road in the Greenview community of Columbia, S.C. (R. pp. 231-65, 272-97, 309, R. Aug. 3rd p. 506, R. Aug. 8th pp. 888-94).

On May 3, 2009, at 11:00 p.m., Reverend Eichelberger was in his home speaking with Temika Ashford, a former church member, who was there to ask for money to pay her water bill. Reverend Eichelberger and Ms. Ashford were sitting in the living room when they heard a noise in another part of the house. The Reverend went to investigate the noise. Ms. Ashford then heard the Reverend say: "How did you get in here." She then heard a commotion, and hollering. Ms. Ashford knew something bad was happening, left the home, got in her car and drove away because she was afraid. She circled the block, and when she could not reach the Reverend by phone, she returned to his house. As she passed Reverend Eichelberger's home while still driving her car, Ms. Ashford saw a man standing on the Reverend's porch wearing what appeared to be white gloves and holding a metal pipe or stick. She described the man as a husky light skinned black man with a big belly and receding hairline wearing a white shirt and blue jeans. Ms. Ashford called 911 and then drove to Farrow Rd. to wait on the police. While she was waiting, she saw the same man again walking on Farrow Rd. At this time, the man no longer had the pipe or rod in his hand and no longer had the white gloves on. Once the police arrived at Reverend Eichelberger's residence, Ms. Ashford returned to the Reverend's home. She got out of her car and tried to give police a description of the man and his location but she was told to wait in her car until police cleared the house and determined what had occurred inside. (R. August 8th pp. 770-841).

When the call was initially dispatched, the first officer to respond, Chancey Duckett, was

inside the Gazbah gas station on Farrow Road about three (3) blocks from Reverend Eichelberger's home. He was dispatched to Reverend Eichelberger's home in reference to a civil disturbance. As he was traveling North on Farrow Rd. in the direction of the Reverend's home, he also saw a light skinned black man walking alone south on Farrow Rd. wearing a white T-shirt or light gray T-shirt and blue jeans. However, at that time he did not detain the man because he did not know exactly what had occurred at the Reverend's home nor had he been given a description of the perpetrator. (R. pp. 231-65).

Once he arrived at the Reverend's home, Officer Duckett found Ms. Ashford outside the residence and told her to wait in her car. He then entered the home and found Reverend Eichelberger on the kitchen floor bleeding heavily. There was approximately two (2) liters of blood on the kitchen floor. The Reverend was unable to respond to the Officer Duckett's questions.2 (R. pp. 231-65).

Police discovered Reverend Eichelberger's home had been broken into at a side door to the residence located next to the driveway. A metal tool had been used to pry open this door and damage was done to the door and door frame. There were also visible tool marks to the door and door frame. (R. pp. 231-65, 328-46).3

2

EMS transported the Reverend to Richland Memorial Hospital. There it was discovered that he had a cracked skull which resulted in swelling of his brain. Reverend Eichelberger died approximately three (3) months later as a result of the injuries he received at the hands of appellant. He died from blunt force trauma to the head caused by a solid object. (R. Aug. 3rd pp. 492-512, R. Aug. 8th pp. 886-94, 921).

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Appellant, had previously been convicted of two (2) separate burglaries prior to the commission of the burglary of Reverend Eichelberger's home. (R. Aug 3rd pp. 640-45). *See* S.C.Code Ann. Section 16-11-310 (burglary in the first degree includes a burglary committed by a person with two (2) or more prior convictions for burglary or housebreaking).

Officer Duckett cleared the home, but the perpetrator was gone. He then searched the area surrounding Reverend Eichelberger's home and found *a steel rod* across the street from the Reverend's home in a neighbor's yard. Officer Duckett also found a pair of white tube socks on a path about twenty-five (25) to thirty (30) yards from the same steel rod in the direction of Farrow Road. Both the rod and the socks appeared to have blood on them. The metal rod was also consistent with the tool marks found on the door to Reverend Eichelberger's home. Both the rod and the white socks were collected by a crime-scene technician for later DNA testing. (R. pp. 231-65, 328-53, R. Aug. 8th pp. 1060-61).

The neighbor in whose yard the pipe was found, Mr. Larry Harp, testified that on *the day of* the burglary and assault on the Reverend, he saw appellant Frankie McGee in the Reverend's yard at 3:00 p.m. talking on the phone and pacing back and forth several times. He saw appellant again later that afternoon outside the Reverend's home at about 5:30 p.m. with a plate, napkin, and cup in his hand, and appellant was eating something. When appellant left the Reverend's yard this last time, Mr Harp saw him walking headed toward Farrow Road. At this time, Reverend Eichelberger was still in his yard dressed in a suit, wearing a straw hat, and working in his flower garden. The neighbor, Mr. Harp, later positively identified appellant from a photo-graphic line-up and also identified appellant at trial as the person he had seen in the victim's yard at 3:00 p.m. and at 5:30 p.m. on May 3, 2009. Mr. Harp also testified that on the night of the burglary and assault, he was awakened about midnight by police because they had found a metal rod at the back of his property near the fence line. Mr. Harp testified that the metal rod did not belong to him, and he informed the police at the time that he did not know how or who put the metal pipe or rod in his yard. (R. pp. 272-97, R. Aug. 3rd 691-93, R. Aug. 8th pp. 938-39).

Ms. Ashford was eventually able to give police a description of the man she saw standing on Reverend Eichelberger's porch. Based on Ms. Ashford's description, other officers began looking for the suspect. Police stopped two (2) men walking together in the area and brought Ms. Ashford to that location. She said one of the men looked like the man she had seen on Reverend Eichelberger's porch, however the clothes he was wearing were not the same.4 As the investigation proceeded, Ms. Ashford was eventually shown a series of photo line-ups. From one of these, Ms. Ashford told police that two (2) photos in State's Exhibit 123 looked like the suspect. One of the photos in State's Exhibit 123 was a photo of appellant. Ms. Ashford identified appellant's photo as the one that looked the most like the person she saw standing on the Reverend's porch with the pipe in his hand. (R. pp. 231-65, R. Aug. 3rd pp. 473-83, R. Aug. 8th 771-841, 917-18, 920, 930-34, 941, 964-69, 1065-72).

The metal pipe or rod and the two white socks were forwarded to the DNA lab for testing. DNA analysis determined that the blood on the rod belonged to Reverend Eichelberger. DNA testing also revealed the blood on the white socks belonged to Reverend Eichelberger. (R. Aug. 3rd pp. 518-61, R. Aug. 8th pp. 920-21).

In March of 2010, officers visited Michelle Perry, a dispatcher with Blue Ribbon Cab Company, where Reverend Eichelberger had worked before his retirement. Reverend Eichelberger held church services in a building attached to the Blue Ribbon Cab Company. Officers showed Mrs. Perry a single photograph of appellant and asked her if she recognized the person in the photograph. Mrs. Perry informed police she recognized appellant because he came to one of the Reverend's church services too early one morning and then a few days later came

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This person was later eliminated as a possible suspect through police investigation and DNA testing. (R. pp. 315-19, R. Aug. 3rd pp. 629-34, Tr. Aug. 8th pp. 917-18, 920, 965, 1062).

back for a Bible study. This occurred in the winter time several months before Reverend Eichelberger was assaulted. (R. pp. 141-44, R. Aug. 3rd pp. 654-69, 670-87, 688-93).

As the investigation continued, police determined the pipe or metal rod recovered from Mr. Harp's back yard was actually a *winch rod* commonly used to tighten straps holding down a load of freight on a flat bed trailer. Police also determined appellant had a CDL (commercial) license to operate a tractor trailer which would pull such a flat bed trailer, and appellant had work experience that would have exposed him to the use of a winch rod to hold down loads on flat bed trailers. (R. Aug. 8th pp. 845-61, 895-900, 721-30, 765-69).5

Police also discovered that on May 2, 2009, the day before the burglary and assault on Reverend Eichelberger, a tractor trailer truck was stolen from the Camden Steel and Metal Company in Camden, S.C. Appellant was a resident of Camden. Video surveillance captured the theft. Appellant's sister, Sandra Thomas, saw the video surveillance footage broadcast on the local news and contacted crime stoppers because she recognized the person who stole the tractor truck as her brother. Ms. Thomas viewed the video again before trial and testified there was no question the person in the video stealing the truck was her brother. The truck was found on May 3, 2009, the same day as the burglary and assault on Reverend Eichelberger, abandoned in the Greenview area next to Happy Daddy Towing Service, about one (1) mile away from Reverend Eichelberger's home. Chain link fencing from the perimeter of Camden Steel and Metal Company was found wrapped around the axle of the truck. The fencing had to be cut from the axle before the truck was returned to Camden. The owner of the truck testified the

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In addition to having a CDL license, appellant had worked as a brick layer and his former employer testified it was common for loads of bricks to be delivered to job sites on a flat bed truck with the load of bricks being held down by straps which were loosened by use of a *winch rod.* (R. Aug. 8th pp. 721-30).

truck was used to haul or pull *a fled bed trailer*, and it would have contained in its tool box behind the cab *a winch rod* exactly like or just like the one used to murder Reverend Eichelberger. (R. Aug. 3rd pp. 646-53, R. August 8th pp. 845-61, 901-12, 959, 1080, 1084).

Subsequently more involved DNA testing of the white socks indicated appellant's DNA was also present on the interior of the socks on which Reverend Eichelberger's DNA (blood) was found. (R. Aug. 3rd pp. 518-61, R. Aug. 8th pp. 935-38, 1084, ll. 3-6).

On March 17, 2010, police questioned appellant while he was incarcerated on other charges at Wateree Correctional Institution. The conversation was tape recorded. Appellant denied assaulting the Reverend, but made several incriminating statements during the interview. Appellant admitted he had been in the area and taken his socks off and left them at a store by a dumpster because of his athlete's foot condition. He then stated he did take his socks off and left them next to a light pole. Police recovered the two (2) bloody socks next to a light pole in a grassy field next to Mr. Harp's residence, not at a gas station. Appellant also denied he stole the truck from Camden; however, he admitted he moved a red tractor truck for a friend while he was in the Greenview area of Columbia. During the interview, appellant also denied he knew what a *winch rod* was. Appellant also admitted he had been on Reverend Eichelberger's front porch. Appellant also admitted he had told someone [his wife] he hurt someone, but he denied it was the victim. (R. Aug. 8th pp. 943-51, 960-61, 963, 974, 976, 980, 1006-10, 1012-17, 1027-28, 1029-31, 1034, 1038, State's Ex. 137).

ARGUMENT I

The trial judge did not err in admitting the in court identification of the witness who testified appellant had been to the Reverend's church before on two occasions, and even if the admission of this evidence was erroneous it was harmless given the other overwhelming evidence of appellant's guilt and the testimony of other witnesses and his own admissions to being in the area of the Reverend's home around the time of the murder.

Standard of Review

(On appeal)

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

(Admission or exclusion of evidence)

The admission of exclusion of evidence is within the sound discretion of a trial judge, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Dennis, ___ S.E2d ___, 2013 W.L. 1316999 (Ct. App. 2013), *not yet released for publication.* A trial court's decision to allow the in-court identification of an accused will not be reversed absent an abuse of discretion or prejudicial legal error. State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000), *citing* State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995); State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998)(the admission of exclusion of evidence in within the sound discretion of a trial judge and

will not be reversed absent an abuse of discretion or prejudicial legal error).

Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), *citing* State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id. Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Liverman, *citing* Moore.

In March 2010, police went to Blue Ribbon Cab Company where the victim had worked before his retirement. Police showed a secretary there, Michelle Perry, a photograph of appellant and asked her if she recognized the person in the photograph. Ms. Perry informed police she did recognize the person in the photograph. She informed them appellant had been to Reverend Eichelberger's church twice in the past. He came to the church one morning too early for the service. He came back to the church on a later date and attended a Bible study. Ms. Perry was not a witness to any of the incidents on the day of the burglary and assault on Reverend Eichelberger which led to his death. She testified appellant came to these two services several months before Reverend Eichelberger was assaulted. (R. Aug. 3rd pp. 654-69, 670-87 & 688-93, 695). Other testimony was admitted at trial through other witnesses that appellant had been in the Greenview area of Columbia before and around the time of the murder, and other testimony was admitted at trial that appellant was familiar with or knew Reverend Eichelberger before his murder and was at the Reverend's home the day of the murder. (R. pp. 272-97, R. Aug. 8th pp. 740-64, 939, 943-51, 974, 976, 980, 999-1003, 1042-43, 1073-75, State's Ex. 137 [Statement of Appellant]).

The Biggers hearing

Prior to the admission of Ms. Perry's testimony, appellant objected to the admissibility of Ms. Perry's in-court identification of him because police only showed her a one photo line-up. Judge Newman conducted a Neil v. Biggers[6] hearing regarding the reliability of her in-court identification. (R. Aug. 3rd pp. 654-669). At the conclusion of the hearing, Judge Newman noted that single photo identifications are disfavored; however, based on the totality of the circumstances surrounding Ms. Perry's identification of appellant and South Carolina law, her out-of-court and in-court identification would be admitted in evidence. Judge Newman did not err in admitting her in-court identification. Regardless, its admission was harmless given it was cumulative to other evidence appellant was in the Greenview community around the time of the crime and knew Reverend Eichelberger.

Analysis

Appellant admits in his brief that immediately prior to Ms. Perry's testimony counsel only challenged the admissibility of her in-court identification. (IBOR, p. 9). (See also R. Aug. 3rd pp. 654-77). It is not clear from appellant's brief whether he is now challenging the admissibility of the out-of-court identification. However, to the extent he is now challenging the admissibility of the out-of-court identification that issue is not preserved for appeal.[7] State v.

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6 Neal v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972).

7 Pre-trial, appellant informed the court it would be moving to suppress the out-of-court identification of appellant by Ms. Perry. (R. pp. 140-42). Judge Newman informed appellant he would rule on issues regarding this witness prior to or at the time of her being called. Thereafter, before the witness was called appellant only moved to suppress the in-court identification of this witness, and there was no objection during her testimony to her out-of-court identification. There is no question that appellant's challenge to the admissibility of the in-court identification is preserved because it was raised *in limine* immediately before the witness testified, therefore an

Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001)(to preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made, and failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004)(making a motion in limine to exclude evidence at the beginning of trial does not preserve issue for review because a motion in limine is not a final determination; therefore, the moving party must make a contemporaneous objection when the evidence is introduced); State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997)(same). As a result, any challenge to the admissibility of the out-of-court identification of appellant by Ms. Perry must be dismissed.

An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). Generally, "a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by the previous illegal identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001).8 To the extent Biggers applies in this situation, the purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding *the prior,*

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objection during her testimony was not necessary with regard to the in-court identification.

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Respondent questions whether Biggers or any of the cases interpreting or following Biggers even apply here. The witness, Ms. Perry, was not an eyewitness to the crime, and she did not identify appellant as the perpetrator of the crime. *See* Ramsey, 345 S.C. 613, 550 S.E.2d at 297; *see also* State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007)(listing 5 factors including degree of attention *at the time of the crime* and lapse of time between *time of crime* and identification).

illegal or tainted out of court identification. State v. Carlson, 363 S.C. 586, 594, 611 S.E.2d 283, 287 (Ct. App. 2005) *citing* Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967 (1968)(conviction based on suggestive pre-trial identification and subsequent in-court identification will be set aside only if the photographic identification was so suggestive as to give rise to a very substantial likelihood of irreparable misidentification), *and* State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000)("An in-court identification of an accused is inadmissible if a suggestive *out-of-court identification procedure* created a very substantial likelihood of irreparable misidentification."). Only if the *pretrial procedure* was suggestive, should the trial court consider the second question, i.e. whether there is a substantial likelihood of irreparable misidentification. State v. Brown, 356 S.C. 496, 503, 589 S.E.2d 781, 784-85 (Ct. App. 2003) *quoting* Moore, 343 S.C. at 287, 540 S.E.2d at 447-48, *other citation omitted.*

The United States Supreme Court has developed a two pronged inquiry to determine the admissibility of an out-of-court or in-court identification. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), *citing* Biggers, 409 U.S. at 198 *and* Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977); State v. Spears 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011), *quoting* Moore, 343 S.C. at 287, 540 S.E.2d at 447 (*citing* Biggers, 409 U.S. at 198-99). First, the court must ascertain whether the identification process was unduly suggestive. Moore, 343 S.C. at 287, 540 S.E.2d at 447. Next, the court must decide whether the out-of-court identification was nevertheless was so reliable that no substantial likelihood of misidentification existed. Id.

"The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). The following factors are to be considered when evaluating the totality of the circumstances when determining the likelihood of misidentification: (1) the witnesses'

opportunity to view the perpetrator at the time of the crime, (2) the witnesses' degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the prior confrontation, and (5) the length of time between the crime and the confrontation. Id. at 127; 644 S.E.2d at 696-97.

