

Volume III of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

FEB 15 2012

S.C. Supreme Court

JOHN HENRY WARD,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

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Applicant contends that Mr. Washington was required under the doctrine of [Estoppel-Inpais] from remaining silent, do to the fact that he previously waived his right to self-incrimination and exposed his self to incrimination by testifying at applicant's first trial and was estopped from denying the same statement if called upon as a witness in applicant's second trial 7

1001

Applicant submits that counsel was ineffective for not objecting to the admission of Mr. Washington's prior-in-court testimony which implicated applicant as the shooter. Counsel should have, at least called Mr. Washington to the witness stand and allow him to invoke the 5th amendment right, then object to his ability to invoke such a right, do to his express waiver, to which he was estopped from denying that he waived said right.

Counsel was also ineffective for failing to allow applicant to testify and for his erroneous advise on the law of unavailable witness, in which applicant's decision not to testify was based upon counsel's and Trial Court's mistatement of the Rule of evidence as it applies to witnesses and prior statements under oath without the benefit of privileged immunity against prosecution. Mr. Washington could not re-invoke his right against self-incrimination, once he has exposed himself to incrimination by the act of testifying in open court.

But for counsel's action and or admissions the outcome would have been different Applicant is entitled to a new trial.

7. Estoppel is defined as:

"A bar; preclusion, also known as [issue] preclusion, a bar which precludes a person from [d]enying the [t]ruth of a fact which has, in contemplation of law, become [s]ettled by the facts and proceedings of judicial or legislative officers, or by the [act] of the party himself, either by conventional writing or by representations, [e]xpressed or [i]mplied. An estoppel arises where man has done some act which the policy of the law will not permit him to gainsay or deny."/

IN REFERENCE TO ISSUE No 7 INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

"Appellate counsel was ineffective for failing to move to correct the record before the court."

Appellate counsel was ineffective for failing to move to correct the record on appeal. The record of the Court of Appeals decision on applicant's case reflect that during its consideration of the case that facts about where the victim was shot was misconstrued and applicant believes that he was prejudiced by this misinformation being considered.

The appeal court stated in its decision on the Hand of one issue "The co-defendant and Ward then got into the truck that chased after the car in which Dunmeyer rode. Witnesses also testified that Ward shot his gun toward the other car, and the victim was killed by a stray bullet from this shoot out." Id

The Court of Appeals further stated the same during its decision on the directed verdict issue " .. Ward and the co-defendant got into a truck from which gunfire erupted towards the vehicle in which Dunmeyer rode. Furthermore, the driver of truck as well as the co-defendant stated that Ward was shooting out of the passenger side window of the truck. Accordingly, there was some evidence that Ward shot the victim as he fired his weapon toward the other vehicle,.. "Id

Applicant contends that the record of the trial is void of any fact to support the court conclusion that the victim was shot while the two vehicles were shooting at each other and appellate counsel had an obligation to correct the record and or facts that the court of appeals was considering. At the very least to correct it afterwards

However, there is evidence in the record that the victim was shot outside the club before Ward or any one else got into vehicles or before any shooting began between the two vehicles. This instead should have been considered by the appeal court, and appellate counsel was ineffective for failing to correct the record. But for counsel's ineffectiveness the outcome would have been different.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
	)	2008-CP-10-6637
John Henry Ward, #309598,	)	
	)	
Applicant,	)	
	)	
v	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent	)	

The Respondent, making its Return to the Application for post-conviction relief filed November 20, 2008, would respectfully show this Court

I

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the September 2003 term of the Charleston County Grand Jury for murder (2003-GS-10-5895). Beattie Butler, Esquire, and Martha Kent Jenkinson, Esquire, represented the Applicant. The Applicant proceeded to trial on June 6-9, 2005, after which a jury found him guilty as indicted. The Honorable Roger M. Young, Sr. sentenced the Applicant to confinement for thirty (30) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Joseph L. Savitz, III, Esquire, of the South Carolina Office of Appellate Defense, and William J. Watkins, Jr., Esquire, represented the Applicant on appeal. Following full briefing by both sides, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Ward, Op No. 4270 (S.C. Ct. App. filed June 29, 2007). Applicant filed a Petition for Rehearing on July 9, 2007. By Order dated August 24, 2007, the Court of Appeals denied the Petition for Rehearing.

The Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on September 21, 2007. By Order dated August 7, 2008, the Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on August 20, 2008.

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the trial transcript, the Final Brief of Appellant, the Final Brief of Respondent, the Reply Brief of Appellant, the Court of Appeals' opinion affirming the conviction and sentence, the Court of Appeals' order denying Petition for Rehearing, the Petition for Writ of Certiorari, the Return to Petition for Writ of Certiorari, the Reply to Respondent's Return to Petition for Writ of Certiorari, the Supreme Court's Order denying Petition for Writ of Certiorari, and the Remittitur dated August 20, 2008.

II

In his application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel failed to move to quash fatally defective indictment
2. Lack of subject matter jurisdiction because indictment was defective
3. Violation of procedural and substantive due process

III

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington,

466 U S 668, 104 S Ct 2052, 2064, 80 L Ed 2d 674, 692 (1984), Butler, 286 S C 441, 334 S E 2d 813

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U S 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S C 115, 386 S E 2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S C at 117, 386 S E 2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S C at 117-18, 386 S E 2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S C 264, 305 S E 2d 247 (1983).

IV

The Respondent submits that Applicant's allegation that the trial court lacked subject matter jurisdiction is without merit. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Dove v.

Gold Kist, Inc., 314 S C 235, 442 S E 2d 598 (1994) A review of the record clearly indicates that there is no basis upon which to conclude that the trial court lacked subject matter jurisdiction Further, the Applicant's indictment is facially valid and proper An indictment is adequate and valid on its face if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution State v James, 472 S E 2d 38 (S C 1996), State v McIntire, 221 S C 504, 71 S E 2d 410 (1952) The indictment in this case is facially valid because it contains all the necessary elements of the offense intended to be charged, states the date of the offenses, and states the name of the accused

V

The Applicant further alleges that he was denied due process of law However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based The Uniform Post-Conviction Procedure Act requires that the Applicant must " specifically set forth the grounds upon which the application is based " S C Code § 17-27-50 (2003) In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held Welch v MacDougall, 246 S C 258, 143 S E 2d 455 (1965), Blandshaw v State, 245 S C 385, 140 S E 2d 784 (1965) Since the Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act This allegation is so vague that it is impossible for the State to respond

VI

The Respondent denies each allegation that is not expressly admitted, qualified, or explained

VII

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held

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May 13, 2009

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
	)	2008-CP-10-6637
	)	
JOHN HENRY WARD, #309598	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent	)	
_____	)	

1 I am an employee of the Respondent in the above-captioned action

2 Regular communication by mail exists throughout the State of South Carolina and that this
is a proper circumstance of service by mail

3 I have this day served a copy of the **Return** in the above-captioned matter on the following
person by depositing same in the United States mail, postage prepaid

Charles T Brooks, III
309 Broad Street
Sumter, SC 29150

DATED this 13th day of May, 2009



Angela Bennett, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
JOHN HENRY WARD, 309598)
Applicant)
STATE OF SOUTH CAROLINA)
Respondent,)
_____)

IN THE COMMON PLEAS COURT

DOCKET NO 2008-CP-10-6637

AMENDED APPLICATION FOR
CONVICTION RELIEF

FILED
2009 MAY 10 PM 2:37
JUDGE J ARMSTRONG
CLERK OF COURT

The Applicant through undersigned Counsel filed his Application for Post Conviction Relief on November 20, 2008, and wishes to amend it as follows

Failing to Object to the hand of one is the hand of all charge, because under the theory of that charge 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 Langley, and in the below section you can clearly read that the trial judge had no grounds to request nor give that charge to the jury because there is no evidence to support that they were together at the club at all

Failing to Object to the Solicitor leading his witnesses to place applicant and co-defendant together outside the club when they were not It is clear that applicant arrived at the club with someone else (Marilyn Ravenell) and if standing outside of the club during the time of the altercation is a crime, then every patron that was standing outside that night should be charged and tried for that crime The Solicitor went as far questioning Mr James Murphy about applicant being involved

in the shaking of Mr Kevin Dunmeyer's truck And if you read the applicant's trial transcript, page 160, line 5

Q Who was shaking the truck?

A A Bunch of people

Q Where were these people from?

A Peters Field

Then in the very next line, he asked Mr Murphy

Q And do you remember seeing anybody in this court room out there around that Truck?

A Yes

Q Who?

A Fiend and Mix, John

Q What were they doing out around his truck?

A They were like standing by it, you know around it Then Fiend headed back towards his truck side

Q So you originally saw Fiend out around Dunmeyer's truck, right?

A Yes

Q And then he ran back over to where is truck was?

A Uh-Huh

Never once did he nor any other witness mention applicant's name in being with Washington, shaking of Dunmeyers's truck, nor involved in any fight outside of the club on that night So I don't see how they could place Washington and Applicant together to accomplish an illegal purpose Just before questioning Mr Murphy he tried to lead Mr Dunmeyer into saying that he saw applicant together

around his truck. If you go back to page 134, line 6 of my second trial transcript you could clearly see that the Solicitor was there again trying to place applicant and Mr. Washington together outside of Mr. Dunmeyer's truck. That's page 134-135 of the second trial transcript. Mr. Dunmeyer even told the Solicitor he saw Keith Richards (who started the fight outside of the club), Kenneth Sanders (who was fighting with Ton-Ton on the outside of the club, whose GPR test came back positive from SLED). He made it clear that he did see those two out around his truck. So if the hands of one is the hand of all theory applies to applicant because he was standing outside of the club, should it not apply to everyone that was standing outside that night?

Dunmeyer States

Q Okay, anybody take a swing at you?

A Yes sir

Q Who took a swing at you?

A Keith Richards and the other guy Fred

James Murphy States

Q So you originally saw Fiend (Washington) out around Dunmeyer's Truck, right?

A Yes

Q And then he ran back over to where his truck was?

A Uh-Huh

Q What did he say when he ran back over to his truck?

A Some bitch was going to die tonight

Q But he and Mr. Ward were out there together around Mr. Dunmeyer's suburban, is that correct?

A (Witness nods head)

Notice out of all the names that were called no one said applicant's name except for the Solicitor? And you noticed how at the end of his questioning he went back to leading his witnesses to try and place applicant and Mr Washington together

Jessie Perrigo states

Q Okay now and this was about the time where were you heading when the shots were fired?

A Well, when the first shots were fired I was standing by Dunmeyer's truck a little bit, then I took off towards where we were parked at

And applicant would also like to ask if

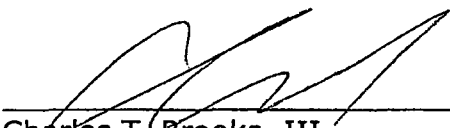
Being that the solicitor made the entire case around "The Petersfield and Cherry Hill Gangs Feud", in which he started his opening statement with these words, page 80, line 19 "and the problem started inside when a fellow names Keith Richards got jealous with his girlfriend, Shaquinta Pinckney because she was dancing with a guy names "Raulo", John Campbell. He goes on to say on line 23, "Keith Richards is from a place called Petersfield in the hollywood area Raulo was associated with another area called Cherryhill" Then on line 6 page 81 he goes on to say "I don't know if any of ya'll are familiar with that area, but Petersfield and Cherry Hill get along like oil and water, which is to say they don't They're like the Hatfields and McCoys They're like North Korea and South Korea with highway 162 being the neutral divider

Applicant has two problems with that The Solicitor stated that Shaquinta Pinckney was dancing with a guy from the Cherry Hill Area (John "Raulo"

Campbell) Applicant finds that to be untrue because he has a written statement from Ms Pinckney which says she was dancing with a fellow b the name of "Skoot", who is not from Cherry Hill, nor is he and Raulo the same person If the Solicitor's case was built on an on going feud between Petersfield and Cherry Hill, it would be safe to say that the thing about it being feud fight be false?

The Solicitor told the jury that these two communities are in a long on going feud with no facts to base it on Because there is not record of an on going feud, should the Solicitor be able to speak on such? There was never any testimony to a feud between the two areas and can that be admissible and should applicant's lawyers objected to the above errors?

RESPECTFULLY SUBMITTED ON BEHALF OF
APPLICANT, John Henry Ward



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August 6, 2009

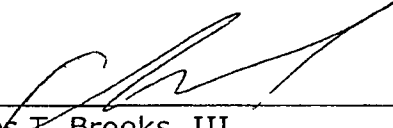
STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
	)	
COUNTY OF CHARLESTON	)	
	)	DOCKET NO 2008-CP-10-6637
JOHN HENRY WARD, 309598	)	
	)	
Applicant	)	AMENDED APPLICATION FOR POST
	)	CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent,	)	
_____	)	

The Applicant through undersigned Counsel respectfully wishes to amend his
Application for Post Conviction Relief as follows

SEE ATTACHED PAGES WITH STATEMENT OF FACTS AND ARGUMENT

(Four Pages)

RESPECTFULLY SUBMITTED ON BEHALF OF
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July 9, 2010

State of South Carolina
County of Charleston

In The Common Pleas Court
Docket No #2008-CP-10-6637

John Henry Ward #309598

Vs

State of South Carolina

Respondent

Supplemental Notice Amended

Application for Post-Conviction Relief

Rule 15(A)

The applicant through undersigned counsel, respectfully wishes to amend his application for Post Conviction Relief with respect to and in back to the is of 14th Amendment the State failed to meet its burden of proof concerning the element of malice in violation of the 14th Amendment guarantee of Due Process of Law

State of Facts

This case presents that applicant and two other acquaintances, Tremayne Washington and Cartrell Douglas, were out at a night club in the Hollywood section of Charleston County when a fight broke out inside the club between a female patron and her alleged boyfriend. After this incident was broken up, another follow up from that fight ensued outside the club which, according to several witnesses, including the officer present at the scene, the security officer working at the club, the applicant and Mr Washington, gunfire erupted and patrons began to scatter. After the crowd cleared out, a victim, Jammie Simmons, was found lying on the ground shot by what is believed to be a stray bullet. He later died the same night as a result of said gunshot wound.

Argument

State failed to meet its burden of proof concerning the element of malice in violation of the 14th Amendment guarantee of due process of law, and the applicant is actually innocent beyond a reasonable doubt.

The petitioner was tried during June 6 – 9, 2005, two days term of General Sessions Court for murder, under indictment No #2003-GS-10-5895, at the close of his two day trial Miss Jenkinson stated on record

There are way too many physical impossibilities in this case. Even the people who were outside couldn't see what happened. You never heard from anybody out there that they saw John Ward in that truck with his arm out the window shooting a gun. No one saw a gun extended from the truck. Tr Pg 790
Line 7 12

In conjunction, the state failed to prove malice beyond a reasonable doubt which malice is element of the statutory of murder 16-3-10, see State v Fuller 229 SC 439 "Malice is defined as implying wickedness and excluding a just cause or excuse. Accordingly, under SC law the statutory offense of murder under 16-3-10 is defined as follows

'Murder is the killing of any person with malice (intent aforethought, premeditated, either expressed or implied' [Emphasis added]

Barron's Dictionary Legal Term Third Edition Steven H. Gifes Malice, the state of mind that accompanies the intentional doing of a wrongful act without justification or excuse

In South Carolina, the offense of murder is defined as "the killing of any person with malice aforethought, either express or implied" S C Code Ann §16-3 10 (1976) There is no issue in this case with regards to a "killing" or whether "malice aforethought" was present at the time of the killing. Malice may be presumed in South Carolina in the absence of circumstance of excuse of justification State v Mason, 54 S C. 240 32 S E 357 (1998).

