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IN THE SUPREME COURT OF MISSISSIPPI

ALEX DURODE JOHNSON, III. — APPELLANT
VS.
STATE OF MISSISSIPPI — APPELEE
CAUSE #2007-CP-01649-COA

BRIEF IN OPPOSITION TO RESPONDANTS REPLY.

Come Now, the Appellant Alex Durode Johnson, III. who file this/his Brief in opposition to Appelee Reply Brief.

This case involves the lack of an indictment and or proper charging informant before being tried and convicted of a felony in the State of Mississippi. The Constitution of the State of Mississippi forbid the prosecution of any person unless it's through a proper indictment hand down by the Grand Jury.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record Certifies that the listed persons have an interest in the outcome of this case.

The undersigned Counsel provides the representations in order that Justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. Honorable ASHLEY HINES, Circuit Judge
2. Mr. George T. Kelly, Jr., Trial Counsel
3. Mr. Jim Hood, Attorney General, State of Mississippi

Alex Durode Johnson, III

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ARUGEMENT IN SUPPORT
POINT-ONE.

The Court Erred in failing to find that it Committed Reversible Error when it allowed the State to Convict the Appellant of possession of cocaine and offense he was never indicted for.

The Evidence on and in support of this issue clearly show that the Appellant was indicted on the felony of Possession of CoCaine with the intent. **(see Exhibit-1 attached).** Counsel with the Court took it upon to allow the Appellant to plea to Straight Possession inwhich the appllant was never indict for. **(see the Record page 69-70).** The records does not show the Appellant appeared before the Circuit Court and testified under oath that he understood that he was charge with Possession of CoCaine with the Intent in this case, that he wished to withdraw his plea of Not Guilty and enter plea of guilty to related charge of Possession of CoCaine with the Intent, that he understood the nature of the offense of Possession of CoCaine with the Intent and that he in fact committed that crime. Jefferson V. State, 556 So. 2d 1016 (Miss. 1989).

The reduce charge which is also a felony was not Resubmitted to the Grand Jury for their Approval, nor does the record show an amendment or that the reduce charge was presented through information The type of injustice denys the appellant his right to be informed as to the nature of his crime nor the elements of that charge. Not to

mention that the indictment in Exhibit -1 was not filed by the Circuit Clerk as required by **Miss. Code 99-7-9**, and did not contain the signature of the Forman of the Grand Jury. The filing of the indictment by the Clerk is the only way for the Court to know if in fact the grand Jury had really indicted the Appellant. See **Morris V. State**, 767 So. 2d 255 (Miss. App. 2000). The Judge is required by Law to state the facts as they are stated in the Indictment, See **Quick V. State**, 569 So. 2d 1197 (Miss. 1990), which states:

The Court has no power to Amend indictment as to matter of substance, without concurrence of grand Jury by whom it was found. The indictment originally charge possession with the intent. The facts and substance was reduce by the Trial Court to straight possession without the grand Jury.

In **Quick V. State**, 569 So. 2d 1197 (1990) the Mississippi Supreme Court held that the State can prosecute only on the indictment returned by the Grand Jury.

Miss. Code 99-19-3

States a person charged with an offense shall not be punished therefore unless legally Convicted thereof in a Court having **Jurisdiction** of the cause and the person.

Box V. State, 241 So. 2d 158 (1970) states that it's the indictment by the grand Jury that gives the Court this **Jurisdiction**, and without it the Court can not proceed.

The Mississippi Constitution Art. 3. Sect. 27, requires that

a person charged with a felony be prosecuted only by a valid indictment of the grand Jury. It was also held in State V. Berryhill, 703 So. 2d 250 (1997) and State V. Sansome, 133 Miss 428, 97 So. 753 (1923) that absent waiver only a grand Jury can charge a person with a felony. The Fifth Amendment of the U.S. Constitution clearly states that:

No person shall be held to answer for a Capital or otherwise Infamous crime unless on a presentment or indictment of the grand Jury.

The Circuit Court nor the State had the authority to reduce the felony charge of possession with the Intent to simple possession without resubmitted the indictment and charge back before the grand Jury because simple possession is also a felony, and the Constitution requires that all Felonys be prosecuted only through indictment of grand Jury, and as shown by the record there's no indictment for information for the pleaed charge of simple Possession.