Even if the out court procedure is suggestive, the in-court identification is admissible if based on information independent of the out-of-court procedure. State v. Carlson, 363 S.C. 586, 600, 611 S.E.2d 283, 290 (Ct. App. 2005), *citing* State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974). The State bears the burden of proving the identification was based on an independent source by clear and convincing evidence. Id. at 377, 210 S.E.2d at 606.

Judge Newman did not abuse his discretion in admitting the in-court identification of Ms. Perry under the totality of the circumstances. Ms. Perry testified that when police came to her place of employment and showed her the photograph they did not insist or tell her that she knew or had previously seen the person in the photograph. They did not tell her she had to identify anyone. The question they asked was open ended, i.e. had she ever seen this person before or did she recognize the person. The record shows police showed the same photograph to several other employees of the cab company and none of those witnesses recognized the person in the picture. Ms. Perry testified she recognized appellant not because police showed her the photograph but because she remembered appellant coming to Reverend Eichelberger's church on two (2) previous occasions several months before the assault on Reverend Eichelberger. The record shows her identification was made only fifteen (15) months after seeing appellant at the church and less than a year since the assault on Reverend Eichelberger.9 She testified that on

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See State v. McCord, 349 S.C. 477, 482-83, 562 S.E.2d 689, 692 (Ct. App. 2009) (admitting identification by victim of assault over six (6) years after the assault had taken place).

the first (1st) occasion, appellant was with a young woman and he was too early for the church service. She testified she spoke with appellant face to face and explained to him he was too early for the church service and would have to wait. As a result, appellant had to sit in the lobby area in front of her for approximately 25 minutes. This occurred around 10:30 a.m. in the morning in the reception area of the cab company. She testified she had the opportunity to view him continuously during that 25 minute period, as she was a dispatcher at the front window, and she remembered that it was a cold day and appellant was wearing a heavy jacket because of the weather. She also testified she remembered when Reverend Eichelberger arrived that morning, appellant, his lady friend, and Reverend Eichelberger went in to the church service together. She also testified she had the opportunity to see appellant on another occasion. She testified that on what she believed was the Tuesday of the following week, appellant returned and attended a Bible study conducted by Reverend Eichelberger. So, she actually viewed him on two (2) separate occasions and there was no testimony at the Biggers hearing that police coerced or suggested to her that she knew the person they were asking about. While she told one officer appellant's picture seemed to favor the person who had come in two (2) times previously to the church,10 the record shows she also informed Detective Sumner that day that she remembered appellant walking in with Reverend Eichelberger on two (2) occasions, and she testified pretrial that if it was not appellant, then appellant had a twin. (R. Aug. 3rd pp. 654-69, 669-87, 688-707). In ruling on the admissibility of her in-court identification, Judge Newman stated as follows:

> Single person show ups are disfavored because they are suggestive in

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See State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998)(absolute certainty of a witness is not required for identification to be admissible); State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996)(same or similar); United States v. Peoples, 748 F.2d 934 (4th Cir. 1984)(similar).

> nature.11 However, the courts in the state have held that they may be reliable under the totality of the circumstances if the state shows that the identification was nevertheless so reliable that no substantial likelihood of misidentification exists.
>
> In this instance, she saw him on two occasions. She says she saw him for a period of twenty-five minutes or so. That it was an unusual circumstance that he arrived unusually early for their church services. She said she saw him. She says she recognized him. She says that she can identify him. I find that the motion to suppress should be denied, and I deny it.

(R. Aug. 3rd pp. 668, ln. 19-pp. 669, ln. 6). Based on the totality of the circumstances surrounding the out of court identification as testified to by Ms. Perry, there is no substantial likelihood of misidentification based on the handing to her and others at her employment a photograph and asking if she or others recognized the person. The State proved by clear and convincing evidence Mr. Perry's identification of appellant was based on an independent source, her memory of appellant being at Reverend Eichelberger's church on two (2) previous occasions. *See* State v. Roach, 364 S.C. 422, 613 S.E.2d 791 (Ct. App. 2005), *vacated in part, affirmed in part,* 337 S.C. 2, 659 S.E.2d 107 (2008). *See also* State v. Nelson, 250 S.C. 6, 156 S.E.2d 341 (1967). Appellant has failed to show Judge Newman abused his discretion in the admission of this evidence. As a result, this appellate ground must be dismissed.

Harmless Error

Even assuming *arguendo* the trial judge erred in admitting the testimony of Ms. Perry, the error was harmless and could not have affected the verdict. "Error is harmless beyond a

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See Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968)(identifications arising from single photo displays are generally viewed with suspicion); State v. Tisdale, 338 S.C. 607, 527 S.E.2d 329 (Ct. App. 2000); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967)(show-ups, or showing a person singly for identification, are widely condemned); State v. Patrick, 318 S.C. 352, 457 S.E.2d 632 (Ct. App. 1995)(witness prior identification of defendant, which occurred in a courtroom while the defendant was being tried for another crime, contained a degree of suggestiveness).

reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (*citing* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002). Ms. Perry was not an eyewitness to the crime and did not identify appellant as the perpetrator of the burglary and murder. Ms. Perry's testimony only helped establish appellant had been in the Greenview area of Columbia before, i.e. Reverend Eichelberger's church, and he knew Reverend Eichelberger. There was testimony from several other witnesses in the case establishing these very facts. **(R. pp. 272-97, R. Aug. 8th pp. 740-64, 939, 943-51, 974, 976, 980, 999-1003, 1042-43, 1073-75).** *See* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012)(admission of evidence can be harmless where testimony was similar to testimony of another witness admitted at trial); State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct. App. 2008)(holding error is harmless where it could not reasonably have affected the trial's outcome, and considering as one factor whether the evidence was cumulative to other testimony).

Mr. Harp, Reverend Eichelberger's neighbor, testified he saw appellant in Reverend Eichelberger's front yard on the day of the burglary and assault. The first time he saw appellant he was beside Reverend Eichelberger's home using a telephone and pacing back and forth. The 2nd time he saw him was around 5:30 p.m. in Reverend Eichelberger's yard eating food and Reverend Eichelberger was also in the yard at the same time working in his flower bed. Mr. Harp positively identified appellant from a photographic line-up and at trial. Appellant is not challenging Mr. Harp's identification of him on appeal. This testimony established appellant was in the area on the day of the crime, at the victim's residence, and he knew the victim. Another witness, Ivan Moore , testified he saw Appellant in the area in the days surrounding the murder of Reverend Eichelberger. **(R. Aug. 8th pp. 747-64).** Further, appellant's DNA was

found on the socks in the grassy field beside Mr. Harp's home, establishing appellant's presence in the area. Detective Arthur Thomas also testified that their investigation had uncovered that appellant had attended Reverend Eichelberger's church on several occasions. **(R. Aug. 8th p. 939, 980).** Detective Reese also testified without objection that police were able to connect appellant to Reverend Eichelberger's church through Ms. Perry. **(R. August 8th pp. 1074-75).** Detective Sumpter also testified without objection to Ms. Perry's out-of-court identification of appellant as having previously been to the church 2 times in February of 2009. **(R. Aug. 3rd 695-707).** Finally, appellant's own statements to law enforcement established the same facts as Ms. Perry's testimony. Appellant admitted to police he had been to Reverend Eichelberger's church and residence, had been in the Greenview area, and had driven a red tractor truck which was abandoned in the area. **(R. Aug. 8th pp. 943-51, 974, 976, 980, 999-1003, 1006-10, 1027-28, 1042-43, 1047, 1048-53, State's Ex. 137).** As a result, the admission of Ms. Perry's testimony was harmless beyond a reasonable doubt. *See* Liverman, *supra* (evidence can be harmless where testimony was similar to testimony of another witness whose testimony was admitted at trial); Page, 378 S.C. at 483-84, 663 S.E.2d 357 (holding error is harmless where it could not reasonably have affected the trial's outcome, and considering as one factor whether the evidence was cumulative to other testimony). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C.173, 460 S.E.2d 368 (1995). This ground of appellant's appeal has no merit and must be dismissed.

ARGUMENT II

The trial judge did not err in admitting evidence in regard to appellant's theft of the truck and its abandonment near the crime scene the day of the murder because it met the standard for admission of the evidence.

Standard of Review
(On appeal)

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

(Admission or exclusion of evidence)

The admission of exclusion of evidence is within the sound discretion of a trial judge, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Dennis, ___ S.E2d ___, 2013 W.L. 1316999 (Ct. App. 2013), *not yet released for publication.*

Argument

The evidence of the theft of the truck, its abandonment near the crime scene, its establishing why appellant was on foot in the Greenview Community, and its connection of appellant to the murder weapon fits squarely within the *rest gestae* of the crime as defined by our appellate courts **and** constituted evidence of identity admissible under Rule 404(b) SCRE. State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), *overruled on other grounds* State v. Gentry, 363 S.C. 93, 610 S.E.2d 495 (2005); State v. Adams, 322 S.C. 114 , 122, 470 S.E.2d

366, 371 (1996); State v. Dennis, ___ S.E2d ___, 2013 W.L. 1316999 (Ct. App. 2013), *not yet released for publication*; State v. Gilmore, 396 S.C. 72, 83 n. 9, 719 S.E.2d 688, 694 n. 9 (Ct. App. 2011).

The admissibility of this evidence was dealt with in a pre-trial hearing. Judge Newman heard argument from both the State and defense regarding the admission of this evidence. Judge Newman also took testimony from appellant's sister regarding her identification of her brother in the surveillance video, and Judge Newman viewed the surveillance video of appellant stealing the truck himself. Judge Newman ruled that the evidence was admissible and found the probative value of the evidence outweighed any prejudicial effect to the accused. (R. pp. 51-90, 164-69). Appellant has failed to show Judge Newman abused his discretion.

Evidence is relevant and admissible if it tends to establish or make more or less probable a fact in issue or a matter in controversy. Rule 401 & 402, SCRE; State v. Wiles, 383 S.C. 151, 158-59, 679 S.E.2d 172, 176 (2009). Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of the person in order show action in conformity therewith; however, such evidence may be admissible to show "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. The evidence admitted must logically relate to the crime with which the defendant has been charged. Wiles; *e.g.* State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009); State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000).

Stated differently, evidence which is "logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." Wiles, 383 S.C. at 158, 679 S.E.2d 172; State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973); *see also* State v. Adams, 322 S.C. 114 , 122, 470 S.E.2d 366,

370-71(1996)(evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime charged, is admissible as *res gestae* evidence).

Nonetheless, even where the evidence is shown to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded. *See* Rule 403, SCRE. Unfair prejudice means and undue tendency to suggest decision on an improper basis. State v. Stokes, *supra*; State v. Beck, *supra*. This Court reviews a trial court's decision regarding the admissibility of evidence under rule 403 pursuant to an abuse of discretion standard. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009). "A trial [court's] balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." Id., *quoting* State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The trial court's determination should be reversed only in exceptional circumstances. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593.

The theft of the truck, its abandonment near the crime scene the day of the crime, its explanation of why appellant was on foot, and its connection of appellant to the murder weapon12 clearly established appellant's identity as the person who murdered Reverend Eichelberger. Rule 404(b); Dennis. It was also the first link in the chain of circumstances that led to the charges in the present case. Wiles; State v. Green, 261 S.C. at 372, 200 S.E.2d at 77.

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The owner of the stolen truck testified that the truck's tool box, located behind the cab, would have contained *a winch bar* exactly like the one recovered by police across the street from the victim's residence with the victim's blood on it. He did not inventory the truck's tool box when the truck was returned to Camden Metal and Steel Company. (R. Aug. 8th pp. 844-61).

And, it supplied the context of the crime, or was intimately connected with and explanatory of the crime charged.

The evidence at trial established the tractor truck was stolen on May 2, 2009, the day before the burglary and assault which led to Reverend Eichelberger's death. The evidence further established it was appellant who stole the truck. Appellant was identified by his own sister from the surveillance tape as being the person who stole the truck. The evidence also established the truck stolen by appellant was abandoned on May 3, 2009 the very day of the burglary and assault that led to the victim's death. Further, the evidence established the tractor truck stolen by appellant was abandoned approximately one (1) mile [six (6) blocks] from the Reverend's home and eventual cite of his murder, establishing appellant's opportunity to commit the crime and proximity to the crime scene. Further, the abandonment of the stolen truck by appellant, whose residence was in Camden, established why he was on foot both before and after the crime as described by several witnesses. Finally, appellant's theft of the truck and abandonment of the same established his access to the murder weapon, a *winch rod*, which would have been located in the tool box behind the cab of the tractor truck. The evidence was therefore admissible under Rule 404(b), SCRE and as *res gestae* of the crime. Wiles, 383 S.C. at 158-59, 679 S.E.2d at 176 (stating evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime charged, is admissible as *res gestae* evidence), *citing* Adams, 322 S.C. at 122, 470 S.E.2d at 370-71; Rule 404(b), SCRE (providing evidence of other crimes is admissible if it proves the identity of the perpetrator of the crime on trial and is not offered to prove character); State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011); State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011)(setting forth requirements of admission of Rule 404(b) evidence); State v. Gillian, 373 S.C. 601, 646 S.E.2d

842 (2007)(burglary prior to crime was admissible under 404(b) to prove identity because it showed access to weapon of similar caliber and manufacture as used to kill the victim and evidence of burglary of jewelry store prior to crime was admissible under 404(b) to prove identity because of defendant's statement that he used that burglary to lure victim to location to murder him; however, extent of details of 1st burglary was excessive and not admissible); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994)(evidence defendant had stole a shotgun two weeks before the murder, and that he later sold the shotgun for drugs, was admissible to establish that he possessed a shotgun at the time of the murder, and that the shotgun was consistent with the weapon used to kill the victim).13 *See also* State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009)(evidence appellant possessed handgun similar to one used to kill the victim solidified his identity as the perpetrator and was admissible).

Appellant also claims the State failed to meet its burden of proving he stole the truck from Camden. Appellant is wrong. Evidence of a prior bad act to prove identity need only be proven by clear and convincing evidence. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990). Where a witness' testimony is the sole evidence of a bad act, the determination of the witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate the witness' veracity. State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2003); State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). A trial judge's ruling admitting bad act evidence will be upheld on appeal if it is supported by any evidence. State v. Cheeseboro, 346 S.C. 526, 552

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Furthermore, the fact that appellant stole the tractor truck further established his knowledge of the trucking industry and as a result his familiarity with a *winch rod* which was the murder weapon.

S.E.2d 300 (2001); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2008).

Appellant's sister testified in the pre-trial hearing that at the time she viewed the surveillance video she had known her brother for thirty-eight (38) years. She further testified she immediately recognized her brother when she saw him stealing the tractor truck on the video broadcast on television. She also testified there was no question in her mind at that time that it was her brother stealing the truck. As a result of seeing him on television, she called Crimestoppers. Approximately one (1) year later, after receiving a phone call from appellant's wife, she contacted Detective Reece, one of the detectives in this case. She further testified that she viewed the video again before trial, and there was no question that it was her brother stealing the tractor truck from Camden. She also testified she identified her brother by his build; she knows his facial features; she knows the type of clothes that he wears; she has seen him all of her life, and she recognizes her brother when she sees him. (R. pp. 79-86). Judge Newman found her identification of her brother to be credible. The State also submitted the surveillance video of the theft of the truck to Judge Newman for his viewing. And, Judge Newman was familiar with appellant's statement to law enforcement in which in an attempt to explain why his DNA or fingerprints might be found in the truck, appellant stated he had moved a red Mack truck for a friend around the time of the murder. The State proved by more than clear and convincing evidence appellant committed the theft of the truck from Camden. State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)(testimony of co-defendant who was with the defendant when prior bad acts were committed was sufficient to meet the clear and convincing standard); State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996)(testimony of co-defendant that defendant had been involved in prior robberies constituted clear and convincing evidence). *See also* State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008)(testimony of one witness was

clear and convincing evidence of prior bad act); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). This argument has no merit.

Further, the probative value of this evidence in a circumstantial murder case, was not substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. The probative value of this evidence to prove the identity of Reverend Eichelberger's murderer and to complete the story of the crime far outweighed any possible prejudice to appellant, i.e. suggesting a verdict for an improper basis. State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)("Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." Further, the jury already knew from other evidence that appellant was previously convicted of at least two (2) burglaries and was incarcerated at the Wateree Correctional Facility at the time of his questioning by police. *See* State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)(the determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case). The evidence of the theft of the tractor truck explained how appellant, a resident of Camden, reached the Greenview area of Columbia the day before or the day of Reverend Eichelberger's murder, it explained why appellant was on foot both before and after the crime, it explained why appellant would have sought Reverend Eichelberger's assistance, and it showed a direct connection to the murder weapon used to kill Reverend Eichelberger. As a result, its probative value was not substantially outweighed by the danger of unfair prejudice to appellant. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009). Appellant has failed to show Judge Newman abused his discretion in the admission of this evidence.

