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S.C. SUPREME COURT

In The State of South Carolina
South Carolina Supreme Court

Michael Anderson Manigan
Appellant,

) 2016-CP-42-4025

VS.

) Certificate of Service

The State of South Carolina
Respondent,

)
)
)
)
)

I Michael A. Manigan #243544 certify
that I have served the Respondents with a copy
of my Appellant's Pro Se Brief, by placing a copy in
the mailroom hands for mailing, postage prepaid, addressed
as follows:

The Supreme Court of South Carolina
Post Office, Box 11370
Columbia, South Carolina 29211

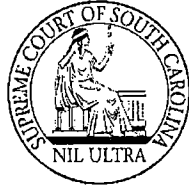
I Michael A. Manigan #243544 certify and
verify under the penalty of perjury that the foregoing
is true and correct.

Michael A. Manigan 5/3/19

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The Supreme Court of South Carolina

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March 28, 2019

Mr. Michael Manigan, 243544
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669

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S.C. SUPREME COURT

Re: Michael A. Manigan v. State
Appellate Case No. 2018-001597

Dear Petitioner:

Your counsel has submitted a petition for writ of certiorari indicating that this appeal is without merit and moves to be relieved as your counsel. *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988). The records of this Court reflect that counsel served you with a copy of the Petition and Appendix.

You may, within forty-five (45) days of the date of this letter, file with this Court a *pro se* response to the petition filed by your counsel. In this response, you may raise and argue any issues you believe the Court should consider in this appeal. Upon receipt of your *pro se* response or the expiration of forty-five (45) days, the matter will be submitted to the Court for its consideration.

If you do decide to file a *pro se* response, the response must be either typewritten or legibly hand printed, and must have at least a one inch margin on all sides. Further, you will need to only submit one copy of your response, and this copy **should not be stapled or bound in any manner.**

In The State of South Carolina
South Carolina Supreme Court

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MAY 07 2019

S.C. SUPREME COURT

Appeal From Spartanburg County

J. Derham Cole, Circuit Court Judge

2016-CP-42-4025

The state,

Respondent,

VS.

Michael Anderson Manigan,

Appellant,

Appellant's Pro Se Brief

Michael Anderson Manigan
Perry Corr Inst
430 Oak Lawn Road
Pelzer, SC 29669

Pro Se

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Statement of Issues on Appeal

1. Was trial counsel ineffective for failure to object to the jury charge on Burglary 1st and Grand Larceny?
2. Was Burglary 1st and grand Larceny considered a double jeopardy claim arising out of the same course action/crime?
3. Was appellant denied a substantial constitutional right to effective assistance of counsel in violation of the 6th Amendment by not requesting a lesser included offense charge when the facts and evidence warranted it?
4. Was trial counsel ineffective for denying appellant's procedural and substantial due process rights by not requesting a 403 and 404(b) determination as required for use of prior convictions similar in nature and failure to request a Calf analysis on the impeachment value of appellant's prior convictions and failure to stipulate the appellant's prior convictions?
5. Was appellant's due process rights violated by counsel's failure to object to the trial court erroneous hand of one hand of all and supplemental jury charge when there was no codefendant in his case?
6. Did the trial court and S.C. Court of Appeals err by not granting appellant a ~~Directed~~ verdict of not guilty pursuant to state v. Mitchell, 341 S.C. 406.
7. Did the trial judge err in denying Manigan's directed verdict motion where, as here, the state failed to submit any direct or substantial circumstantial evidence tending to prove beyond reasonable doubt that Manigan committed 1st degree burglary or grand larceny?
8. Did the trial judge err in charging the jury that "The hand of one is the hand of all" where as here, The investigating officer conceded there was no evidence tying the alleged accomplice to the crimes?

①. Trial counsel ineffective for failure to object to trial courts jury charge on Burg 1st and grand larceny

Applicant contend that the trial court erred in charging the jury that it could find that the offense occurred on December 11, 2010 as opposed to what the indictment for 1st degree burglary stated. Applicant alleges the trial court's error or abridge his right to a fair trial and was a comment on the facts in violation of Article V, § 21 of the South Carolina Constitution.

The pertinent portion of applicant's original indictment states as follows: That the Defendant, Michael Anderson Manigan, did in Spartanburg County, on or about December 10, 2010, willfully and intentionally enter the dwelling belonging to Elizabeth Anne Vandam located at 224 Carlisle Street, Spartanburg, South Carolina without consent and with the intent to commit a crime therein, and that the defendant did enter the dwelling either:

① The Defendant did enter in the night and/or

② armed with a deadly weapon; and/or

③ Caused physical injury to any person who is not a participant in the crime; and/or

④

④ uses or threatens the use of a dangerous instrument;
and/or

⑤ display what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearms,

⑥ committed the crime while possessing a prior record of two or more convictions for burglary or housebreaking or a combination of both.

in violation of section 16-11-311, Code of Laws of South Carolina (1976) as amended.

Against the peace and dignity of the state, and contrary to the Statute in such case made and provided.

After jury selection, the solicitor confirmed that he would seek to prove the offense occurred on December 11, 2018, not on or about December 11, 2010. The indictment was not physically altered to reflect striking of the words "on or about".

During the trial the allege victim and other witnesses testified that the allege incident occurred on Saturday December 11, 2010.

Applicant did not have a chance to defend on the basis of alibi.

⑤

A defendant is entitled to be sufficiently apprised of the offense charged so that he can adequately prepare his defense. *State v. Hardee*, 279 S.C. 409, 413, 305 S.E.2d 521, 524 (1983).

While it is true that the state need not prove the exact date set forth in the indictment unless time is an essential element of the offense or is made a part of the description of it. The State should not be allowed to prove a different date than that set forth in the indictment where the defendant relies upon the defense of alibi, unless the defendant is held to have had knowledge that the state would attempt to prove a different date upon trial. *State v. Pierce*, 263 S.C. 23, 27, 207 S.E.2d 414, 416

Although the indictment in this case was not physically modified, the record shows the state and trial court amended the indictment to specify a certain date, December 11, 2010, and presented its proof accordingly.

The indictment was orally amended from on or about December 11, 2010 to December 11, 2010.

The miscue of failing to physically alter the indictment is not dispositive. Under the

Circumstances of this case, the trial judge's charge constituted error which trial counsel failed to object to, deprived the applicant of his right to a fair trial. Applicant was also denied a right to due process of law in that he never had an opportunity to offer a alibi defense.

If it were not for trial counsel's acts and omissions, the outcome of applicant's trial would have been different. Trial counsel failed to object to both indictments before the jury was sworn.

② Applicant was denied a substantial Constitution Right to Effective assistance of counsel in violation of the 6th Amendment of the U.S. Constitution.

Trial Counsel failed to request the Lesser included offense of Burglary 1st and Grand larceny. Trial counsel's actions, prejudiced the applicant and unduly subjected him to Federal law violations. In *Keble v. United States*, 412 U.S. 205, 93 S.Ct. 1993. The Supreme Court stated although the lesser included offense doctrine developed at common law to assist the prosecution in case where the evidence failed to establish some element of the offense originally charged, it is now beyond dispute that the applicant is entitled to an instruction on a lesser included offense if the evidence such as the case at bar would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. See *Sansone v. United States*, 380 U.S. 343, 85 S.Ct. 1004 (1965), *Berra v. United States*, 351 U.S. 131 *Stevens v. United States*, 162 U.S. 313. Applicant should have been granted through trial counsel's

request a lesser charge to the jury, because the evidence warranted it.

The U.S. Supreme Court ruled in *Stevenson, Supra* that in a case where some of the elements of the crime charged themselves constitute a lesser crime, the applicant if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. In *Spoziono v. Florida*, 468 U.S. 447, 104 S. Ct 3154 (1984) the absence of a lesser included instruction increases the risk that the jury will convict... Simply to avoid setting the defendant free, the goal of the "Beck Rule," in other words is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between Burglary 1st and innocence. *Beck v. Alabama*, 447 U.S. 625. Applicant asserts that trial counsel's failure to request and trial court's failure to charge the jury on the lesser included offense of Burglary 1st not only subjected him to due process rights

Violations under the 14th Amendment, but also clearly subjected him to equal protection rights violation under the 5th Amendment of the U.S. Constitution.

As the result of the Supreme Court ruling and mandates, the very same constitutional equal protection rights should have been afforded to the applicants.

There is a reasonable probability that had trial counsel requested a lesser included offense, there is a reasonable probability that the outcome would have been different.