The Supreme Court stated in Stirone V. U.S., 80 S. Ct. 270, that the very purpose of the requirement that a man be indict by the grand Jury is to limit his jeopardy from offense charged by a group of his fellow citizens acting independently of either prosecuting Attorney or Judge. The Court went on to say in Exparte Bain 121 U.S. 1, 7 S. Ct. 781, that after the indictment was changed it was no longer the indictment of the grand Jury that presented it. Any other doctrine would place the rights of the Citizen, which were intended to be protected by the Constitution provision at the

mercy or control of the Court or Prosecuting Attorney.

Jurisdiction was lost in this case because the original indictment in **(Exhibit-1)** was not properly reduce to simple possession. Simple Possession is a felony and there's no showing of an indictment for the reduced charge nor information property waived by the Appellant.

The Appellant must be **Discharge** from custody because the Circuit Court Failed to indict appellant for the felony charge of possession.

POINT - TWO

Appellant Layer Were Ineffective For The Following Reason:

The Standard of review for ineffective assistance of counsel is set out in **Strickland V. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed 2d (1984). The test to be applied is (1) whether counsel's over all performance was deficient and (2) whether or not the deficient performance, if any, prejudiced the Appellant. In the sense that confidence in the correctness of the out-come is under minded. The Standard applies to the entry of a guilty plea. See **Schmitt V. State**, 560 So. 2d 148, 154 (Miss. 1990).

There is a strong but rebuttable professional assistance. **Id. At 456** (Citations Omitted). The deficiency and any prejudicial

effect are assessed by looking at the totality of the circumstances. Carney V. State, 525 So. 2d 776, 780 (Miss. 1988). Appellant contends that in any Ineffective Assistance of Counsel claim, the following is grounds to administer an ineffective claim. A court viewing transcript must reason that the substance of these arguments merely supplies an additional piece of evidence that counsel would have found, had he pursued the relevant theories. See Stevens V. Delaware Corr. ctr, 295 f. 3d 361, 370 (3d Cir. 2002). In Stevens, the 3d Circuit held that Appellant submission of affidavits in support of failure to investigate claim was **"New Evidence"**. That Counsel could have found had Counsel Investigated.

Appellant contends that his Lawyer were deficient as follow:

(A.)

Failure TO INFORM THE APPELLANT OF THE ELEMENTS OF THE CRIME AND POSSIBLE DEFENSES.

Appellant was denied Ineffective Assistance of Counsel because his Attorney failed to provide appellant with Adequate Information prior to making the plea of guilty. Appellant Attorney failed to inform the Appellant of the elements of the crime and possible defenses. See Schmitt V. State, 560 So. 2d 148, 154 (Miss. 1990). United State V. Bringham, 906 f. 2d 392 (9th Cir. 1990). The burden is on the defendant to bring forth proof which demonstrates that both prongs of the Strickland test are met. Moody V. State, 644 So. 2d 451, 456 (Miss. 1994) (Citation omitted).

FAILURE TO CONDUCT AN INVESTIGATION AND INTERVIEW

In **Anderson V. Johnson,** 338 f. 3d 382, 388 (5th Cir. 2003) The 5th Cir upheld the District Courts Ruling that Counsel Ineffective when Counsel fails to conduct an Investigation and Interview eye witnesses. Even more, when Counsel fails to call witness to testify at Hearing **Id 338 f. 3d At 398.** Such a lack of diligence by Counsel is a constitutional violation, itself, preventing the discovery of helpful testimony in support of an Innocence claim. Such exculpatory witness in contrast with a claim such as Appellant hold in this claims a benchmark of claim to enhance his claim.