Harmless Error

Even assuming *arguendo* error in the admission of the evidence, it was harmless. Appellant's guilt was conclusively established by his DNA found in the socks which also contained the blood of Reverend Eichelberger and which were found in close proximity to the murder weapon which contained Reverend Eichelberger's DNA.14 Further, it was established separate from the challenged evidence, that appellant had worked in the trucking and construction industry and had knowledge of and familiarity with a *winch bar,* the murder weapon. And, appellant's identity was established by the victim's neighbor who placed appellant at the crime scene just hours before the murder of the victim. As a result, appellant's guilt was proven independent of the challenged evidence. Any error in the admission of the evidence was harmless.

CONCLUSION

For the above stated reasons, appellant's convictions and sentences for the murder of Reverend Tryon Eichelberger and the burglary of his home must be affirmed.

Respectfully submitted,

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The perpetrator of the murder was seen standing on the victim's front porch immediately after the burglary and assault wearing what appeared to be *white* gloves and holding some type of *metal rod.*

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Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

By: _____
J. Anthony Mabry

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June 6, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2011-199807
THE, STATE

Respondent,

v.

FRANKIE MCGEE,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211 (b), SCACR, and the August 13 2007 Order of the South Carolina Supreme Court entitled "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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June 6, 2013

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the Interagency Mail to Kathrine H. Hudgins, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 6th day of June, 2013.

ANTHONY MABRY
Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Frankie Lee McGee, Appellant.

Appellate Case No. 2011-197606

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5227
Heard September 10, 2013 – Filed April 30, 2014

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

KONDUROS, J.: In this criminal case, Frankie Lee McGee appeals his convictions of murder and burglary, arguing the trial court erred in admitting identification testimony based on a single photo lineup, as it was unduly suggestive and inherently unreliable. He also contends the trial court erred in admitting evidence of the theft of a vehicle as part of the res gestae of the murder. We affirm.

FACTS

On the night of May 3, 2009, Temika Ashford was visiting Reverend Tryon Eichelberger at his home in Columbia. They heard a noise in another part of the home, and Eichelberger went to investigate. Ashford heard Eichelberger ask, "[H]ow did you get in here?" and then a "commotion" and "hollering." Because Ashford was afraid, she left the home, got in her car, and drove away. She drove around the block, and when she could not reach Eichelberger by phone, she returned to his house. She saw a husky man with a potbelly and receding hairline standing on the porch. He was dressed in a white shirt and jeans, wearing white gloves, and holding a metal pipe. She called 911, left the house, and drove down Farrow Road to wait on the police. While she was waiting, she noticed the man she had seen on the porch walking along the road, no longer carrying the pipe nor wearing the gloves. Once the police arrived at the home, Ashford returned there.

Officer Chauncey Duckett of the Columbia Police Department was dispatched to the scene. On his way there, while traveling on Farrow Road, he saw a light-skinned black man walking, wearing a white or light gray t-shirt and jeans. Once at the scene, he found Eichelberger lying on the floor bleeding heavily. Eichelberger's skull was cracked, he had a brain injury, and he lost a lot of blood. He died three months later as a result of his injuries. The police determined a metal tool had been used to pry open a side door to Eichelberger's home. Officer Duckett found a steel rod across the street from Eichelberger's home, in Larry Harp's yard. Officer Duckett also found a pair of white tube socks next to a light pole about twenty-five to thirty yards from the steel rod in the direction of Farrow Road. The socks and rod had blood on them. DNA analysis initially identified the blood on the items as Eichelberger's. Further testing revealed McGee's DNA inside the socks as well. The rod was consistent with the tool marks found at Eichelberger's home.

On the day of the attack, Harp saw a man he later identified as McGee in Eichelberger's yard at 3:00 p.m., talking on the phone and pacing. He saw him again in the yard at about 5:30 p.m. with a plate, napkin, and cup in his hand and eating, while Eichelberger worked in his garden. Harp testified McGee was wearing an athletic jersey and denim shorts and had a medium heavy build and light brown skin. Around midnight on the night of the attack, the police woke Harp because they discovered the rod in his yard. Harp informed the police the rod

was not his and he did not know how it got there. The police later determined the rod was a winch rod, which is commonly used to tighten straps on a flatbed trailer.

After Ashford gave the police a description of the man she observed on the front porch, the police began looking for the suspect. Police found two men walking together, and one of them matched the description Ashford had given. Ashford said the man looked like the person she saw but he was not wearing the same clothes. However, the man was eliminated as the perpetrator through more police investigation and DNA testing. Later, Ashford was shown a series of photographic line-ups. In them, she saw two pictures she believed looked like the suspect; one of the two pictures was of McGee. She identified McGee's picture as the one that most resembled the man she saw on Eichelberger's porch.

In March 2010, officers visited Michelle Perry, who was a dispatcher with the cab company at which Eichelberger had worked. Eichelberger held church services in a building attached to the cab company's office. Officers showed Perry a picture of McGee and asked if she recognized him. She told them she had seen him two different times about a year before Eichelberger was attacked. The first time she saw him, he came to one of Eichelberger's church services too early one morning and waited about twenty-five minutes outside the office. She saw him again a few days later when he returned for a Bible study.

On May 2, 2009, the day before Eichelberger was attacked, a red Peterbilt tractor-trailer truck was stolen from a business in Camden, where McGee lived. The truck was found the following day about one mile from Eichelberger's home. The theft was recorded by video surveillance, which was later broadcast on local news programs. Officer Sandra Thomas of the Columbia Police Department, McGee's sister, saw the video, recognized McGee, and contacted Crime Stoppers' anonymous tip line. The owner of the truck testified it was used to haul a flatbed trailer and would have contained a winch bar in its tool box.[1] Police learned McGee had a commercial license to operate a tractor trailer that could pull a flatbed trailer, like the one stolen.

On March 17, 2010, officers interrogated McGee while he was incarcerated on an unrelated offense. McGee denied attacking Eichelberger but admitted he had been

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[1] An inventory was never performed to determine if the winch rod was missing from the truck.

in that area of Columbia that night. He also said he had gone by Eichelberger's house that day and been on the porch of the house. He told the police that due to an athlete's foot condition, he had taken his socks off while in the area and left them by a dumpster at a store. He then said he left the socks by a light pole. McGee denied stealing the truck from Camden but said he moved a red Mack tractor-trailer truck[2] while in Columbia. McGee told police he did not know what a winch rod was. He also admitted he had told his wife that after a drug dealer pointed a pistol at him, he hit the drug dealer with it on the night of Eichelberger's attack. The police were unable to locate the drug dealer McGee said that he hit.

McGee was indicted for murder and first-degree burglary. Before trial, McGee moved to exclude the evidence regarding the theft of the truck in Camden. The trial court found the evidence was admissible as part of the res gestae of the murder. At trial, McGee moved to suppress the in-court identification by Perry, arguing the identification procedure was unduly suggestive. After conducting a *Neil v. Biggers*[3] hearing, the trial court denied the motion to suppress. The jury convicted him of both charges, and the trial court sentenced him to life imprisonment for murder and thirty years' imprisonment for the burglary. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.* "The admission or exclusion of evidence is a matter within the trial court's sound discretion . . . ." *State v. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013), *cert. pending*. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); *see also State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). "The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply

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[2] Peterbilt and Mack are both makers of trucks that are used to pull tractor trailers.
[3] 409 U.S. 188 (1972).

determines whether the trial judge's ruling is supported by any evidence." *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004).

LAW/ANALYSIS

I. Identification

McGee argues the trial court erred in admitting Perry's identification testimony based on a single photo, as it was unduly suggestive and inherently unreliable. We disagree.

The cases relied on by McGee at trial and on appeal all pertain to identifications by eyewitnesses[4] to crimes. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (holding the court should consider the following factors when determining the likelihood of a misidentification: (1) the witness's opportunity to view the criminal *at the time of the crime*; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's level of certainty at the confrontation; and (5) the time *between the crime and the confrontation*); *State v. Traylor*, 360 S.C. 74, 82, 600 S.E.2d 523, 527 (2004) (providing the same factors); *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) ("[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law."). However, Perry was not an eyewitness to the crime. Perry's testimony related to seeing McGee a year before the attack and was for the purpose of showing that McGee knew Eichelberger. Therefore, any reliance on cases concerning the admissibility of eyewitness identification is misplaced. Because McGee only challenged the admission of Perry's testimony as unduly suggestive and inherently unreliable, there is nothing for us to consider. *See State v. Beekman*, 405 S.C. 225, 235, 746 S.E.2d 483, 488 (Ct. App. 2013) (noting an issue must be raised to and ruled upon by the trial court to be preserved for appellate review), *cert. pending*. Further, Perry's testimony was cumulative because McGee admitted going to the cab company office the year before in his statement to police, which was admitted into evidence at trial. Additionally, McGee admitted knowing Eichelberger. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 449 (2003) (holding the

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[4] An eyewitness is "[o]ne who personally observes an event." *Black's Law Dictionary* 667 (9th ed. 2009).

admission of improper evidence is harmless when the evidence is merely cumulative to other evidence); *State v. Garris*, 394 S.C. 336, 349, 714 S.E.2d 888, 895 (Ct. App. 2011) ("To warrant reversal based on the admission of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice."). Therefore, we affirm the trial court's admission of Perry's identification.

II. Res Gestae

McGee maintains the trial court erred in admitting evidence of the theft of the truck as part of the res gestae of the murder. We disagree.

"Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (citing Rules 401 & 402, SCRE). "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "The evidence admitted must logically relate to the crime with which the defendant has been charged." *Wiles*, 383 S.C. at 158, 679 S.E.2d at 176.

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . [and is thus] part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (alterations in original) (internal quotation marks omitted), *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). "When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." *State v. Preslar*, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005) (internal quotation marks omitted). Under this theory, the temporal proximity of the prior bad act should be closely related to the charged crime. *State v. Owens*, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

"[E]vidence considered for admission under the res gestae theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence." *State v. Dennis*, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013), *cert. pending*. Rule 403 provides that even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "This [c]ourt reviews 403 rulings pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision." *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004).

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." *Wiles*, 383 S.C. at 158, 679 S.E.2d at 176. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *Dennis*, 402 S.C. at 636, 742 S.E.2d at 26 (internal quotation marks omitted). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403." *State v. Collins*, 398 S.C. 197, 207, 727 S.E.2d 751, 757 (Ct. App. 2012) (brackets and internal quotation marks omitted), *cert. granted* August 8, 2013.

The trial court did not abuse its discretion in allowing the evidence of the theft of the truck as part of the res gestae. The trial court determined there was a sufficient nexus between the theft and the murder. It found the evidence of the truck was

circumstantially intimately connected and explanatory of the crime. The trial court further found the evidence of the theft placed the discovery of the winch rod and McGee at the scene of the crime and put it all into context. It also determined the admission of the testimony regarding the theft was necessary for the State to be able to present a complete, unfragmented case. The evidence of the theft was relevant because the truck allowed McGee access to a winch rod like the one used to commit the murder and also placed him in the area around the time of the attack because the truck was found about a mile from Eichelberger's home. The theft occurred the night before the attack. The evidence of the theft of the truck was needed to show the story of the attack on Eichelberger. The unfair prejudice from the admission of evidence of the theft did not substantially outweigh the probative value. Accordingly, the trial court did not abuse its discretion in allowing the evidence of the theft.[5]

CONCLUSION

Based on the foregoing, the trial court did not abuse its discretion in admitting Perry's testimony or the evidence regarding the theft of the truck. Accordingly, the trial court is

AFFIRMED.

FEW, C.J., and LOCKEMY, J., concur.

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[5] McGee also argues the trial court failed to analyze the prior bad act under Rule 404(b), SCRE, and that the State failed to establish the theft of the truck was admitted to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Because we find the trial court properly admitted the evidence as part of the res gestae, we need not address this issue. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); *State v. Wood*, 362 S.C. 520, 529, 608 S.E.2d 435, 440 (Ct. App. 2004) ("Because we dispose of this issue under a res gestae analysis, we do ***NOT*** reach the *Lyle*/Rule 404(b) argument.").

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

FRANKIE LEE MCGEE,

APPELLANT

APPELLATE CASE NO. 2011-197606

Appeal from Richland County

Clifton Newman, Circuit Court Judge

Opinion No. 5227

PETITION FOR REHEARING

On April 30, 2014, this Court issued a published opinion affirming Appellant's convictions for murder and burglary first degree. State v. McGee, Op. No. 5227 (S.C. Ct.App. filed April 30, 2014). Appellant challenged the admission of witness Michelle Perry's identification testimony as being unduly suggestive and inherently unreliable. This Court found that Appellant's reliance on Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and its progeny was misplaced because Perry was not an eyewitness to the crime. This Court wrote, "However, Perry was not an eyewitness to the crime. Perry's testimony related to seeing McGee a year before the attack and

was for the purpose of showing that McGee knew Eichelberger. Therefore, any reliance on cases concerning the admissibility of eyewitness identification is misplaced. Because McGee only challenged the admission of Perry's testimony as unduly suggestive and inherently unreliable, there is nothing for us to consider." Counsel respectfully submits that this Court overlooked the fact that if challenged, identification testimony from any witness, not just an eyewitness to the crime, must be deemed reliable before admission at trial before a jury. Pursuant to Rule 221(a), SCACR, counsel for Frankie Lee McGee petitions the Court for rehearing.

On March 12, 2010, Investigator Sumter with the Columbia Police Department showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of appellant and asked her if she recognized him. (R. pp. 688-690). Perry testified at trial that she recognized the Appellant in the photo because he arrived at one of Reverend Eichelberger's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23). At trial Perry identified Appellant as the person she identified from the single photo shown to her by the police as the person who had been at the Cab Company on two previous occasions. (R. p. 677, lines 5-24). Prior to her testimony before the jury, Appellant moved to suppress any in court identification made by Michelle Perry because of the unduly suggestive identification procedure and the resulting unreliability of the identification. (R. p. 667, line 12 – 668, lines 1-14). The judge denied the motion to suppress. (R. p. 668, lines 15 – p. 669, lines 1-6). In denying the motion to suppress the trial judge made a determination that the identification by Perry was reliable despite the suggestive one photo identification procedure utilized by the investigator with the Columbia Police Department. Respectfully, this reliability determination is the precise issue Appellant asks this Court to consider. This issue was raised and ruled upon by the trial judge. As noted in footnote 7 on page 10 of Respondent's final brief, "There

is no question that appellant's challenge to the admissibility of the in-court identification is preserved because it was raised *in limine* immediately before the witness testified, therefore an objection during her testimony was not necessary with regard to the in-court identification."

To the extent that this opinion holds that if challenged, a reliability determination prior to admission by the trial judge of identification testimony is not necessary unless the witness was an eyewitness to the crime, counsel respectfully seeks rehearing. Counsel respectfully submits that reliance on Neil v. Biggers in challenging Perry's identification is **not** misplaced. Counsel is unaware of any law limiting a Neil v. Biggers identification hearing only to eyewitnesses to the crime. Trial courts in South Carolina commonly determine reliability and admissibility, pursuant to Neil v. Biggers, of identification testimony from witnesses who were not eyewitnesses to the crime. See State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987). Rule 104(c) SCRE provides, "Hearings on the admissibility of confessions or statements by an accused, and **pretrial identifications** of an accused shall in all cases be conducted out of the hearing of the jury." (emphasis added). The trial judge in the present case correctly held a hearing pursuant to Neil v. Biggers and found the identification reliable and thus admissible. Appellant challenges the reliability/admissibility finding of the trial judge and asks this Court to review that finding pursuant to Neil v. Biggers.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

This 15th day of May, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FRANKIE LEE MCGEE,

APPELLANT

APPELLATE CASE NO. 2011-197606

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 15th day of May, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 15th day of May, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

The South Carolina Court of Appeals

The State, Respondent,

v.

Frankie Lee McGee, Appellant.

Appellate Case No. 2011-197606

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Donald J. Zelenka, Esquire
Kathrine Haggard Hudgins, Esquire
J. Anthony Mabry, Esquire
Alan McCrory Wilson, Esquire

FILED
June 19, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

Opinion No. 5227 (S.C. Ct. App. filed 4/30/2014)

10-GS-40-0121, 0124

THE STATE,

RESPONDENT,

V.

FRANKIE LEE MCGEE,

APPELLANT

APPELLATE CASE NO. 2011-197606

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 6/19/2014.

QUESTION PRESENTED

Did the Court of Appeals err in refusing to find that the trial judge erred in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable?

STATEMENT OF THE CASE

In April of 2010, the Richland County Grand Jury indicted McGee for murder and burglary first degree, indictments #2010-GS-40-0121, 0124. On August 1, 2011, McGee proceeded to jury trial before the Honorable Clifton Newman. Attorneys Douglas S. Strickler, Elizabeth Fielding Pringle and Jennifer C. Davis represented McGee at trial. Attorneys Kathryn Luck Campbell, Dolly Justice Garfield and Nicole M. Simpson prosecuted the case. On August 10, 2011, the jury returned verdicts of guilty. Judge Newman sentenced McGee to life imprisonment for the murder and 30 years for the burglary. A timely notice of intent to appeal was filed on August 15, 2011, and the appeal perfected.