③ A Trial counsel failed to request to exclude the name and basic nature of the applicant's prior convictions

B Trial counsel failed to request from the trial court a Colf analysis on the impeachment value of applicant's prior convictions when his credibility was a crucial issue in the case.

C Trial Counsel was ineffective for denying applicant's procedural and substantial due process rights by not requesting a 403 and 404(b) determination as required for use of prior convictions similar in nature.

In this case as in any other in which the prior conviction is for an offense likely to support conviction on some improper basis, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the prior convictions, and it was an abuse of discretion to admit the testimony when an alternative was available. The introduction

of evidence that reveal the names and basic nature of a defendant's prior convictions in a prosecution unfairly prejudices the defendant within the meaning of Rule 403 and 404(b)
See *Old Chief v. U.S.*, 519 U.S. 172, 117 S.Ct. 644

On several occasions during trial several witnesses flagrantly violated applicant's rights under Rule 403 & 404(b) SCRE by attacking my character. The prejudicial effect of the misconduct cannot be disputed. As this case turned largely on the jury's credibility determinations of several witnesses who testified.

Rule 403 and 404(b) requires ① a proper evidentiary purpose; ② relevance under 402; ③ a weighing of the probative value of the evidence against its prejudicial effect under 403; and a limiting instruction concerning the purpose for which the evidence may be used. The record does not support the finding of probative value which would support effectiveness of counsel, without a determination, it robs the applicant of the Rule protection. These rules (403 & 404(b)) was never mentioned or considered by the trial court.

A decision to admit applicant's prior convictions without safeguards would be an error of law amounting to an abuse of discretion, State v. Scrivens, 529 S.E.2d 71 and State v. Smick Levich, 234 S.E.2d 230. Trial counsel's acts and omissions fell below the professional norms for attorneys. This issue could have been preserved for appeal. The trial judge did not have the benefit of the guidance recently provided in Coff and Scrivens, supra. The record does not reflect that the trial judge engaged in any meaningful analysis of the relevant factors or that the court balanced the probative effect to the accused.

Error which substantially damages the applicant's credibility as in the case at bar, cannot be held harmless. The testimony by witnesses went to his character and propensity to engage in criminal conduct not to "motive" and in any event, the prejudicial effect of the extrinsic evidence / testimony outweighed any probative value in violation of Lyle and 404(b).

④ Trial counsel violated applicant's Due Process rights by not objecting to the trial court's erroneous jury charge and supplemental jury charge.

The trial court gave a Hand of one Hand of all jury charge at the end of trial which was erroneous. The state chose to indict applicant of Burglary 1st and Grand Larceny as a principle. The indictments gave no indication of the state theory or any specifics involved in the Burglary 1st other than that alleged in the indictment. Gary Manigan an alleged co-defendant was also charged as the principle on the same charge. Both of applicant's indictments specifically stated that the applicant committed the Burglary 1st and grand larceny on or about December 10, 2010 as the principle.

See Indictments Neither indictment included the other defendant's name in it to place each other on notice that they were co-defendants. Nor did the state charge the defendants with criminal conspiracy

For reasons not appearing in the record by indicting the applicant only for the two charges and not indicting Gary Manigan and applicant for conspiracy, The state assumed the burden of proving that applicant and allege co-defendant Gary Manigan were: ① each at the scene of the crime when it happened; and ② that each committed the criminal act. See State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716, 724 (1959). If the nature of the crime is such that the presence of the accuse at the place and time of its commission is essential to his guilt, the burden is upon the state to prove beyond a reasonable doubt that he was then and there present. The on or about scenario does not place the applicant and Gary Manigan together at the same time. The prosecution failed to properly allege or prove a conspiracy or aid and abet theory under which both defendants could be found guilty of Burglary 1st and Grand Larceny, Gary Manigan's Burglary charge and grand Larceny charge was dropped, while he was charged

with receiving stolen goods. Had the state charged the alleged co-defendants with conspiracy, it could have pursued convictions against both defendants under the Hand of one Hand of all theory. However, with the charges dropped against Gary Mamigan, there was no alleged co-defendant to charge to the jury Hand of one Hand of All Theory. Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. State v. Woomer, 276 S.C. 258, 277 S.E. 2d 696 (1981).

To admit evidence under this theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown, which did not occur in this case. The state did not charge both defendants with conspiracy so this approach was unavailable.

While a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the

Indictment facially charges a complete offense, and the state presents evidence which convicts under a different theory than that alleged, *Thomason v. State*, 892 S.W.8, 11 (Tex Crim. App. 1994) [392 s.c. 434] citations omitted.

"The court may not substantially amend the indictment through its instruction to the jury." *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270; *United States v. Miller*, 471 U.S. 130.

The Fourth Circuit has held that regardless of whether a defendant objects, *Stirone* demands reversal when a constructive amendment has occurred. See *United States v. Floresca*, 38 F.3d 706, 713 (4th Cir. 1994) (en banc)

Stating that it would be unfair to deprive a defendant of the grand jury protection; *United States v. Bendall*, 171 F.3d 195, 210 applying *Floresca*

A conviction upon a charge not made in the indictment constitutes a denial of due process. There is a reasonable probability had trial counsel would have objected to the jury charge, there is a reasonable probability that the outcome would have been different.

This principle in turn rests on the broader premise that a person can not incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.

See Stirone, Supra

The instant that the court amends the indictment as in the case at bar the court loses jurisdiction. At that point in time, there is nothing that can cure that defect. It is a jurisdictional defect. Upon an indictment so charged, the court can proceed no further. There is nothing for which the applicant can be held to answer. See Ex Parte Bain v. U.S., 30 L. Ed 2d 849.

Even where the trial court did not permit a formal amendment of the indictment the effect of what it did by charging Hand of one Hand of all / accomplice liability and conspiracy was the same. These were unindicted offenses that were charged to the jury.

The applicant contend and will show that the burden shifting instruction in his trial unconstitutional under Sanstrom v. Montana, 29 S. Ct. 2450 and Francis, 105 S. Ct. 1965

citing S.C. Const. Art. V § 21 the Court states that judges shall not charge juries with respect to matters of fact, but shall declare the law, [A] judge may not instruct the jury in a manner which assumes the truth of the facts needing to be proved: Although portions of the requested charge may be sound, the trial court was not required to dissect the charges and give the jury the unobjectionable parts.

Butler v. Gamma Nu Chapter

of Sigma Chi, 445 S.E.2d 468.

Conviction and sentence should be vacated.

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S.C. SUPREME COURT

M. A. [Signature] 5/3/19

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P.C.I. MAILROOM

(19)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 MICHAEL MANIGAN #243544)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent,)

IN THE COURT OF COMMON PLEAS

2017-CP-42-4025

AFFIDAVIT OF SERVICE BY MAIL

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:

Rodney Wade Richey, Esquire
 Richey & Richey, PA
 PO Box 10916
 Greenville, SC 29603-0916

DATED this the 14th day of July, 2017.

Jennifer Jennison

 Jennifer Jennison, Legal Assistant
 For Respondent

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STATE OF SOUTH CAROLINA	}	IN THE COMMON PLEAS COURT
COUNTY OF SPARTANBURG		
Michael A. Manigan,	}	TRANSCRIPT OF RECORD 2016-CP-42-4025
Applicant,		
-vs-	}	November 15 and 17, 2017 Spartanburg, South Carolina
The State.		

B E F O R E :

HONORABLE G. THOMAS COOPER, JUDGE

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

RODNEY W. RICHEY, ESQUIRE
Attorney for the Applicant

VALERIE GIOVANOLI, ESQUIRE
Attorney for the State

Linda D. Moffitt
Circuit Court Reporter

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No exhibits entered into evidence.

1 (Proceedings November 15, 2017)

2 MS. GIOVANOLI: For the record, this is Michael
3 Manigan vs. the State of South Carolina.

4 THE COURT: All right. Ms. Giovanoli, you may
5 proceed.

6 MS. GIOVANOLI: Thank you, Your Honor.

7 Michael Manigan vs. the State of South Carolina,
8 Docket No. 2016-CP-42-4025.

9 We are before the Court on an application for post
10 conviction relief.

11 To spare you the procedural history, I just wanted to
12 go ahead and request a continuance on behalf of the state.
13 My witness has called in sick, and, unfortunately, we are
14 not ready to proceed.

15 However, there is another matter. Mr. Manigan had
16 filed a pro se letter requesting to relieve Mr. Rodney
17 Richey, and I just wanted to address this motion while
18 we're here on the record.