In addressing petitioner claim, malice is in and of itself an element of the offense of murder, also intent without justification being further required as an element of the offense which must be proven beyond a reasonable doubt. See Re Winnship 397 U S 358 90 S C T 1068, 25 L E 2d 368 in order to fully understand the constitutional requirements of standards of proof and who has the burden to prove certain elements in a case a survey of the United States Supreme Court dealing with this issue is necessary. In 1969, the Supreme Court held that a prosecutor must prove every element of the charged offense beyond a reasonable doubt. In Re, Winnship 397 U S 358 90, S C T 1068, 25 L E 2d 368

1 The state failed to prove that the defendant committed the charge of murder, and that the defendant acted with malice

2 The defendant is actually innocent of the crime of murder beyond reasonable doubt. Applicant must demonstrate that 'in light of all the evidence' it is jury would have convicted him, cite at Schult v Delo, 513 U S 298 372 328, 115 S C T 851 865 130 L E 2d 808 (1995)

The applicant claims that he is actually innocent of the crime of murder. There is no physical evidence (blood, hair, semen, fingerprints, DNA) belonging to the applicant that was recovered from the crime scene

The state placed an under burden upon applicant and caused applicant to be convicted of the crime of murder without any evidence to support the elements of murder and therefore prejudiced applicant as to deny him a fair impartial trial in violation of the 6th and 14th Amendment

Under South Carolina law, malice may be presumed in the absence of circumstances of excuse of justification and if presumption is permissible, e.g. absence of circumstances of excuse, the presumption satisfies the state's burden to prove malice aforethought beyond reasonable doubt. However, when all circumstances of the case are fully developed, justification for killing, any presumption as to malice will vanish. S C 1976 (16-3-10) see cite at Thomas v Ieeks 547 F Supp 612

In the applicant's case, State v John Henry Ward there was no malice presented that shows the applicant shot and killed the victim at the night club, with a deadly weapon by use of threatening to do bodily harm to the victim, which is the state's burden to prove malice aforethought beyond a reasonable doubt

However, when all the circumstances of the case are fully developed, and the defendant produces evidence to show justification for Vanish State v Rochester 75 S C 1941 51 S E 685 (1904) In essence once a defendant produces evidence suggesting an absence of malice, the burden shifts back to the state to prove beyond a reasonable doubt the existence of malice See cite at Thomas v Leeks 547 F Supp 617

Therefore, the state is wrong by convicting the applicant of a "malice" murder outside of the night club which the state could not put one piece of evidence to link the defendant at the crime scene Malice aforethought, however, is an element of murder in South Carolina State v Harry 220 S C 506 1 68 S E 2d 409 (1951) Since all circumstances defendant produced evidence suggesting absence of malice could not be presumed State v Rochester, 72 S C 194 51 S E 2d 685 (1904) Therefore, the element of malice required proof by the state beyond a reasonable doubt

Malice, n (1) the intent without justification or excuse, to commit a wrongful act (2) Reckless disregard of law or of a persons legal rights most typical in non legal context Cite at Thomas v Leeks 547 F Supp 612

Argument (2)

Applicant was denied due process and equal protection of the law under S C Constitution and Fourteenth Amendment

In a criminal case, the trial court s subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses State v Watson 563 S E 2d 336 (S C 2002) Moreover, the trial court does not have subject matter jurisdiction to convict a defendant of an offense unless (1) there has been an indictment which sufficiently states the offense, (2) the defendant has waived presentment of the indictment, or (3) the offense is a lesser included offense of the crime charged in the indictment State v Guthrie, 572 S E 2d 309 (S C App 2002) Thus a judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and realized on Blanton v Stathos 570 S E 2d 565 (S C App 2002)

In acknowledging the fact that South Carolina affords its citizens the process of being convicted upon a presentment of an indictment by a Grand Jury, pursuant to S C Const Art I §11 In order to assure that the commands of the equal protection clause of the Fourteenth Amendment has been satisfied we must look to the laws of this state that governs such procedure U S Exrel Curtis v Warden of Green Haven 463 F 2d 84 (1972) S C Code Ann §14-9-170, mandates as follows the Grand Jury as drawn in accordance with the law for service upon the court of General Sessions in each of the counties constitute the grand jury for the county court and shall meet with the county court at each of its terms

S C Code Ann §14-9-210, mandates in relevant part

the county solicitor shall prepare and, through the presiding Judge of the Court of General Sessions submit to the Grand Jury, while in attendance upon the Court of General Sessions, bills of indictments in all cases pending in the county court, when such cases have not been previously acted on by the Grand Jury

The General Assembly for South Carolina has also enacted a statutory court term schedule under S C Code Ann §14-5-740 for Charleston County which is as follows

(2) Charleston County – the court of General Sessions for Charleston County shall be held at Charleston of the first Monday in January for one week, on the first Monday in March for two weeks, on the fourth Monday in May for two weeks, on the second Monday in September for two weeks, and on the fourth Monday in December for two weeks

In analyzing the construction of 14-9-170, and the schedule terms under §14-5-740 we find that these indictments were not returned in a court term of General Sessions which is illegally convened by the language of 14-9-170

Thus the paper purporting to be indictment indorsed as a true bill by the foreman of a Grand Jury, and delivered by him out of a term of General Sessions, was not a true bill indictment which the trial court convicts applicant upon Renigar v U S 172 F 2d 646 (4th Cir 1909)

"In applicant case on tr Pg 759 line 6 The court They haven't been indicted -

The applicant's indictment indicates they were returned by the Grand Jurors of Charleston County, at a Court of General Sessions, convened on September 2 2003 Moreover, the United States Supreme Court has held that without jurisdiction the court cannot proceed at all in any cause Jurisdiction is the power to declare the law, and when it causes to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause And for a court to pronounce upon the meaning or the constitutionality of state or federal law when it has no jurisdiction to do so is, by very definition, for that court to act ultra vires Steel Co v Citizens for a Better Environment, 118 S C T 1003 (1989)

(B)

Applicant was denied due process based on outrageous government conduct when the solicitor knew or should have known that he was manufacturing new crimes in order to obtain a trial by a jury This conduct manifests a sham legal process pursuant to S C Code Ann §16-17-735, which provides that the obtaining of unlawful indictment is a criminal offense U.S v Stenberg, 803 F 2d 422 C A and the proper relief under this doctrine is quasal of the prosecution State v King, 708 S W 2d 364 Therefore, allowing applicant to trial by jury without documents is a bar to all prosecution Hamilton v McCotton 772 F 2d 171 (1982)

Conclusion

Wherefore applicant should be granted a new trial because applicants 14th Amendment Rights have been violated which leads to a violation of Due Process of Law and fundamental miscarriage of justice in the outcome of his trial by jurors

Date July 7, 2010

John H. Ward # 309,598

386 Redemption Way

McCormick, SC 29899

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF GENERAL SESSIONS
2008-CP-10-06637

JOHN HENRY WARD,
Plaintiff

V

STATE OF SOUTH CAROLINA,
Defendant

TRANSCRIPT OF RECORD

JULY 20, 2010
Charleston, South Carolina

B E F O R E

THE HONORABLE DEADRA L JEFFERSON, JUDGE

A P P E A R A N C E S

MR MATTHEW FRIEDMAN, ASST ATTORNEY GENERAL
REPRESENTING THE STATE

MR CHARLES T BROOKS, ESQUIRE
REPRESENTING THE DEFENDANT

Anne Bouley Meyer, RPR
Circuit Court Reporter

I N D E X

WITNESSES

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EXHIBITS

COURT'S EXHIBITS

- 1) Order setting the term for the Grand Jury
- 2) Indictment

1 THE COURT Mr Brooks, are you ready to
2 proceed?

3 MR BROOKS I have a motion before the Court
4 to put on the record, Your Honor, but other than
5 that --

6 THE COURT Let me take care of the procedural
7 part of that, then we will deal with that

8 This is John Henry Ward versus the State of
9 South Carolina, 2008-CP-10-6637 It's before the
10 Court on an application for post-conviction relief
11 which was filed on November 20th of 2008 It appears
12 that there have been two amended application, one
13 filed on August 10th, 2009 and one on August 13th of
14 2009

15 Mr Ward has been appointed Mr Charles T
16 Brooks, III to represent him The State is
17 represented by Matthew Friedman The trial counsel
18 was Beattie Butler and Martha Kent-Runey, I would
19 assume sitting first and second chair on the case

20 I don't see them, I told Ms Runey to be back
21 She was here before we broke for lunch

22 A return in this case was filed May 14th of
23 2009 And the Court has been provided with the
24 transcript of the trial Which was tried before the
25 Honorable Roger Young Make sure I'm accurate He

1 was tried on indictment 2003-GS-10-5895 which was an
2 indictment for murder That trial took place on June
3 6th through 9th of 2005 where he was found guilty

4 He was tried by the Honorable Roger M Young
5 who sentenced him to 30 years A timely notice of
6 appeal was filed That appeal was perfected It
7 worked its way through the system His conviction
8 and sentence were affirmed as State versus Ward,
9 opinion number 4270 A petition for re-hearing was
10 filed July 9, 2007 And by order dated August 24th,
11 2007, that petition was denied

12 He applied for a writ -- a petition for a writ
13 of certiorari to the Supreme Court on September 21st,
14 2007, and that was denied by the Supreme Court on
15 August 7, 2008 The remittitur was issued on August
16 2, 2008

17 He alleges ineffective assistance of trial
18 counsel in that counsel failed to move to quash a
19 fatally defective indictment He alleged the lack of
20 subject matter jurisdiction because the indictment
21 was defective in violation of procedural and
22 substantive due process, which I assume was made more
23 specific in the amended applications for
24 post-conviction relief

25 And that includes allegations that trial

1 counsel was ineffective for failing to object to
2 prosecutor's comment referring to the applicant as a
3 member of a gang Trial counsel ineffective for
4 failing to move for a separate trial

5 Alleging ineffective of assistance for failing
6 for moving to quash the indictment, failing to object
7 to the jury charge on accomplice liability, failing
8 to argue the use of the codefendant's recorded
9 testimony from applicant's first trial which ended in
10 a mistrial, failing to allow applicant to testify at
11 his second trial, and applicant testified at his
12 first trial which ended in a mistrial, ineffective
13 for failing to move to correct the record before the
14 appellate court

15 I don't think that can be a grounds for a
16 post-conviction relief That would relate to
17 appellate counsel, and you can't file a
18 post-conviction relief action -- well you could I
19 guess I don't think that would be a basis of the
20 relief against this lawyer He would have had no
21 obligation as appellate defense Appellate defense
22 would have been handling his appeal

23 Now I understand, Mr Brooks, that -- if I
24 misquote this in any way, please correct me You ask
25 that the Court continue this matter because the

1 applicant's family wanted to hire an investigator,
2 correct?

3 MR BROOKS That's part of it, Judge

4 THE COURT Okay Is there more to it?

5 MR BROOKS As the Court will know, this
6 month indigent defense has sent out a letter on civil
7 cases that pertains to post-conviction relief matters
8 that they don't have any money for the upcoming year

9 THE COURT I did not know that until you told
10 me that earlier today

11 MR BROOKS I understand Sorry, Judge
12 They sent a letter out to all the members of the bar
13 as it relates to civil pay-appointments, specifically
14 dealing with sexual violent predator cases, DSS
15 matters, and of course post-conviction relief
16 matters

17 In that letter it basically says that they
18 have no funds for the upcoming year to address any
19 experts, investigators, basically to pay for costs
20 associated with a person who is indigent in these
21 matters, to associate any costs associated with those
22 cases

23 And of course I sent, since I do a substantial
24 amount of post-conviction relief work, I sent a
25 letter to all of my clients And I sent a copy of

1 the letter of course to Mr Ward

2 And he indicated that hey, you know, I would
3 like to have some type of experts in this situation,
4 perhaps an investigator to perhaps go back and track
5 down some of these witnesses, because a lot of his
6 case was witness' testimony, people who tend to not
7 have the greatest credibility, as well as a lot of it
8 came down to some ballistics issues about where the
9 gun may have been fired, this angle versus that
10 angle

11 THE COURT Well he is aware, however, that
12 this Court is not going to retry the case This
13 Court is going to look at the effectiveness of his
14 counsel

15 MR BROOKS Obviously with trial counsel,
16 through the course of conversations, has indicated
17 that he did not do any of those things Obviously to
18 find out if that would have made a difference in his
19 situation, he would have to be allowed to seek that
20 out

21 And now because there is no money from the
22 state to do that, I did talk to his family while we
23 are here today, and they indicated that they would
24 make some strong efforts to do so

25 So in light of that, we would respectfully ask

1 the Court to continue this matter to the next term of
2 court

3 THE COURT As I shared with you, that would
4 not be the basis of an appeal The Court would
5 simply leave the record open and I would give them
6 the timeline to hire someone and I would supplement
7 the record with any testimony and take the matter
8 under advisement

9 That would not justify such a gross waste of
10 the Court's time by adjourning court for the entire
11 afternoon Clearly he has other witnesses he can
12 call, and other arguments that the Court could
13 consider and leave the record open for that witness

14 In addition to that, I thought about it over
15 the luncheon recess, indigent defense has always run
16 out of money This is nothing new When I
17 practiced law we usually expected them to run out of
18 money by June You always tried to get all your
19 stuff in before June, because they usually ran out of
20 money

21 I don't think that prevents you, however, from
22 getting an order to hire an investigator for him
23 Because they're not going to be paid in advance
24 anyway And then the new funding cycle starts, and
25 there would be money available for him, maybe

1 MR BROOKS I have to correct you --

2 THE COURT You'd have to go talk to Mr Adams
3 or I forget the lady in his office

4 MR BROOKS I have to correct you in regards
5 to this, because we have begun a new cycle And
6 their letter indicates they have no money

7 THE COURT For the new cycle?

8 MR BROOKS For the upcoming year to deal
9 with any civil cases They don't know when they will
10 be --

11 THE COURT You're saying no money for the
12 upcoming year?

13 MR BROOKS 2010/2011 We are in the
14 beginning of the fiscal year because we are in July
15 July to June, they have no money

16 THE COURT That doesn't mean you are
17 precluded from getting an order allowing him to have
18 an investigator, and for that investigator to be paid
19 when funds become available

20 MR BROOKS All the investigators know there
21 is no money

22 THE COURT So they're not going to work
23 That's reasonable

24 MR BROOKS Yeah All -- as a matter of
25 fact, I asked some investigators on some other cases

1 who immediately upon knowing, as I have informed him,
2 he immediately brought back his work and said he is
3 done until if and when there is some money or
4 somebody comes in

5 THE COURT I need to hear the attorneys'
6 testimony too because the public defenders office has
7 three investigators and they're thorough And I have
8 never known them not to research something to death
9 So I am just assuming there was some strategic
10 reason, or that it really wouldn't have borne out
11 anything

12 So I'm just hesitant to continue it for that
13 reason And I'm not going to continue it for that
14 reason But I will give his family a reasonable time
15 to get an investigator if they want to and we will
16 supplement the record with that And I will
17 reconvene the hearing whenever -- but I'm not going
18 to give them an indefinite amount of time to do that

19 MR BROOKS I understand

20 THE COURT Because if you are going to do
21 something, you are going to do it I will give them
22 a reasonable amount of time to hire an investigator
23 And I don't have any idea who it is they plan to hire
24 or-what that person's fees are, but

25 when did you talk to them, did you talk to

1 them today about getting an investigator?