On September 10, 2013, a three judge panel of the Court of Appeals heard arguments in the case. On April 30, 2014, the Court of Appeal affirmed the sentence and conviction. The petition for rehearing was filed on May 15, 2014, and denied on June 19, 2014. This petition for writ of certiorari follows.

STATEMENT OF FACTS

On May 3, 2009, at 11:00 PM Temika Ashford drove to the home of Reverend Tryon Eichelberger in the Greenview community of Columbia, South Carolina. (R. p. 772, lines 16 – p. 773, lines 1-25). Reverend Eichelberger was an 87 year old former cab driver who held church services in the banquet hall behind the Blue Ribbon Cab Company. (R. p. 671, lines 6-12). Ms. Ashford met the Reverend a few years earlier when she had called for a cab. (R. p. 771, lines 6 – p. 772, lines 1-5). Ms. Ashford had a relationship with the Reverend and he would give her money to pay her bills. (R. p. 772, lines 6-15; R. p. 137, lines 22 – p. 138, lines 1-2).

Ms. Ashford testified that as she and the Reverend were sitting in the living room, they heard a noise in another part of the house. (R. p. 774, lines 14-25). The Reverend went to check on the noise. (R. p. 775, lines 13-25). According to Ms. Ashford, she then heard a commotion and hollering. (R. p. 776, lines 18-25). Ms. Ashford testified that she left the house, got in her car and drove away because she was scared. (R. p. 777, lines 4-25). When she could not reach the Reverend by phone, she returned to his house. (R. p. 778, lines 22 – p. 779 lines 1-2). According to Ms. Ashford, she saw a man standing on the Reverend's porch wearing white gloves and holding a pipe. (R. pp. 779-780). She described the man as husky with a big belly and receding hairline wearing a white shirt. (R. p. 779, lines 24 – p. 780, lines 1-2).

Ms. Ashford called 911 and then drove to Farrow Rd. According to Ms. Ashford, she was waiting on the police. (R. p. 782, lines 13-15). She testified that she saw the man again walking on Farrow Rd. (R. p. 782, lines 16-24). Once the police arrived, Ms. Ashford returned to the Reverend's house. (R. p. 783, lines 6-23).

Officer Chauncey Duckett of the Columbia Police Department was one of the first officers on the scene. Once inside the house, the officer found the Reverend on the kitchen floor bleeding

heavily. (R. p. 237, lines 13-22). The Reverend was unable to respond to the officer's questions. (R. p. 238, lines 11-13). EMS transported the Reverend to Richland Memorial Hospital. (R. pp. 300-303). Officer Duckett interviewed Ms. Ashford and she initially denied being inside the Reverend's house. (R. p. 239, lines 15-25). Ms. Ashford described the suspect she saw as wearing a white T-shirt and jeans. (R. p. 243, lines 7-9).

Based on Ms. Ashford's description, other officers began looking for the suspect. Officer Erskine Moody observed two individual walking in the Greenview area and one the individuals matched the description. (R. p. 732, lines 13 – p. 733 lines 1-21). The individual matching the description fled. (R. p 733, lines 23 –p. 734, lines 1-20). The suspect was apprehended and identified as David Williams. (R. p. 734, lines 21 -25).

The police took Ms. Ashford to see if she could identify David Williams. In a written statement to police, Ms. Ashford said that Williams was the man she saw on the Reverend's porch with gloves and a long object in his hand. (R. p. 829, lines 12 – p. 830, lines 1-4). She indicated, however, that he was wearing different clothes. (R. p. 830, lines 4-5). During the course of the investigation Ms. Ashford was shown six different photo line-ups but was never able to conclusively identify the suspect. (R. p. 832, lines 2-19). Ms. Ashford told police that two photos in State's Exhibit #123 resembled the suspect. (R. p. 795, lines 1-11). One of the photos in State's Exhibit #123 is a photo of Petitioner. (State's Exhibit # 123, R. p. 1224).

Officer Duckett continued to search the scene around the Reverend's house. Officer Duckett found a steel rod in Larry Harp, one of the Reverend's neighbor's yard. (R. p. 240, lines 8 – p. 241, lines 1-2). Officer Duckett also found a pair of white tube socks on a path about 25 – 30 yards from the steel rod. (R. p. 241, lines 11-20). Both the rod and the socks appeared to have blood on them. DNA analysis initially only determined that the blood on the rod and the socks belonged to the

Reverend. (R. pp. 539-546). Subsequent DNA testing, however, indicated that Petitioner's DNA was also present on the socks. (R. pp. 547-558).

The neighbor, Larry Harp, testified that on the day of the assault he saw appellant in the Reverend's yard once at 3:00 PM talking on the phone and again at about 5:00 PM with a plate and cup in his hand. (R. pp. 274-276; p. 290, lines 1-25). The neighbor testified that Petitioner was wearing an athletic jersey and denim shorts. (R. p. 292, lines 6-18).

In July of 2009, the Reverend died as the result of complications of a subdural hemorrhage due to blunt head impact. (R. p. 890, lines 18-23). In March of 2010, officers showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of Petitioner and asked her if she recognized him. (R. p. 671, lines 23 – p. 672, p. 673, lines 1-14). According to Perry, she recognized Petitioner because he came to one of the Reverend's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23).

On May 2, 2009, the day before the assault, a truck was stolen from the Camden Steel and Metal Company in Camden, South Carolina. (R. pp. 845 – 847). Video surveillance captured the theft. (R. p. 847, lines 13 – p. 848, lines 1-21). Sandra Thomas, a City of Columbia Police Officer and the Petitioner's sister saw the video on the news and testified that she recognized her brother in the video. (R. pp. 902 – 904). According to the sister, she called crime stoppers. (R. p. 904, lines 8-18). The truck was found on May 3, 2009, next to Happy Daddy Towing Service, about a mile away from the Reverend's home. (R. pp. 646 - 652). There was no forensic evidence linking Petitioner to the truck and no evidence that a winch was missing from the truck.

On March 17, 2010, officers interrogated Petitioner while he was incarcerated on an unrelated offense at Wateree Correctional Institution. (R. p. 957, lines 22 – p. 958, lines 1-4). Petitioner denied assaulting the Reverend and explained that he had taken his socks off and left them at the store by a dumpster because of his athlete's foot condition. (R. p. 1028, lines 21 – p. 1029, 1030, lines 1-8; State's Exhibit #137).

ARGUMENT

The Court of Appeals erred in refusing to find that the trial judge erred in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable.

At trial Petitioner moved to suppress any in court identification made by Michelle Perry because of the unduly suggestive identification procedure and the resulting unreliability of the identification. (R. p. 928, lines 12 – 929, lines 1-14). The judge denied the motion to suppress. (R. p. 929, lines 15 – p. 930, lines 1-6). The judge erred.

On March 12, 2010, Investigator Sumter with the Columbia Police Department showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of Petitioner and asked her if she recognized him. (R. pp. 949-951). Perry testified at trial that she recognized the Petitioner because he came to one of the Reverend's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23). At trial Perry identified Petitioner as the person she identified from the single photo shown to her by the police. (R. p. 938, lines 5-24).

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977)

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34

L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*

In State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S. Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S. Ct. 375).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

The single photo of appellant shown to Perry was unduly suggestive. Under the totality of the circumstances and a review of the Biggers factors, the identification was not so reliable such

that there was no substantial likelihood of misidentification. As argued by Petitioner, Perry had only two brief opportunities to view the appellant almost 14 months earlier. (R. p. 929, lines 4-14). Perry admitted that she knew why the investigator had come to see her and show her the photo of appellant. (R. p. 939, lines 7-13).

The Court of Appeals found that Petitioner's reliance on Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and its progeny was misplaced because Perry was not an eyewitness to the crime. The Court of Appeals wrote, "However, Perry was not an eyewitness to the crime. Perry's testimony related to seeing McGee a year before the attack and was for the purpose of showing that McGee knew Eichelberger. Therefore, any reliance on cases concerning the admissibility of eyewitness identification is misplaced. Because McGee only challenged the admission of Perry's testimony as unduly suggestive and inherently unreliable, there is nothing for us to consider." (App. p. 5). The Court of Appeals erred.

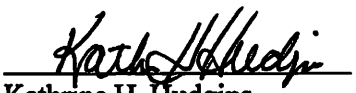
Petitioner's reliance on Neil v. Biggers in challenging Perry's identification is **not** misplaced. If challenged, identification testimony from any witness, not just an eyewitness to the crime, must be deemed reliable before admission at trial before a jury. The law does not limit a Neil v. Biggers identification hearing only to eyewitnesses to the crime. Trial courts in South Carolina commonly determine reliability and admissibility, pursuant to Neil v. Biggers, of identification testimony from witnesses who were not eyewitnesses to the crime. See State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987). Rule 104(c) SCRE provides, "Hearings on the admissibility of confessions or statements by an accused, and **pretrial identifications** of an accused shall in all cases be conducted out of the hearing of the jury." (emphasis added). The trial judge in the present case correctly held a hearing pursuant to Neil v. Biggers and found the identification reliable and

thus admissible. Appellant challenges the reliability/admissibility finding of the trial judge and asks this Court to review that finding pursuant to Neil v. Biggers.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5227 (S.C. Ct. App. filed 4/30/2014)
10-GS-40-0121, 0124

THE STATE,

RESPONDENT,

V.

FRANKIE LEE MCGEE,

APPELLANT

APPELLATE CASE NO. 2011-197606

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Salley W. Elliott, Esquire, and the S.C. Court of Appeals this 18th day of July, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day of July, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001551

THE STATE,

Respondent,

v.

FRANKIE McGEE,

Appellant.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The trial judge did not err in admitting the in court identification of the witness who testified petitioner had been to the Reverend's church before on two occasions, and even if the admission of this evidence was erroneous it was harmless given the other overwhelming evidence of petitioner's guilt and the testimony of other witnesses and his own admissions to being in the area of the Reverend's home around the time of the murder.
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CONCLUSION 21

CERTIFICATE OF SERVICE

PETITIONER'S STATEMENT OF QUESTION PRESENTED

1. Did the Court of Appeals err in refusing to find that the trial judge erred in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable?

STATEMENT OF THE CASE

On May 3, 2009, at 11:00 p.m., petitioner Frankie McGee burglarized the home of Reverend Tryon Eichelberger located in Richland County and murdered Reverend Eichelberger. McGee was arrested months later on March 19, 2010 after an extensive police investigation. In April of 2010, the Richland County grand jury indicted petitioner for murder and burglary in the 1st degree. (2010-GS-40-0121). Petitioner proceeded to trial on August 1, 2011 before the Honorable Clifton Newman and a jury. Attorneys Douglas Strickler, Elizabeth Fielding Pringle, and Jennifer C. Davis represented petitioner. Assistant Solicitors Kathryn Luck Campbell, Dolly Justice Garfield, and Nicole M. Simpson prosecuted the case for the State. On August 10, 2011, the jury convicted petitioner of murder and burglary in the 1st degree. Judge Newman sentenced petitioner to life imprisonment for the murder of Reverend Eichelberger and thirty (30) years for the burglary of his home.[1] (R. 1, 231-65, 272-447, 492-640, 646-53, 670-706, 722-43, 747-841, 845-79, 886-94, 897-951, 953-1053, 1055-1102, 1204-07, 1211-14).

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals raising two (2) issues. (BOA). Respondent filed a responsive brief. (BOR). On April 30, 2014, the Court of Appeals affirmed petitioner's convictions and sentences. Judge Konduras authored the Opinion. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). Petitioner filed a petition for rehearing, which was denied on June 19, 2014. Petitioner filed this Petition for Writ of Certiorari raising one (1) issue. Respondent files this Return to Petition for Writ of Certiorari.

[1]At sentencing, petitioner's criminal record was provided to Judge Newman. Petitioner was convicted in 1994 of attempted strong armed robbery, in 1997 of attempted strong armed robbery, in 2006 and 2007 of three (3) counts of burglary in the 3rd degree, two (2) counts of grand larceny, and malicious injury to personal property. In the same year, he was also convicted of breach of trust with fraudulent intent and burglary in the 2nd degree. (R. 1206-07).

RESPONDENT'S STATEMENT OF FACTS

The victim, Reverend Tryon Eichelberger, was 87 years old at the time of his murder. Reverend Eichelberger lived on Isaac Street off Farrow Road in the Greenview community of Columbia, S.C. (R. 231-65, 272-97, 309, 506, 888-94).

On May 3, 2009, at 11:00 p.m., Reverend Eichelberger was in his home speaking with Temika Ashford, a former church member, who was there to ask for money to pay her water bill. Reverend Eichelberger and Ms. Ashford were sitting in the living room when they heard a noise in another part of the house. The Reverend went to investigate the noise. Ms. Ashford then heard the Reverend say: "How did you get in here." She then heard a commotion, and hollering. Ms. Ashford knew something bad was happening, left the home, got in her car and drove away because she was afraid. She circled the block, and when she could not reach the Reverend by phone, she returned to his house. As she passed Reverend Eichelberger's home while still driving her car, Ms. Ashford saw a man standing on the Reverend's porch wearing what appeared to be white gloves and holding a metal pipe or stick in his hand. She described the man as a husky light skinned black man with a big belly and receding hairline wearing a white shirt and blue jeans. Ms. Ashford called 911 and then drove to Farrow Road to wait on the police. While she was waiting, she saw the same man again walking on Farrow Road. At this time, the man no longer had the pipe or rod in his hand and no longer had the white gloves on. Once the police arrived at Reverend Eichelberger's residence, Ms. Ashford returned to the Reverend's home. She got out of her car and tried to give police a description of the man and his location but she was told to wait in her car until police cleared the house and determined what had occurred inside. (R. 770-841).

When the call was initially dispatched, the first officer to respond, Chancey Duckett, was inside the Gazbah gas station on Farrow Road about three (3) blocks from Reverend

Eichelberger's home. He was dispatched to Reverend Eichelberger's home in reference to a civil disturbance. As he was traveling North on Farrow Rd. in the direction of the Reverend's home, he also saw a light skinned black man walking alone south on Farrow Rd. wearing a white T-shirt or light gray T-shirt and blue jeans. However, at that time, Officer Duckett did not detain the man because he did not know exactly what had occurred at the Reverend's home nor had he been given a description of the perpetrator. (R. 231-65).

Once he arrived at the Reverend's home, Officer Duckett found Ms. Ashford outside the residence and told her to wait in her car. He then entered the home and found Reverend Eichelberger on the kitchen floor bleeding heavily. There was approximately two (2) liters of blood on the kitchen floor. The Reverend was unable to respond to Officer Duckett's questions.[2] (R. 231-65).

Police discovered Reverend Eichelberger's home had been broken into at a side door to the residence located next to the driveway. A metal tool had been used to pry open this door and damage was done to the door and door frame. There were also visible tool marks to the door and door frame. (R. 231-65, 328-46).[3]

Officer Duckett cleared the home, but the perpetrator was gone. He then searched the area surrounding Reverend Eichelberger's home and found *a steel rod* across the street from the

---

[2]EMS transported the Reverend to Richland Memorial Hospital. There it was discovered that he had a cracked skull which resulted in swelling of his brain. Reverend Eichelberger died approximately three (3) months later as a result of the injuries he received at the hands of petitioner. He died from blunt force trauma to the head caused by a solid object. (R. 492-512, 886-94, 921).

[3]Petitioner had previously been convicted of two (2) separate burglaries prior to the commission of the burglary of Reverend Eichelberger's home. (R.640-45). *See* S.C.Code Ann. Section 16-11-310 (burglary in the first (1st) degree includes a burglary committed by a person with two (2) or more prior convictions for burglary or housebreaking).

Reverend's home in a neighbor's yard. Officer Duckett also found a pair of white tube socks on a path about twenty-five (25) to thirty (30) yards from the same steel rod in the direction of Farrow Road. Both the rod and the socks appeared to have blood on them. The metal rod was also consistent with the tool marks found on the door to Reverend Eichelberger's home. Both the rod and the white socks were collected by a crime-scene technician for later DNA testing. (R. 231-65, 328-53, 1060-61).