19 THE COURT: Is that correct -- is that correct?

20 THE APPLICANT: Your Honor --

21 THE COURT: Is that correct?

22 THE APPLICANT: Yes, sir. May I -- may I say
23 something, sir? I --

24 THE COURT: Just a moment. Yeah. Let's proceed with
25 that. Yes. Mr. Manigan, I'll be glad to hear from you.

1 THE APPLICANT: Mr. Richey first come to see me, I
2 took his professionalism the wrong way. And no sooner than
3 I wrote that letter I wanted to get it back, so I couldn't
4 get it back. But I want to retract that. No way I want
5 another counsel. I don't want to file no motion to relieve
6 him of this.

7 THE COURT: Okay.

8 THE APPLICANT: I want -- I want him where he at now,
9 beside me. I need him, sir.

10 THE COURT: All right. Where are you housed?

11 THE APPLICANT: Sir?

12 THE COURT: Where do you stay? Where are you housed?

13 THE APPLICANT: Perry -- Perry Correctional Facility.

14 THE COURT: Okay. What are you in for?

15 THE APPLICANT: A burglary first, a grand larceny.

16 THE COURT: Okay. Do you understand the state wants a
17 continuance?

18 THE APPLICANT: Yes, sir.

19 THE COURT: You got any objection to that?

20 THE APPLICANT: No, sir. I -- I sure don't, sir.

21 THE COURT: Okay. They want to bring your lawyer, and
22 your lawyer is sick today apparently.

23 THE APPLICANT: Yes, sir. I -- okay, sir.

24 THE COURT: All right.

25 THE APPLICANT: All right, sir.

1 THE COURT: His motion to -- with -- motion to relieve
2 counsel is withdrawn.

3 MS. GIOVANOLI: Thank you, Your Honor.
4 Motion for continuance?

5 THE COURT: Let me ask -- just a minute.
6 Is it Mr. Welchel?

7 MS. GIOVANOLI: Welchel, yes, Your Honor.

8 THE COURT: Welchel.
9 Any chance of getting him in this week?

10 MS. GIOVANOLI: I can attempt to contact him, but I
11 can't speak to his availability at this point.

12 THE COURT: This gentleman is about to jump out of his
13 chair for some reason.

14 MS. GIOVANOLI: Okay. And this is Mr. Russell Ghent
15 from the Seventh Circuit solicitor's office.

16 MR. GHENT: Your Honor, may it please the Court.

17 I checked on his whereabouts and was told by two
18 people in his office he'd called in sick. I'll be glad to
19 check and find out the nature of his illness and whether
20 he'd be available during the rest of the week.

21 THE COURT: That'd be a big help.

22 MR. GHENT: Yes, sir.

23 THE COURT: I'd like to move forward with this case.

24 MR. GHENT: Yes, sir.

25 THE COURT: We've got two more days.

1 MR. GHENT: Would Your Honor allow me to go ahead and
2 step out and see if they know?

3 THE COURT: Certainly.

4 MR. GHENT: Thank you, Your Honor.

5 THE COURT: Let's just wait and see if...

6 (Pause.)

7 MS. GIOVANOLI: Your Honor, I have -- James Irby is on
8 Thursday, and there's three experts in that case and three
9 other lay witnesses. Ms. Blanchette expected it to be
10 almost a full day's hearing. So we already have three
11 others to work around with that.

12 THE COURT: I know.

13 (Pause.)

14 MR. GHENT: May it please the Court.

15 THE COURT: Yes, sir.

16 MR. GHENT: I've asked someone to check with the
17 public defender to see if he can find out the nature of
18 Mr. Whelchel's illness. He is my age. He was a classmate.
19 He's not someone who just calls in because he is not --

20 THE COURT: No. I mean, is he still -- is he a public
21 defender?

22 MR. GHENT: Yes, sir, yes, sir.

23 THE COURT: Okay. All right.

24 MR. GHENT: I'll find out something for Your Honor.

25 THE COURT: All right. Or let Ms. Giovanoli and

1 Mr. Richey know.

2 MR. GHENT: Yes, sir.

3 THE COURT: How about your client? How about Mr.
4 Manigan? Can we keep him here?

5 MS. GIOVANOLI: Under your order, I believe so, Your
6 Honor.

7 (Pause.)

8 MR. RICHEY: He's at Perry, which is over in
9 Greenville County. They normally bring them the day of.

10 THE COURT: Okay. Well, that's fine. He doesn't have
11 that far to travel. I just -- I didn't want the state to
12 have to transport him back to the coast and then back up
13 here Friday.

14 MR. RICHEY: Yes, sir.

15 THE COURT: But if he's at Greenville -- and I'm sure
16 he'd just as soon sleep in his own bed in Greenville as he
17 would in the Spartanburg County Detention Center.

18 THE APPLICANT: Yes, sir. Yes. I rather.

19 THE COURT: All right. Well, Friday. We may have you
20 back on Friday.

21 THE APPLICANT: Okay, sir.

22 THE COURT: Good luck to you, sir.

23 THE APPLICANT: Thank you, sir.

24 THE COURT: If not, I don't know when.

25 END OF PROCEEDINGS NOVEMBER 15, 2017

(26)

1 (Proceedings November 17, 2017)

2 THE COURT: You may proceed.

3 MS. GIOVANOLI: Thank you, Your Honor.

4 This is the case of Michael Manigan vs. the State of
5 South Carolina, Docket No. 2016-CP-42-4025.

6 We're before the court on an application for post
7 conviction relief filed November 10th of 2016.

8 Applicant was indicted in June of 2011 for burglary
9 first degree and grand larceny.

10 On January 14th of 2013 applicant proceeded to trial
11 while represented by Richard H. Welchel.

12 On January 16th of 2013 applicant was found guilty as
13 indicted of both charges and sentenced by the Honorable J.
14 Derham Cole to imprisonment for 40 years for burglary first
15 degree and ten years for grand larceny to be served
16 concurrently.

17 Applicant filed a timely notice of appeal. The appeal
18 was perfected. The South Carolina Court of Appeals
19 affirmed applicant's conviction.

20 Thereafter applicant filed an application for post
21 conviction relief alleging various claims of ineffective
22 assistance of counsel.

23 The state is present and ready to proceed. Applicant
24 is also present. He's represented by Mr. Rodney Richey to
25 whom I will hand it over.

Handwritten signature: (27)

Michael A. Manigan
Direct examination by Mr. Richey

1 THE COURT: Mr. Richey.

2 MR. RICHEY: We call Mr. Manigan.

3 MICHAEL A. MANIGAN, having
4 been first duly sworn, testified as follows:

5 THE COURT: Have a seat in the witness box and state
6 your full name for the record.

7 DIRECT EXAMINATION BY MR. RICHEY

8 Q State your name.

9 A Michael Anderson Manigan.

10 Q Mr. Manigan, were you convicted in Spartanburg County?
11 Were you convicted in Spartanburg County?

12 A Yes, sir.

13 Q And what were you convicted for?

14 A First degree burglary and grand larceny.

15 Q Who represented you on those charges?

16 A Mr. Welchel.

17 Q Okay. And what type of sentence did you receive?

18 A Forty years for burglary and ten years for grand
19 larceny.

20 Q Okay. And you filed an application for post
21 conviction relief because you believed that your lawyer did
22 not properly represent you, is that correct?

23 A Yes, sir, it is.

24 Q Okay. And this was a burglary. And what was supposed
25 to have happened in the burglary? Just briefly.

(28)

Michael A. Manigan
Direct examination by Mr. Richey

1 A Briefly?

2 Q Yeah. What happened in the burglary?

3 A Well, the lady house allegedly was broken into and --
4 and some stuff was in a pass where a lot of trash was
5 stored at. It's like a -- it's not a trash dump, but
6 people disregard junk there.

7 And when I went through that pass that night it wasn't
8 none there. And maybe an hour or couple of hours later
9 when we -- that's where we played cards and chess at. When
10 I come back through that pass there was a bag in that area
11 in the pass, and I kicked it and it made a sound. So I
12 looked inside of it and I seen it was a computer screen and
13 something. But I left it.

14 THE COURT: What kind of screen?

15 THE WITNESS: It was a computer monitor or something,
16 but I left it. I didn't -- I didn't pick it up. I didn't
17 take it with me. I left it where it was.

18 A And when -- by me looking in it, I touched something
19 in that bag, and that's how my print got in there. And --
20 and during the trial that's what -- that's what -- that's
21 what -- that's how I got charged with the burglary, because
22 that print was in there.

23 Q And you actually had two trials, right?

24 A Yes. The first trial was a mistrial.

25 Q And you believed that your counsel didn't properly

(29) 10

Michael A. Manigan
Direct examination by Mr. Richey

1 represent you. Did you testify at trial?