2 MR BROOKS With the family about not only
3 about getting an investigator, the process, basically
4 they'd have to bear the costs of it

5 THE COURT That's what I mean when I say for
6 them to get an investigator

7 MR BROOKS That's right

8 THE COURT What did they indicate to you?

9 MR BROOKS One cousin said that was
10 something that they would do because they obviously
11 care about their loved one Another cousin said
12 that's what he planned to do if that's what it takes

13 THE COURT Have they even looked into it to
14 see how much it would cost?

15 MR BROOKS They haven't because --

16 THE COURT Why don't you give me an idea what
17 it costs because I haven't looked at a voucher in a
18 minute I know what my assumptions are about what
19 the fees were

20 MR BROOKS I told them, you are talking
21 about an investigator and perhaps a ballistics
22 expert, I told them, you know, safe side --

23 THE COURT A ballistics person is probably
24 going to be about \$1,500, and an investigator's start
25 out is probably going to be about 2,500 so he's

1 looking at about \$4,000

2 MR BROOKS I told them between five to ten,
3 judge I would rather --

4 THE COURT Well to get started it's going to
5 be at least 5,000 for them to even get started

6 MR BROOKS That's what I told them, so

7 THE COURT Because the ballistics person,
8 usually when they submit vouchers it's 1,500, and
9 then more if the analysis requires more than that

10 MR BROOKS These people out there now, when
11 I say these people, these experts, anybody -- it's
12 not just actually pertaining to Mr Ward's case,
13 anybody in general, knowing that OID doesn't have any
14 money at the beginning of the fiscal cycle, we don't
15 know if and when, nobody is going to do any work

16 THE COURT But I think that's just to cover
17 themselves I think they're going to find money for
18 indigent defense I think it's going to create -- I
19 hate to sound like an alarmist -- but it really could
20 create quite a crisis if they don't I suspect
21 they're going to find some money somewhere They
22 going to have to, or have a lot of lawsuits

23 MR BROOKS Yes, it may, Judge Be that as
24 it may, I can only take the facts as I'm given them
25 and work with the resources I have which at this time

1 is none, so

2 THE COURT Well I will give you adequate time
3 for them to hire someone, and then for the Court to
4 supplement the record with that testimony There is
5 no prejudice that would be suffered to him by that
6 because he would be given ample opportunity to do it
7 And to have that testimony presented and considered
8 by the Court

9 But again all of that is contingent on me
10 hearing from the lawyers And I need to hear what
11 they did

12 MR BROOKS But, Judge, the only problem I
13 have with that is what if, you know, I ask -- and
14 I'll use Beattie Butler for this -- I ask him a line
15 of questioning, but then the family goes out and
16 hires a ballistics expert that raises --

17 THE COURT He's going to testify about his
18 strategy in pursuing this case and what he did He
19 had investigators

20 MR BROOKS I understand that But if that
21 ballistics expert comes back and says --

22 THE COURT You just recall Mr Butler if you
23 need to I don't think there is anything the
24 ballistics expert is going to find out that you are
25 going to need to ask Mr Butler about But in the

1 outside chance there is, I will let you recall him

2 MR BROOKS Judge, I don't want to start, to
3 get to the point, but we don't know, that's the
4 problem that happens with these cases we don't
5 know

6 THE COURT I don't see any prejudice to your
7 client I told I've left the record open and I will
8 let you recall Mr Butler I'm not delaying the
9 trial of this matter

10 MR BROOKS Yes, ma'am

11 THE COURT All these PCR cases have to be
12 disposed of in a timely manner, this case is from
13 2008 It should have been disposed of a year ago,
14 really, truth be told

15 MR BROOKS Yes, ma'am

16 THE COURT It's reasonable within a year of
17 filing for it to have already been disposed of so I
18 am not going to delay it any further

19 so that is what you all discussed with me
20 prior to was the investigator And I indicated to
21 you I would give him additional time to get an
22 investigator if he so desired I still would
23 encourage you to pursue having an order signed and
24 indigent defense authorizing someone to go forward
25 we will see what happens, you never know

1 Has the legislature adjourned for the year?

2 Are they still coming back?

3 MR BROOKS As far as I know they --

4 THE COURT They don't have any supplemental
5 sessions about vetoes? I can't remember We are
6 now into July, I guess, maybe not

7 MR BROOKS All the information I had was I
8 think they have to wait until the session starts up
9 in --

10 THE COURT In January?

11 MR BROOKS Yes, ma'am

12 THE COURT Okay You said there was
13 something else?

14 MR BROOKS No, I was just talking about
15 that

16 THE COURT Okay We will proceed And then
17 if we need to supplement the record we will do that
18 And if you need to recall any witnesses as a result
19 of what your experts may or may not find, you
20 certainly will be allowed to do that as well

21 I'm going to give them a window to obtain the
22 services of an investigator I'm not going to be
23 waiting six or seven month for that to happen

24 MR BROOKS Your Honor, do you have any idea
25 how long --

1 THE COURT I think 30 days is more than
2 sufficient time to hire somebody if you are going to
3 do it, 45 at the most Then another 30 days probably
4 for them to do what they need to do in terms of
5 gathering any evidence, or looking into the matters
6 that -- but again, it is not this Court's prerogative
7 to retry a case I'm not going to do It's not the
8 scope of a post-conviction relief action

9 MR BROOKS I understand

10 THE COURT Okay Ready to proceed?

11 MR BROOKS Yes, ma'am

12 THE COURT You may proceed

13 MR BROOKS We would call Mr Ward to the
14 stand

15 THE COURT Mr Ward, you can testify at
16 counsel table

17 MR JOHN HENRY WARD,
18 after having first been duly sworn to state the
19 truth, the whole truth and nothing but the truth,
20 testified on his oath as follows

21 THE COURT You may proceed Mr Brooks, you
22 may take your seat if you'd like whichever you're
23 more comfortable with

24 MR BROOKS Yes, ma'am

25 DIRECT EXAMINATION

1 BY MR BROOKS

2 Q Mr Ward, you were represented in this matter
3 by Mr Butler, is that correct?

4 A Yes, sir

5 Q You also had Ms Jenkinson from the Public
6 Defender's Office?

7 A Yes, sir

8 Q And they were court-appointed to you, is that
9 correct?

10 A Yes, sir

11 Q And you've raised the post-convention relief
12 allegation as it relates to their representation, is
13 that correct?

14 A Yes, sir

15 Q And you've also raised the allegation of
16 prosecutorial misconduct?

17 A Yes, sir

18 Q Can you tell the Court, you've done a lot of
19 stuff in preparing for this matter, is that correct?

20 A Yes, sir

21 Q Can you tell the Court one of the issues in
22 regards to the prosecutor we had talked about in
23 regards to some things that were mentioned in the
24 trial?

25 A Yes, sir I claim that the prosecutor's

1 inflammatory remarks against me in opening
2 statements, based on no evidence, proclaiming that
3 stuff that he was talking about prejudiced me

4 First of all, he was claiming that I was a
5 member of or leader of a gang, and I got a trial
6 transcripts to back that up Like for instance on
7 the trial transcript page 80, lines 10 through 12 the
8 prosecutor said that we were drunk, drinking, beating
9 our chests and have something to prove

10 And he went on further to say in trial
11 transcript page 81, line 5 through 11, that the fight
12 outside soon turned into a melee between the Peter's
13 Field folks on one side, and the Cherry Hill folks on
14 one side

15 He asked the jury if they were familiar with
16 that group If they were not, the Peter's Field
17 group and the Cherry Hill group does not get along,
18 they get along like oil and water And he made
19 remarks about North Korea and South Korea pertaining
20 to Peter's Field and Cherry Hill And he was going
21 on about the Hatfields and McCoys

22 Q Did your lawyer raise any objections to that?

23 A No, my lawyer did not object to any of that
24 He went on record as saying going through the trial
25 transcript page 81 line 21, they said, John Henry

1 ward is Peter's Field

2 He continue on by saying, it didn't matter who
3 pulled the trigger in this certain incident, that we
4 were friends, we were in this together And
5 basically I think his remarks like tainted my entire
6 trial His comments really were brought up aroused
7 the bias and prejudice of the jury on gangs

8 Q As it relates to your trial counsel, was this
9 your first trial in this matter?

10 A No, no, no, it was my second trial on this
11 matter The first trial I was tried by myself
12 without any of my codefendants

13 Q And the second trial was a joint trial, is
14 that correct?

15 A Yeah, the second trial was a joint trial

16 Q And the first trial ended in a hung jury, is
17 that correct?

18 A Yes, sir The first trial ended up in a hung
19 jury because there was just no evidence that I did
20 the crime

21 Q All right And did you testify in your first
22 trial?

23 A Yes, sir, I did

24 Q Did you testify in your second trial?

25 A No, sir, I didn't My counsel advised me not

1 to testify when that clearly deprived the jury from
2 hearing testimony that I wasn't even in the vehicle
3 during the time that the gunshots were fired

4 Q Now as far as your criminal history, what
5 criminal history did you have prior to the first
6 trial?

7 A Open container and disorderly conduct

8 Q And did you and your attorney discuss whether
9 or not that would be something that could be brought
10 up in the middle of your trial to impeach you if you
11 took the stand?

12 A No, they didn't discuss why they didn't want
13 me to testify as thorough as I thought they would be
14 They just told me that they would advise me not to
15 testify at my second trial because there was
16 confusion in my first trial

17 Q Okay Now did your trial counsel ask for a
18 separate trial away from your codefendant prior to
19 the second trial?

20 A No, he didn't I asked him about severance of
21 the trial and they told me there was nothing they
22 could do about severing the trial

23 Q Do you recall when it was brought up?

24 A It wasn't, -not-to my knowledge

25 Q Okay Now you also raised the issue about

1 defects on the indictment Can you explain that to
2 the Court?

3 A They give out, at the penitentiary I was at, I
4 ordered a status report on the indictment process
5 And the week that they got my indictment stamped is
6 for the 2nd of September when the paperwork clearly
7 states that the indictment, court for indictment
8 would only be held on the 2nd Monday in the month of
9 September

10 And the indictments were, I don't want to say
11 bogus, I want to say the indictments really couldn't
12 have been good if the court wasn't being held that
13 day

14 Q One of the issues raised was in regards to the
15 jury charge, the charge went to the jury about the
16 hand of one is the hand of all?

17 A Yes

18 Q Can you elaborate on that allegation as it
19 relates to this matter?

20 A Okay From my knowledge of the hand of one is
21 the hands of all -- beg the Court -- to my knowledge
22 on the hand of one is the hand of all, according to
23 State versus Dickman, if two or more combine together
24 to commit an unlawful act and a homicide is committed
25 by one of the actors as the probable and natural

1 consequences of the acts done in pursuance of a
2 common design, all present and participating in the
3 unlawful undertaking are as guilty as the one who
4 committed the fatal act

5 They got that quoted as the hand of one is the
6 hand of all And I think that's the charge they used
7 and the case that they went from

8 Q Now in your situation, were you with this
9 codefendant, Tremayne Washington?

10 A No I was not with Tremayne Washington on the
11 night in question In fact, I arrived at the club
12 with another gentlemen as well, another codefendant
13 of mine, Mr Douglas We both came to the club with
14 somebody else

15 And I was intending on leaving the club with
16 Mr Ravenel The police officer that was there
17 covering an unruly suspect, and he accessed taking
18 from the public The only reason I went back into
19 the club is I forget my shirt

20 And when I went back in the club that's when
21 the fight started Everybody exited the club Fight
22 continued on the other side Shots were fired I
23 ran back to get into Marvin's vehicle, he was gone
24 because the police had already ran him off

25 And shots were fired, I'm trying to get out of

1 there I see this truck coming down the road I
2 know Mr Washington, you know what I'm saying, so I
3 flagged him down, caught a ride home just like my
4 other codefendant was doing

5 we didn't plan for anything to happen we
6 didn't talk we didn't even speak to each other in
7 the club And for the solicitor to come out and tell
8 the jury that we were together just because we were
9 in the same building, I mean

10 Q Do you think that is something your lawyers
11 should have objected to?

12 A They should have objected to it because it was
13 not true And if they had called Mr Marvin Ravenel
14 to the witness stand like I asked him repeatedly,
15 they would have heard testimony that me and Marvin
16 Ravenel went to the club together with no intentions
17 of seeing Mr Washington

18 Mr Washington also got on the stand and said
19 that he invited several other people to the club
20 which did not include my name

21 Q And Mr Ravenel, you figure that would be a
22 witness that would help support your case?

23 A Yes I told him about the witness I have
24 copies of the subpoenas where they subpoenaed him for
25 both of my trials

1 Q Now when you say you told them

2 A I told my attorneys Because the whole basis
3 of the solicitor's argument was that me and my
4 codefendant were in cahoots, we were together all
5 night He even went as far as getting his witnesses
6 and asking them direct questions whether we were
7 together which was clearly fabricated because we
8 wasn't

9 I hadn't spoken (sic) to Mr Washington in
10 several months

11 Q Okay

12 A I mean I don't see where the crime was
13 committed where just because me and Mr Washington
14 was in the same building and we know each other, I
15 don't see how that can be a crime or the hand of one
16 is the hand of all

17 Q Now one of the other things that you raised
18 was ineffective assistance of counsel, I guess the
19 appellate counsel?

20 A Yes

21 Q In not moving to correct the record Can you
22 tell the Court about that?

23 A Well my appellate counsel, he basically didn't
24 look at my case He didn't go on to correct the
25 record on the mishaps of the solicitor, either did

1 trial counsel

2 I mean he basically came in, not -- didn't
3 speak to me He came in like one week before he went
4 to court and wrote me a letter to let me he was going
5 to court and he just basically didn't contact me,
6 didn't get with me, he didn't say anything about my
7 case, he just

8 Q Who was your appellate counsel?

9 A Mr Watkins Bill Watkins

10 Q Now you've covered a lot of issues, Mr Ward
11 Is there anything you haven't covered that you want
12 to tell the Court about now?

13 A Well there is actually a few things, if I may,
14 I wanted to tell the Court about

15 Q Okay, go right ahead

16 A And I also wanted to state that, I quote the
17 solicitor's words, he was arguing out of the presence
18 of the jury that -- and I quote, he said, from the
19 beginning to the end I argued this But the only
20 evidence I have to show is any evidence that is
21 standard

22 And he was like, if there is any evidence to
23 support that these two people acted in cohorts with
24 one another to commit this awful -- I mean unlawful
25 crime, he said, he didn't have to prove conspiracy,

1 wasn't required to prove a verbal agreement between
2 them

3 But one thing he did say, he said it required
4 him to prove that -- to prove any kind of agreement
5 between them other than what can be inferred to two
6 ex conduct -- his definition and his own words
7 conduct was they're friends, I mean they have been
8 friends, they were at the club together, they
9 identify with a particular group And for lack of a
10 better word, a gang fight between two rival groups

11 I mean to my knowledge I mean friendship -- I
12 mean me being someone's friend is not any element of
13 any crime that I ever heard or read And the fact
14 that we are in the same building together, that
15 doesn't bear that I have done anything wrong

16 And he went along saying that they were at the
17 nightclub together, which was an untrue statement
18 because I came to nightclub with a different person
19 Like I said, according to the testimony neither of us
20 arrived at the club together, we didn't talk at the
21 club together, no one saw us hanging or mingling at
22 the club together

23 It just so happened that my ride got chased
24 off by the officer that out there, I needed a ride
25 home, I saw him, I flagged him down, I got in the

1 truck So I mean, I don't see that as being a crime
2 And from testimony, I mean I'm 6'2" I got long
3 arms If someone -- there was no testimony that
4 someone saw -- I'm sitting in the passenger seat of
5 the truck, there is no testimony that someone
6 actually saw my arm come out of that truck with a
7 gun No one saw this gun No one knew where he got
8 this gun from

9 If I stick my arm out of a moving vehicle,
10 especially a pickup truck, somebody is going to see
11 that firearm

12 I had it sitting on the driver's lap and he
13 say he didn't know where I got gun from, he didn't
14 know where it come from And that's two people that
15 was facing murder charges that had a reason to put
16 the blame on me

17 I mean I'm sorry for the loss Me and the
18 young man, me and Mr Simmons was real close But I
19 simply did not do what they say I did I just simply
20 did not shoot no gun I didn't kill nobody So I
21 don't feel I should be spending 30 years of my life
22 behind bars for something I didn't do when they have
23 no real proof

24 They going by speculation of this one being
25 drunk, and this one don't want to get the time that I

1 got so they point the finger at me And I don't
2 think that's right If you are going by the facts,
3 there is facts to prove that he fabricated a lot of
4 it, the solicitor that is, and my lawyer didn't
5 object to it that it was all fabricated

6 Q Anything else?

7 A No No, sir

8 MR BROOKS All right That's it from us,
9 Your Honor

10 THE COURT Mr Friedman, do you have any
11 questions for the witness?

12 MR FRIEDMAN Thank you, Your Honor

13 THE COURT You're welcome You may proceed

14 CROSS-EXAMINATION

15 BY MR FRIEDMAN

16 Q Mr Ward, did the solicitor ever specifically
17 call you a gang member?

18 A Yes, sir, Mr Attorney, sir If you take page
19 81 of the trial transcript, well excuse me, if you go
20 back and check page 81 of the trial transcript, lines
21 5 through 11, where he is describing folks from
22 Peter's Field and Cherry Hill as the Hatfields and
23 McCoys, North Korea and South Korea, oil and water,
24 and Highway 61-being a neutral divider

25 Then he goes down to Line 21 he made the

1 statement that says that John Henry Ward is Peter's
2 Field Meaning that I am a member of this Peter's
3 Field gang, or maybe a leader, the lead of this
4 Peter's Field gang

5 So in reference to him making me out to be a
6 gang member or a member of some kind of organization,
7 yes, he did, and it's right there in black and white

8 Q Peter's Field is where you are from, right?

9 A Peter's Field is where I grew up When this
10 altercation took place, I wasn't even living in
11 Peter's Field But yes that's where I am from, yes,
12 sir

13 Q So he kind of inferred that there was a
14 dispute between Peter's Field and Cherry Hill but he
15 didn't actually call you a gang member, is that
16 right?