Additionally the United States Supreme Court held in **Wiggins V. Smith,** that Ineffective Assistance of Counsel may be found when the Attorney preforms an Inadequate Investigation of Appellant life and fails to call expert Witnesses to testify regarding his background. **Id. 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).**

With all this mind, Counsel failed to Interview Appellant eye witnesses and witnesses who were present and held knowledge of said crime that was committed. Witnesses who should have been Interviewed are: **(1.) Kendrick Johnson (AKA "Pac Man") (2.) Junius Chaney (AKA "Bug") (3.) Carolyn Reed (4.) James Carlisle Jr. (AKA "Jr. Carlislie) (5.) Margie Henderson.**

When counsel failed to Interview these exculpatory witness Counsel Investigation fell short of what a reasonably competent

Attorney would have done. Anderson, 338 f. 3d at 396. Had Counsel been competent Attorney, he would have interview the witnesses and got a **Affidavit Statement** from **all** of the eye witnessess that he had **Subpoena for Trial. (See Record page 54).**

Appellant point is a witness's character flaws cannot support a failure to Investigate without so much as contacting a witness, much less speaking to the witness, such action left counsel Ill equipped to assess their credibility or persuasiveness as a witness.

Many Court have concluded that the failure to conduct any pretrial Investigation generally constitutes a clear Instance of Ineffectiveness.

Appellant asserts that a clear context of a complete failure to Investigate exists, Counsel can hardly be said to have made a strategic choice in advising Appellant to plea guilty. Counsel failed to pursue a certain line of Investigating the witnesses and pursuing the facts of the case, therefore, no clear decision could have been made by Counsel about Appellant guilt. See Strickland, 466 U.S. At 690-691, 104 S. Ct. 2052, Anderson, 338 f. 3d A t 393.

Clearly had Counsel interviewed Appellant witnesses and investigated the case, Counsel could have easily discovered that Appellant was being charged for drug that belonged to Carlislie. The matter would also be discored that several witnesses existed, and that Carlislie had fled the area to New Orleans.

Truly, Counsel failed in this area, Counsel could not have Investigated Appellant case at any time or point. Anderson, 338

f. At 391. Counsel could have easily found that the drugs belonged to Carlislie, who was showing to Gaston. See Nealy V. Cabana, 764 f. 3d 1173, 1177 (5th Cir. 1985). Holding Counsel at a minimum has a duty to Interview potential witnesses and to make an Independent Investigation of the facts and circumstances of the case. Anderson, 338 f. 3d At 389 holding, Counsel is Ineffective when Counsel fails to call witnesses at the Plea Hearing. Id. 338 f. 3d At 388-389.

Appellant alleged that there is sufficient evidence to show that Counsel was Ineffective and the guarantee of the Sixth Amendment was violated along with the Due Process Clause of the Fourteenth Amendment which States it can not be Denied. Boykin, 395 U.S. At 245, 89 S. Ct. At 1713.

FAILURE TO PURSUE AN ADEQUATE INVESTIGATION OF THE CASE AND EVIDENCE.

Counsel's lack of diligence resulting in a Constitutional Violation it self prevented the discovery of Supporting Evidence and Eye Witnesses exculpatory testimonies in whom Appellant had Identified to Counsel, direct proof of his claims. Counsel's decision is contary to the governing Law set forth in the Strickland Standard,

Therefore, when Counsel held Gaston, to not be a favorable witness, when Gaston was present to answer the threat complaint, rises to the level of a Constitutionally deficient performance because the State felt Gaston held enough knowledge about the truth of what

took place to cause the State to Intimidate Gaston. **(See Record page 71–73).**

Counsel can not said to have properly conducted an Interview with Gaston, for Counsel claims Gaston's statement, Light as to hold **No Merit**, when in fact Leroy Spand's statement clearly stated that Jr. Carlislie were showing Gaston some small plastic bags. **(See the Record page 36).** Here is the Evidence showing an Incomplete Investigation by Counsel and that the drugs belonged to Jr. Carlislie and not Appellant. Counsel's Investigation fell below that of a competent Counsel. This leaves Counsel without an excuse indicating his Ineffective Assistance.

There is **No** question about the **value** of Gaston statement **(See the Record page 40 and 73).** The leaves little question as to appellant being forced to plead guilty. **(See the Record page 71 line 14; page 72 line 18 and page 76 line 23).**

FAILURE TO CHALLENGE THE IMPROPER ADMISSION OF EVIDENCE TO SUPPORT A CONVICTION AND EVIDENCE OF PRIOR BAD ACTS.