The neighbor in whose yard the pipe was found, Mr. Larry Harp, testified that on *the day of* the burglary and assault on the Reverend, he saw petitioner Frankie McGee in the Reverend's yard at 3:00 p.m. talking on the phone and pacing back and forth several times. He saw petitioner again later that afternoon outside the Reverend's home at about 5:30 p.m. with a plate, napkin, and cup in his hand, and petitioner was eating something. When petitioner left the Reverend's yard this last time, Mr Harp saw him walking headed toward Farrow Road. At this time, Reverend Eichelberger was still in his yard dressed in a suit, wearing a straw hat, and working in his flower garden. The neighbor, Mr. Harp, later positively identified petitioner from a photo-graphic line-up and also identified petitioner at trial as the person he had seen in the victim's yard at 3:00 p.m. and at 5:30 p.m. on May 3, 2009. Mr. Harp also testified that on the night of the burglary and assault, he was awakened about midnight by police because they had found a metal rod at the back of his property near the fence line. Mr. Harp testified that the metal rod did not belong to him, and he informed the police at the time that he did not know how or who put the metal pipe or rod in his yard. (R. 272-97, 691-93, 938-39).

Ms. Ashford was eventually able to give police a description of the man she saw standing on Reverend Eichelberger's porch. Based on Ms. Ashford's description, other officers began looking for the suspect. Police stopped two (2) men walking together in the area and brought Ms.

Ashford to that location. She said one of the men looked like the man she had seen on Reverend Eichelberger's porch, however the clothes he was wearing were not the same.[4] As the investigation proceeded, Ms. Ashford was eventually shown a series of photo line-ups. From one of these, Ms. Ashford told police that two (2) photos in State's Exhibit 123 looked like the suspect. One of the photos in State's Exhibit 123 was a photo of petitioner. Ms. Ashford identified petitioner's photo as the one that looked the most like the person she saw standing on the Reverend's porch with the pipe in his hand. (R. 231-65, R. 473-83, 771-841, 917-18, 920, 930-34, 941, 964-69, 1065-72).

The metal pipe or rod and the two (2) white socks were forwarded to the DNA lab for testing. DNA analysis determined that the blood on the rod belonged to Reverend Eichelberger. DNA testing also revealed the blood on the white socks belonged to Reverend Eichelberger. (R. 518-61, 920-21).

In March of 2010, officers visited Michelle Perry, a dispatcher with Blue Ribbon Cab Company, where Reverend Eichelberger had worked before his retirement. Reverend Eichelberger held church services in a building attached to the Blue Ribbon Cab Company. Officers showed Mrs. Perry a single photograph of petitioner and asked her if she recognized the person in the photograph. Mrs. Perry informed police she recognized petitioner because he came to one of the Reverend's church services too early one morning and then a few days later came back for a Bible study. This occurred in the winter time several months before Reverend Eichelberger was assaulted. (R. 141-44, 654-69, 670-87, 688-93).

As the investigation continued, police determined the pipe or metal rod recovered from Mr.

[4]This person was later eliminated as a possible suspect through police investigation and DNA testing. (R. 315-19, 629-34, 917-18, 920, 965, 1062).

Harp's back yard was actually a *winch rod* commonly used to tighten straps holding down a load of freight on a flat-bed trailer. Police also determined petitioner had a CDL (commercial) license to operate a tractor trailer which would pull such a flat-bed trailer, and petitioner had work experience that would have exposed him to the use of a winch rod to hold down loads on flat-bed trailers. (R. 845-61, 895-900, 721-30, 765-69).[5]

Police also discovered that on May 2, 2009, the day before the burglary and assault on Reverend Eichelberger, a tractor trailer truck was stolen from the Camden Steel and Metal Company in Camden, S.C. Petitioner was a resident of Camden. Video surveillance captured the theft. Petitioner's sister, Sandra Thomas, saw the video surveillance footage broadcast on the local news and contacted Crime Stoppers because she recognized the person who stole the tractor truck as her brother. Ms. Thomas viewed the video again before trial and testified there was no question the person in the video stealing the truck was her brother. The truck was found on May 3, 2009, the same day as the burglary and assault on Reverend Eichelberger, abandoned in the Greenview area of Columbia next to Happy Daddy Towing Service, about one (1) mile from Reverend Eichelberger's home. Chain link fencing from the perimeter of Camden Steel and Metal Company was found wrapped around the axle of the truck. The fencing had to be cut from the axle before the truck was returned to Camden. The owner of the truck testified the truck was used to haul or pull *a fled-bed trailer*, and it would have contained in its tool box behind the cab *a winch rod* exactly like or just like the one used to murder Reverend Eichelberger. (R. 646-53, 845-61, 901-12, 959, 1080, 1084).

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[5]In addition to having a CDL license, petitioner had worked as a brick layer and his former employer testified it was common for loads of bricks to be delivered to job sites on a flat-bed truck with the load of bricks being held down by straps which were loosened by use of a *winch rod.* (R. 721-30).

Subsequently, more involved DNA testing of the white socks indicated petioner's DNA was also present on the interior of the socks on which Reverend Eichelberger's DNA (blood) was found. (R. 518-61, 935-38, 1084, ll. 3-6).

On March 17, 2010, police questioned petitioner while he was incarcerated on other charges at Wateree Correctional Institution. The conversation was tape recorded. Petitioner denied assaulting the Reverend, but made several incriminating statements during the interview. Petitioner admitted he had been in the area and taken his socks off and left them at a store by a dumpster because of his alleged athlete's foot condition. He then stated he did take his socks off and left them next to a light pole. Police recovered the two (2) bloody socks next to a light pole in a grassy field next to Mr. Harp's residence, not at a gas station. Petitioner also denied he stole the truck from Camden; however, he admitted he moved a red tractor truck for a friend while he was in the Greenview area of Columbia. During the interview, petitioner also denied he knew what a *winch rod* was. Petitioner also admitted he had been on Reverend Eichelberger's front porch. Petitioner also admitted he had told someone [his wife] he hurt someone, but he denied it was the victim. (R. 943-51, 960-61, 963, 974, 976, 980, 1006-10, 1012-17, 1027-28, 1029-31, 1034, 1038, State's Ex. 137, R. 1225-1329).

ARGUMENT

The trial judge did not err in admitting the in court identification of the witness who testified petitioner had been to the Reverend's church before on two occasions, and even if the admission of this evidence was erroneous it was harmless given the other overwhelming evidence of petitioner's guilt and the testimony of other witnesses and his own admissions to being in the area of the Reverend's home around the time of the murder.

Standard of Review

(On appeal)

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

(Admission or exclusion of evidence)

The admission of exclusion of evidence is within the sound discretion of a trial judge, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (Ct. App. 2013). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

(Admission or exclusion of identification testimony)

A trial court's decision to allow the in-court identification of an accused will not be

reversed absent an abuse of discretion or prejudicial legal error. State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000), *citing* State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995); State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998)(the admission of exclusion of evidence in within the sound discretion of a trial judge and will not be reversed absent an abuse of discretion or prejudicial legal error). Whether an eyewitness' identification is sufficiently reliable is a mixed question of law and fact. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), *citing* State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id. Generally, the decision to admit an eyewitness' identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Liverman, *citing* Moore.

Admissibility of identification testimony

The test for the admissibility of an eyewitness' identification is whether the method was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law. Stovall v. Denno, 388 U.S. 293 (1967); State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982); State v. Dixon, 284 S.C. 526, 328 S.E.2d (Ct. App. 1985). Where some degree of suggestiveness exists in a pre-trial identification, the suppression of the identification is not automatically required. Manson v. Braithwaite, 432 U.S. 98 (1977); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980). Suggestiveness alone does not mandate exclusion of evidence. Gibbs v. State, 403 S.C. 484, 744 S.E.d 170 (2013); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). Instead, reliability is the linchpin in determining the admissibility of identification evidence. Gibbs, *supra*; State v. Denson, 269 S.C. 407, 237 S.E.2d

761 (1977); Mansfield, 343, S.C. at 78, 538 S.E.2d at 263; State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). In determining the admissibility of an eyewitness' identification, the question is not merely whether the identification procedure was suggestive, but whether under the totality of the circumstances the identification was reliable. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000)("[T]he identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure."), *quoting* Jefferson v. State, 206 Ga. App. 544, 425 S.E.2d 915, 918 (1992). The reliability of an identification procedure depends upon the consideration of a totality of the facts and circumstances of each particular case. State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987); State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981); State v. Johnson, 318 S.C. 372, 458 S.E.2d 49 (Ct. App. 1995). "Thus the inquiry turns upon 'whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." Gibbs, *supra*, *quoting* State v. Moore, 343 S.C. at 287, 540 S.E.2d at 448)(other citation omitted). Even if an identification procedure is impermissibly suggestive, the admission of other evidence that positively identifies a defendant renders a suggestive identification procedure harmless error. State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001).

Pertinent Facts

In March 2010, police went to Blue Ribbon Cab Company where the victim had worked before his retirement. Police showed a secretary there, Michelle Perry, a photograph of petitioner and asked her if she recognized the person in the photograph. Ms. Perry informed police she did recognize the person in the photograph. She informed them petitioner had been to Reverend Eichelberger's church twice in the past. He came to the church one (1) morning too early for the service. He came back to the church on a later date and attended a Bible study. Ms. Perry was not

a witness to any of the incidents on the day of the burglary and assault on Reverend Eichelberger which led to his death. She testified petitioner came to these two (2) services several months before Reverend Eichelberger was assaulted. (R. 654-69, 670-87 & 688-93, 695). Other testimony was admitted at trial through other witnesses that petitioner had been in the Greenview area of Columbia before and around the time of the murder, and other testimony was admitted at trial that petitioner was familiar with or knew Reverend Eichelberger before his murder and was at the Reverend's home the day of the murder. (R. 272-97, 740-64, 939, 943-51, 974, 976, 980, 999-1003, 1042-43, 1073-75, State's Ex. 137 [Statement of Petitioner], R. 1225-1329).

The Biggers hearing

Prior to the admission of Ms. Perry's testimony, petitioner objected to the admissibility of Ms. Perry's in-court identification of him because police only showed her a one photo line-up. Judge Newman conducted a Neil v. Biggers[6] hearing regarding the reliability of her in-court identification. (R. 654-69). At the conclusion of the hearing, Judge Newman noted that single photo identifications are disfavored; however, based on the totality of the circumstances surrounding Ms. Perry's identification of petitioner and South Carolina law, her out-of-court and in-court identification would be admitted in evidence. Judge Newman did not err in admitting her in-court identification. Regardless, its admission was harmless given it was cumulative to other evidence petitioner was in the Greenview community around the time of the crime and knew Reverend Eichelberger.

[6]Neal v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972).

Analysis

Any challenge to the witness' out of court identification is not preserved

Petitioner admitted in his brief below and admits in his Petition for Certiorari that immediately prior to Ms. Perry's testimony counsel only challenged the admissibility of her *in-court identification.* (IBOR, p. 9; Petition for Writ of Certiorari, p. 9). (See also R. 654-77). It is not clear from petitioner's brief whether he is now challenging the admissibility of the out-of-court identification. However, to the extent he is now challenging the admissibility of the out-of-court identification, that issue is not preserved for appeal.[7] State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001)(to preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made, and failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004)(making a motion *in limine* to exclude evidence at the beginning of trial does not preserve issue for review because a motion *in limine* is not a final determination; therefore, the moving party must make a contemporaneous objection when the evidence is introduced); State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997)(same). As a result, any challenge to the admissibility of the out-of-court identification of petitioner by Ms. Perry must be dismissed.

[7] Pre-trial, petitioner informed the court it would be moving to suppress the out-of-court identification of petitioner by Ms. Perry. (R. 140-42). Judge Newman informed petitioner he would rule on issues regarding this witness prior to or at the time of her being called. Thereafter, before the witness was called petitioner only moved to suppress the in-court identification of this witness, and there was no objection during her testimony to her out-of-court identification. There is no question that petitioner's challenge to the admissibility of the in-court identification is preserved because it was raised *in limine* immediately before the witness testified, therefore an objection during her testimony was not necessary with regard to the in-court identification.

The Lack of Merit of Petitioner's Argument

An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). Generally, "a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by the previous illegal identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001).

As the Court of Appeals correctly found, there is no merit to petitioner's argument because the cases relied on by petitioner at trial and on appeal pertain to identifications by eyewitnesses to crimes. *See e.g.* Neil v. Biggers, 409 U.S. 188, 199-200 (1972)(holding the court should consider the following factors when determining the likelihood of misidentification: (1) the witness's opportunity to view the criminal *at the time of the crime*; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's level of certainty at the confrontation; and (5) the time *between the crime and the confrontation*);[8] State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523, 527 (2004)(providing the same factors); State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000)("[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law."). However, Ms. Perry was not an eyewitness to the crime, and she did not identify petitioner as the perpetrator of the crime. *See* Ramsey, 345 S.C. 613, 550 S.E.2d at 297, *and* State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007)(listing 5 factors including degree of attention *at the time of the*

[8] An eyewitness is "[o]ne who personally observes an event." *Black's Law Dictionary*, 667 (9th ed. 2009).

crime and lapse of time between *time of crime* and identification). Perry's testimony related to seeing petitioner a year before the attack and was for the purpose of showing that McGee knew Reverend Eichelberger.

To the extent Biggers applies in this situation, the purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding *any prior, illegal or tainted out of court identification.* State v. Carlson, 363 S.C. 586, 594, 611 S.E.2d 283, 287 (Ct. App. 2005) *citing* Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967 (1968)(conviction based on suggestive pre-trial identification and subsequent in-court identification will be set aside only if the photographic identification was so suggestive as to give rise to a very substantial likelihood of irreparable misidentification), *and* State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000)("An in-court identification of an accused is inadmissible if a suggestive *out-of-court identification procedure* created a very substantial likelihood of irreparable misidentification."). Only if the *pretrial procedure* was suggestive, should the trial court consider the second question, i.e. whether there is a substantial likelihood of irreparable misidentification. State v. Brown, 356 S.C. 496, 503, 589 S.E.2d 781, 784-85 (Ct. App. 2003) *quoting* Moore, 343 S.C. at 287, 540 S.E.2d at 447-48, *other citation omitted.*

The United States Supreme Court has developed a two pronged inquiry to determine the admissibility of an out-of-court or in-court identification. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), *citing* Biggers, 409 U.S. at 198 *and* Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977); State v. Spears 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011), *quoting* Moore, 343 S.C. at 287, 540 S.E.2d at 447 (*citing* Biggers, 409 U.S. at 198-99). First, the court must ascertain whether the identification process was *unduly* suggestive. Moore, 343 S.C. at 287,

540 S.E.2d at 447. Next, the court must decide whether the out-of-court identification was nevertheless was so reliable that no substantial likelihood of misidentification existed. Id.

"The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). As previously stated, the following factors are to be considered when evaluating the totality of the circumstances when determining the likelihood of misidentification: (1) the witnesses' opportunity to view the perpetrator at the time of the crime, (2) the witnesses' degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the prior confrontation, and (5) the length of time between the crime and the confrontation. Id. at 127; 644 S.E.2d at 696-97.

Even if the out court procedure is suggestive, the in-court identification is admissible if based on information independent of the out-of-court procedure. State v. Carlson, 363 S.C. 586, 600, 611 S.E.2d 283, 290 (Ct. App. 2005), *citing* State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974). The State bears the burden of proving the identification was based on an independent source by clear and convincing evidence. Id. at 377, 210 S.E.2d at 606.

Judge Newman did not abuse his discretion in admitting the in-court identification of Ms. Perry under the totality of the circumstances. Ms. Perry testified that when police came to her place of employment and showed her the photograph they did not insist or tell her that she knew or had previously seen the person in the photograph. They did not tell her she had to identify anyone. The question they asked was open ended, i.e. had she ever seen this person before or did she recognize the person. The record shows police showed the same photograph to several other employees of the cab company and none of those witnesses recognized the person in the picture.