17 A He tried to make it as an ongoing rival
18 between Peter's Field and Cherry Hill, when in fact
19 people from Peter's Field and Cherry Hill go to
20 school together, go to church together

21 We have people from Peter's Field and Cherry
22 Hill that's married and have kids together I don't
23 see the rivalry in that

24 Q Did your attorneys explain to you the hand of
25 one is the hand of all?

1 A They didn't explain the hand of one is the
2 hand of all They had it on the big projector screen
3 and I read it They didn't explain it to me, what
4 did it consist of or, no, they didn't

5 Q I believe your testimony earlier was that you
6 weren't actually in the codefendant's truck until
7 after the shots were fired?

8 A Yes And they didn't let me testify to that
9 in my second trial I testified to it in my first
10 trial which ended up in a mistrial

11 They advised me not to testify in this trial
12 I don't know why, for whatever reason personally, I
13 don't know why But they didn't let me testify to
14 that They didn't let me get on the stand

15 Q Your position would be that you were not in
16 the car?

17 A My position is that I wasn't in the car during
18 the time of the gun shoot But I was, like I told
19 you, I arrived at the club with somebody else He
20 had left me They were shooting guns I'm trying to
21 get out of there

22 I saw the truck, I knew the dude, I flagged
23 him down, he stopped, they picked me up, Mr Douglas
24 was driving, Mr Washington was in the back When
25 the light came on I jumped in the empty seat and got

1 out of there I made a split-second decision rather
2 than get out there and get shot

3 Q You testified you arrived at the club with Mr
4 Ravenel?

5 A Yes, sir

6 Q And your attorney did not subpoena him for
7 trial?

8 A They did subpoena him And after numerous
9 times of me calling him, asking them to call him up
10 as a witness they didn't

11 And that deprived the jury of hearing either
12 the testimony that I wasn't in the truck or that I
13 rode to the club with another individual

14 Q Now was Mr Ravenel still at the club when the
15 shots were fired?

16 A No The police had chased him off I was
17 initially in the truck with him about to leave
18 because they had an unruly partner at the door And
19 the police -- we were giving him a ride home, it was
20 a family member

21 And I went out and I got in the truck I
22 forget my shit, I took my shirt -- the club was hot
23 so I took my shirt off, my jersey on top of my
24 T-shirt, I had on a white T-shirt So I went back in
25 the club for my jersey and that's when the fight

1 happened

2 I came back outside, they were still fighting
3 I was standing there looking, shots started coming
4 I went to go back to Marvin's vehicle, Marvin was
5 gone I kept on moving They still shooting

6 So I saw -- I looked back I saw his truck, I
7 know him, I stopped him, I got in the truck

8 Q Well Mr Ravenel was not still at the scene
9 when the shots were fired?

10 A No, he wasn't

11 Q If he wasn't there, then what benefit would
12 his testimony be at trial?

13 A His testimony was a benefit at trial would be
14 that the solicitor's whole case was based on that me
15 and Mr Washington was together We were Peter's
16 Field, we were a group, we went out there together

17 I wasn't even living in Peter's Field at the
18 time this happened I went to my mother's house to
19 take something there Me and Mr Ravenel --
20 basically what I'm trying to say is that me and Mr
21 Ravenel arrived at the club together, we were going
22 to leave the club together

23 Mr Ravenel's testimony would have went to
24 rebut the solicitor saying that me and Mr Washington
25 and Mr Douglas were together the whole time I mean

1 just because we were in the same building, that
2 doesn't mean that we're together I hadn't seen Mr
3 Washington for two months prior to this

4 MR FRIEDMAN I have nothing further, Your
5 Honor

6 THE COURT Any redirect?

7 MR BROOKS No, Your Honor

8 THE COURT Call your next witness

9 MR BROOKS We would call Beattie Butler

10 THE COURT Mr Butler, if you would come to
11 the stand to be sworn

12 MR BEATTIE BUTLER,
13 after having first been duly sworn to state the
14 truth, the whole truth and nothing but the truth,
15 testified on his oath as follows

16 THE COURT You may proceed

17 DIRECT EXAMINATION

18 BY MR BROOKS

19 Q Now, Mr Butler, you were court-appointed to
20 represent Mr Ward in this matter, is that correct?

21 A I think technically Ms Runey, Jenkinson at
22 the time, would have been the one who was appointed
23 I was assisting her

24 Q Okay And would it be fair to say that you
25 were lead counsel?

1 A No I would say she was lead counsel But my
2 -- part of my responsibilities in the public
3 defender's office is that I help other lawyers on
4 their big cases

5 When I do that I will usually handle legal
6 issues, if there are forensic issues I do those, if
7 there is an especially important witness, like a
8 cooperating codefendant, I will do the
9 cross-examination

10 But I believe Mr Runey did opening statements
11 and closing arguments She would have been lead
12 counsel

13 Q Now in assessing this case, is there anything
14 you guys would have done differently?

15 A Yes

16 Q What might that be?

17 A The dilemma in this case always was that we
18 always thought that Tremayne Washington was the
19 shooter And in the first trial that resulted in a
20 hung jury, and we were told it was 11 to 1 to acquit,
21 Mr Washington cooperated and testified against Mr
22 Ward

23 And I crossed Mr Washington And I know I'm
24 biased, but I think I did an extremely good job of
25 crossing Mr Washington, although he is probably

1 pretty easy to cross, and suggested that he was the
2 shooter

3 I think he came across to the jury as not
4 believable, a less than desirable person in general,
5 and came across as the shooter That was our theory
6 in the first trial The judge, Judge Dennis, refused
7 to charge hand of one in that trial

8 In the second trial the prosecutor decided not
9 to cooperate with Mr Washington, I suspect in large
10 part because of how poorly he did on the stand And
11 there was a joint trial, so the state was prosecuting
12 Mr Ward and Mr Washington together And we didn't
13 object to a joint trial

14 I did not think there was a basis to object
15 But I didn't foresee that the state was going to play
16 Mr Washington's testimony from the first trial
17 before the jury

18 Q Wait a minute, let me get this straight They
19 actually played the recording of the first trial, and
20 specifically your cross-examination of Mr
21 Washington?

22 A That's right They played his entire
23 testimony It obviously would have been admissible
24 against Mr Washington as an admission by a party
25 opponent in a joint trial In a joint trial they

1 would have been able to, and did, play Mr
2 Washington's testimony just as if it were a statement
3 to police or anybody else It's an admission

4 Q Wouldn't that run afoul of some Bruton issues
5 because --

6 A Well, no, because I cross-examined him in the
7 first trial It's not a confrontation problem, at
8 least at first glance, because I got to cross-examine
9 Mr Washington And I think I did so effectively and
10 thoroughly

11 But the problem was in a joint trial,
12 cross-examining Mr Washington effectively and
13 thoroughly and suggesting that he is the shooter hurt
14 Mr Ward

15 And the prosecutor knew that I mean that's
16 why he played the testimony of his own witness in
17 trial one, to be used against Mr Washington in trial
18 two

19 Q Because the end result was actually both
20 defendants were found guilty?

21 A Both were found guilty and he got his hand of
22 one charge But the dilemma for me is John was
23 punished because his lawyer did a good job at
24 cross-examining Mr Washington

25 I cross-examined Mr Washington, suggested

1 that he was a liar and the shooter I still believe
2 both of those things are true, to the extent that
3 that matters

4 That was then used against John when they
5 tried them jointly, and got them the hand of one
6 charge that I think resulted in both of them getting
7 convicted

8 So in other words because we did a good job at
9 cross-examining Mr Washington in trial one, John was
10 punished in trial two So much so, like I said, the
11 prosecutor used his own witness that was favorable to
12 him in trial one to help prosecute Mr Washington,
13 and as a consequence Mr Ward, in trial two

14 Q So is that in some way the prosecutor
15 basically taking an inconsistent position?

16 A Yeah, I can speak to that in a second But
17 the problem is I think I should have objected Even
18 though I was able -- I had cross-examined Mr
19 Washington in trial one, my focus on Mr Washington
20 would have been different in trial two when the
21 theory of -- the prosecution's theory and defense was
22 different I would have cross-examined him
23 differently

24 By making him out to be the shooter in trial
25 one, it's all or nothing, it's either John Ward is

1 either guilty or not guilty and there is no
2 accomplice liability But once they are tried
3 together and the state gets their hand of one charge,
4 all of the evidence that makes Tremayne Washington
5 look guilty, as a consequence makes John look guilty

6 So I should have objected to the joint trial
7 And I should have objected to them playing the
8 testimony

9 And, you know, I think that the reason this
10 probably never comes up, at least that I have never
11 seen it, where my cross-examination of a witness ends
12 up serving my clients to my client's detriment is
13 Tremayne Washington's lawyer should have had a
14 proffer agreement such that his cooperation wouldn't
15 ever be used against him I don't know if that
16 didn't happen, but I can only assume that it did not

17 But once that doesn't happen, in other words
18 Tremayne Washington's lawyer leaves the door open for
19 them to use his testimony against him, we should have
20 objected to the joint trial, and I should have
21 objected to them essentially playing Tremayne
22 Washington's testimony in a case where I then
23 couldn't cross-examine him in the current trial, if
24 that makes sense

25 Q Okay And --

1 THE COURT Let me be clear I don't mean to
2 interrupt you You did cross him in the second
3 trial?

4 A Did not because he didn't take the stand in
5 the second trial

6 All they did was press play for Tremayne
7 Washington They just played the tape of his
8 testimony from trial one, wherein by the time I was
9 done I had him admitting he was a liar And it
10 looked bad for the state, and it made Tremayne
11 Washington look bad

12 In trial two they can't call him, he has got a
13 5th Amendment right not to testify against himself
14 They simply played his testimony to the jury And I
15 didn't think it was hearsay because I did cross him
16 before But the problem was, what I didn't foresee,
17 was that my cross-examination would have been
18 different in a joint trial

19 By making him look to be the shooter, if they
20 get their hand of one charge, that hurts my client

21 Q (By Mr Brooks) You didn't try to call him to
22 the stand, did you?

23 A No We wouldn't have been able to call him to
24 the stand, he has the right to remain silent

25 Q So you felt pretty comfortable that Mr Runion

1 would have objected to that, is that correct?

2 A I don't know if he would have had any more
3 solid basis to object than I would what he should
4 have done is he should have had a proffer agreement
5 that they couldn't have used his testimony against
6 him That's kind of standard But I have no control
7 over that

8 Q But if you had tried to call Mr Washington to
9 the stand, you feel reasonable sure that Mr Runion
10 would have objected to that?

11 A Of course I couldn't have called him to the
12 stand, anymore than Mr Runion could have called John
13 Ward to the stand

14 Now you were asking me about inconsistent
15 positions?

16 Q Correct

17 A Did you want me to speak to that?

18 Q Please

19 A Something else that we should have objected
20 to, which is sort of part of the overall sort of
21 problem with the way the prosecution shifted focus
22 from just prosecuting John to prosecuting both John
23 and Tremayne, was the prosecution had to take
24 inconsistent positions on things

25 A good example was in trial one, to show that

1 Tremayne Washington was the shooter, we called a
2 witness -- whose name I cannot remember but it's in
3 the record -- we called a witness who testified that
4 the morning after the shooting, or sometime shortly
5 after the shooting, that Tremayne Washington was
6 washing his hands in bleach

7 Our theory was he was worried that there would
8 be some evidence on his hands, maybe even that he
9 washed his clothes or took a shower or took a bath or
10 something like that, but definitely I remember his
11 washing his hands in bleach

12 We put up that testimony And the prosecutor
13 attempted to impeach our witness on those facts I
14 cannot remember what it was, but for example
15 something like, you didn't tell the police that,
16 suggesting that this witness was lying

17 Well in trial two, when their theory is we
18 don't care who the shooter is, they are both jointly
19 responsible, the prosecutor called that same witness
20 in his case in chief and did not question the
21 veracity of his account of Mr Washington washing his
22 hands in bleach and used that to his advantage

23 So once again our calling a witness that
24 helped us in trial one by suggesting that Tremayne
25 Washington was the shooter because he was washing his

1 hands in bleach, the prosecutor flipped that on us
2 and used it to John's disadvantage And I think we
3 should have objected to that as well

4 Q Okay Now also you did not have any type
5 ballistics experts to help with the whole issue about
6 where the casings were and where the gunfire was, is
7 that correct?

8 A We did not have a ballistics expert, no, we
9 did not

10 Q As far as did you guys use an investigator in
11 this case?

12 A I'm sure we did You know, Ms Runey could
13 speak to that better than I could We have in-house
14 investigators, but we don't have in-house ballistics
15 or firearms experts

16 Q Is there anything else that you would have
17 changed or would have done differently?

18 A We should have objected to the joint trial, we
19 should have objected to them playing Tremayne
20 Washington's testimony because my cross-examination
21 was different in trial two, and we should have
22 objected to the prosecutor taking inconsistent
23 positions with respect to that one witness whose name
24 I can't recall - -

25 If there is something else you can ask me, but

1 that's off the top of my head the problems that I
2 see

3 Q Do you think those things prejudiced Mr Ward?

4 A Absolutely In the first trial from the
5 prosecutor's office the vote was 11 to 1 to acquit
6 And I think that's because we were able to convince
7 them that in all likelihood Tremayne Washington was
8 the shooter

9 Q You said from the prosecutor's office, does
10 that mean you got that information from them?

11 A Yes

12 Q Is that witness's name Jermaine Hayward?

13 A That sounds familiar Ms Runey will know
14 better than I I'm sure you all have both
15 transcripts In the first trial we called him, Bruce
16 Durant attempted to impeach him And in the second
17 trial Mr Durant called him as his own witness

18 Whoever the witness who testifies about him
19 washing his hands in bleach is the witness

20 MR BROOKS No further questions, sir

21 THE WITNESS Thank you

22 THE COURT Any questions?

23 MR FRIEDMAN Thank you, Your Honor

24 THE COURT- You may proceed

25 CROSS-EXAMINATION

1 BY MR FRIEDMAN

2 Q Mr Butler, you testified that you were able
3 to cross-examine the codefendant at the first trial?

4 A Yes

5 Q You had him admit that he was a liar?

6 A I can't remember exactly, but it's one of
7 those cross-examinations that stands out in my mind
8 because he was fighting with me, fighting with me,
9 fighting with me And at the end he gave me what I
10 was trying to get, which was tantamount to his
11 admitting he was a liar

12 And I just remember Judge Dennis saying
13 something during a break like, persistence pays off,
14 or something like that But, yeah, something like
15 that

16 Q Did it come across that he was not credible?

17 A I think so, yes

18 Q How would that not benefit your client in the
19 second trial if that was played?

20 A Because in the second trial it didn't matter
21 who the shooter was once they got their accomplice
22 liability charge See they didn't get accomplice
23 liability charge in the first trial

24 In the second trial, once they get a charge of
25 the hand of one is the hand of all, which I know the

1 court of appeals has ruled on that, I still don't
2 think they should have gotten that charge, but once
3 they get that, it doesn't matter who the shooter is

4 And if Tremayne Washington is the shooter,
5 John Ward can still be guilty And the prosecutor
6 knew that I mean that's the only reason he would
7 play the testimony that was designed to prosecute
8 John Ward in the first trial, and then used to
9 prosecute Tremayne Washington and John Ward in the
10 second trial

11 Tremayne Washington looked so bad in his
12 testimony, that it was used against him in trial two

13 Q And you testified that you did not think that
14 was hearsay?

15 A I thought it was not hearsay I hadn't looked
16 back at the role I still think it's probably not
17 hearsay because it's prior testimony, and I had the
18 right to cross-examine him

19 Whether or not it should make a difference
20 that my motive in cross in the second would be
21 different, would be either a confrontation issue or a
22 hearsay issue, I don't know But it seems to me it
23 should be one of the two if not both

24 Q Okay Did you object to the hand of one is
25 the hand of all charge?

1 A Yes, we did My recollection is that we
2 fought about that pretty doggedly And my argument
3 was that the evidence that they were appealing --
4 which further goes to why there should have been a
5 separate trial

6 The argument -- I mean the evidence that the
7 state appealed to for the hand of one charge was
8 something that Tremayne Washington said which was,
9 some son-of-a-bitch is gong to die tonight, or
10 something like that

11 And while that might justify a hand of one
12 charge against Tremayne Washington, it doesn't seem
13 to me that it should justify the hand of one charge
14 against John Ward And for that reason as well we
15 should have moved to have separate trials

16 Q Did the applicant ever tell you that he was
17 not in the car when the shots were fired?

18 A My recollection is that was his position all
19 along, is that he got in the car afterwards

20 MR FRIEDMAN I have nothing further

21 THE COURT Any redirect?

22 MR BROOKS No, ma'am

23 THE COURT Any objection to the witness being
24 excused from the applicant?

25 MR BROOKS No, ma'am

1 THE COURT From the state?

2 MR FRIEDMAN No, ma'am

3 THE COURT Mr Butler, you are excused

4 You may proceed, Mr Brooks

5 MR BROOKS We would call Ms Runey to the
6 stand

7 THE COURT Ms Runey, if you would come to
8 the witness stand to be sworn

9 MS MARTHA KENT JENKINSON RUNEY,
10 after having first been duly sworn to state the
11 truth, the whole truth and nothing but the truth,
12 testified on her oath as follows

13 THE COURT You may proceed

14 DIRECT EXAMINATION

15 BY MR BROOKS

16 Q How are you today?

17 A I'm fine, thank you

18 Q You also represented Mr Ward in this case?

19 A I did

20 Q And you were, I guess, lead counsel?

21 A I was

22 Q And it's through the public defender's office,
23 is that correct?

24 A Yes - - -

25 Q Now there was one witnesses that you guys

1 called in the first trial, the state called in the
2 second trial?