Counsel did not act with due diligence according to **Rule 1.3 of Lawyer–Client Relationship.** Strickland, 466 U.S. At 687, 104 S. Ct. 2052. Counsel's errors deprived appellant of a fair trial. See Washington V. State, 800 So. 2d 1140, 1145 (MS 2001).

Appellant was left **No** means of defense he had **No Choice except to do what Counsel Instructed him to do, plead guilty.**

Vittitoe V. State, 556 So. 2d 1062 (MS 1990).

Counsel left the case uninvestigated and lead appellant to believe he had **No** supporting facts to stand on if they went to trial. Counsel informed appellant that Gaston statement supported **No proof** to show any ground to Win at Trial. Counsel told appellant **(your only Hope is to plead guilty to a lesser Sentence)**. Poor advice when there exists such Evidence to support that appellant is very much Innocent. See Boykin, 395 U.S. At 243, 89 S. Ct. At 1712, Myers, 583 So. 2d At 1773.

FAILURE TO CONDUCT AN INVESTIGATION INTO THE POLICE FILES AND DISCOVERY OF EVIDENCE THAT STATE HELD.

When a Counsel fails to Investigate and Interview witness, then it's safe to assume Counsel knew little if any about appellant case. Reason enough would show why Counsel played the part of prosecutor and not defense Counsel.

Appellant holds the allegation of existence in facts, being fold by his witness temtimony which was never allowed to materialize because Counsel failed to Interview and Investigate the Information they held. **These** witness had **No** knowledge that they **were** going to be **Subpoena for this trial.** The witness are: **Carolyn Reed, Margie Henderson, Leroy Spand, Julius Chaney,** and **Kendrick Johnson. (See the Record page 54).**

Appellant, Statement of Facts, set the records in order and direct this Court into the facts in this case. **(See Exhibit-A attached).**

Were the officers report shows their side of what was to have taken place, however their reports do not add up. **(See the Record page 35)** where Officer Donham clearly reported that the **Unidentified B/M** saw the appellant threw a bag. But this Sgt. **(Mr. Donham)** order this man to leave and ~~not~~ return. It's true to say that this Unidentified B/M **(DeAndre Gaston)** would have beening a witness for the **State.** The Record will show that Sgt. Donham nor Officer Jackson do not see the appellant throw any thing. The **Records (page 33-35)** clearly shows that these two (2) officers, did not see what they reported or what they **said,** they seeing. The Records speak for itself. **(See page 34 of the Record)** It clearly reported that Officer Jackson saw a Bag nearly hitting another officer **(Sgt. Donham).** Also reported there was **no one else** in the cafe when the bag was thrown. **(See the Record page 35)** where it clearly stated, **the Bag landed on the "Other" end of the Pool Table** and there was an Unidentified Black Male standing in the cafe when the bag supposely been thrown. In fact neither officers saw **James Carlislie Jr.** in the cafe nor when he exit the cafe. This a fact by the Records, that Officer Jackson had to add to his statement; **(See page 34)** what he did not have in his Details of Report; **(See page 33).** That the **Bag Nearly Hitting Sgt. Donham.**

By the Record, we can say that Officer Jackson had a view of Sgt. Donham and were the bag suppose to been thrown to.

"But" Officer Jackson never see the **Unidentified B/M** when this man where standing in the **same area** were Officer Jackson say he saw the bag nearly hitting Sgt. Donham. **How** couldn't Officer Jackson see the unidentified black male, when he saw everything else.

Counsel failed to Investigate the statements that the officers gave. While there exist Numerous facts that are contradictory such as Gaston was in the cafe when the **struggle** between appellant and the police took place and Counsel would have learned about Carlislie running of the cafe. **(See the Record page 49).**

The Record clearly shows how counsel left plenty of area to allow the State to coere appellant into the plea. Boykin, 395 U.S. At 243, 89 S. Ct. At 1712 to be enforceable, a guilty plea must emanate from the Accused Informed Consent.

Even more had Counsel Investigated Officer Jackson and Sgt. Donham complaint **"Statement"** the very contrary facts were easy to see. Counsel was obligated to have Investigated why Officer Donham would have order the male to exit the cafe and not return. **Strange** when a **"Drug Bust"** was Just made and this man was present. When the law is clear that every person present was a suspect, and an Investigation would have to be made.