2 A Not at the first one, no, sir.

3 Q Okay. You testified at the second one.

4 A Yes, sir.

5 Q And did your lawyer discuss with you the pros and cons
6 about testifying?

7 A No, sir.

8 Q Okay. And you have grounds that your counsel failed
9 to conduct an analysis about your -- about your prior --
10 about impeachment of your prior record, is that correct?

11 A Yes, sir.

12 Q Okay. Can you tell me what you mean? Under 404,
13 correct?

14 A Well, under Rule 403 and 404(b) he didn't -- it's an
15 impeachment court analyst, but he didn't -- he didn't --
16 there was a probate value where you're trying to weigh it
17 and see what should you -- should you -- should it be
18 admissible or not.

19 He didn't -- he didn't do that -- the rule 404 -- 403
20 and 404(b) wasn't even mentioned or considered in this
21 case. He didn't -- he didn't -- did none of that. He
22 didn't -- he didn't weigh no probate value or try to find
23 out should it be admissible or not. He didn't --

24 Q As to your prior record.

25 A Yes. He didn't do that.

Michael A. Manigan
Direct examination by Mr. Richey

1 Q Okay. And in this case there was a cousin or somebody
2 involved, supposedly involved, is that correct?

3 A Well, he -- they say he wasn't involved in it. He
4 wasn't -- he was not involved in it. They -- they
5 claimed -- said in court that he was not involved in it.
6 He just had -- he had received some stolen goods, earrings,
7 from somewhere, and he pawned them.

8 Q And that was part of the -- the supposed burglary,
9 stuff from the burglary, correct?

10 A Yes, sir.

11 Q And were -- were you charged -- let me ask you this.
12 Did you believe that the -- that your counsel did not
13 represent you because he failed to object to the jury
14 instructions?

15 A Yes, sir, that, failed to object to the jury
16 questioning and...

17 Q And what was that?

18 A Excuse me?

19 Q What was that?

20 A Well, it was that one jury instruction he failed to
21 object to, was the hand of one, the hands of all. But
22 there's several issues I have, but the hands of one is the
23 hands of all clearly -- criminal conspiracy saying that
24 one -- one or two or more conspired to commit a crime.

25 So my indictment says it was first degree burglary and

Michael A. Manigan
Direct examination by Mr. Richey

1 grand larceny. The indictment didn't say criminal
2 conspiracy. My indictment didn't say hand of one, hand of
3 all.

4 I'm the only one been charged. So in order for it to
5 be hands of one, hands of all, have to be two or more
6 conspired together for criminal -- in a criminal act.

7 Q Okay. And that other person, was the other person
8 supposed to have been the cousin because he had the stuff?

9 A Yeah. He had -- he had received some earrings from
10 someone.

11 Q And did you ask your lawyer to prepare a defense of
12 third-party guilt?

13 A Yes, but he didn't. He didn't offer third-party
14 guilt. No, sir. He did not.

15 Q And who -- who was the third party that -- that you
16 were alluded to could have been responsible for this crime?

17 A Actually, I don't know, sir.

18 Q Go ahead.

19 A I don't know who it was. I know if he said it wasn't
20 my nephew and it wasn't me, it had to be a third party
21 because I -- it wasn't me. That's what I was asking to put
22 up the argument for.

23 Q Okay. And -- and you did not have any of the items
24 from the house, is that correct?

25 A No, sir, no, sir. Nothing.

Michael A. Manigan
Direct examination by Mr. Richey

1 Q And the only person that had the items was a cousin,
2 correct?

3 A Yes. He had some earrings.

4 Q Did you -- well, did you -- did you believe your
5 counsel should have requested the lesser charge of first
6 degree burglary?

7 A Yes. You know, the case it boils -- it warrants a
8 lesser charge, because, well, by with the lesser charge I
9 could be convicted of a lesser or acquitted or degraded.
10 But by not getting me a lesser charge that -- that -- that
11 raises a greater risk that the jury will convict.

12 But without that it's just like the Beck rule. It's a
13 -- it's a -- it's eliminated fact-finding process. You
14 know, it's all or nothing. You just get charged with
15 burglary first or innocent.

16 So with the lesser -- lesser included offense it could
17 be -- I could be found guilty of that or acquitted of
18 the -- of the greater one. But my attorney didn't -- he
19 didn't. He didn't exercise that -- he didn't exercise
20 that.

21 Q Do you believe he should have objected to the
22 indictments under the hand-of-one-hand-of-all theory?

23 A Yes, sir. I sure do, sir.

24 Q Did your -- did your attorney gather any information
25 that you were not at the scene of this crime?

Michael A. Manigan
Direct examination by Mr. Richey

1 A No, sir.

2 Q Did you provide him with any?

3 A Yes. I -- well, I know the people. You know, I don't
4 understand. I know the peoples. And, no, they -- that
5 print that was on that bag back in that field, yes, I was
6 in that field, but I was not in that house. Whether it was
7 print, latent. They say it was latent prints everywhere,
8 but it wasn't mine.

9 So that print in that -- on that piece of equipment
10 out there in that field where trash at don't constitutes --
11 constitute me being inside or in that premises or on that
12 premises.

13 Q Was there any other evidence to connect you to the
14 crime?

15 A Just that print out there in that field where that bag
16 was, that field of trash.

17 Q Were you offered any plea offers in this case?

18 A Yes.

19 Q What was that?

20 A I think it was 20 years.

21 Q And did you turn it down?

22 A Yes, sir.

23 Q And can did you tell me why you turned it down?

24 A Because why should I accept a plea of 20 years for
25 something I didn't do? So I wanted to turn it down.

Michael A. Manigan
Direct examination by Mr. Richey

1 Q And did you tell your lawyer that?

2 A Yes.

3 Q After you got the first mistrial, is that when you got
4 the offer, or was that before the second trial?

5 A Might have been before the first one. I can't -- I
6 can't recall.

7 Q Do you believe if the lawyer had effectively
8 represented you you would have been found not guilty?

9 A Yes, sir.

10 Q Are you asking this Court to grant you a new trial?

11 A Yes, sir.

12 Q And just one last thing. This -- this thing on
13 third-party defense where you're alleging it was somebody
14 else that you knew or didn't know --

15 A I didn't know. Talking about I didn't know.

16 Q This wasn't about the cousin.

17 A No, sir.

18 Q Okay. Thank you. Answer any questions.

19 A Sir, I also want to bring up the fact about the
20 incorrect -- not the -- not using the correct
21 direct-verdict standard where he done offered direct
22 standard -- you know, the correct verdict or direct --
23 excuse me.

24 Q Take your time.

25 (Pause.)

Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 A That he did not -- that he did not argue the correct
2 direct -- direct-verdict standard. He didn't -- he didn't
3 argue that standard. He didn't object and he didn't argue
4 that.

5 By that print being in that field in that bag, that
6 don't constitute being in the house. I want that -- that
7 that bag was in a field. I come through a field and looked
8 in a bag. That -- just because my print was on that bag,
9 because anyone could've went through that field.

10 I want it to be known that even though a print was on
11 that bag it wasn't -- my print was not in that house. So
12 that did not put me on that premises.

13 Q Right. Just because it was on the bag, that doesn't
14 mean it was in the house. There was none on the house.

15 A None.

16 Q Okay. Thank you. Answer questions the attorney
17 general has for you.

18 CROSS-EXAMINATION

19 BY MS. GIOVANOLI

20 Q Good afternoon, Mr. Manigan.

21 A Good afternoon.

22 Q You've testified today to your version of events.
23 Didn't you testify the same way at trial, that you were
24 walking down a path?

25 A Yes.

Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 Q That's what you presented to the jury.

2 A Yes.

3 Q Correct? But you testified that your lawyer never
4 talked to you about testifying, is that correct?

5 A Yes. He did talk to me about testifying.

6 Q Okay. Earlier during direct testimony you said that
7 he did not.

8 A I said he did not -- I did not testify in the first
9 trial.

10 Q No. But then you also testified that Mr. -- your
11 trial attorney did not discuss the pros and cons of
12 testifying with you, is that correct?

13 A I don't remember, ma'am. I -- I know that I didn't
14 testify in the first trial, and in that second trial I was
15 instructed to give up -- if a pass, they had a picture and
16 they showed the picture on the screen, and he said get up
17 there and show them where that pass where you coming
18 through and that pass -- so I can prove to them that I
19 wasn't on nobody's property.