3 A That's correct

4 Q Is that Mr Hayward?

5 A That sounds right to me I would have to
6 check the transcript, but I do believe that there was
7 a witness, Jermaine Hayward

8 Q That Mr Butler was speaking about?

9 A Yes

10 Q And now you do recall you guys never made a
11 motion to sever in the second trial, is that
12 correct?

13 A That's correct

14 Q And you do recall the prosecutor making
15 references to gang affiliation as it relates to Mr
16 Ward? Do you recall that?

17 A I do recall references that Cherry Hill and
18 Peter's Field and their disputes among each other

19 Q And him linking that to Mr Ward?

20 A Yes

21 Q Was there any objection raised to that?

22 A I don't remember I don't think so if it was
23 within the solicitor's opening I don't remember
24 objecting to that

25 Q Now Mr Ward testified in the first trial, is

1 that correct?

2 A He did

3 Q And he didn't testify in the second trial, is
4 that correct?

5 A That's correct

6 Q He didn't have any prior criminal history that
7 would have allowed the solicitor to impeach him, did
8 he?

9 A No, I don't think so

10 Q And his position was still the same between
11 the first trial and the second trial which was he got
12 in the car after the shots were fired, is that
13 correct?

14 A It was His position was always the same

15 Q Okay And you advised him not to get up on
16 the stand the second time around?

17 A Yes, sir, I did

18 THE COURT Let me interrupt you one second,
19 Mr Brooks, I apologize I sent my clerk to do
20 something and I just realized she didn't need to
21 waste her time

22 You may continue, thank you

23 MR BROOKS No more questions, Judge

24 THE COURT Mr Friedman?

25 MR FRIEDMAN Thank you

CROSS-EXAMINATION

BY MR FRIEDMAN

Q Ms Runey, was there a reason that you advised him not to testify at the second trial?

A I think we had based our advice on talking to the jurors from the first trial. And we did advise Mr Ward not to testify. I do believe he really wanted to testify.

Q And you testified that it was his position that he was not in the truck until after the shots were fired?

A That's correct.

Q Were there any witnesses that testified that he was in the truck when the shots were fired?

A Were there witnesses at the trial?

Q At the trial?

A I think those would be -- any witnesses that testified that he was in the truck were codefendants who were also charged.

Q Did he ask you to subpoena Marvin Ravenel? Do you recall that?

A I believe we did subpoena Marvin Ravenel.

Q Was there a reason that you didn't call him at trial?

A I don't remember why we didn't call him at

1 trial

2 Q Did you see any issues with the indictment,
3 any problems?

4 A I did not

5 MR FRIEDMAN Beg the Court's indulgence

6 THE COURT Uh-hum

7 Q (By Mr Friedman) Do you recall any reason
8 that you did not object when the codefendant's
9 testimony was replayed in the second trial?

10 A I think that we should have We didn't know
11 that that was coming at the beginning of the trial
12 And we certainly should have -- as Mr Butler
13 testified, he did a great cross of Mr Washington in
14 the first trial But we would have certainly handled
15 it differently in the second trial had we been able
16 to cross-examine him

17 I think both trials were different based on
18 the fact of Mr Ward being tried alone in the first
19 trial, and with Mr Washington in the second trial
20 If we did not object to it, we certainly should have

21 Q Do you think there was any benefit to the
22 applicant that that testimony came in considering
23 that on cross-examination the codefendant looked like
24 he was not credible?

25 A I think it hurt Mr Ward for us not to be able

1 to cross-examine him in the second trial

2 MR FRIEDMAN I have nothing further

3 THE COURT Any redirect?

4 MR BROOKS No, ma'am

5 THE COURT MS Runey, on what basis would you
6 have been able to object to the statement coming in?

7 MS RUNEY I think under Mr Ward's right to
8 confrontation

9 THE COURT But you had the opportunity to
10 cross-examine him in the first trial, it was sworn
11 testimony There are no Crawford or Bruton issues
12 I'm just curious

13 Your know, it's one thing to say that you
14 would have objected, and that's fine because you can
15 interpose an objection But if it wouldn't have been
16 granted, what prejudice would he have suffered?

17 And I'm trying to figure out what would be the
18 basis of having -- how could a judge have excluded
19 it? On what basis?

20 MS RUNEY I think the issues become
21 different when he is being tried with Mr Washington
22 under the theory of the hand of one is the hand of
23 all And we weren't able to ask him about those
24 things about his association with Mr Ward, whether
25 they came to the club together or not, and whether or

1 not they left together

2 I think Mr Butler, I cannot speak for how he
3 would have cross-examined him, but I think that our
4 plan of attack on Mr Washington would have been very
5 different

6 THE COURT So what would have been the basis
7 for excluding the testimony is my question?

8 MS RUNEY That we weren't able to
9 cross-examine him in a trial for both Mr Washington
10 and Mr Ward

11 THE COURT And under what legal theory could
12 that have been granted?

13 MS RUNEY I think under Mr Ward's right to
14 confrontation It was a very different trial, the
15 second one than the first one

16 THE COURT Any questions as a result of the
17 Court's questions?

18 MR BROOKS Yes, ma'am

19 REDIRECT EXAMINATION

20 BY MR BROOKS

21 Q MS Runey, in light of that would you guys
22 have made a motion -- if you had known that the
23 prosecution was going to play this testimony from the
24 first trial, play it in the second trial, would you
25 have asked the Court to sever the trial?

1 A Yes And I guess I should answer the question
2 starting from the beginning of the trial we would
3 have made that motion at the beginning of the trial
4 if I knew that that recorded testimony was going to
5 be introduced by the state

6 Q Because as a result there wasn't any other
7 statements or anything that would have required any
8 issues dealing with Bruten as it relates to Mr
9 Washington, was there, other than that prior
10 testimony?

11 A I don't recall if he gave a written statement
12 to police officers, but I don't think he did

13 Q And after the trial was underway, and after
14 that statement came in effect, it would have been
15 prudent for you to try to call Mr Washington to the
16 stand so that you could ask him those questions,
17 isn't that correct?

18 A If I could have

19 Q And because you would have wanted to ask him
20 questions such as, talking about when Mr Ward was in
21 the vehicle versus when he was not in the vehicle, is
22 that correct?

23 A Yes

24 Q And that would have changed your whole line of
25 questioning as it relates to Mr Washington, isn't

1 that correct?

2 A Sure

3 Q And you guys weren't able to do that, weren't
4 able to bring Mr Washington to the stand, isn't that
5 correct?

6 A That's correct

7 Q Why is that?

8 A Because he was being tried himself, and he has
9 the right to remain silent and not testify against
10 himself

11 Q And that was actually in conflict with Mr
12 Ward's Sixth Amendment right, isn't that correct?

13 A Yes, sir

14 Q Which is to confront his witnesses, isn't that
15 correct?

16 A Yes

17 Q There was never any statement given by Mr
18 Ward, isn't that correct?

19 Mr Ward never gave any statement, any
20 confession, anything saying anything that was
21 contradicting to his position?

22 A He may have given a statement, but he
23 certainly did not give a confession to the shooting,
24 no

25 Q But his statement never caused you any concern

1 about his position?

2 A No, it did not

3 Q But based on the fact that now, as you've
4 testified, the trials are now different, isn't that
5 correct?

6 A Correct

7 Q And that's what made a difference in regards
8 to Mr Washington's prior testimony in court, is that
9 correct?

10 A Yes

11 Q And if you guys perhaps had made that motion
12 for severance and had cited that prior recorded
13 statement, then you might have had a grounds to be
14 able to do something once it was played, is that
15 correct?

16 A Yes, sir

17 Q Okay

18 MR BROOKS No other questions

19 THE COURT Mr Friedman, any questions?

20 MR FRIEDMAN No questions, Your Honor

21 THE COURT I have another question that I
22 neglected to ask Did you interview Mr Ravenel?

23 MS RUNEY Yes, ma'am

24 THE COURT Do you have your notes where you
25 interviewed him?

1 MS RUNEY I have some notes in this file I
2 have three boxes of files my office In this file
3 that I brought with me I do have an email where one
4 of our in-house investigators did interview Mr
5 Ravenel

6 THE COURT And what does his testimony, what
7 did it reflect? Was it able to corroborate what was
8 said?

9 MS RUNEY What Mr Ward said

10 THE COURT Uh-hum?

11 MS RUNEY Yes That he went to the club
12 with him Another friend or family member had left
13 with Mr Ravenel when the shooting occurred Mr
14 Ward had gone back inside to get his shirt

15 And when Mr Ward came back -- Mr Ravenel
16 couldn't testify as to what Mr Ward did when he came
17 back out of the club, but Mr Ravenel left

18 THE COURT Because he was gone

19 MS RUNEY Yes, and left Mr Ward there

20 THE COURT So what Mr Ravenel would have
21 been able to corroborate then is that Mr Ward came
22 to the club with him, but other than that he didn't
23 have any knowledge because he had left?

24 MS RUNEY That's correct

25 THE COURT And you don't remember why you did

1 not call him?

2 MS RUNEY I do not remember

3 THE COURT Any questions, Mr Brooks?

4 MR BROOKS Yes, ma'am

5 THE COURT And I apologize, I just wanted to
6 ask while it was on my mind

7 MR BROOKS That's all right

8 REDIRECT EXAMINATION

9 BY MR BROOKS

10 Q One of the things that the solicitor's
11 position was that Mr Ward and Mr Washington were
12 together, isn't that correct?

13 A Yes

14 Q And Mr Ravenel's, I guess the interview, his
15 statements would have been contradictory to that,
16 isn't that correct?

17 A Yes

18 Q In terms of Mr Washington and Mr Ward being
19 together?

20 A Yes It would contradict who Mr Ward came to
21 the club with, yes

22 Q Which would have caused some potential
23 problems with the prosecutor's case, isn't that
24 correct?

25 A It could have, yes

1 Q Their theory was that Mr Washington and Mr
2 Ward were in cahoots together, isn't that correct?

3 A That's right

4 Q This would have perhaps potentially caused
5 some problems with that whole theory, isn't that
6 correct, Mr Ravenel's statements?

7 A Yes

8 Q Okay

9 MR BROOKS No further questions, Judge
10 THE COURT Mr Friedman, any questions?

11 MR FRIEDMAN No, Your Honor

12 THE COURT Also Mr Brooks raised something
13 Did the state also subpoena Mr Ravenel?

14 MS RUNEY I would not have copies of their
15 subpoenas

16 THE COURT But I mean you would have been
17 aware, he would have been on their witness list Was
18 he at some time on their witnesses list?

19 MS RUNEY That's something that I could
20 certainly find out I have a copy of their witness
21 list

22 THE COURT Mr Brooks, did you say? Were you
23 the person that said that, or your client, or was it
24 Mr Butler that said that the state had also
25 subpoenaed Mr Ravenel?

1 MS RONEY I think that may have been Mr
2 Hayward

3 MR BROOKS We are talking about Mr Hayward

4 THE COURT Oh, I apologize

5 MR BROOKS Mr Hayward is the one that Mr
6 Butler had talked about -- Mr Hayward is the one
7 that testified that Mr Washington washed his hands
8 with bleach, and that --

9 THE COURT I got the names confused I
10 apologize So that person was on both witness lists

11 MS RONEY We called Mr Hayward in the first
12 trial, and the solicitor's office called him as a
13 witness for the state in the second trial

14 THE COURT Okay

15 Mr Friedman, any questions as a result of the
16 Court's questions of the witness?

17 MR FRIEDMAN No, Your Honor

18 THE COURT Any objection to the witness being
19 excused from the applicant?

20 MR BROOKS No, ma'am

21 THE COURT From the state?

22 MR FRIEDMAN No objection, Your Honor

23 THE COURT You are excused

24 Anything further, Mr Brooks?

25 MR BROOKS That is all we have today, Judge

1 THE COURT Okay Mr Friedman, do you have
2 any witness you wish to call?

3 MR FRIEDMAN No witnesses from the state,
4 Your Honor

5 THE COURT In the interim, I'm going to give
6 the family 30 days to obtain an investigator And
7 I'm going to give the investigator 30 days, or any
8 other -- I say investigator, but also a ballistics
9 experts, if that's their desire

10 Well actually you didn't ask any questions
11 about that, Mr Brooks, of the witnesses to determine
12 if that was even necessary

13 MR BROOKS I did ask Mr Butler if he had
14 them since they talked about shell casings

15 THE COURT But you needed to ask them
16 questions about strategy and whether it really was
17 necessary You know, I have been chief judge for
18 general sessions probably every other year since I
19 have been on the circuit court, as well as civil
20 chief administrative judge

21 And I have never known them to be shy to ask
22 for an expert when they need one And I'm curious
23 for this record to know if they felt one was
24 necessary, because that's going to go into whether
25 they -- into some strategy as well, and whether it

1 really would have made a difference now that I have
2 heard all that I heard

3 Also you said they wanted an investigator to
4 find these witnesses, but you haven't established
5 that his counsel didn't already talk to those
6 witnesses

7 MR BROOKS I understand, Judge

8 THE COURT So if you want to recall one of
9 them and re-ask those questions, that's fine

10 MR BROOKS We will call Mr Butler

11 THE COURT Mr Butler, if you would retake
12 the stand I will remind you, sir, you are still
13 under oath

14 MR BEATTIE BUTLER,
15 after having previously been duly sworn to state the
16 truth, the whole truth and nothing but the truth,
17 testified on his oath as follows

18 DIRECT EXAMINATION

19 BY MR BROOKS

20 Q Mr Butler, you guys didn't consult with a
21 ballistics expert, is that correct?

22 A We did not In the second trial we had -- I'm
23 not sure what we qualified him as, but we did have
24 funds to retain somebody who did a reconstruction of
25 the crime scene and a video demonstration based upon

1 taking measurements at the crime scene And we
2 worked with him and worked with him and he was
3 without a doubt the worst expert that I have ever
4 called in a trial

5 And I remember the night before trial
6 thinking, I don't even know if I'm going to call this
7 guy He was not a firearms expert And one of the
8 issues was would it have been possible for John to
9 have fired the weapon, as was claimed, from the front
10 passenger seat and the shots to have occurred the way
11 they occurred and the shell casing to have ended up
12 where it ended up

13 And my recollection is I thought that using
14 this witness, whose name -- I think he's the only
15 person we called actually in our case -- we could
16 establish that

17 And he was so bad that even though I put him
18 up to get one fact, he couldn't lay the foundation
19 even to get the video in I decided not to offer the
20 video, the animation that he did And he couldn't
21 answer any of my questions to establish the
22 foundation for what opinion I wanted out of him

23 So in hindsight we relied on him for something
24 that I think he was not qualified to testify about
25 And ballistics and firearms would have been an issue

1 Q Now as it relates to the ballistics and
2 firearms, what was the state's theory about Mr Ward
3 in the car that you were kind of eluding to?

4 A Well again that depends on who you ask and
5 when I think the state's theory would have been
6 that John was shooting the weapon from the front
7 passenger seat of the SUV, that the other codefendant
8 was driving, and that Tremayne Washington was in the
9 back

10 But by the time they got to closing arguments
11 it could have been, doesn't matter who was shooting
12 what, you know But I still think had we been able
13 to conclusively show that Tremayne Washington was the
14 shooter and not John, that would have definitely
15 helped

16 I can't say obviously what theory the jury
17 ultimately believed But my understanding was that
18 the state's theory was that John was the shooter, but
19 by the time they got to argument it would have been,
20 well under the hand of one is the hand of all, it
21 doesn't really matter

22 Q Now as far as the ballistics and the shots
23 being fired, was the theory that John sitting in the
24 front passenger side had taken the firearm and then
25 placed it up over the roof of the vehicle and fired

1 towards the driver's side?