FAILURE TO BRING THE INTIMIDATION COMPLAINT TO THE COURT ATTENTION

In all, making an overall view of the record, Counsel was made aware of the Threats on Gaston, treated his statement as having No supporting facts. Counsel was aware that appellant was being coerced into making the plea. **(See the Record page 91 line 14, page 92 line 18, and page 96 line 16-23). (page 71, 72, and 76.)**

The law states where a defendant's plea guilty, is coerced or otherwise Involuntary, any Judgment of conviction entered thereon is subject to Collateral Attack. Boykin V. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969), Myers V. State, 583 So. 2d 174, 176-177 (MS 1991).

The Evidence supporting Appellant's claims based upon an Ineffective Assistance of Counsel, the **Night before** the plea hearing appellant called his Attorney and told Mr. Kelly about the State had Intimidate Gaston. **(See the Record page 59).** It is clearly that Mr. Kelly knew **(See the Record page 72 line 24 and 27).** With this knowledge, Counsel made No attempt to Investigate or bring this matter known before the Court.

When Counsel fail to bring the Intimidation complaint to the Court attention and the Trial Court stated what on **(page 72 line 18 of the Record)**, left the appellant no other chose but to stated what on the **(Record page 76 line 23).**

(See page 73 of the record), where Counsel never get a **Affidavit** from that witness nor any of the other witness.

Viewing the Appellant Statement of Facts, appellant point out an shine of light upon the facts that only Gaston holds facts

that Counsel deem unimportant indeed, this exculpatory witness possessed information important enough that the State Threatened and Intimidate Gaston with charges to keep Gaston quiet. **(See the Record page 71 line 14-23).**

By making an evaluation of this matter, the scheme should have **Raised questions** in the mind of appellant counsel as to what kind of information did Gaston hold that the State would even the Sheriff about the appellant case, that is if Counsel was a Competent one. Counsel along with the Trial Judge should have conducted an Investigation into this matter and asked for a **"Continuance"**. Truly this should have **Raised Suspicion** by any true **Counsel** and a **fair Judge**. Evenmore this Violate the right to call witnesses. Here we see Counsel becoming part of the prosecution, Rather than acting as Counsel for the defense. **(See the Record page 72 Line 22).** Counsel looks for a way out as he attempts to help **railroading the defendant.** Counsel held an obligation to defend his client, there exists a clear demonstration that Counsel's performance to defend his client, was lacking and that a reasonable decision that makes particular investigations necessary. Guided by **Strickland,** Counsel failure to interview five (5) witness he had **Subpoena** and Gaston to a charged crime Constitutes Consititutionally deficient Representation. Bryant V. Scott, 28 F. 3d 1411, 1418 (5th Cir. 1994).

POINT - THREE

THE TRIAL COURT ERRED IN FAILING TO INFORMER JOHNSON OF HIS CONSTITUTIONAL RIGHT TO AVOID SELF-INCRIMINATON.

Appellant contends that his guilty plea was Involuntary as a matter of law because case is Similar in many respect to **Horton V. State**, 584 So. 2d 764 (Miss. 1991). In **Horton**, the defendant filed for Post-Conviction Relief on grounds that he was not advice of his Constitutional Right **to Avoid Self-Incrimination.** The trial Court summarily dismiss the petition. Upon Scrutinizing the plea hearing transcript. This Court concluded that the trial Judge had not informed **Horton** of his Rights to **Avoid Self-Incrimination** and Remanded the case for an Evidentiary hearing on whether the defendant had fully Under stood the Nature of his guilty plea; See **Vittitoe V. State**, 556 So. 2d 1062 (Miss. 1990). As in **Horton**, the transcript of appellant plea hearing does not reflect that he was advice concerning the rights of which he Allegedly Claims Ignorance.

POINT - FOUR

Appellant incoporates the ramaining issues from his Appellant Brief on File in Support of this Brief, and included a statement that his trial, plea and entire Record is incomplete as alledged and aruged in the Circuit Court.

CONCLUSION

Appellant request that this Court grant his petition and Discharge the Appellant as Law Requires.