The record shows the identification procedure was not *unduly* suggestive. [9]

Further, Ms. Perry testified she recognized petitioner not because police showed her the photograph but because she remembered petitioner coming to Reverend Eichelberger's church on two (2) previous occasions several months before the assault on Reverend Eichelberger. The record shows her identification was made only fifteen (15) months after seeing petitioner at the church and less than a year since the assault on Reverend Eichelberger. *See* State v. McCord, 349 S.C. 477, 482-83, 562 S.E.2d 689, 692 (Ct. App. 2009) (admitting identification by victim of assault over six (6) years after the assault had taken place). She testified that on the first (1st) occasion, petitioner was with a young woman and he was too early for the church service. She testified she spoke with petitioner face to face and explained to him he was too early for the church service and would have to wait. As a result, petitioner had to sit in the lobby area in front of her for approximately twenty-five (25) minutes. This occurred around 10:30 a.m. in the morning in the reception area of the cab company. *See* State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984)(identification held reliable where the victim observed the accused for 4 to 4 and ½ minutes at arms-length in a well-lighted store); State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct. App. 1993)(in-court identification held reliable, where the witness saw the perpetrator for 3 minutes in a well-lighted store and identified defendant in a show-up 10 minutes after robbery). She testified she had the opportunity to view him continuously during that twenty-five (25) minute period, as she was a dispatcher at the front window, and she remembered that it was a cold day and petitioner was wearing a heavy jacket because of the weather. *See* State v. Nelson, 250 S.C. 6, 156 S.E.2d 341 (1967)(where robber was in the store for about 5 minutes, in a well-lit area, a few feet from the

[9] In fact, Petitioner did not even challenge the admissibility of the out-of-court identification. Apparently, it was for this reason that the Court of Appeals noted there was nothing for them to review as far as the admissibility of the trial testimony of Ms. Perry.

victim who stated that she had a good look at his face, victim had sufficient opportunity to view suspect and made a positive identification of suspect eight weeks after robbery). She also testified she remembered when Reverend Eichelberger arrived that morning, petitioner, his lady friend, and Reverend Eichelberger went in to the church service together. She also testified she had the opportunity to see petitioner on another occasion. She testified that on what she believed was the Tuesday of the following week, petitioner returned and attended a Bible study conducted by Reverend Eichelberger. So, she actually viewed him on two (2) separate occasions, and there was no testimony at the Biggers hearing that police coerced or suggested to her that she knew the person they were asking about. *See* State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005)(eyewitness could make reliable in-court identification where he spoke with defendant for 15 to 20 minutes about 2 weeks before the crime and then viewed defendant a 2nd time during the shooting in a well-lit room and could see through sheer bandana and recognized defendant's gold teeth). While she told one officer petitioner's picture seemed to favor the person who had come in two (2) times previously to the church,[10] the record shows she also informed Detective Sumter that day that she remembered petitioner walking in with Reverend Eichelberger on two (2) occasions, and she testified pretrial that if it was not petitioner, then petitioner had a twin. (R. 654-69, 669-87, 688-707). In ruling on the admissibility of her in-court identification, Judge Newman stated as follows:

> Single person show ups are disfavored because they are suggestive in nature.[11] However, the courts in the state have held that they may be reliable

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[10]*See* State v. Hopper, 215 S.C. 74, 78-79, 54 S.E.2d 517, 518-19 (1949)(absolute certainty of a witness is not required for identification to be admissible); State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998)(same); State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996)(same or similar); United States v. Peoples, 748 F.2d 934 (4th Cir. 1984)(similar).

[11]*See* Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968)(identifications arising from single photo displays are generally viewed with suspicion); State v. Tisdale, 338 S.C. 607, 527

> under the totality of the circumstances if the state shows that the identification was nevertheless so reliable that no substantial likelihood of misidentification exists.
> In this instance, she saw him on two occasions. She says she saw him for a period of twenty-five minutes or so. That it was an unusual circumstance that he arrived unusually early for their church services. She said she saw him. She says she recognized him. She says that she can identify him. I find that the motion to suppress should be denied, and I deny it.

(R. 668, ln. 19 - 669, ln. 6). Based on the totality of the circumstances surrounding the out of court identification as testified to by Ms. Perry, there is no substantial likelihood of misidentification based on the handing to her and others at her employment a photograph and asking if she or others recognized the person. The State proved by clear and convincing evidence Mr. Perry's identification of petitioner was based on an independent source, her memory of petitioner being at Reverend Eichelberger's church on two (2) previous occasions. *See* State v. Roach, 364 S.C. 422, 613 S.E.2d 791 (Ct. App. 2005), *vacated in part, affirmed in part,* 337 S.C. 2, 659 S.E.2d 107 (2008). *See also* State v. Nelson, 250 S.C. 6, 156 S.E.2d 341 (1967). Petitioner has failed to show Judge Newman abused his discretion in the admission of this evidence. As a result, the Court of Appeals did not err, and this petition must be dismissed.

Harmless Error

Further, as the Court of Appeals correctly found, even assuming *arguendo* Judge Newman erred in admitting the testimony of Ms. Perry, the error was harmless and could not have affected the verdict. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (*citing* Arnold v. State,

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S.E.2d 329 (Ct. App. 2000); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967)(show-ups, or showing a person singly for identification, are widely condemned); State v. Patrick, 318 S.C. 352, 457 S.E.2d 632 (Ct. App. 1995)(witness prior identification of defendant, which occurred in a courtroom while the defendant was being tried for another crime, contained a degree of suggestiveness).

309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002).

Ms. Perry was not an eyewitness to the crime and did not identify petitioner as the perpetrator of the burglary and murder. Ms. Perry's testimony only helped establish petitioner had been in the Greenview area of Columbia before, i.e. Reverend Eichelberger's church, and he knew Reverend Eichelberger. There was testimony from several other witnesses in the case establishing these very facts. **(R. 272-97, 740-64, 939, 943-51, 974, 976, 980, 999-1003, 1042-43, 1073-75).** *See* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012)(admission of evidence can be harmless where testimony was similar to testimony of another witness admitted at trial); State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct. App. 2008)(holding error is harmless where it could not reasonably have affected the trial's outcome, and considering as one factor whether the evidence was cumulative to other testimony).

Mr. Harp, Reverend Eichelberger's neighbor, testified he saw petitioner in Reverend Eichelberger's front yard on the day of the burglary and assault. The first time he saw petitioner he was beside Reverend Eichelberger's home using a telephone and pacing back and forth. The 2nd time he saw him was around 5:30 p.m. in Reverend Eichelberger's yard eating food and Reverend Eichelberger was also in the yard at the same time working in his flower bed. Mr. Harp positively identified petitioner from a photographic line-up and at trial. Petitioner is not challenging Mr. Harp's identification of him on appeal. This testimony established petitioner was in the area on the day of the crime, at the victim's residence, and he knew the victim.

Another witness, Ivan Moore, testified he saw petitioner in the area in the days surrounding the murder of Reverend Eichelberger. **(R. 747-64).** Further, petitioner's DNA was found on the socks in the grassy field beside Mr. Harp's home, establishing petitioner's presence in the area.

Detective Arthur Thomas also testified that their investigation had uncovered that petitioner had attended Reverend Eichelberger's church on several occasions. **(R. 939, 980).** Detective Reese also testified without objection that police were able to connect petitioner to Reverend Eichelberger's church through Ms. Perry. **(R. 1074-75).** Detective Sumter also testified without objection to Ms. Perry's out-of-court identification of petitioner as having previously been to the church 2 times in February of 2009. **(R. 695-707).**

Finally, petitioner's own statements to law enforcement established the same facts as Ms. Perry's testimony. Petitioner admitted to police he had been to Reverend Eichelberger's church and residence, had been in the Greenview area, and had driven a red tractor truck which was abandoned in the area. **(R. 943-51, 974, 976, 980, 999-1003, 1006-10, 1027-28, 1042-43, 1047, 1048-53, State's Ex. 137, R. 1225-1329).**

As a result, the admission of Ms. Perry's testimony was harmless beyond a reasonable doubt. *See* Liverman, *supra* (evidence can be harmless where testimony was similar to testimony of another witness whose testimony was admitted at trial); Page, 378 S.C. at 483-84, 663 S.E.2d 357 (holding error is harmless where it could not reasonably have affected the trial's outcome, and considering as one factor whether the evidence was cumulative to other testimony). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C.173, 460 S.E.2d 368 (1995).

Finally, petitioner's guilt was conclusively established by his DNA found in the white socks which also contained the blood of Reverend Eichelberger and which were found in close

proximity to the murder weapon which contained Reverend Eichelberger's DNA.[12] Further, it was established separate from the challenged evidence, that petitioner had worked in the trucking and construction industry and had knowledge of and familiarity with a *winch bar,* the murder weapon. And, petitioner's identity was established by the victim's neighbor who placed petitioner at the crime scene just hours before the murder of the victim. Finally, petitioner was placed in the area of the victim's home by his theft of the truck from Camden and his abandonment of the same, with fencing material wrapped around the truck's axle, close to the crime scene one (1) day before the burglary and assault of Reverend Eichelberger. Further, this evidence established why petitioner was on foot on the day the victim was murdered and was in need of Reverend Eichelberger's assistance. As a result, petitioner's guilt was proven independent of *the challenged evidence.* State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001)(even if an identification procedure is impermissibly suggestive, the admission of other evidence that positively identifies a defendant renders such procedure harmless error). Any error in the admission of Ms. Perry's in-court identification was harmless beyond any doubt.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari must be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

[12]The perpetrator of the murder was seen standing on the victim's front porch immediately after the burglary and assault wearing what appeared to be *white* gloves and holding some type of *metal rod.*

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

By:_____
J. Anthony Mabry
ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, SC 29211

August 13, 2014

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Return to Petition for Writ of Certiorari*** in the foregoing action by depositing copies in the Interagency Mail to Kathrine H. Hudgins, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 13th day of August, 2014.

ANTHONY MABRY
Assistant Attorney General

The Supreme Court of South Carolina

The State, Respondent,

v.

Frankie Lee McGee, Petitioner.

Appellate Case No. 2014-001551
Lower Court Case Nos. 2010-GS-4000121, 2010-GS-4000124

ORDER

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals in *State v. McGee*, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). The petition is denied.

C.J.
FOR THE COURT

Columbia, South Carolina
December 4, 2014

cc:
The Honorable Jenny Abbott Kitchings
The Honorable Jeanette W. McBride
Kathrine Haggard Hudgins, Esquire
Donald J. Zelenka, Esquire
J. Anthony Mabry, Esquire
Alan McCrory Wilson, Esquire
Daniel Edward Johnson, Esquire

FORM 5

2014CP4003323

STATE OF SOUTH CAROLINA)
)
County of Richland)
S.C.D.C. #241658
Frankie Lee McGee)
Full name and prison number (if any) of Applicant)
)
v.)
)
)
State of South Carolina)
)
)
)

IN THE COURT OF COMMON PLEAS

RICHLAND COUNTY FILED
2014 MAY 18 AM 8:41
JEANNETTE W. MCBRIDE C.C.P. & G.S.

APPLICATION FOR

POST-CONVICTION RELIEF

ISTRUCTIONS – READ CAREFULLY

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

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

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

1. Place of detention South Carolina DePartment Corrections Lieber, Corrections Inst Ridgeville S.C.
2. Name and location of Court which imposed sentence Columbia, S.C. Richland County Judicial Center General Session
3. Name(s) of co-defendant(s) (if any) NO Co-DeFendants
4. The indictments number or numbers (if known) upon which and the offences foe which sentence was imposed:
   (a) #2010-GS-40-121 Murder

(b) #2010-GS-40-124 Burglary 1st

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) AUG-10-2011 - Life In S.C.D.C

(b) AUG-10-2011 - 30-Years In S.C.D.C

(c) _____

6. Check whether a finding of guilty plea was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty V

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence? V Yes

_____

8. If you answer "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. S.C. Court of APPeals Columbia, S.C

ii. Division of APPellate DeFense.

iii. _____

(b) the result in each such Court to which you appealed:

i. THe APPeal Court ConFirmed Conviction

ii. APril, 30, 2014

iii. _____

(c) the date of each such result:

i. APril, 30, 2014

ii. _____

iii. _____

(d) if known, citations of written opinion entered pursuant to such results:

i. NO

ii. _____

iii. _____

9. If you answered "no" to (7), state reasons for not appealing:

(a) Sentence WAS APPeRld During Trial

(b) _____

(c) _____

10. (A) State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) InsuFFiCient, IneFFective, Councel

(b) Garanteed BY THe sixth AND Fourteenth

(c) Amendment OF THe U.S. Constatution AND S.C. LAW.

11. State concisely and in the same order the facts which support each ground set out in (10):

(a) Trial Councel Failed To Enter AND

(b) Objection To EVIDence Presented BY

(c) THe Solicitar. During Trial.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) Any petition in State or Federal Courts for habeas corpus or post – convictions relief? NO

_____

(c) Any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8) NO

(d) Any other petitions, motions or applications in this or any other Court?

NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. NO

ii. _____

of Addendum | P, C, R |

Frankie McGee #241658

P, C, R, Addendum

10

(A) APPlicant WAS denied THE EFFective Assistance of Counsel Guaranteed BY THE Sixth AND Fourtenth Amendment of THE U.S. Constitution And South Carolina LAW AND AS A Result WAS PreJudiced When Council Failed To obJect To THE Introduction of InAdmissible EViDence.

10(A) Trial Council Failed To Enter AN obJection When THE Solicitor Introduced EViDence of

① A Stolen Truck Found A Mile AWAY

② A metAl BAr Found In THe Neibhores BACK YArd Inside A Fence.

③ A PAir of Socks Found on THE Ground ACross THE ROAd In A Field Foot PASS on ANother street. Which Contained Touch D, N, A on THE Socks Belong To THE SUSPect Arested THAt night AND PositiVily IDenti Fied.

PCR Addendum

10(A) During Trial: Councel With Held Evidence From The Jury. Causing The Defendant To Be Found Guilty

① A Recorded Interveiw From The Witness At The Police Dept 3-Days After The Incident Happen.

② The Witness WAS At The Victim House To Have Sex For money. Also During This Recorded Interview On The Witness She Said That She Did Not See No one Inside The Victim House During The Burglary And When She Left The House She Did Not See No one Outside of The Victim House. Also In The Police Incident Report That night She The Witness Wrote Statements of Truth On A Suspect NAme (David Williams) At scene of Crime AND Positivily IDentified Him In A Police Show up Procedure AS The only suspect In The Victim Yard. The night of The Incident. With A object In His Hands.

③ SOCKS Found on The Ground ACross The Road In A Field. During Trial The D,N,A Expert Testified on Stand That The Same Suspect Arrested BY The Police AND Positivily IDentified BY The Witness His D,N,A WAS Present

iii. _____

(b) the name and location of the Court in which each was filed:

i. No APPLication WAS Filed

ii. _____

iii. _____

(c) the disposition thereof:

i. NO

ii. _____

iii. _____

(d) the date of each such disposition:

i. NO

ii. _____

iii. _____

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

i. NO

ii. _____

iii. _____

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

NO

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

(a) which grounds have been presented:

i. NO

ii. _____

iii. _____

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

i. NO

ii. _____

iii. _____

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

(a) P, C, R

(b) _____

(c) _____

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

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petition, motion or applications with respect to this conviction, which you filed? NO

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

(a) the name and address of each attorney who represented you:

i. Douglas Steven Strickler. ESQ

ii. Fielding Pringle. ESQ

iii. Columbia, S.C. Richland County Public Defen

(b) the proceeding at which each attorney represented you:

i. Douglas Strickler - Court of General Sessions

ii. Fielding Pringle - Court of General Sessions

iii. _____

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

To Seek Relief In HAving THE Convictions (Reversed AND or Remanded) or VACated AND Corrected.

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Richland)

VERIFICATION

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

5-15-14

Frankie Mcgee

SWORN to and subscribed before me this 15th Day of May, 2014

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Frankie Magee, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefore. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Frankie Magee
Applicant

SWORN to and subscribed before me this 15th
Day of May, 2014

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

RICHLAND COUNTY
FILED
2014 MAY 18 AM 8:41
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Frankie McGee, #241658, Applicant, v. State of South Carolina, Respondent.	2014-CP-40-03323 **RETURN AND MOTION TO DISMISS WITHOUT PREJUDICE**

Respondent, making its Return to the application for post-conviction relief, filed May 18, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the April 2010 term of the Richland County Grand Jury for Murder (2010-GS_40-0212) and Burglary in the First Degree (2010-GS-40-0124). Douglas Strickler, Esquire and E. Fielding Pringle, Esquire, represented the Applicant. Applicant proceeded to a jury trial before the Honorable Clifton Newman, where he was convicted as indicted on August 10, 2011. Judge Newman sentenced him to life imprisonment for Murder and thirty years imprisonment for Burglary in the First Degree.

Applicant filed a Notice of Appeal and an appeal was perfected on his behalf. He is represented by Appellate Defender Kathrine Hudgins on this appeal. This matter is presently pending before the South Carolina Court of Appeals.

II.

Applicant filed an application for Post-Conviction Relief with the Richland County Clerk of Court on May 18, 2014, citing several allegations from which relief has been requested.

However, this matter is currently on appeal before the South Carolina Court of Appeals. Under Rule 227, SCACR, and S.C. Code Ann. 17-27-20(b) (1985), Respondent submits that at the present time, post-conviction relief is not available to Applicant because his direct appeal is pending before the appellate courts. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Therefore, Respondent submits that this application for post-conviction relief must be summarily dismissed without prejudice until such time as the direct appeal is resolved.

III.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, Respondent moves to dismiss the application without prejudice because of Applicant's pending appeal which is directly connected to his conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

PostOffice Box 11549
Columbia, South Carolina 29211

By: Megan E. Harrigan
Attorneys for the Respondents

June 9, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2014-CP-40-03323
	)	
FRANKIE MCGEE, #241658	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Motion to Dismiss without Prejudice** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Frankie McGee, #241658
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina 29472

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

DATED this 9th day of June, 2014.