2 A I can't say that for sure, and Ms Runey might
3 know that better But the reason I'm remembering
4 that is that a shell casing is recovered from the
5 vehicle that was found in that space between the
6 windshield and the front and the hood of the car, you
7 know, where the windshield wipers would be

8 And if the shell casings eject from the right
9 side of the an automatic weapon, which is what I
10 understand that they do, it was hard for me to figure
11 out how somebody shooting from the front passenger
12 side of the vehicle could shoot in such a fashion
13 that the shell casing would end up there

14 As to whether or not that's the direction that
15 the shots were alleged to have been fired, I couldn't
16 say sitting here now this much later

17 Q But having a ballistics expert, could that
18 have helped you be able to theorize where these shots
19 would have been coming from?

20 A Yeah, I think so My recollection is the
21 state called a firearms expert Those are two
22 different thing actually But I think more
23 accurately a firearms expert And I believe that the
24 state called somebody from-SLED, and it might have
25 been Dan Freeze but I'm not positive

1 Q So obviously to sum it up, do it all over
2 again, some type of firearms, ballistics expert would
3 have been very beneficial in your trial?

4 A I wish we had done it, I will say that What
5 effect it would have had, I would be speculating
6 But I wish we would have done it

7 MR BROOKS No further questions on that
8 issue

9 THE COURT Mr Friedman, any questions?

10 MR FRIEDMAN I have no questions, Your
11 Honor

12 THE COURT You did not cover the investigator
13 for additional witnesses, and the thoroughness with
14 which they spoke with witnesses

15 MR BROOKS Well, okay

16 THE COURT I mean, I don't know if Mr Butler
17 would --

18 MR BUTLER Ms Runey would have to address
19 that

20 THE COURT Okay Ms Runey, I'll remind you
21 that you are still under oath

22 MS MARTHA KENT JENKINSON RONEY,
23 after having previously been duly sworn to state the
24 truth, the whole truth and nothing but the truth,
25 testified on her oath as follows

1 DIRECT EXAMINATION

2 BY MR BROOKS

3 Q Ms Runey, was an investigator used in
4 preparation of Mr Ward's case?5 A Yes At the beginning of Mr Ward's case Lee
6 ghen in our office was assigned to the case When
7 the case was transferred to me, I used my own
8 investigator within our office, Art Jovenah
9 (phonetic) And I used him throughout the case

10 Q okay

11 A And in the trial

12 Q Do your notes reflect whether or not this
13 investigator had talked to all of the state's
14 witnesses, at least all of the lay witnesses?15 A I do believe so I would have to check each
16 one individually I do remember that there was
17 extensive investigation, but individually I don't
18 remember19 what I do generally and what I did in this
20 case is I have a file on each potential witness, and
21 have any documents related to them, as well as a memo
22 from my investigator, as to his attempts to interview
23 this person and what he learned from them24 Q Did the memo or in the process of putting
25 together the file, did that investigator help come up

1 with what the theory was as far as where these
2 bullets came from?

3 A He did

4 Q Can you surmise to that as to what that was?

5 A We went out to the scene I believe several
6 times He also worked with this expert that we had
7 hired trying to recreate what happened when Mr
8 Washington's car pulled out of the driveway of the
9 club

10 And he assisted me in trying to figure out,
11 you know, exactly what happened That is difficult
12 to recreate, but I do know that my investigator
13 helped me with that

14 Q Let me ask you this From what you gathered
15 as far as the information gathering process, if the
16 vehicle was facing in this direction, the driver
17 being on this side and the passenger being on this
18 side Were the shots going in this direction or were
19 the shots going in that direction?

20 A From my -- from what I can remember that the
21 shots were coming from the passenger side of the car
22 I don't think it could be determined whether they
23 were coming from the front passenger window or the
24 back passenger

25 Q So it would have been to the right of the

1 vehicle?

2 A To the right of the vehicle

3 Q Okay And all of the lay witnesses who were
4 not codefendants, did they all corroborate that in
5 terms of their statements to the investigator?

6 A I'd have to check each one, I don't remember

7 Q Did the investigator's report kind of
8 summarise that to that extent?

9 A His reports is going to summarise what they
10 told him Now each one, I don't remember what they
11 said about the shots fired But that was something
12 that we concentrated on, and he would have asked
13 them But I don't know what their answers would have
14 been

15 Q Okay

16 MR BROOKS No other questions

17 THE COURT Mr Friedman, any other questions
18 for Ms Runey?

19 MR FRIEDMAN Just one, Your Honor

20 THE COURT You may proceed

21 CROSS-EXAMINATION

22 BY MR FRIEDMAN

23 Q Ms Runey, did he happen to give you the names
24 of any witnesses that he could not locate?

25 A I don't know if there were any that we could

1 not locate I know that if he gave us a name we
2 would have attempted to locate them

3 The information in my file could be that they
4 would not return our calls or that we could not find
5 them so there could be

6 MR FRIEDMAN Thank you, no other questions
7 THE COURT Any redirect?

8 REDIRECT EXAMINATION

9 BY MR BROOKS

10 Q Did the investigator figure out how many shots
11 were fired from taking any of these witnesses'
12 statements?

13 A Not that I recall

14 MR BROOKS No other questions

15 THE COURT Ms Runey, you may step down

16 I really have not heard anything that
17 justifies the necessity of an investigator I will
18 give them 30 days get a ballistics expert if they
19 desire that And the ballistics expert can conduct
20 his investigation probably in less than 15 or 20
21 days

22 So what we are looking at -- there is a 45-day
23 window which is September 6th But actually at the
24 conclusion of the 30 days, which is August the 20th,
25 which is a Friday, you will need to let me know if

1 the family has in fact retained a ballistics expert

2 If they have not, then the proceedings are
3 going to be resumed on the following Monday

4 Okay, is there my argument?

5 I assume you said, Mr Friedman, you had no
6 witnesses, correct?

7 MR FRIEDMAN No, Your Honor

8 THE COURT Is there any argument?

9 MR BROOKS Judge, based on the information
10 we have, bear in mind we don't the ballistics expert
11 that we talked about

12 THE COURT Well that's a very limited issue
13 Everything else is fairly clear-cut in this from the
14 record I have read the record I read it before
15 I'm provided with these things will in advance, so I
16 read the entire trial transcript already

17 I'm going to read some parts of it again,
18 however But there are some things that are really
19 fairly clear-cut He raised the issues regarding the
20 sufficiency of the indictment, and really the
21 gravamen of that argument is that there was no term
22 of the grand jury at that time and that is
23 inaccurate

24 I was Chief Judge at that time and I signed an
25 order setting the terms of the grand jury from

1 February through June And then Judge Pieper was
2 Chief Judge and set them for July through December
3 This was an indictment for September 2nd and there
4 was in fact a term of the grand jury Tuesday and
5 Wednesday, September 2nd and 3rd, 2003

6 So there really -- I have the order here, I am
7 going to make it a Court's Exhibit as well as the
8 indictment So there really is no issue regarding
9 that

10 The issues of severance were raised in the
11 Court of Appeals -- not the severance but the
12 admissibility of his codefendant's statement was
13 raised in the appellate matter And they
14 acknowledged that while it was not objected to, that
15 it was admissible

16 So I think that sort of mitigates against them
17 being ineffective The opinion says, even though it
18 wasn't raised, we take this opportunity to settle it

19 MR BROOKS Judge, be that as it may, I don't
20 think the Court has actually heard the argument yet

21 THE COURT Oh, no, I'm going to let you --
22 I'm just trying to narrow down what we are talking
23 about to the real issues

24 Because the failure to object is something
25 that is not the issue, the issue is whether it

1 becomes ineffective So go ahead and make your
2 argument, then I'm going to let Mr Friedman -- go
3 ahead and make your argument, Mr Brooks

4 MR BROOKS Be it as it may, Judge, I think
5 the problem is not so much that the court wants to
6 take the position it might be admissible, still they
7 should have objected to it which they themselves
8 admit to

9 In addition to that, they didn't try to -- if
10 the severance had not been granted, at the very least
11 they did not try to call him to the stand We don't
12 know whether Mr Runion would have allowed him to go
13 to the stand, they were only assuming that, but at
14 least they should have tried to call him to the stand
15 in order to protect Mr Ward's Sixth Amendment Right

16 THE COURT I don't think there would have
17 been any basis for them to call him to the stand I
18 don't think they could have called him as a witness

19 Well he would have taken the Fifth, but no
20 judge was going to let him take the Fifth in the
21 presence of the jury

22 MR BROOKS Judge, they could have tried to
23 call him to the stand to deal with the issue of when
24 Mr Ward was actually in the vehicle, which obviously
25 changed between the first trial and the second trial

1 Because then that point would have been clear
2 the second trial to determine if they knew that there
3 was going to come about the hand of one is the hand
4 of all in talking about the shots coming from the
5 vehicle. Then the question would have been when was
6 Mr. Ward in the vehicle versus this time or that
7 time.

8 Whereas in the first trial the line of
9 questioning was totally different because it would
10 just deal with one person accusing him of firing the
11 shots. And Mr. Ward, him being the only person
12 sitting at the table there would be no issue of
13 accomplice liability, the hand of one is the hand of
14 all.

15 So it's a different line of questioning which
16 both counsel admit would have changed between the
17 first trial and the second trial, which obviously
18 would have protected my client's Sixth Amendment
19 right which we put forth to the Court as being very
20 important.

21 THE COURT You need to make your full
22 argument.

23 MR. BROOKS Judge, in light of the fact in
24 addition to that Ms. Runey also testified in regards
25 to Mr. Ravenel, who was not called to the stand, his

1 interviews supported that same position that Mr Ward
2 did not get in the vehicle until after the shots were
3 fired That person never did testify in the first
4 trial or the second trial

5 And we think that would have been very
6 important, because that would have helped deal with
7 Mr Washington's prior statement now being
8 admissible Because at least Mr Ravenel would have
9 been able to come in and perhaps rebut that from the
10 the defense's perspective to say when Mr Ward was in
11 the vehicle, as well as Mr Ward himself

12 And counsel, both admitted to that, that they
13 advised him not to take the stand Because at the
14 very least he could have gotten up there and no prior
15 criminal history that could have been impeachable,
16 and he could have gotten up there to talk about maybe
17 he wasn't actually in the vehicle Of course the
18 jury never heard that in the second trial

19 So we put that forth that as another
20 indication of counsels' ineffective representation
21 and therefore Mr Ward should be granted a new trial
22 Of course, judge, this is based on the information
23 that we put forth before the Court, excluding the
24 ballistics expert that we talked about

25 THE COURT Is that the totality of your

1 argument?

2 MR BROOKS Yes, ma'am

3 THE COURT Mr Friedman, would you like to
4 respond?

5 MR FRIEDMAN Thank you, Your Honor I would
6 submit that there was no prejudice on counsel's
7 failure to object to the replaying of the
8 codefendant's testimony Mr Butler was able to
9 cross-examine the codefendant at the first trial He
10 testified that he did a good trial and made it look
11 like he was not credible Since he was able to
12 cross-examine him, there is no Crawford issue And
13 it was not hearsay, there is really no basis for the
14 objection

15 Counsel objected to the hand of one is the
16 hand of all charge, so that was preserved for appeal,
17 that was denied As far as the solicitor's opening
18 statement, he never specifically called the
19 application a gang member He inferred there was
20 some kind of rivalry between the Cherry Hill and the
21 Peter's Field folks, but he did not actually call him
22 a gang member

23 As far as Marvin Ravenel, the applicant
24 testified that Mr Ravenel left before the shooting
25 even occurred I suppose he could have testified

1 that he arrived at the club with the applicant, but I
2 don't see how his testimony would be that beneficial
3 if he did not see the shooting

4 I think Your Honor covered the indictment
5 issue We don't believe that has any merit I'm not
6 sure if I'm missing anything I think we covered
7 everything We would ask that you deny and dismiss
8 the application

9 THE COURT Well I'm going to take it under
10 advisement until the family determines if they're
11 going to hire a ballistics expert, and whether I need
12 to have the record supplemented with that testimony

13 But the majority of the items raised really do
14 not touch on that issue And I think probably the
15 majority of those I can go ahead and address based on
16 the testimony that is before the Court One of which
17 is the failure, or the allegation that there was a
18 failure to object to the prosecutor's comment
19 referring to the application as a gang member, a
20 member of a gang

21 I have read the transcript and that is not the
22 verbiage that is used In addition to that, the
23 state is allowed to argue what they believe the facts
24 will show And I cannot discern any prejudice from
25 that statement, nor has there been any testimony

1 presented regarding that

2 And he does in fact have the burden of proof
3 as regards to that So I find that he has failed to
4 meet his burden of proof regarding that And I
5 really do not see any basis in the record for his
6 counsel to have objected to the statement

7 The other item that has been talked about a
8 great deal is severance Case law really is quite
9 clear You know, you can argue that I should have
10 have asked for a severance and that if it were
11 granted it would have benefitted my client But
12 based on what I have reviewed in the record, it's
13 really unlikely that a severance would have been
14 granted

15 I'm not clairvoyant, however knowing -- and I
16 cannot say what another judge would have done, but
17 based on case law, the fact that they had
18 antagonistic defenses is not the basis for granting a
19 severance So the fact that they had different
20 postures regarding the case and they had different
21 defenses is not a basis for severance So it's
22 unlikely that a severance would have been granted

23 So I really don't know that that is
24 dispositive either, nor that there was any prejudice
25 that I can discern from the record in counsel failing

1 to move for -- or not moving for a severance

2 I have already addressed the indictment, there
3 was no basis to quash the indictment It was -- a
4 true bill was done during a regularly scheduled
5 course of the grand jury in September of 2003 And
6 that schedule, and that administrative order, as well
7 as the indictment, will be made a part of the Court's
8 records as Court's exhibits

9 Counsel did object to the hand of one is the
10 hand of all charge, so they could not be ineffective
11 for that They objected to it, it was fully argued,
12 and the Court determined based on the facts of the
13 case that it was appropriate to charge it And under
14 the facts of this case it was appropriate to charge
15 it

16 Regarding the prerecorded testimony of the --
17 of his codefendant, I'm going to go back and read
18 those portions of the transcript again, I need to
19 review those again And also I need to go back and
20 read the Court of Appeals decision again in its
21 totality because I misunderstood

22 Basically I think what they said was that
23 counsel did not object to it, and agreed that it was
24 admissible But even-though I'm going to review it,
25 I asked Ms Runey those questions for a very specific

1 reason

2 Saying, I failed to object, is one thing, but
3 you have to prove some prejudice from that The
4 rules require that when you object you have some
5 basis for objecting, and that there be some basis in
6 the law that that relief would be granted

7 The statement was admissible, it was not
8 hearsay That's why I very specifically asked those
9 questions And as the fact finder I'm entitled to
10 ask questions Especially when there are holes in --
11 where I'm not hearing answers to things that I know
12 are germane to the case

13 And I gave you all the opportunity to ask
14 additional questions as a result of that The Court,
15 in its fact finding province, is given the discretion
16 to ask questions It's not like when you have a jury
17 trial because the Court is not the fact finder

18 But in this province I am the fact finder and
19 I needed clarity When someone says, I should have
20 objected, I need to know why and I need to know what
21 the legal basis of that would be so that I can make
22 the appropriate analysis as to whether there was some
23 prejudice for failure to do that, and whether the
24 outcome of the trial would have been different
25 because of that

1 And again, like I said, I looked at most of
2 these transcripts last week And yesterday afternoon
3 I spent the afternoon reading this one again

4 But in my review of it, I really cannot
5 discern any basis for the exclusion of that
6 testimony It was previous sworn testimony It was
7 -- they had the ability to cross-examine the witness
8 There has been argument that it would have been done
9 differently, and that the fact that they were
10 effective prejudiced their client

11 This case comes down to a credibility issue as
12 to who to believe or not to believe And I can't
13 imagine that someone is prejudiced because somebody
14 did a good job of showing someone wasn't credible
15 That should really logically enure to Mr Ward's
16 benefit

17 In other words, it should also enure to the
18 fact, and I gave them the benefit of arguing, that
19 they weren't in this together, that this man is not
20 credible, that he has never told the truth about
21 anything And they certainly had the ability to
22 argue all of that and that he has lied