20 So, yes. I did -- he did tell me to get up there, and
21 he give me a picture. And I'm thinking this was the
22 courtroom. And he made me stand over there in front of
23 that jury and hold up a picture and point to them and say
24 this is what -- this is the pass that I crossed and this is
25 where -- where the car headlights -- this is where I come

Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 across that pass.

2 I -- I'm -- I'm thinking this was the place, the
3 courtroom. And I stood right there because, he told me get
4 up and go over there and stand and talk to him. We
5 talked -- he did discuss that.

6 Q So you wanted to testify so you could tell your jury
7 your side of the story.

8 A No. He told me to go up there and show them where
9 that pass was so they can know that -- so, see, what they
10 said it was on this lady's property.

11 Q Okay. So you wanted to tell the jury your story.

12 A No. I didn't want to tell them nothing. I was --
13 but --

14 Q Okay. Your testimony is you wish you hadn't
15 testified.

16 A Yes.

17 Q Okay. Now, you testified and you're alleging that
18 your lawyer failed to ask for a 403 and 404(b) or cost
19 analysis of the prior --

20 A Impeachment, probate value, weigh it and see -- and
21 weigh it and see what the probate was admissible, weigh the
22 cons out and see, because that is attacking my character
23 and making -- when you just -- it attacks my character.

24 Q But you're aware that your two prior burglaries
25 convictions are actually elements of this crime. That's

Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 what made your -- your charge burglary first. Do you
2 understand that?

3 A No. I didn't.

4 Q The -- the two prior burglary convictions weren't used
5 to impeach you. They were used for the elements of the
6 burglary first crime.

7 A Well, had I knew they was going to do that I'd -- I'd
8 a did whatever I could to not bring that in to them and
9 present that. I -- I would -- I'd -- whatever I had to do
10 to do that, I would. I would have.

11 Q And your lawyer actually tried not to have that
12 presented. In the trial he actually tried to stipulate to
13 the prior convictions, and the state did not stipulate to
14 that.

15 A I can't remember. I don't -- I can't recall, ma'am.

16 Q Okay. Well, it's all in the record.

17 A Okay, ma'am. Because, like I said, I can't recall.

18 Q So you testified that you wanted your lawyer to argue
19 for third-party guilt but he didn't. Is that correct?

20 A Yes, ma'am.

21 Q Do you remember the pretrial hearing he actually made
22 a motion to have third-party guilt introduced into this
23 case and he called five different witnesses in support of
24 that argument? Do you remember that?

25 A He called five different witnesses?

Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 Q That's right. He called the victim; he called the
2 officer; he called the pawn shop store worker, an
3 investigator and a neighbor. This is all testimony
4 proffered in support of his argument for a
5 third-party-guilt charge. Do you not remember that?

6 A I -- I remember people calling to the stand. The
7 prosecution called witness but I -- I don't remember no
8 third-party guilt. No, ma'am. I -- I can't say I do,
9 ma'am.

10 Q Are you aware that the third-party-guilt jury charge
11 was actually read at trial?

12 A Yes. I think so, ma'am.

13 Q You testified in your direct that there was no
14 evidence that connected you to the crime except that
15 fingerprint on the bag outside, is that correct?

16 A Yeah, yeah, in that property, yes.

17 Q Okay. So correct if I'm wrong, but during trial this
18 was the evidence that was elicited by the state. The
19 victim's home was broken into, is that correct?

20 A Uh-huh.

21 Q The victim's computer monitor, printer and beer and
22 jewelry was stolen, is that correct?

23 A Yes.

24 Q They elicited testimony that the defendant -- which
25 was you -- and the nephew watched victim's neighbor doing

Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 yard work same day for a long period of time.

2 A Ma'am --

3 Q Was there evidence presented at trial of that?

4 A Also, ma'am, I live in the neighborhood. So if I'm
5 sitting on my front porch and she over in her -- in her
6 front yard cutting grass, ma'am, that's not -- I'm not
7 conspiring or watching over there. This is neighborhood.
8 I have that right to sit on my porch and conversate with my
9 nephew or wave at people go up and down the street. I did
10 not case anything, ma'am.

11 Q Okay. But they presented evidence that you were out
12 there watching her house that day.

13 A No. I was out there on my porch. They one said I
14 watching house. I was not watching no house. I was out on
15 the porch. By me looking around I may looked at her house,
16 my neighbor house and several other houses in that
17 neighborhood.

18 Q And the state also elicited testimony that you and
19 your nephew talked to the neighbor who was doing yard work
20 and asked her multiple times when she would be done.

21 A They said that at trial, but, ma'am, I don't remember
22 asking her that. That lady's in the yard all the time. So
23 I would not be asking -- asking her no question like that.

24 Q And then you conceded that the night of the burglary
25 the police found a fingerprint on the stolen printer found

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Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 in the victim's back yard.

2 A Then, again, it wasn't in the victim's back yard. It
3 was in a field over her fence where some other trash was.
4 That's the reason why Mr. Welch told me to explain to them
5 where that bag was. And it had a picture of that field.
6 And I stood up right there and -- and showed them where
7 that bag was this in that field. It was not in her back
8 yard. It was in a field if, as you said.

9 Q Okay. And then --

10 A You should have on record that that was a place of
11 trash in a field behind a fence.

12 Q That was your testimony.

13 A No, no, no. That's what's -- that's what's in the
14 thing. They also said it was vines and woods and falling
15 limbs in that area.

16 Q And that was your testimony at trial, correct?

17 A Yes, ma'am.

18 Q Okay. So, also, let's see. There was also evidence
19 elicited by the solicitor that prior to the burglary you
20 had never been inside the victim's home, is that correct?

21 A Still haven't.

22 Q You still haven't been there.

23 A No.

24 Q Right. And then also there was evidence elicited that
25 there's no reason for you to be in the victim's back yard

Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 where the bag was found.

2 A And then, again, ma'am, you keep saying the back yard.
3 It was not the back yard. Where her fence stop at, it was
4 over there in another field with other trash and debris,
5 was in a path. It was not in the back yard.

6 She have a 6-foot privacy fence. In order for it to
7 be in her back yard I had to go over that privacy fence and
8 be in her back yard. That was on the -- the back, because
9 I seen in that path is on the other side in a vacant lot in
10 a field.

11 Q Okay. And then you also went to the victim's house at
12 2:00 a.m. after the burglary and talked to the victim, is
13 that right?

14 A No, ma'am. I -- I didn't go back -- I seen her, and I
15 asked her that I would watch out if anything out of the
16 norm come on -- out of the norm happened or something,
17 we'll watch out. That said the same thing to the neighbor
18 next door and the neighbor across the street and the
19 neighbor to the left.

20 Q And you --

21 A But we don't have -- we don't have a neighborhood
22 watch. And I say we'll watch out for one another.

23 Q And you told her that that night at 2:00 a.m. --

24 A Yeah.

25 Q -- when you went over and asked for --

Michael A. Manigan
Cross-examination by Ms. Giovanoli

1 A It's -- and --

2 Q And you told her -- let me finish my question and then
3 you can answer it. You told her it's a shame your house
4 was broken into. You asked for a beer and you told her --

5 A No. I don't remember asking for no beer. I just said
6 it was a shame the house was broken into. I don't know --
7 I don't know if she drink beer or not.

8 Q And then your nephew sold the victim's diamond
9 earrings to a pawn shop two days later, is that correct?

10 A That's what -- that's what the pawn guy said, yes, it
11 is.

12 Q And there was also evidence elicited that you had two
13 prior burglaries, which made this a burglary first.

14 A Yes. I did have two prior burglaries.

15 Q I have no further questions. Thank you.

16 THE COURT: Mr. Richey.

17 MR. RICHEY: No other questions.

18 THE COURT: All right. Come down. Thank you very
19 much.

20 MR. RICHEY: Call Mr. Welchel.

21

22

23

24

25

Richard H. Welchel
Direct examination by Mr. Richey

1 A Yes, sir.

2 Q Was there any other evidence that he had did this
3 crime other than that?

4 A Nothing direct in my opinion. You know, they -- they
5 developed during the course of the trial that the testimony
6 of the neighbor that saw Mr. Manigan and his cousin Gary in
7 the yard and this neighbor was cutting the victim's grass
8 and other people's grass, and she testified that Gary
9 Manigan, the cousin or nephew, I believe, came -- came up
10 to her and kept interrupting her and asking her how many
11 yards she was going to do and how long she was going to do
12 that for and statements like that.

13 And she testified that Mr. Manigan talked to her too.
14 And there was other testimony about him talking to the
15 victim later on that night.

16 Q And you tried this case twice, right?

17 A I did.

18 Q Okay. And this offer that he got of 20 years, do you
19 know when he got it? Was it before the first trial or
20 after the first trial? Do you recall?