Kelly Oppenheimer, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Frankie McGee, #241658, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT 2014-CP-40-03323 **ORDER OF DISMISSAL WITHOUT PREJUDICE**

RICHLAND COUNTY FILED
2014 JUN 11 AM 9:30
JEANETTE W. WALKER
C.C.P. & G.S.
RIDE

This matter comes before the Court by way of an application for post-conviction relief filed on May 18, 2014.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the April 2010 term of the Richland County Grand Jury for Murder (2010-GS_40-0212) and Burglary in the First Degree (2010-GS-40-0124). Douglas Strickler, Esquire and E. Fielding Pringle, Esquire, represented the Applicant. Applicant proceeded to a jury trial before the Honorable Clifton Newman, where he was convicted as indicted on August 10, 2011. Judge Newman sentenced him to life imprisonment for Murder and thirty years imprisonment for Burglary in the First Degree.

Applicant filed a Notice of Appeal and an appeal was perfected on his behalf. He is represented by Appellate Defender Kathrine Hudgins on this appeal. This matter is presently pending before the South Carolina Court of Appeals.

In accordance with Rule 71.1(b), SCRCP, this Court finds that post-conviction relief is not available to Applicant at the present time because his direct appeal is pending before the South Carolina Court of Appeals. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Therefore, this Court finds that this Application for post-conviction relief must be summarily dismissed without

SCANNED

prejudice until such time as the direct appeal is resolved.

IT IS THEREFORE ORDERED that the Application filed on June 25, 2012, be denied and dismissed without prejudice.

AND IT IS SO ORDERED!

L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

August 12, 2014
Columbia, South Carolina.

FORM 5

2015CP4000241

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF Richland)
Frankie Lee McGee #241658)
Full name and prison number (if any) of Applicant.)
)
v.) APPLICATION FOR
)
State of South Carolina) POST-CONVICTION RELIEF
)

RICHLAND COUNTY FILED
2015 JAN 13 PM 3:33
JEANETTE W. McBRIDE C.C.P. & G.S.

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention South Carolina Dept. Corrections
2. Name and location of Court which imposed sentence Judicial Center-Richland County
3. Name(s) of co-defendant(s) (if any) No-Co Defendant.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) #2010-GS-40-121 Murder
   (b) #2010-GS-40-124 Burglary 1st
   (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) AUG-10-2011-Life In S.C.D.C.
   (b) AUG-10-2011-30-Years In S.C.D.C.

Revised 3/2003

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty V

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

V Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. S.C. Court of APPeals Columbia, S.C.

ii. Writ of Certiorari S.C. Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. APPeal Court Confirmed Conviction

ii. Supreme Court Denied THE Hearing

iii. _____

(c) the date of each such result:

i. APPeal Court 4-30-14

ii. Writ of Certiorari 12-14-14

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. No

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) APPeal Court

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

S.C.D.C

FRANKIE LEE McGEE #241658

P, C, R, — Addendum — Amendment

(A) APPLICANT: FRANKIE LEE McGEE # 241658 WAS Denied THE Effective Assistance of Council Guaranteed BY THE SIXth AND Fourteenth Amendment OF THE U.S. Constitution AND South Carolina LAWS AS A Result WAS PredJudiced When Council FAild To obJect TO All THE InAdmissable EVIDence Introduction. Before AND During Trial (8-1-11). In Presence OF THE Jury.

(B) Trial Council Failed To Enter AN obJection When THE Solicitor Introduced In Admissable EVIDence During Trial. AGAINST THE DeFendant

① A Stolen Truck Found Parked At A Towing ImPound Yard. 1 mile AWAY From THE Victim Home. No one WAS Seen Driving THE Truck In Columbia OR In THE NeibhoreHooD. THE DeFendANT WAS Not CHARged for A Truck THEFt During Trial AND NO D.N.A From DeFendant In or on THE Truck At THE Towing ImPound Yard When Truck WAS Found. AND Given BACK To THE Owner. Nothing WAS RePorted missing From Truck.

P, C, R - Addendum - Amendmet

(2) A metal Bar Found ACross THE Road AWAY From THE Victim House In THE Neibhore Back Yard Inside A Fenced AreA on THE Ground In THE GrASS NO D, N, A From THE DeFendANt WAS Present on THE Metal BAr When Found. During Trial It WAS Not Proven Where THE obJect CAme From Also During Trial A WitnesS (TemekA AshFord) PositivilY IDentiFied A SusPect THe SAme night minutes AFter THE IncIdent HAPPen ANd She Wrote StAtements In A Sworn oATh In DetAil TO THE Police ANd Said (DAVid WilliAms) WAS THE SusPect She Seen In THE Victim YArd With White PlAstice Gloves ANd Holding A Stick or A MettAl PiPe In His HANds No one WAS Seen Inside. THE House Before or AFter THE Incident.

(3) THE DefendAnt Mr. McGEE WAS Not Seen or IDentiFied AS A SusPect BY No one on THAt night THE IncIdent HAPPen or THE YeAr AND NO D, N, A From THE DefendAnt on THE obJect Neither At THE Victim House or ProPerty.

P,C,R,-Addendum-Amendment

(4) A Pair of Socks Found on THE Ground ACross THE Road on A Foot Paith In A Field During Trial on Stand THE D,N,A ExPerf TestiFied THAt THE SusPect(DAViD Williams) D,N,A WAS Present on THE Socks He WAS Also PositiviLy IDentiFied As THE SusPect In THE Victim Yard BY THE Witness (Temeka AshFord) No one WAS Seen With or using ANY Socks THAt night or THAt DAY. During Trial D,N,A ExPert TestiFied THAf A 3, PeoPle Touch D,N,A MixEr WAS Present on THE Socks When Found on THE Ground In A Field ACross THE Road. NeXt To A Yellow House PitchErs TO ProV AlSo. Where Socks Were Foud

(5) During Trial(8-1-11) THE Councelor For THE DeFendAnt WitheLd EViDence From THE JurY A ReCorded InterView on THE Witness At THE Victim HOUSE When THE Incident HAPPen 3 DAYs LAtter At THE Police DEPt She said She DiD NOt See No one Inside or outside THE Victim House Neither DiD She See ANY one Who Committed THE Crime At THE Victim House She Also Said In THE Recorded InterView It WAS DArk AND She DiD Not See THE Person FACe In THE Victim YArd. THAt night. She Said She onLY SAW White PLAstic Gloves.

P, C, R, - Addendum - Amendments

(6) Councel Witheld Evidence From The Jury Concerning A Recorded InterView on other SusPects THAt Told THe Police Who HAd Committed THe Crime AND Where To Find THe EViDence used In THe Crime Also Who HAd It.

(7) Councel FAild To obJect To THe InconsitAnt Statements From THe Witness on StAnd During TriAl (8-1-11) THe IncidenT HAPPen on (MAY, 3, 2009) (11:40 Pm) THe Witness (TemekA AshFord) Said In A Police RePort THe Person She saw In THe Victim YArd THAt night At (11:45 Pm) WAS WeAring A White Shirt AND Blue JeAns During TriAl (8-1-11) on StAnd She TestiFied AND Said THe SusPect In THe Victim YArd WAS WeAring KHAKiS. InConSistAnt StAtements. About Clothing During TriAl.

(8) Councel FAild To obJect TO THe Error StAtements During TriAl From THe ProseCuter TO THe Jury SPeculAtionS on WhAt HAPPen When She WAS Not Present At THe Crime Scene When It HAPPen MiSSleAding THe Jury. on StAtements.

P, C, R - Addendum - AMendments

(9) Councel Faild To obJect To THE Statements From THE Investagator THOMAS White on Stand For Committing PerJury About Wher THE SOCKS Were Found. THE Columbia Police Dept Incident RePort on (5-3-09) INDICATED THAT THE PitChures TAken of THE Socks When Found Were ACross THE ROAD In A VACANT Field on THE Ground Next To A ABANDON Yellow House. During Trial (8-1-11) Investagator THOMAS Lied on StAND During Trial AND Said THE SOCKS Were Found Next To A Light Pole He Committed PerJury Neither WAS Investagator THOMAS Present At THE Crime Scene THAT night S, L, E, D ! Incident RePorts. He WAS NOT Present.

(10) Councel FAild To obJect To THE Prosecuter USing A Secretely Hidden TAPe Recorder. During THE Interogation On THE DeFendant 11 monthes AFter THE Incident HAPPen THE DeFendant DiD Not Know He WAS Being Secretly ReCorded AGAinst His Will Also During Trial It WAS Proven THE TAPE ReCorder WAS Being Turned on AND OFF only Recording Parts of THE Interogation on DeFendant.

P, C, R, - Addendum - Amendment

(11) Councel Failed To object To THE Investagator Reese Committing PerJury On Stand AFter A Sworn oath of Truth During Trial (8-1-11) Investagator Reese Lied on Stand AND Said He AND Investagator THOMAS WAS on THE Crime Scene At THE Victim House For Hours on THE night THAT THE Incident HAPPen on (5-3-09) At 11:45 PM THE Columbia Police Incident RePorts Officer Reese WAS At THE Crime Scene For 4 Minutes AND LeFt THE Crime Scene OFFicer THOMAS WAS Not At THE Crime Scene until THE NEXT DAY. PerJury on Stand During Trial.

(12) During Trial (8-1-11) (Temeka AshFord) THE Witfnes At THE Victim HOUSE TeSTiFied On STAND She DiD Not See THE BurgIARY AND She DiD Not See THE ASAULT on THE Victime She only HeARd A Noise THen She RAN Down THE Street To Her CAr She Said She DiD Not See NO one In THE HOUSE or OUT Side THE HOUSE When She LeFt. AND RAN TO Her CAr. Down THE Street ON A Side ROAD.

Frankie McGee #241658 - S.C.D.C.

P, C, R, - Addendum - Amendment

(13) The Witness (Temeka Ashford) (5-3-09) Lied To The uniform Police At The Crime Scene minutes After The Incident HAPPen She Said THaT She WAS Not Inside THE Victim House When THE Incident HAPPen. False Statement. To Police She WAS THere To HAVe SeX For Money. THE Witness (Temeka Ashford) DiD Positivily IDentiFY (DAVid Williams) AS THE SuSPect She SAW IN THE Victim Yard Wearing Blue JeANS AND A White Shirt With White Plastic Gloves on His HANds With A Long Stick OR PiPe She Also Took A Sworn oATh To Tell THE Truth AND Wrote A 2, PAige HAND Written Statement In DetAil AND She Said It WAS Him She SAW (DAViD Williams) He WAS Also Arrested BY THE Columbia Police DEPt THE SAME night MAtching Clothes DeSCriPtion THE Arresting officer TestiFied on StAND. TO THE Police RePorts.

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PAGES

P, C, R, - Addendum-Amendment

(14) THE DeFendAnt Frankie Lee McGEE DiD Not Committ THis Crime Neither WAS He Present In THE AreA or NeibhoreHooD When THE Incident HAPPen on (5-3-09) At (11:45 PM) WronFul ConViction. on THE DeFendANt (FRANKie Lee McGEE).

(15) During TriAl (8-1-11) Investagator Reese While on StAnd under oAth ReViewd BY ReAding THE HANdwritten StAtements From THE Witness At THE Scene of THE Crime minutes After THE Incident HAPPen She Wrote THE Person She PositiviIY IDentiFied AS THE SusPect In THE Victim YArd WeAring Blue JeAns AND A White Shirt With White PlAstic or Rubber Gloves on His HANds Holding A Long obJect In His HAnds WAS Arested THE SAme night BY THE Columbia Police DePt. After He RAN Home ANd WAS Found Hiding In THE Closet She Said He WAS WeAring DiFFerent Clothes But It WAS Him. His NAme Is (DAViD WilliAms) THE other SusPect WAlking With Him WAS NeVer IDentiFied or Arested. Inside THE Victim House on THE Floor WAS A BlooDY Shoe Print THE Police Dont Know Who It Belongs TO No Ctothing WAS TAken From THE SusPects Home TO BE Tested For D, N, A He WAS Found Hiding At Home.

S.C.D.C

FRANKIE MCGEE #241658

P, C, R, - Addendum - Amendment

During Trial (8-1-11) Councel With Held Evidence From The Jury Concerning The Stolen Truck From Camden S.C.

(A) The owner Testified on Stand During Trial And Said When He Received The Truck Back Nothing WAS Reported missing Inside or outside The Truck The Initials on The metal Bar Did Not Belong To No one At The Compony Where The Truck Came From. Camden Police Dept Did Not Charge The Defendant With A Truck Theft Columbia Police Dept Did Not Charge The Defendant With A Truck Theft The Defendant D.N.A WAS Not on The Truck or In The Truck When Found Parked At The Towing Compony Impound Yard office. No one WAS Seen In The Truck or Around The Truck When Found In Columbia At The Towing Impound Yard office. The Police Reports Indicate That The Defendant WAS Already In Columbia At The Metal Recycling Plant on The Same DAY Before The Truck WAS Stolen From Camden S.C. 1 And A ½ Hours AWAY From Columbia, S.C.

P.C.R. - Adendum - Amendment

During Trial (8-1-11) Councel Failed To ObJect To THE metAl BAr THAt WAS USed AGAinst THE DefendAnt

(B) THE ColumbiA Police DepArt IncidenT RePort on (5-3-09) INDICATES THE only Person PositivilY IDentiFied BY THE Witness At THE Scene BY (TemekA AShFord) WAS (DAVID WilliAms) In A HAND Written StAtements AFter She Swore To Tell THE Truth She PositivilY IDentiFied (DAVID WilliAms) THAt night AS THE SusPect In THE Victim YArd THAt night At 11:45 Pm With A Long MetAl ObJect In His HANds WeArring White PlAstic or Rubber GloveS on HANdS He WAS Also Arrested BAsed on THE Clothing DescriPtion Given To THE Police From THE "911" CAll Also THE "911" CAll WAS Lost Before TriAl StArted on (8-1-11) THE DefendAnt WAS Not IDentiFied or Seen In THAt NeibhoreHOOD THE night of THE IncidenT Neither THAt YeAr It HAPPen THE uniForm Police TestiFied on StAnd THAt (DAVID WilliAms) WAS WeArring A White Shirt AND BlueJeANS OR DArk PANTS When He Foot CHASed Him Home.

P.C.R - Addendum - Amendment

(C) During Trial (8-1-11) Councel Failed To object To Prosecution opening Statements on Speculations About What HAPPen When She WAS Not Present At THE Crime Scene THAt Night THE Incident HAPPen. There WAS No Police Incident RePort. AND No Witness To Testify on StaNd to Prove THE Allegation's Said BY TIte Prosecuter During THE Trial Missleading THE Jury With False Statements. opening AND Closing Statements. About What HAPPen At THE Incident on (5-3-09) At THE Victim House.

(D) Councel Failed To Advise THE Judge Before Trial Started THAt THE Columbia Police DEPt Investagators Intemgated THE DEFendant AND CHArged THE DEFendant With A WArrant DAted (MAY, 6, 2009) THE DEFendant WAS Also TransPorted From S.C.D.C To THE Richland County Detetion Center on THE Same Wrong WArrant THE Burglary AND THE ASault HAPPen In Columbia on (MAY, 3, 2009 - SUNDAY) THE DEFendANt WAS Served A WArrant DAted MAY, 6, 2009 - WED.

P, C, R, - Addendum - Amendment

(E) During Trial (8-1-11) Councel Failed To Advise The Judge THAT on A Capitol murder CHArge THE InVestAgator must Serve THe SusPect THe Correct WArrant ProperlY DAted. THE Columbia Police Dept InvestAgators DiD Not Serve mr. McGEE THE Correct WArrant Before Neither During Trial THE DefendAnt WAS CHArged Convicted ANd Sentenced To Prison on THE Wrong WArrant InDiCating THE Incident HAPPen on (MAY, 6, 2009- WED) Also THE Interogation WAS Concerning WhAt HAPPen on MAY, 6, 2009-WED THE BurglAry ANd ASAult HAPPen on (MAY, 3, 2009- SunDAY).

(F) (8-1-11) Before Trial Started THE Prosecuter Instructed THE Judge THAT THE only Witness At THE Crime Scene THE night OF THE Incident Will Not Be Able To Do ANY Kind of In Court IDentification on THE DefendAnt Also She HAS AlReadY PositivilY IDentiFied A SusPect THE Same night At THE Crime Scene minutes After THE Incident HAPPen.