23 But again I'm going to review those portions
24 of the trial transcript again, but at this moment I'm
25 not persuaded that in fact there was some prejudice

1 in that regard

2 As it regards him failing to testify I guess
3 I'm in a bit of an advantage because I know Ms
4 Runey, and I have never known her to make decisions
5 haphazardly And if she didn't let her client
6 testify, or advised him not to, there's a reason,
7 something wasn't beneficial to him

8 And it's the same line of reasoning with Mr
9 Ravenel If he was going to be -- there's something
10 -- and it has been a long time ago, the trial of this
11 case And I believe her when she says she doesn't
12 remember why she didn't call him But I would have
13 to imagine it's because there was something in there
14 that may not necessarily have benefitted her client

15 But, by the same token, it really doesn't
16 matter The only thing he can confirm is that they
17 came to club together The uncontroverted testimony
18 is that he left before all these other things sort of
19 spilled out and happened

20 But I'm going -- again, I'm going to think
21 about that one a little more as well

22 Now as regards appellate counsel for failing
23 to move or correct the record, the same Strickland
24 standard is applied to appellate counsel But I
25 don't have any testimony before me to know why it

1 wasn't done, or whether he failed to meet the
2 objective standard

3 So in that regard I think I would have to find
4 he has failed to meet his burden of proof But again
5 I'm going to read back through the transcript to make
6 sure I don't have the benefit of the appellate
7 briefs I don't know whether that really would have
8 made a difference I'm certain the appropriate facts
9 from the transcript were in there

10 It is oftentimes, having sat on several terms
11 of the appellate court, sometimes in translation when
12 you are -- it's not unusual, in other words, for a
13 scriveners error to have been made that had
14 absolutely no effect on the ultimate decision of the
15 court

16 So I don't know that that would have made any
17 appreciable difference And there is nothing before
18 this Court that would meet the burden to prove that
19 appellate counsel was ineffective for that reason

20 Now it is not unusual for the state to change
21 theories between one trial to the other, or change
22 theories about a witness And there is nothing in
23 the rules that precludes them from doing that And
24 there is nothing in the rules that requires them to
25 disclose that to defense counsel unless it is

1 exculpatory, which we all know what that term means

2 And I have not read anything in the record,
3 nor have I heard anything in testimony that would
4 meet that burden, or establish that they had some
5 duty to disclose anything to the defense

6 There has been a great deal of testimony
7 about, if I knew this or that I would have followed a
8 different course strategically And while I'm
9 empathetic to that, again there are many things I
10 would like the ability to do over That is not the
11 basis of finding that someone is ineffective You
12 always want to do something different when you have
13 the benefit of hindsight

14 Again the state had absolutely no duty to
15 disclose their theory of the case to defense counsel
16 so they would have only seen it as the case evolved,
17 as it was presented

18 So unfortunately, in criminal cases, that's
19 just the way it plays out In civil cases everybody
20 discloses everything to everybody There is no
21 ambush so to speak

22 But in criminal cases that can happen, both
23 from the defense perspective and from the state's
24 perspective Nobody has to show their hand And it
25 happens all the time And there is a specific reason

1 for that because people don't want the other side to
2 know what their strategy is because they don't want
3 them to be able to prepare for it

4 So not foreseeing everything does not meet the
5 burden of ineffective assistance It may well mean,
6 and again I'm empathetic to that, that I would have
7 wanted to change my strategy Of course in hindsight
8 I would want to try the case differently

9 But if that were the benchmark for
10 post-conviction relief, everybody would get a new
11 trial, because there are always things that people
12 want to do differently, there is always the desire to
13 want to try a case differently than it was tried the
14 first time when the desired result is not reached

15 But I'm not certain that I follow that You
16 just would never have any finality with things
17 Because every time it didn't turn out, you could come
18 back later and say, well, they had a different
19 strategy, or they had a different theory about this
20 case and I want to try it differently

21 And that's just not the way the Court has to
22 look at it I have to look at it, one, whether their
23 performance fell below an objective standard The
24 Court, of course, presumes that they were competent,
25 and the applicant has the burden of proving that they

1 were not And that but for these errors, that the
2 outcome of the trial would have been different

3 And again the -- what the Court looks at is
4 not whether somebody would have objected or what they
5 would have done, but whether even if they -- let's
6 just say worst case scenario they failed to object,
7 but did that failure to object result in some
8 prejudice And did that prejudice rise to the level
9 that undermines the Court's confidence in the outcome
10 of the trial such that the Court believes that the
11 outcome would have been different, but for those
12 errors

13 And at this point I'm just not convinced of
14 that So I'm going to again review the transcript,
15 and go back over -- other than those issues that I
16 have already ruled upon, I'm going to review the
17 admission of the testimony because there actually is
18 some discussion in the record about being able to
19 cross-examine him

20 It was raised by Mr Butler, and there is some
21 colloquy in the record between he and Judge Young
22 regarding it, and Mr Runion I just need to go back
23 and review that again But I'm going to take it
24 under advisement to give me the opportunity to review
25 those portions of the transcript

1 And if the Court -- I'm going to give you all,
2 as I have indicated his family, the opportunity until
3 the 20th I believe it is, which is 30 days, to obtain
4 a ballistics expert

5 And, Mr Brooks, you need to let me know
6 whether they have obtained that expert on the 20th,
7 which is a Friday And if they have not retained the
8 expert, then I'm going to resume it and we are going
9 to finish it up and the Court is going to go ahead
10 and then -- I mean we may not need to have a hearing,
11 I will probably just direct whomever to prepare the
12 order

13 MR BROOKS One other issue was my client's
14 allegation of prosecutorial misconduct

15 THE COURT The statement, yeah I covered it

16 MR BROOKS The statement about the gang
17 member

18 THE COURT Uh-hum, I covered that I read
19 that in the transcript

20 MR BROOKS Okay

21 THE COURT He never actually said that He
22 made some comments about what the relationship was
23 between individuals, but he never called him a gang
24 member

25 MR BROOKS I just wanted to make sure Your

1 Honor covered that

2 THE COURT Uh-hum I looked at that I read
3 that on yesterday and I read it again while he was --
4 because I wanted to see the exact language that was
5 used

6 MR BROOKS Yes, ma'am

7 THE COURT His perception is that that was
8 the inference But what the prosecutor actually said
9 basically is that there was just some rivalry between
10 these people, and that there have been problems
11 between them

12 I don't think that rises to the level -- lets
13 just say the worst case scenario, there is no
14 prohibition from him saying there was a gang If he
15 -- just as well as the defense, they argue what they
16 believe the evidence will show

17 As long as it's within what they perceive --
18 and in addition to that you have to remember that the
19 Court gives a preliminary instruction that tells the
20 jury to give the attorneys their undivided attention,
21 but to remember that what the attorneys say is not
22 evidence It's only their perspective as to what
23 they believe the evidence will show

24 And we reenforce it again and say, but it is
25 not evidence And to hold the state to that

1 standard, which is -- and we also instruct that the
2 state has the burden of proving beyond a reasonable
3 doubt each and every element of the offense, that the
4 defendant has absolutely no burden

5 We even instruct that the defense doesn't have
6 to given an opening statement They aren't required
7 to do so They don't have to say a word That the
8 burden remains on the state throughout the trial to
9 prove every element beyond a reasonable doubt And
10 that he has no burden He doesn't have to say
11 anything during the course of the trial

12 And to hold that state to that burden And
13 it's the jury's decision to determine whether they
14 have met that burden or not which means -- and I
15 always instruct young -- not instruct, but I caution
16 lawyers, be very careful about what they think the
17 evidence is going to show Because if at the end of
18 the trial it doesn't show that, the jury is going to
19 hold you to it

20 They're very intuitive people They listen
21 They're objective They listen to the evidence and
22 they think back, you know, they told me this was
23 going to happen Or he was going to show me this

24 And at the end, of course the other side it's
25 their responsibility to draw that out, which I'm sure

1 the defense would have done aptly, that the state
2 told you they were going to show you all these
3 things, let me tell you what they didn't show you
4 that they said they were going to show you

5 I have read that portion of the transcript
6 It doesn't -- even if -- I think it would have been
7 within the parameters of what the evidence would have
8 shown in the trial and it would have been
9 appropriate

10 MR BROOKS Yes, ma'am

11 THE COURT Let me know by the 20th and then
12 we will go from there

13 MR BROOKS Yes, ma'am

14 THE COURT In the meantime I will review this
15 transcript again

16 (Whereupon, the proceedings in this matter
17 before the Court were adjourned)

18 * * * * *

C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record, and of all the proceedings had and evidence introduced in the above captioned case, relative to appeal, in the Circuit Court for South Carolina, on the indicated date

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

--- Anne Bouley Meyer ---

Anne Bouley Meyer, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

Case Number 2008-CP 10 6637

John Henry Waid #309598)

Applicant)

v)

ORDER OF DISMISSAL

State of South Carolina)

Respondent)

Presiding Judge
 Applicant's Attorney
 Respondent's Attorney
 Trial Counsel

Deadra L. Jefferson
 Charles T. Brooks III Esq
 Matthew J. Friedman Esq
 Martha Kent Runey Esq
 Beattie Butler Esq
 July 20, 2010
 Anne Meyer

Date of Hearing
 Court Reporter

This matter came before the Court by way of an application for post-conviction relief (PCR) filed November 20, 2008 and amended on August 10, 2009 and October 13, 2009. The Respondent made its Return on May 13, 2009. An evidentiary hearing into the matter was convened on July 20, 2010 at the Charleston County Courthouse.¹ The Applicant was present at

¹ Counsel for the Applicant requested a continuance on the basis that the Applicant's family had expressed a desire to hire an investigator. Trial counsel had indicated to PCR counsel that he did not hire a ballistics expert and therefore PCR counsel indicated to the Court that a report from a ballistics expert would be relevant insofar as it clarified whether trial counsel's failure to hire a ballistics expert prejudiced the Applicant. Due to state budget cuts PCR counsel was recently informed that the Office of Indigent Defense does not have funds to reimburse PCR counsel for funds expended to hire an investigator. Upon receiving this information from PCR counsel, the Applicant's family communicated to PCR counsel that they wanted to hire an investigator and/or ballistics expert. The Court explained to PCR counsel that this request was not the basis for a continuance as the public defender's office employs full-time investigators that would have fully investigated the case and assisted trial counsel, but that the Court would agree to leave the record open until August 20, 2010 in order to allow the Applicant's family adequate time to hire a ballistics expert and/or investigator. The Court also agreed to allow the investigator and/or ballistics expert fifteen additional days to complete his investigation and therefore agreed to leave the record open for additional testimony until September 6, 2010 if the Applicant's family does in fact hire an investigator by August 20, 2010. The Court was informed on August 26, 2010 that the Applicant's family did not hire an

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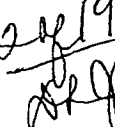
the hearing and was represented by Charles T. Brooks III Esquire. Matthew J. Friedman Esquire of the South Carolina Attorney General's Office represented the Respondent.

The Applicant Martha Kent Runey Esquire and Beattie Butler Esquire, testified at the PCR hearing. This Court had before it the records of the Charleston County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the records from the Court of Appeals regarding the Order affirming Applicant's sentence and denying his Petition for Rehearing, the records from the Supreme Court regarding the Order denying Applicant's Petition for Writ of Certiorari, the Remittitur, the Applicant's PCR application and amended applications, the Respondent's Return thereto, the trial transcript and the transcripts of the Applicant's prior testimony and Tremayne R. Washington's prior testimony both from the Applicant's first trial.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the September 2003 term of the Charleston County Grand Jury for Murder (2003-GS-10-5895). Martha Kent Runey Esquire (sitting first chair) and Beattie Butler, Esquire (assisting as second chair) represented the Applicant. On June 6-9, 2005, the Applicant proceeded to trial with his co-defendant Washington, after which a jury found both guilty as indicted. The Honorable Roger M. Young Sr. sentenced the Applicant to confinement for thirty (30) years. The Applicant was tried previously by jury on December 6-9, 2004, by Judge Markley Dennis with his co-Defendant Washington testifying against him, which trial ended in a mistrial. The State and Defendant were represented by the same counsel during this previous trial.

investigator or ballistics expert. Applicant's counsel advised the Court that he would not be supplementing the record with any additional testimony. Therefore, the record was closed on September 6, 2010.

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A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Joseph L. Savitz III Esquire of the South Carolina Office of Appellate Defense and William J. Watkins Jr. Esquire represented the Applicant on appeal. Following full briefing by both sides, the South Carolina Court of Appeals Affirmed the Applicant's conviction. See *State v. Ward*, 374 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007). Applicant filed a Petition for Rehearing on July 9, 2007. By Order dated August 24, 2007, the Court of Appeals denied the Petition for Rehearing. Subsequently, the Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on September 21, 2007. By Order dated August 7, 2008, the Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on August 20, 2008.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel:
 - a. Failed to move to quash the indictment
 - b. Failed to object to the 'hand of one is the hand of all' jury charge
 - c. Failed to object to the Solicitor leading his witnesses to place Applicant and Co-defendant together outside the club
 - d. Failed to object to Solicitor's comment referring to the Applicant as a member of a gang
 - e. Failed to move for a separate trial
 - f. Failed to object to the use of the Co-defendant's recorded testimony from Applicant's first trial²
 - g. Failed to allow Applicant to testify at the trial
2. Lack of subject matter jurisdiction because indictment was defective
3. Violation of procedural and substantive due process
4. Ineffective assistance of appellate counsel in that appellate counsel failed to move to correct the record before the appellate court

FINDINGS OF FACT AND CONCLUSIONS OF LAW

² The Court notes that the Applicant's argument that trial counsel failed to object to the use of the co-defendant's prior trial testimony is in opposition to the Applicant's argument on appeal. See *State v. Ward*, 374 S.C. 606, 616 n.1, 649 S.E.2d 145, 150 n.1 (Ct. App. 2007). The Court of Appeals noted that [o]n appeal, Ward admit[ed] he acquiesced to the playing of the former testimony. *Id.* Moreover, Ward never argued the trial court erred in allowing his co-defendant's testimony to be played during his current trial, nor did he argue that the change in the State's strategy prevented him from thoroughly cross-examining his co-defendant during that first trial. *Id.*

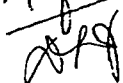
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This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Applicant testified that trial counsel advised him not to testify at his second trial. He testified that trial counsel did not fully explain why they were advising him not to testify but they indicated that it had to do with some type of confusion during his first trial. He also testified that trial counsel did not explain accomplice liability to him. The Applicant further testified that he is not a member of a gang but that the Solicitor during opening statements referred to him as a member of a gang and his trial counsel did not object to this statement.

In regards to accomplice liability, the Applicant testified that he could not have been acting in concert with his co-defendant Tremayne R. Washington, because he did not come to the club with Mr. Washington and was never with Mr. Washington at the club. The Applicant testified that he came to the club with Mr. Ravenel. The Applicant further testified that trial counsel did not call Mr. Ravenel as a witness despite the fact that they served him with a subpoena for both trials.³ The Applicant testified that Mr. Ravenel would have added credibility to the assertion that the Applicant was not acting in concert with Mr. Washington and would have contradicted other witnesses. To explain his presence in Mr. Washington's truck, the

³ Martha Kent Runey Esq. testified that Ravenel was subpoenaed for both trials. She testified that her in-house investigator interviewed Mr. Ravenel. She testified that Ravenel's testimony would corroborate that Applicant went to the club with him that night that he left the club with another friend or family member when the shooting occurred and that Applicant went back in the club to retrieve his shirt. She testified that Ravenel's testimony would not be able to shed any light on the Applicant's movements when he came back out of the club. Ravenel's testimony could only confirm that Applicant went to the club with him and that he left Applicant at the club when he went back inside to retrieve his shirt. Ms. Runey could not recall why she did not call Ravenel to testify.

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Applicant testified that he went back inside the club to find his jersey but when he returned outside the fight had escalated and he could not locate Mr. Ravenel or Mr. Ravenel's vehicle. The Applicant testified that he flagged down Mr. Washington for a ride home because he could not find Mr. Ravenel. The Applicant further testified that despite the fact that he has very long arms that would have been noticeable to witnesses, no witnesses testified that they saw his arm come out of Mr. Washington's truck. However, there was direct and circumstantial evidence in the record corroborating his placement in the vehicle as a passenger.