21 A There was an offer before the first trial that he
22 turned down. There was an offer in September.

23 The first trial was in June. It was mis -- we tried
24 it all the way through and he -- I don't remember if he
25 testified or not at the first one, but he says he didn't.

Richard H. Whelchel
Direct examination by Mr. Richey

1 We tried it all the way through.

2 The solicitor in the first trial made an argument that
3 I objected to as shifting the burden of proof to
4 Mr. Manigan. And Judge Couch was the trial judge, and he
5 agreed with me. That's why there was a mistrial the first
6 time.

7 We got an offer in September of that year. I forget
8 which year it was. But we got an offer in September,
9 burglary second violent and grand larceny. And they would
10 run concurrent and they -- there would be 15. And I took
11 that to Mr. Manigan and he turned it down.

12 Q So -- so they'd offered him less than the amount that
13 he testified to.

14 A Yes, sir.

15 Q Okay. When it's discussed with him the implications
16 of what his record would have on this case in terms of -- I
17 believe he -- he believed that the burglaries could be kept
18 out under 403 and 404 balancing act. Did you discuss that
19 with him?

20 A I explained to Mr. Manigan that the problem we had in
21 his particular case was the fact that he was indicted under
22 the statute that allows the prior burglaries to be used as
23 an element of the crime and that 403 didn't have anything
24 to do with that, that those -- he was indicted under that
25 particular statute.

Richard H. Welchel
Direct examination by Mr. Richey

1 well, the indictment had all of the -- all of the
2 statutory items in it, but they were going forward on it
3 being in the nighttime and the fact that he had two prior
4 burglary convictions. That's why I made the motion to
5 stipulate.

6 Q In terms of the -- in terms of where he lived, did he
7 live in that community?

8 A Yes, sir.

9 Q And -- and at the time he was supposed to have been
10 casing this house was -- was he on his property? Are you
11 aware of that?

12 A He was on his front porch and in his yard. You've got
13 to understand that his house is -- if this is the street,
14 his house would be right here and her house would be one or
15 two down. You can see down the street where her house was
16 and down the street where the lady's that was cutting the
17 grass was. You can see her house too. I went to the scene
18 numerous times.

19 Q This third-party guilt -- and you've got the
20 transcript of what you did on it -- did you discuss that
21 with him, the whether you could succeed or not succeed?

22 A Oh, yes, sir.

23 Q Okay. And he testified that you did not properly
24 argue the directed-verdict standard. Do you believe you
25 did that?

Richard H. Welchel
Cross-examination by Ms. Giovanoli

1 A I do.

2 Q Did you tell him it was in his best interest to take
3 this plea offer? Did you tell him it was in his best
4 interest, or you just left it up to him?

5 A The plea offer of 15?

6 Q Yes, sir. yes, sir.

7 A I told him to take it.

8 Q And he expressed to you that he was not guilty of the
9 charges, correct?

10 A That's correct.

11 Q One moment.

12 (Pause.)

13 Q Isn't his house -- isn't his house across the street
14 from the lady's house?

15 A His house?

16 Q Yes.

17 A Yeah.

18 Q Thank you.

19 CROSS-EXAMINATION

20 BY MS. GIOVANOLI

21 Q Good afternoon, Mr. Welchel. Thanks for being here.

22 A Yes, ma'am.

23 Q How long have you been practicing criminal law?

24 A I'd have to do some math. It'll be -- right now it's
25 35 plus years. I'm just -- just shy of 36 years.

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Richard H. Welchel
Cross-examination by Ms. Giovanoli

1 Q Has that always been with the public defender's
2 office?

3 A No, ma'am. I started out as an assistant solicitor in
4 Richland and Kershaw County.

5 After that I came home to Spartanburg in '85 and
6 worked there for two or two and a half years in the
7 solicitor's office here. And then I was in private
8 practice doing criminal defense and a host of other things
9 for almost 20 -- 20 years.

10 And then I went. And at that time when I started my
11 private practice I was also a part-time public defender for
12 about six or seven or eight years.

13 And then back in 2006 I closed my private practice and
14 came back to the public defender as a full-time assistant
15 public defender.

16 Q Okay. Thank you for all of that history.

17 I want to address one thing that the applicant's
18 alleged you didn't discuss the pros and cons of him
19 testifying in his case. Did you actually discuss the pros
20 and cons of him testifying?

21 A Numerous occasions I had test -- excuse me. I
22 discussed that with him prior to the first trial. I
23 discussed that with him during the course of and prior to
24 his actual testimony. There's -- I think it's in the
25 transcript where I told Judge Cole that I wanted to talk to

Richard H. Welchel
Cross-examination by Ms. Giovanoli

1 my client again about whether or not he had to testify or
2 wanted to testify. And the decision to testify was his.

3 Q And that's correct. That's on page 219 on line 14.
4 You actually requested that you could discuss with him
5 testifying over lunch, is that correct?

6 A Yes.

7 Q Is that what your recollection of the trial was?

8 A Oh, yeah. I mean, I did that. I don't know what line
9 and page it's on, but it's there.

10 Q Okay. And as far as the offer for 15 years concurrent
11 on burglary second violent and grand larceny, you relayed
12 that offer to the applicant. Did you explain the offer to
13 him?

14 A Yes, ma'am.

15 Q Do you feel that he understood the offer?

16 A He understood the offer.

17 Q And it was your testimony that you advised him to take
18 the offer.

19 A Yes, ma'am.

20 Q And was that based on the state's evidence against the
21 applicant?

22 A Yes, ma'am. This is one of the few cases that I've
23 tried where the state uses the two prior convictions for
24 burglary as an element of its crime. And I tried to get
25 him to understand that before he ever takes the stand or

51 22

Richard H. Welchel
Cross-examination by Ms. Giovanoli

1 doesn't take the stand one of the first things that the
2 jury is going to hear is that he has two prior convictions
3 for burglary and that's an element of the crime. That's
4 why he's charged with burglary first. He --

5 Q You tried to prevent that blow by moving to stipulate
6 to those prior convictions.

7 A I did, ma'am.

8 Q Did the state stipulate?

9 A No. They would not.

10 Q And they have a discretion to prove their case, every
11 element.

12 A Unfortunately, yes.

13 Q Okay. Going to the directed-verdict standard, did you
14 keep up with this case on appeal?

15 A Not really, I mean.

16 Q Okay.

17 A I found out that it -- I filed the appeal notice and
18 everything. And I saw. I've read the stuff when it --
19 when it came back.

20 Q So you weren't aware that the directed-verdict issue
21 was actually briefed on appeal based on your arguments.

22 A No.

23 Q It was just -- able to be briefed.

24 A Okay.

25 Q As far as third-party guilt, applicant's expressed

Richard H. Welchel
Cross-examination by Ms. Giovanoli

1 that he wanted you to pursue third-party guilt alleging
2 someone else that he didn't know committed the crime. Was
3 that your recollection of your discussions with him?

4 A No, ma'am.

5 Q Okay. The third-party guilt that you pursued was
6 based on a nephew?

7 A The third-party-guilt individual was Gary Manigan. We
8 had -- and I've never had this before or since. We had a
9 fellow that was in possession of the victim's stolen
10 property in less than 36 hours.

11 The burglary took place on a Saturday evening. On a
12 Monday morning within the hour of the pawn shop a half-mile
13 from this incident, opening up Gary Manigan shows up with
14 the victim's earrings -- I think diamond earrings -- and
15 pawns them for \$50. That's why we went with third-party
16 guilt.

17 Gary Manigan was originally charged with burglary and
18 larceny himself. They chose -- when I say they, I mean the
19 city of Spartanburg. They chose to charge him or let him
20 plead to receiving stolen goods.

21 Q And Gary Manigan, was he related to Mr. Manigan?

22 A I think he's a nephew.

23 Q And you actually proffered extensive testimony in the
24 pretrial hearing on your motion to, I guess, introduce
25 evidence of third-party guilt.

55

Richard H. Welchel
Cross-examination by Ms. Giovanoli

1 A Yes, ma'am. Judge Cole accepted it.

2 Q Okay. And did Judge Cole read a third-party-guilt
3 charge to the jury?

4 A Yes, ma'am.

5 Q With regard to the -- he's alleged that you didn't
6 request a lesser included offense. Was -- did the facts
7 support a lesser included offense in this case?

8 A No, ma'am.

9 Q Was there any other reason why you wouldn't have
10 requested the charge on a lesser burglary?

11 A I would have had it been any other kind of burglary,
12 but it's because it's this statutory burglary.

13 Q Applicant also takes issue with the fact of a
14 hand-of-one-hand-of-all charge was read. Do you recall any
15 discussions with the Court regarding that charge?