Respectfully Submitted,

Alex Durode Johnson, III

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Certificate Of Service

I, Alex Durode Johnson, III Pro Se herein, do hereby certify that I have this day mailed postage full prepaid, a true and correct copy of the foregoing Brief In Opposition To Respondants Reply to the following

Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205-0249

Mr. Jim Hood, Attorney General
P.O. Box 220
Jackson, MS 39205

This the 1st day of February, 2008.

Respectfully Submitted,

Alex Durode Johnson, III
Alex Durode Johnson, III
M.D.O.C. #76193
I.C.C.F.

Exhibit-1

INDICTMENT POSSESSION OF COCAINE WITH INTENT
41-29-139(a)(1) & (b) (1)

STATE OF MISSISSIPPI

NO. 2005-198

COUNTY OF WASHINGTON

In the Circuit Court of Washington County, at the July 2005 Term.

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful men and women of Washington County, duly elected, empanelled, sworn and charged at the July 2005 Term of the Circuit Court, to inquire in and for the body of Washington County, in the name and by the authority of the State of Mississippi, upon their oaths, present:

That **ALEX DURODE JOHNSON, III**, on or about 3rd day of May 2005, in Washington County, did unlawfully, willfully, knowingly and feloniously have and possess of cocaine, a Schedule II controlled substance, with the intent to sell, barter, transfer or deliver the same to another, in violation of Section 41-29-139 of the Mississippi Code of 1972, as annotated and amended

against the peace and dignity of the State of Mississippi.

A TRUE BILL

ASSISTANT DISTRICT ATTORNEY

FOREMAN OF THE GRAND JURY

Filed and recorded the _____ day of _____, 2005.

Circuit Clerk _____

EXHIBIT-1 (20)

Exhibit-A

Statement of Fact

On the evening of May 3rd, 2005 around about 6:30 p.m. Johnson open the C+J Cafe located in Glen Allan, Mississippi. Leroy Spand, Junius Chaney (refferred to hereafter as "Bug") were in the cafe with me. A few minutes later James Carlislie Jr. and DeAndre Gaston enter the cafe and start shooting pool. Johnson ask Bug to go and get a bag ice for that night. Bug left and a couple minutes later Leroy left the cafe. A couple minute later Johnson was coming out of the kitchen area and notice two (2) police car passing by. Johnson than stated, two (2) police cars just pass by and came from behind the Bar and walk to the front door. Carlislie and Gaston were standing between the pool table and the T.V. When Johnson got to the front door and stood there, Johnson saw the third (3) police car pull up and into the cafe parking lot. That Officer (Mr. Vernon Jackson refferred to hereafter "Officer Jackson") got out of his car. That's when Johnson exit the cafe an walk onto the porch and onto the ramp. Johnson start to walk to the porch and Johnson notice the other two (2) police cars was coming back to the cafe parking lot. Johnson than walk out onto the ramp and spoke to Officer Jackson. Johnson enter the porch from the ramp and pick up a bag with a bottle in it and as Johnson was entering back in the cafe. Johnson threw a bag with

a beer bottle in the bag, into the Trashcan. Officer Jackson enter behind me and ask me what that you just threw into that trashcan. That's when Johnson turn around and saw Officer Jackson with a bag in his hand without a bottle in it. That's when Johnson start walking back toward the front door trying to explain to Officer Jackson what I just thrown into that trashcan. When Johnson got close to Jackson, that's when Jackson grabbed Johnson hand. Johnson try to pull his hand away from Jackson. Than Jackson stated "Don't Make Me Kill You" after he said that, Jackson kneed Johnson between his legs. That's when Johnson pull away from Jackson and start to run. Jackson than yelled Back door Back door. When Johnson were in the kitchen area, Johnson heard Jackson yelled again Back door. When I try to exit the kitchen an back to the bar area, that's when Jackson push me back into the kitchen and threw me on the floor. I were on the floor three (3) or more minutes before Sgt. Donham came into the kitchen. Jackson told Sgt. Donham the bag is out there, Sgt. Donham left the kitchen than Officer Williams Carter came into the kitchen than Sgt. Donham came back into the kitchen.

Respectfully Sumbitted,

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