P, C, R, - Addendum - Amendment

Interogation on Defendant

(G) The Incident At The Victim House HAPPen on (MAY, 3, 2009) In Columbia S.C. on (March, 2010) Three Columbia Police DePt Investagator Interogated THE DeFend--ANt While Incarcerated on A unRelated CHArge In Prison S.C.D.C. At WAtEree River Correction In Sumter County S.C. During THis Interogation THE Investagator (Kevin Reese) Forged THE DeFendAnt NAme On THE MirandA Wright's PaPers BeCause THE DeFendAnt ReFuse To Signe ANY PaPers Also During THis Interogation on THE DeFendant Investagator (Kevin Reese) THReaten To PHYSICALY ASAULT THE DeFendant BY Punching His Fist Into THE CHAir AND Table Close To DeFendAnt FACE AND HeAD Also Investagator (Kevin Reese) Asked THE DeFendAnt To Shake HANds With Him While Doing So Investagator (Kevin Reese) Squeezed THE DeFendANt HAND AND Twisted His Arm AND THE Investagator (Reese) Started Shouting At THE DeFendAnt Confess! Confess. THE TWO Hidden TAPE ReCorders WAS Also Turned on AND off With A Remote Control During THE Interogation on mr. McGEE one Year AFter THE Incid-

P, C, R, - Addendum-Amendment

Interogation On Defendant

(H) The Columbia Police Dept Investagators Interogated The Defendant on (March, 2010) 11, Monthes After The Incident Happen In (May, 3, 2009) The Investagators Secretly Recorded The Interogation Without The Defendant Knowing He WAS Being Recorded. They used Two Digital Remote Controll Tape Recorders Also It WAS Proven During Trial The Hidden Tape Recorders WAS Being Turned On And off During The Interogation only To Record Parts of The Interogation on The Defendant. Also Investagator (Kevin Reese) Threaten To HAVE The Defendant Killed While In Prison. During The Interogation (March, 2010)

(I) Investagator (Kevin Reese) Called S.C.D.C To HAVE Mr. McGEE Put on Solitary Confindment 3-DAYS Before The Interogation NO FOOD NO WATTER NO Mental Health Medicine NO Blanket Mr. McGEE WAS Threaten And Forced To Talk To The Investagators. BY S.C.D.C, Officers

P, C, R, Addendum-Amendment

(J) During Trial (8-1-11) Councel Faild To object To Four Witnesses on Stand During Trial.

(1) (Temeka Ashford) Testified on Stand THAT She DID Not see No one Inside or outside THE Victim House During THE Burglary or THE ASSAULT She only Heard A Commotion AND Noise. She Also Positivily IDentiFied A SusPect THE Same night minutes After THE Incident HAPPen AND She Wrote Statements of Truth on Him In Detail His NAme WAS (DAvid WilliamS). He WAS WEARing BLUE JEANS AND A White Shirt

(2) (LARRY HARP) NEXdoor Neibhore TestiFied on Stand TO SAY He SAW THE DEFENDANT At THE Victim HOUSE At 3:30 AND 5:30 THE SAME DAY TALKing TO THE Victim In His YArd THE DEFENDANT WAS WEARing A FOOT BALL JERZY AND Denim Shorts With A PLate OF FOOD In One HAND AND A CUP In THE other HAND He TestiFied THAT After Mr. MCGEE LEFT THEnHe Went over To TALK To THE Victim AnNothing WAS Wrong THE InCident HAPPen At THE Victim HOUSE At 11:45 PM THE Witness (LARRY HARP) TestiFied He DID Not See No one At THE Victime HOUSE THAT NIght At 11:45 PM

P, C, R, Addendum - Amendment

(3) (IVAN Moore) Testified on Stand To Say He Saw The Defendant Mr. McGEE In The Neibhore Hood The month of The Incident He Lives Two miles AWAY From The Victim AND He DiD Not See The Defendant At The Victim House Neither DiD He See The Defendant THE Night of THE Incident. (IVAN moore) HAS Seven Convictions of Drugs AND Gun's He Also HAS Seven more CHarges Pending Court Trial Before He TestiFied on StAND. AGainst Defendant. For The ProseCuter.

(4) (Michell Perry) TestiFied on StAND To Say She SAW THE DeFendANt Attend Church With THE Victim 3-monthes Before THE Incident HAPPen THE Police Showed Her A Single PHoto OF THE DeFendANt For IdentiFiCation PurPoses She TcstiFied THAt She HAS Never Ben In THAt CHurch AND THE PHoto OF THE DeFendANt WAS A MUG-Shot PitChure of DeFendANt, She Said She HAS Never Seen THE DeFendANt At THE Victim House She Work Next Door TOO THE CHurch No one Attends THE CHurch CAnnot IDentiFy THE DeFendANt - As Being At CHurch THE Witness DiD Not See THE DeFendANt THE month OF THE Incident She Said She SAW THE DeFendANt THree-monthes Before THE In cident HAPPen.

P, C, R, - Addendum - Amendment

— Councel Failed To oBJect —

(5) During Trial (8-1-11) There WAS No Witneses And No Police Incident Reports To SAY Mr. McGEE Committed ANY CRime No one Testified During Trial To SAY Mr. McGEE WAS At THe Victim House THAT Night When THe Incident HAPPen At 11:45 PM THe Witness (Temeka AshFord) DiD Positivily IDentiFY A SusPect NAme (DAViD Williams) Minutes AFter THe Incident HAPPen At THe Victim House She Also Wrote A Two PAge StAtement Of Truth In DetAil She Said It WAS Him Also A DesCriPtion of SusPect (6 FT 1" - TAll 180 - or - 200 LBS) White Shirt AND Blue JeANS Wearing White PlAstic Gloves on HAND's She TestiFied THAt She DiD Not See THe FAce or Could Not See THE FACE BECAUSE It WAS REAl REAl DArk AND NO Lights TO See.

(6) Mr. McGEE Is 5 FT 8" AND 230 LBS Neither WAS Mr. McGEE IDentiFied THAt Night or THAt YeAr of THe Incident AS Committing ANY Crime

P, C, R, - Addendum - Amendment

(7)

During Trial (8-1-11) THE Witness (Temeka Ashford) While on Stand And Under oath Testified THAT THE Person In THE Victim Yard THAT night At 11:45 PM WAS Wearing KHAKiS And She DiD Not See His FACE or Could Not See A FACE It WAS "Real Real" Dark And No Street Lights on.

(8) Councel Failed To ObJect To THE D,N,A Extracting Procedure Used on THE Socks Found ACross THE ROAD In A Field on A Foot Path Near A Abandon House onestreet over From THE Victim Resident No one WAS Seen With or Using ANY Socks THAT Night Also THE D,N,A ExPert TestiFied on Stand During TriAl (8-1-11) And SAid THree PeoPle D,N,A Is on THE Socks. Also (DAViD Williams) A SuSPect PositiviLy IDentiFied ANd Arested THE SAme Night After He RAN From THE Police on Scene His D,N,A Is on THE Socks AND THE Witness (Temeka AshFord) PositiviLy IDentiFied Him As THE SuSPent In THE Victim YARD THAT Night And She Wrote A Two PAge StAtement In DetAil And Said THAT He WAS THE Person She SAW THAT nigHt In YARd

FRANKIE McGEE #241658 - S.C.D.C.

P,C,R, Addendum-Amendment

(9) Councel Failed To objECT TO THE Touch D,N,A EXtracting Procedure's used To [redacted] EXtract D,N,A From THE Socks Found on THE Ground ACross THE ROAD In A Field THE First D,N,A Test For Touch D,N,A WAS NegAtive On THE DefendANt Mr. McGEE THis WAS (MAY, 09) Eleveen monthes LAter (3-12-10 A Procedure WAS USed To EXtract Touch D,N,A When THE Protocol MANuel For EXtracting Procedure's DOES Not List THE Procedure used For obtaining A Touch D,N,A. THer IS No MANuel Listed For EXtracting Touch D,N,A. Also When Tested THree PeoPle Touch D,N,A WAS Present on THE Socks InCluding A SusPect NAme (DAVid Williams) He WAS Also PosiTivily IDentiFied BY THE Witness (Temeka AshFord) THE same night minutes AFter THE Incident HAPPen At THE Victim House He WAS Also Arrested THAt SAme Night BY THE UniForm Police In THE NeibhoreHooD Running From THE Police on THE CRime SCene. minutes AFter THE Incident HAPPen.

TRANKIE MCGEE #S.C.D.C.-241658

P, C, R, - Addendum - Amendment

During Trial (8-1-11) Councel Failed To object TO THE Prosecuter using THE Clerk of Court From Kershaw County To TestiFY on Stand In Richland County Concerning THE Defendant Mr. McGEE Pleading Guilty To A Burglary 2nd And 3rd In kershaw County 2 Years Prior Before He WAS CHArged With Burglary 1st In Columbia, Richland County. Mr. McGEE DiD Not TestiFY on StAND During Trial (8-1-11) Also THE Burglary 2nd AND 3rd Mr. McGEE Pleaded Guilty TO In kerShAW County Years Before He WAS CHArged With THE Burglary 1st In Richland County Were Not Connected. In No WAY.

During Trial (8-1-11) No one WAS Seen Burglarizing THE Victim House No one WAS Seen Inside Neither outside At THE Time OF THE Incident Mr. McGEE D, N, A IS Not Inside or outside Victim House. Mr. McGEE D, N, A Is Not on THE obJect USed In THE Crime. Mr. McGEE WAS Not IDentiFied BY No one THAt Year. Also THE Wittnes At Crime Scen (Temeka AshFord) Positivily IDentiFied A SusPect or THE Same night AND She Wrote Statements on Hi of Truth In Detail on Him At Crime Scene.

(a) InSufficient IneFfective, Council
(b) Guaranteed BY THe Sixt ANd Fourteenth
(c) Amendment of THe U.S. ConStatution ANd The S.C. LAW.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Council Faild To Enter ANd obJection
(b) To In AdmisSable EViDence PreSented To
(c) THe JurY DuriNg Trial BY THe ProSecuter

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. NO Petitions NO APPlicAtions
ii. _____
iii. _____
iv. _____

(b) the name and location of the Court in which each was filed:

i. NO Court
ii. _____
iii. _____
iv. _____

(c) the disposition thereof:

i. NO DisPosition.
ii. _____
iii. _____

iv. _____

(d) the date of each such disposition:

i. NO DisPositions

ii. _____

iii. _____

iv. _____

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

i. NO Citations

ii. _____

iii. _____

iv. _____

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

NO

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

(a) which grounds have been presented:

i. NO

ii. _____

iii. _____

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

i. NO

ii. _____

iii. _____

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

(a) Direct APPeal

(b) Writ of Certiorari

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

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

(a) the name and address of each attorney who represented you:

i. Douglas Steven Strickler. ESQ

ii. Fielding Pringle. ESQ

iii. Richland County Public Def, Columbia, S.C

(b) the proceedings at which each such attorney represented you:

i. Pre-limanery Hearing And

ii. Court of General Sessions Trial.

iii. _____

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

Im Seeking Relief In HAving THese CHarges Reverse or Droped

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

NO

Im Seeking Releif To HAVe THese Conviction CHarges VACated, Set Aside, ReverSed AND OR DroPed or Corrected.

STATE OF SOUTH CAROLINA)
)
County of)

VERIFICATION

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

S.C.D.C

Frankie Lee Mcgee #241658

Frankie Lee Mcgee

SWORN to and subscribed before me this 8th day of Jan, 2015.

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

S.C.D.C #241658

Franklin Lee Magee
Applicant
Franklin Lee Magee

SWORN or affirmed to and subscribed before me this 8th day of Jan, 2015.

Ludrean Bryant
Notary Public

My Commission Expires: May 26, 2020

RICHLAND COUNTY FILED
2015 JAN 13 PM 3:34
JEANETTE W. WALDEN C.C.P. & G.S.

Revised 3/2003

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Frankie Lee McGee, #241658, Applicant, v. State of South Carolina, Respondent.	2015-CP-40-0241 **RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed January 13, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the April 2010 term of the Court of General Sessions for Richland County for Murder (2010-GS-40-0121) and Burglary First Degree (2010-GS-40-0124). Applicant was represented by Douglas Stricker, Esq., and E. Fielding Pringle, Esq. Applicant proceeded to trial on August 1, 2011. He was convicted as indicted. The Honorable Clifton Newman sentenced Applicant to life imprisonment for Murder and thirty years for Burglary.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Kathrine Haggard Hudgins, Esq. On April 30, 2014, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). Applicant filed a petition for rehearing on May 15, 2014, which was denied on June 19, 2014.

First PCR Application (2014-CP-40-3323)

Applicant filed an application for Post-Conviction Relief (PCR) on May 18, 2014, alleging:

1. "Insufficient, Ineffective Councel [sic]."
    a. "Trial councel [sic] failed to enter and [sic] objection to evidence presented by the solicitor. During trial."

Respondent filed a Return and Motion to Dismiss Without Prejudice on the basis that Applicant's direct appeal was still pending at the time. On June 11, 2014, the Honorable L. Casey Manning signed an Order dismissing the application without prejudice.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial hearing, Applicant's records for the Department of Corrections, Applicant's prior PCR records, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

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

1. Ineffective Assistance Counsel, in that;
    a. Counsels "failed to enter and [sic] objection to inadmissible evidence presented to the jury during trial by the prosecutor",

III.

Applicant's claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

IV.

Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VI.

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

VII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

(SIGNATURE BLOCK ON FOLLOWING PAGE)

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 11th, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2015-CP-40-00241
FRANKIE LEE MCGEE, #241658	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Anna R. Good, Esquire
Law Office of Anna Good, LLC
Post Office Box 7284
Columbia, SC 29202

DATED this 11th day of June, 2015.

Sara B. Moore, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) **COUNTY OF RICHLAND)** **)** **Frankie Lee McGee)** **SCDC # 241658,)** **Applicant,)** **)** **vs.)** **)** **)** **State of South Carolina,)** **Respondent.)**	**IN THE COURT OF COMMON PLEAS** **2015-CP-40-0241** **AMENDED APPLICATION FOR POST CONVICTION RELIEF**

2015 NOV -2 AM 11:1

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby amended as follows to include **in addition** to prior grounds stated in the original application for post-conviction relief:

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Ineffective assistance of trial counsel – trial counsel failed to have warrants dismissed/quashed, as amended warrants were never served on Applicant;

(b) Ineffective assistance of trial counsel—trial counsel failed to retain eye witness expert on defendant's behalf;

(c) Ineffective assistance of trial counsel—trial counsel failed to object to sentencing judge's belief of facts of the case and sentence;

(d) Ineffective assistance of trial counsel—trial counsel failed to object statements regarding witness Tameka Ashford in opening statments; and

(e) Ineffective assistance of appellate counsel—trial counsel failed to argue the appropriate issues on appeal, including witness Tameka Ashford's testimony being admissible and the admissibility of nearby truck.

18. Add appellate attorney as attorney PCR is addressing: Katherine Hudgeons

LAW OFFICE OF ANNA GOOD, LLC

Anna Good, Esquire
Attorney for Applicant
PO Box 7284
Columbia, SC 29202
803-661-6758
803-403-8752 (fax)

Columbia, South Carolina
This 2nd day of November, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	Docket No. 2015-CP-40-0241
Frankie Lee McGee, Applicant,	)	
vs.	)	**CERTIFICATE OF SERVICE BY MAIL**
State of South Carolina, Respondent	)	

Colleen Shields certifies that on the 2nd day of November, 2015, she served the Amended Application for Post Conviction Relief on Clay Mitchell, Assistant Attorney General, by placing a copy of the same in the U.S. Mail with due and proper postage attached thereto, addressed as follows:

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

By: Colleen Shields

Colleen Shields
Paralegal to Anna Good

LAW OFFICE OF ANNA GOOD, LLC
P.O. Box 7284
Columbia, SC 29202
(803) 661-6758

Columbia, South Carolina
This 2nd day of November, 2015

State of South Carolina)
)
County of Richland)

In the Court of Common Pleas
Fifth Judicial Circuit
2015-CP-40-0241

Frankie Lee McGee,

Applicant,

vs.

State of South Carolina,

Respondent.

Transcript of Record

August 30, 2017
Columbia, South Carolina

B E F O R E:

The Honorable Paul M. Burch, Judge

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

Anna Rawl Browder, Esquire
Attorney for Applicant

Jessica E. Kinard, Esquire
Attorney for Respondent

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

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NO.	DESCRIPTION	I.D.	EVID.

No exhibits marked during proceeding.

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 9:35 a.m.)

THE COURT: All right.

MS. KINARD: All right. Thank you, Your Honor. And may it please the Court: This is the matter of *Frankie McGee v. the State of South Carolina*. It's Case No. 2015-CP-40-0241. We're before the Court on an application for postconviction relief, filed January 13th, 2015.

Mr. McGee is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment for the Richland County Clerk of Court.

He was indicted in the April 2010 term of the Richland County Grand Jury for murder and burglary first-degree. At trial he was represented by Doug Strickler and Fielding Pringle. That trial began on August 1st, 2011, and he was convicted as indicted.

The Honorable Clifton Newman sentenced him to life imprisonment for murder and 30 years for burglary. A timely notice of appeal was filed on his behalf, and an appeal was perfected by Katherine Hudgins of the Office of Appellate Defense.

On April 3rd, 2014, the South Carolina Court of Appeals affirmed his convictions and sentences. He filed a petition for rehearing on May 15th, 2014, which was denied on June 19th, 2014.