16 A We knew that was coming. The hand of one is hand of
17 all was going to be charged in the first case. And Judge
18 Cole said it was going to be charged in the second case
19 too.

20 Q Okay. I have no further questions. Thank you very
21 much.

22 MR. RICHEY: No other questions.

23 THE COURT: You may come down. Thank you very much.
24 May this witness be excused?

25 MS. GIOVANOLI: No objection from the state.

1 THE COURT: Without objection, you're free to go, sir.
2 Thank you very much.

3 THE WITNESS: Thank you, Your Honor.

4 (Whereupon, the witness was excused.)

5 MR. RICHEY: Nothing.

6 MS. GIOVANOLI: Nothing from the state.

7 THE COURT: Thank you very much, counsel. Proposed
8 orders in 30 days.

9 END OF REQUESTED TRANSCRIPT OF RECORD

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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for spartanburg County, South Carolina, on the 15th and 17th days of November 2017.

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

October 26, 2018



Linda D. Moffitt
Circuit Court Reporter

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Conclusions

Appellant request that this Honorable Court grant a Directed verdict in this case of Not guilty on the Burglary 1st and Grand Larceny charge and/or grant a new trial.

M. L. AMY 5/3/19

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MOTIONS AND MATTERS

1 MR. WHELCHER: --- Your Honor, yes, sir. Have a seat,
2 yeah, you can sit down. Your Honor, at this time I make a
3 motion for a directed verdict based on the insufficiency of
4 the evidence that's presented thus far in the trial. The
5 State has closed its testimony, Your Honor, I would make my
6 motion for a directed verdict based on the fact that the only
7 evidence that ties Mr. Manigan to this particular burglary is
8 the fingerprint that was found on property approximately a
9 hundred feet away from the home. I would cite as precedent
10 for this request for a directed verdict, Your Hon -- Your
11 Honor, the case of the *State vs. Mitchell*, it's both case
12 heard before the Court of Appeals of South Carolina and
13 subsequently heard or appealed by the State to the Supreme
14 Court of South Carolina. The facts in that case are
15 remarkably similar to this case, Your Honor. In *Mitchell*
16 what happened was the victim in that case was a fella by the
17 name of Mr. Mathis. Mr. Mathis came home in the evening and
18 found that there were beers missing from his refrigerator. He
19 questioned his children, Your Honor, and determined that they
20 didn't have anything to do with the beer missing from the
21 refrigerator, thought nothing of it. Several days later, I
22 think six to be exact, he went into a back room or a spare
23 room in his home and when he went into that room he stepped on
24 glass and then he started lookin' around and saw where someone
25 had broken the window and unlatched the latch for the window

MOTIONS AND MATTERS

1 in that room. He then checked other property in his house,
2 Your Honor, and found that two weapons were stolen. He called
3 the police, they came out the next morning, dusted for
4 fingerprints and ultimately developed a print that matched
5 that of the defendant in the *Mitchell* case Mr. Mitchell. That
6 fingerprint was the only evidence, any kind of physical
7 evidence that tied Mr. Mitchell to that particular burglary.
8 Court of Appeals and and both the Supreme Court ruled that the
9 evidence in the *Mitchell* case like in this case, Your Honor,
10 was entirely circumstantial and that only evidence linking
11 M -- and that the only evidence linking Mr. Mitchell to the
12 burglary was the fingerprint as in this case. My client was
13 not arrested until months after that happened when the
14 fingerprint was developed, that's the only evidence that ties
15 him to this case. *Scape* -- the case of the *State vs. Bostick*
16 cites *Mitchell*, Your Honor, and it says that, Analyzing the
17 evidence presented by the State in the most light, in the
18 light most favorable to it, we believe the State's evidence
19 here raised the only a suspicion of guilt by *Bostick*. In
20 addition, I've shown him the memorandum handed to Your Honor
21 that in addition to *Bostick* there was a *State vs. Walker* case
22 that was decided by the Supreme Court and they also cited both
23 *State vs. Mitchell* Court of Appeals and the Supreme Court.
24 The interesting thing in both of those decision is this, Your
25 Honor: I couldn't have found a case that is as similar to

MOTIONS AND MATTERS

1 this, I couldn't made up a case like this one that is so
2 similar to *Mitchell* if I had tried to. In *Mitchell* the
3 defendant had two prior convictions for burglary that was
4 stipulated to by the defense and of course we attempted to
5 stipulate to that earlier. The only evidence that tied
6 Mr. Mitchell, as you can see in my memorandum, to this
7 particular burglary was that fingerprint even though they had
8 testimony that Mr. Mitchell had been in the home on previous
9 occasions. The testimony, excuse me, Your Honor, the evidence
10 in this *Mitchell* case is this: The fingerprint evidence. A
11 fingerprint was found on a screen outside the window that was
12 broken and everybody assumed was the point of entry, screen
13 was found on the ground and the print was on the screen. Both
14 the Court of Appeals of South Carolina and the Supreme Court
15 of South Carolina determined that that print does not prove
16 entry. That print, Your Honor, was found on a screen on the
17 ground directly beside or directly beneath the window that was
18 the point of entry and the courts, both of them, said or ruled
19 that that fingerprint in that location does not prove entry,
20 which is one of the elements required of the burglary, does
21 not prove the entry and therefore when the defense made their
22 motion for a directed verdict in that case that motion shoulda
23 been granted. Uh, our case the facts are unbelievably
24 similar, Your Honor, except for the fact that the fingerprint
25 found in this case as the testimony has revealed is on

MOTIONS AND MATTERS

1 property more than 100 feet away from the alleged point of
2 entry and there no testimony of when that fingerprint got
3 there, who put it there, other than it belonging to my client,
4 Your Honor. I believe that case *State vs. Mitchell* and this
5 case are so very similar that it is proper for the Court to
6 direct a verdict of not guilty.

7 THE COURT: Ms. Poulos.

8 MS. POULOS: Yes, sir, thank you, Your Honor. Your
9 Honor, in response to Mr. Whelchel's motions, we we clearly
10 believe that through the testimony of victim, the other
11 witnesses, the officers that we have presented sufficient
12 evidence. We know that all of the evidence is circumstantial
13 in this case, it's without a doubt it is clearly a
14 circumstantial case but we believe that we have strong
15 forensic evidence that connects Mr. Manigan, Michael Manigan,
16 to this case. There's evidence of two prior burglary
17 convictions, there is testimony that he was across the street,
18 that he was eyeing the victim's property, he, there's even
19 testimony that he went over after this incident happened when
20 the victim was a -- home alone and said point blank, I've been
21 watching your house. Your Honor, taking all of those factors
22 together, we don't, we don't believe that -- we believe that
23 in in the light viewed most favorable to our case, Your Honor,
24 that it is sufficient, it is a substantial, I mean, a
25 circumstantial case but, Your Honor, we believe that we've

MOTIONS AND MATTERS

1 crossed that threshold that would allow this case to go to the
2 jury and we would argue in opposition to Mr. Whelchel's
3 motion.

4 MR. WHELCHER: Your Honor, the problem is this: The
5 Supreme Court and the Court of Appeals before them said in
6 their decision, This is a circumstantial case, everything in
7 it is circumstantial. But for this fingerprint, that's all
8 they have and when they s -- they say, excuse me, Your Honor.
9 Court of Appeals and Supreme Court both rule that the evidence
10 in the *Mitchell* case was entirely circumstantial as in this
11 case, that the only evidence linking Mr. Mitchell to the
12 burglary was the fingerprint even though there was testimony
13 at the trial that he had been there and they all knew
14 Mr. Mitchell. My client lives across the street, that's
15 not, that's only circumstantial evidence and that's not
16 evidence of entry in this case. When they quoted and they
17 cited *Mitchell* in *State v. Walker* and said that when evidence
18 merely raises a suspicion of guilt, the proper thing for the
19 Court to do is to erect -- to direct a verdict of not guilty.
20 The Court said, excuse me, Your Honor, the Court of Appeals
21 said, Whether or not fingerprint found outside a dwelling near
22 the point of entry is substantial circumstantial evidence
23 sufficient to permit a jury to receive the case, that's the
24 question, they said we think not and that's in the first Court
25 of Appeals case *State v. Mitchell*, 332 South Carolina 619.

MOTIONS AND MATTERS

1 That was appealed to the Supreme Court by the State and the
2 Supreme Court affirmed that ruling and said that the
3 respondent, in that case the defendant, was entitled to a
4 directed verdict on the burglary charge, that's *State v.*
5 *Mitchell*, 341 South Carolina, it's it's in the memorandum of
6 law, Your Honor. Based on the facts that the *Mitchell* case
7 that's already been decided by Court of Appeals and the
8 Supreme Court and the incident case are so very similar, Your
9 Honor, I would make a motion for a directed verdict of not
10 guilty. I have the *Mitchell* cases if Your Honor ---

11 THE COURT: Okay. Well I I see some similarities;
12 however, I also see some differences and from what you tell me
13 the the differences in the *Mitchell* case the Court found that
14 there was not evidence of an entry. There was evidence of a
15 fingerprint outside the residence but there was no evidence of
16 an entry of a person into the residence. In this case there's
17 plenty of evidence of an entry.

18 MR. WHELCHER: Excuse me, Your Honor?

19 THE COURT: In this case there is plenty of evidence of
20 an entry into the residence because the victim has testified
21 the condition of her home when she left that day and the
22 co -- the condition of her home when she returned home so I
23 don't think there's any real question that someone entered the
24 residence so the question is was it the defendant or not and
25 in this case there was property taken after that entry, that

JOHNNIE WILLIAMS - DIRECT EXAMINATION BY MR. WHELCHER

1 property has the defendant's fingerprint on it so it had to be
2 taken from inside the residence because that's where it was
3 then it was found outside the residence, that is
4 circumstantial evidence no doubt but it is substan -- a
5 substantial circumstantial evidence so your motion is denied.
6 Alright, anything else we need to address before we bring the
7 jury in?

8 MS. POULOS: Nothing from the State, Your Honor.

9 THE COURT: Alright, bring 'em in.

10 THE BAILIFF: Okay.

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

12 (Whereupon, a discussion was held off the record.)

13 THE COURT: Good afternoon, ladies and gentlemen. As you
14 know we recessed for lunch, the State had concluded with their
15 presentation so we're now gonna proceed with any to be
16 offered by the defendant. Mr. Whelchel.

17 MR. WHELCHER: Thank Your Honor, call Johnnie Williams.

18 (Whereupon, the witness came forward.)

19 JOHNIE WILLIAMS, having been
20 first duly sworn, testified as follows:

21 THE CLERK: Thank you, you may be seated.

22 DIRECT EXAMINATION BY MR. WHELCHER:

23 Q. State your name please for the record, sir.

24 A. Johnnie Williams.

25 Q. Where do you work, Mr. Williams?

JOHNNIE WILLIAMS - DIRECT EXAMINATION BY MR. WHELCHER

1 A. I'm employed by E-Z Money Pawn Shop in Spartanburg.

2 Q. And how long have you worked there, sir?

3 A. Twenty-three years.

4 Q. Mid-December of 2011, excuse me, 2010 did you have
5 occasion to take in some earrings, sir?

6 A. Yes, sir, I do.

7 Q. And when you received this property, Mr. Williams, is
8 there paperwork that you fill out?

9 A. Yes, sir.

10 Q. Okay, and the people who bring this property to ya they
11 have to provide some type of a identification, is that
12 correct?

13 A. Yes, sir, has to be a South Car -- or a state ID, ---

14 Q. Okay.

15 A. --- state issued ID.

16 Q. Alright. And did you receive property on the 13th of
17 December of 2010 earrings specifically?

18 A. Yes.

19 Q. What time was that, sir?

20 A. I think it was at 10:22.

21 Q. Excuse me?

22 A. 10:22.

23 Q. In the morning.

24 A. Yes, sir.

25 Q. What are your hours of operation, sir?

MOTIONS AND MATTERS

1 MS. POULOS: Circumstantial evidence, Your Honor, I'm
2 assuming that's a standard charge that you normally give.

3 THE COURT: It will be in this case.

4 MS. POULOS: Yes, sir.

5 THE COURT: Alright, Mr. Whelchel.

6 MR. WHELCHER: Your Honor's already charging
7 circumstantial, I believe I would be opposed to the hand of
8 one is the hand of all, Your Honor, based on my previous, uh,
9 motion on the directed verdict matter, Your Honor.

10 THE COURT: Alright, any other requests?

11 MR. WHELCHER: No, sir.

12 THE COURT: Alright, Court is in recess until 9:30 in the
13 mornin'.

14 (Whereupon, a discussion was held off the record.)

15 (Proceedings January 16, 2013)

16 THE BAILIFF: Thank you, be seated.

17 THE COURT: Alright, any matters we need to address
18 before the jury is brought in?

19 MS. POULOS: Nothing from the State, Your Honor.

20 MR. WHELCHER: No, sir.

21 THE COURT: Alright, bring 'em in, please.

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

23 THE COURT: Good morning, ladies and gentlemen.

24 UNIDENTIFIED JUROR: Mornin'.

25 THE COURT: As you know when we recessed yesterday all of

MOTIONS AND MATTERS

1 that there's no substant -- that the evidence of the
2 fingerprint is substantial circumstantial evidence, is not
3 substantial circumstantial evidence, excuse me, and that that
4 is not a enough for this case and that case, Your Honor, to be
5 presented to the jury and based on that decision I would ask
6 that the Court direct a verdict of not guilty in this case.

7 THE COURT: Alright. Ms. Poulos, do you need to be heard
8 any further?

9 MS. POULOS: No, sir, Your Honor, I believe we addressed
10 all of our arguments.

11 THE COURT: Alright, that motion is denied. Alright,
12 ya'll have any requests for instruction?

13 MS. POULOS: Your Honor, um, believe that we would
14 request as a charge to the hand of one is the hand of all. I
15 think there's evidence that ties two people to this crime,
16 they have opened the door and in getting in evidence of Gary
17 Manigan pawning the items, there's clearly fingerprint at the
18 scene of the defendant Michael Manigan as to items that were
19 stolen from inside the home that were found in the bag outside
20 of the property, Your Honor, and and we think that this is
21 sufficient to at least include hand of one hand of all
22 accessory of that nature, Your Honor, we would request ---

23 THE COURT: Okay.

24 MS. POULOS: --- that charge.

25 THE COURT: Any other requests from the State?

MOTIONS AND MATTERS

1 balance of today, ask that you report back to the courthouse
2 to your jury room at 9:30 in the mornin' and at that time
3 we'll conclude with the lawyer's final summations, my
4 instruction and your deliberations so keep in mind during the
5 over night recess you're still not to discuss the case, not to
6 conduct any investigation, don't do any research, don't permit
7 yourselves to be exposed to any type of media coverage that
8 might relate to the trial. Have a good evening, please report
9 to your jury room at 9:30 in the mornin'.

10 THE BAILIFF: This way, please.

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

13 THE COURT: Would you like to renew your motions?

14 MR. WHELCHER: I would renew my motion for a directed
15 verdict, Your Honor, specifically based on holding by the
16 Supreme Court in the case of the *State vs. Mitchell* that I,
17 uh, presented to the Court earlier. The Supreme Court, again,
18 Your Honor, held that even though there was evidence of entry
19 in that case, all the evidence that they had was
20 circumstantial against Mr. Mitchell. The evidence in this
21 case is similar to, remarkably similar to the evidence against
22 my client, it is all circumstantial evidence and I believe
23 that the proper thing to be done at this point is that for the
24 Court to direct a verdict of not guilty. The Court does not
25 say that that there's no evidence of entry, the Court says

MICHAEL ANDERSON MANIGAN - CROSS-EXAMINATION BY MS. POULOS

1 A. Yes.

2 Q. --- do you deny being convicted of a burglary in the
3 past?

4 A. No, I do not deny it.

5 Q. Do you deny being convicted of two burglaries in the ---

6 A. No, ---

7 Q. --- past?

8 A. --- I do not not deny it.

9 Q. Thank you.

10 A. The reason why I do not deny ---

11 Q. Ca --- that's all I have.

12 A. Oh, thank you.

13 MR. WHELCHER: Nothing further.

14 THE COURT: Alright, you may step down.

15 (Whereupon, the defendant left the stand.)

16 (Whereupon, a discussion was held off the record.)

17 MR. WHELCHER: Defense rests, Your Honor.

18 THE COURT: Any reply?

19 MS. POULOS: No, sir, Your Honor.

20 THE COURT: Alright, ladies and gentlemen, that is all of
21 the testimony or other evidence to be offered in the case.
22 What remains to be done are the lawyer's final summations,
23 after which I'll instruct you on the law and then you'll begin
24 deliberations and that likely will take longer than what we
25 have left for the afternoon so I'm gonna excuse you for the

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