The Applicant testified that he asked trial counsel if they could sever the trials but that trial counsel never made a motion for severance and never objected to the joint trial. Further, the Applicant testified that the indictment was defective because it was stamped by the Grand Jury on September 2, 2005, but the Grand Jury only meets on the second Monday of each month. The Applicant also testified that his appellate counsel was ineffective for failing to correct the record on appeal and not communicating with him.

Beattie Butler Esq., who sat as second chair in Applicant's trial, also testified at the PCR hearing. Mr. Butler testified that Martha Kent Runey Esq. was the Applicant's lead counsel at trial but that he assisted her with the trial because of the difficulty of the trial. Mr. Butler testified that the Applicant's first trial ended in a hung jury and that the Solicitor's office told him that the jury had voted 11-1 to acquit the Applicant. Mr. Butler also testified that the Applicant faced some complex issues during his second trial because the State decided to try the Applicant by himself in the first trial and then decided to try the Applicant with his co-defendant in the second trial. Mr. Butler testified that he would have done things differently in the first trial if he had known that the Applicant was going to later be tried in a joint trial with his co-defendant. Mr. Butler testified that he always thought the Applicant's co-defendant, Mr.

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Washington, was the shooter and that he thought he was able to destroy Mr. Washington's credibility by effectively cross-examining him in the first trial and almost getting him to admit that he was the shooter. However, Mr. Butler testified that he would have approached the cross-examination differently if he had known that the two co-defendants would be tried together in a second trial and that Mr. Washington's testimony from the first trial would be used against both Defendants in the second trial. Mr. Butler also testified that he would have approached the cross-examination differently if he had known that the "hand of one" charge was going to be used in the second trial.

Further, Mr. Butler testified that he did not object to the joint trial because he did not think he had a basis on which he could object, but he would have objected if he had known that the State was going to use Mr. Washington's recorded testimony from the first trial in the second trial. Mr. Butler testified that, in retrospect, he should have objected to the joint trial and should have objected to the State's request to play Mr. Washington's testimony from the first trial during the second trial. He testified that he did not think the recorded testimony was hearsay or had any Bruton⁴ issues during the trial, but, at the time, he did not realize that his cross-examination would have been different in the second trial because of use of the "hand of one" charge in the second trial. He also testified that he now thinks he could have objected to the recorded testimony on the basis of the confrontation clause or hearsay but could not specify or articulate the precise legal theory or basis under which the testimony would be excluded.⁵ He

⁴ Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968)

⁵ When asked if he had an objection to Mr. Washington's prior testimony being played, Mr. Butler replied that he did not think he could object because he had the opportunity to fully cross-examine the witness and the testimony qualifies under the exception of former testimony. Mr. Butler did place on the record that Mr. Washington was unavailable because he was going to assert his Fifth Amendment privilege in this trial (Tr. 488:6-488:17, June 6, 2005). In addition, there is a lengthy colloquy between the Court and counsel regarding the admissibility of the former sworn testimony of Mr. Washington (Tr. 487:14-490:16, June 6, 2005). Mr. Washington's counsel

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also testified that both the Applicant and co defendant were found guilty at the second trial but that he thought the Applicant was 'punished' at the second trial because of his (Mr Butler's) effective cross examination by destroying Mr Washington's credibility during the first trial Mr Butler explained that, because the hand of one charge was used in the second trial, any evidence that made Mr Washington look guilty, specifically trial counsel's effective cross-examination of Mr Washington also impacted the jury's perception of the Applicant's guilt

Mr Butler also testified that they did not use a ballistics expert but did call a reconstruction expert at trial However, Mr Butler testified that the reconstruction expert did not do a good job testifying and that he wishes he would have called a ballistics expert instead He also testified that he thinks a ballistics expert would have testified that Mr Washington was the shooter, but that it is difficult to speculate as to whether the use of a ballistics expert would have made a difference in the trial

Mr Butler also testified that he should have objected to the State's change in theory and strategy in the second trial in regards to the recorded testimony as well as the State's inconsistent positions in the first and second trial Specifically, Mr Butler testified that he should have objected to the joint trial, because as a result of the joint trial the State was able to use different theories in their prosecution of the case, such as calling Jermaine Heyward as a witness in the second trial Mr Butler testified that during the first trial, he called Mr Heyward as a witness because Mr Heyward's testimony implicated Mr Washington as the shooter but during the second trial the State called Mr Heyward as a witness because his testimony now implicated both co-defendants as a result of the joint trials and the "hand of one" charge Mr Butler testified that the Applicant was prejudiced as a result of his failures On cross-examination Mr

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Butler testified that he did object to the hand of one charge. He also testified that the co-defendant did not appear to be credible during his testimony in the first trial.

Martha Kent Runey Esq. Applicant's lead trial counsel also testified at the PCR hearing. Ms. Runey testified that she used two investigators talked to all of the State's witnesses and recalls doing an extensive investigation of the case. She also testified that she attempted to locate all of the witnesses given to her by the Applicant but that some of the witnesses did not return her phone calls and could not be located.

Ms. Runey testified that she thinks that trial counsel's inability to cross-examine Mr. Washington at the second trial had a negative effect on the Applicant's second trial. She also testified that she failed to object to the State's use of the co-defendant's recorded testimony and that she could have objected on the basis of the confrontation clause. When questioned Ms. Runey could not specify precisely the basis upon which she would have objected to the admission of the co-defendant's recorded testimony. Ms. Runey further testified that she would have made a severance motion if she had known that the State was going to use Mr. Washington's recorded testimony. Additionally, she testified that she advised the Applicant not to testify at the second trial based on her conversations with the jurors from the first trial.

Ms. Runey also testified that she does not recall why she did not call Mr. Ravenel as a witness in the trial but that she did interview him. She also testified that there were not any issues with the Applicant's indictment.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application by a preponderance of the evidence. Rule 71 I(e) SCRCP, Butler v. State 286 S.C. 441 334

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S E 2d 813 (1985) Where ineffective assistance of counsel is alleged as a ground for relief the Applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result Id at 442 334 S E 2d at 814 (quoting Strickland v. Washington 466 U S 668 686 104 S Ct 2052 2064 (1984))

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases Strickland, 466 U S at 687-90, 104 S Ct at 2064-66 The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment Id The Applicant must overcome this presumption in order to receive relief Id Cherry v. State 300 S C 115 118 386 S E 2d 624 625 (1989)

Courts use a two pronged test to evaluate allegations of ineffective assistance of counsel First the Applicant must prove that counsel's performance was deficient Under this prong, attorney performance is measured by its reasonableness under professional norms Cherry 300 S C at 117 386 S E 2d at 625 (quoting Strickland 466 U S at 688, 104 S Ct at 2065) Secondly counsel's deficient performance must have prejudiced the applicant such that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different ' Id A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial Johnson v. State 325 S C 182 186 480 S E 2d 733, 735 (1997)

This Court finds that Mr Butler and Ms Runey are trial practitioners with experience in the trial of serious offenses Counsel conferred with the Applicant on numerous occasions and represented him during two full trials In regard to Counsel's communication with the Applicant

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the Court finds Counsel to be credible and finds that Counsel had a reasonable strategy in advising the Applicant not to testify at the second trial and did not base their advice on legal errors. Further, the Court notes that the Applicant has failed to meet his burden because he has not proven that counsel's performance was deficient or that but for any deficiency the result of the trial would have been different. The Court specifically notes that the State presented multiple witnesses who testified against the Applicant and conflicted with Applicant's testimony from the first trial. Cf. Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991) (Counsel can be found ineffective where his advice not to testify was based on an error of law and undercover officer's testimony was sole testimony against defendant).

Further, the Court finds that Applicant did not produce adequate evidence to suggest that Counsel failed to discuss the pending charges, the elements of the charges, what the State was required to prove, Applicant's version of the facts, Applicant's constitutional rights, the discovery materials, the possible punishments, and the possible defenses or lack thereof. Further, the Court finds that Counsel properly investigated the case and properly attempted to contact Applicant's witnesses. Specifically, the Court finds that the Applicant has failed to meet his burden of proof in regards to the allegation that trial counsel failed to call Mr. Ravenel as a witness.⁶ Specifically, the Court finds that the Applicant has not proven any prejudice from any alleged deficient performance of trial counsel. The Applicant failed to prove that Mr. Ravenel's testimony would have impacted the outcome of the trial. The Court also notes that the Applicant alleged in his application that trial counsel was ineffective in failing to object to the Solicitor leading his witnesses to place the Applicant and Co-defendant together at the club. However, at

⁶ The Court notes that the Applicant did not list this specific allegation in his PCR application or amended PCR applications, but presented argument on this issue at the hearing, and therefore the Court chooses to address the issue.

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the PCR hearing the Applicant failed to present any evidence regarding this allegation and therefore the Applicant failed to meet his burden of proof regarding this allegation

In regards to the allegation that counsel was ineffective for failing to quash the fatally defective indictment, the Court finds that the indictment was proper and that the Applicant has failed to meet his burden in regards to this allegation. An indictment is adequate and valid on its face if the indictment is returned by a legally constituted and unbiased grand jury and if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer. State v. James 321 S.C. 75, 76, 472 S.E.2d 38, 40 (Ct. App. 1996); Costello v. United States 350 U.S. 359, 76 S.Ct. 406 (1956). The indictment in this case is facially valid because it contains all of the necessary elements of the charged offense as well as the accurate statute under which the Applicant was charged.⁷ Further, according to the Court's research of the official court record of the 2005 Grand Jury terms, the indictment was issued during a valid Grand Jury term specifically the term of September 2, 2005. The Court finds that because the indictment was valid, the Applicant has failed to show any prejudice from Counsel's failure to object to the indictment. Further, the Court notes that Applicant's trial counsel attempted to get Applicant's case dismissed at the directed verdict stage of the trial due to a perceived issue with the indictment but was unsuccessful. The trial court refused to find that the indictment had fatal errors and warranted a directed verdict and, similarly, this Court fails to be persuaded that the indictment was fatal or that any failure by trial counsel to challenge the indictment had a prejudicial effect on the Applicant.

⁷ The Court notes that the Applicant argued in his Amended PCR Application that the indictment was defective because it included language about acting in concert with others. The Court finds that the indictment is not invalid as a result of this language. The indictment is a notice document. The indictment in this case charged the Applicant with murder and clearly gave the Applicant notice of the charge and its elements.

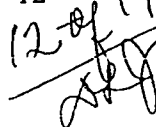
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The Court notes that the Applicant also alleges that the trial court lacked subject matter jurisdiction because the indictment was defective but the Court finds that this argument is without merit and that the Applicant has failed to meet his burden of proof in regards to this allegation as well. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222, 227 (2000) (citing Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994)). The Supreme Court of South Carolina has acknowledged that subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 499 (2005). In Gentry, the Court held

[I]f an indictment is challenged as insufficient or defective the defendant must raise that issue before the jury is sworn and not afterwards. However, a defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted.

Id. at 101-02, 610 S.E.2d at 499 (holding that because appellant did not raise the sufficiency of the indictments before the jury was sworn, he could not raise the issue on appeal). see also S.C. Code Ann. § 17-19-90 (2003). The Court notes further that a presentment of an indictment is not needed to confer subject matter jurisdiction on the circuit court. Gentry, 363 S.C. at 102 n.6, 610 S.E.2d at 499 n.6. The Applicant has failed to show that he raised the sufficiency of his indictment prior to the jury being sworn. Thus, he cannot now raise the issue on appeal. Nevertheless, because an indictment is not needed to confer subject matter jurisdiction, the trial court clearly had subject matter jurisdiction to adjudicate the Applicant's case. Therefore, the Applicant cannot show any failure of counsel to act had any prejudicial effect on him.

In regards to Applicant's allegation that trial counsel failed to object to the Solicitor's comment referring to the Applicant as a gang member, the Court finds that the Applicant has

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failed to meet his burden on this allegation as well' The transcript does not support this 'allegation' The Solicitor referenced animosities between Petersfield and Cherry Hill in his opening statement but never directly referred to the Applicant as a gang member (Tr 81 2-25 June 6-9 2005) The Court finds that the Applicant has failed to show that either prong of the Strickland test has been met in regards to this allegation

In regards to Applicant's allegation that trial counsel failed to object to the 'hand of one' jury charge the Court finds that the Applicant has failed to meet the Strickland burden The Court finds trial counsel credible as to this issue Trial counsel testified that he objected to the 'hand of one' charge Upon the Court's review of the transcript the trial court had a lengthy charge conference with all of the attorneys involved in the trial During this charge conference Applicant's trial counsel objected to the 'hand of one' charge and then upon the Court's denial of his objection again renewed his objection to the charge (Tr 746 10-765 14 June 6-9 2005) As such the Applicant has failed to meet the first prong of the Strickland test Trial counsel's representation did not fall below an objective standard of reasonableness because trial counsel clearly objected to the 'hand of one' charge during Applicant's trial

The Court also finds that the Applicant was not prejudiced by trial counsel's failure to move for a separate trial Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right State v Dennis 337 S C 275 281, 523 S E 2d 173, 176 (1999) Joint trials are generally allowed, even when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime Id However in joint trials the trial judge 'must assure protection of each defendant's constitutional right to confront witnesses against him' Id at 282 523 S E 2d at 176 Further the decision to deny or grant a severance is left to the sound

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discretion of the trial court and a severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. Id.

The Court finds that despite the mutually antagonistic defenses presented by the Applicant and his co-defendant trial counsel had no proper basis on which he could request a separate trial or any assurance that such a motion was likely to be granted. The Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by trial counsel's performance. Specifically, the Applicant has failed to prove that a motion for severance would have been granted because he has failed to prove that one of his specific trial rights was compromised. Additionally, the Applicant has failed to prove that the joint trial prevented the jury from making a reliable judgment about his guilt. The Court notes that if the Applicant's right to cross examine or confront witnesses had been compromised by the joint trial or if the Applicant had pointed to a specific trial right that was prejudiced by the joint trial then perhaps the Court's analysis would be different. Further, if the Applicant proved that the joint trial prevented the jury from making a reliable judgment about his guilt due to issues such as confusing or overlapping facts then perhaps the Court's analysis would find that a motion for severance would have been required. However, the Applicant has failed to prove that trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

In regards to the Applicant's allegation that trial counsel was ineffective because trial counsel failed to object to the use of the co-defendant's prior trial (recorded) testimony, the Court finds that the Applicant has failed to meet the Strickland test, especially the prejudice prong. The fact that both trial counsel testified that they should have objected to the co-

defendant's testimony does not prove that the perceived error was prejudicial to the Applicant. Under Strickland, an Applicant alleging a deficiency in attorney performance must affirmatively prove prejudice. Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Further, [e]ven if a defendant shows that particular errors of counsel were unreasonable, the defendant still must prove that the errors had an adverse effect on the defense and specifically more than some conceivable effect on the outcome of the proceeding. Id. As the Court in Strickland explained, "[r]epresentation is an art and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id.

Here, even if trial counsel erred in failing to object to the admissibility of the co-defendant's testimony, the Applicant has failed to prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result or that there is a reasonable probability that, but for the alleged errors of counsel, the result of the proceeding would have been different. Based on the Court's review of the transcript, there were at least two witnesses who testified that the Applicant had a gun in his hand and was firing shots. Further, there were multiple witnesses that testified that the Applicant was present with Mr. Washington (the co-defendant) in the truck at the time of the shooting. Even after hearing the testimony, the jury, as the factfinder, could have reached a number of different conclusions.

Here, the Applicant has not proven that the outcome of the trial would have been different if trial counsel had objected to the testimony. First, the Applicant has not proven that trial counsel had a basis upon which to object. Therefore, there is no evidence that the objection would have been successful. The Applicant had an opportunity to fully cross-examine the co-defendant at the first trial and the co-defendant's testimony was reliable and admissible as prior

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sworn testimony Rule 804(b)(1) SCRE Danny R Collins South Carolina Evidence § 17-6-531 (2^d ed South Carolina Bar 2000) See generally Crawford v Washington 541 U.S. 36 124 S.Ct. 1354 (2004) Bruton v United States 391 U.S. 123 88 S.Ct. 1620 (1968) State v Dennis 337 S.C. 275 523 S.E.2d 173 (1999) Admittedly as presented this presents a novel factual circumstance rarely seen in a subsequent trial however it is uncontroverted that the same trial testimony was presented and much the same questions asked by counsel as the first trial It is hard to imagine that there would have been any great variance in the cross examination of the witness for the first versus the second trial As subsequently observed the purpose of cross examination is to impeach the credibility of the witness such that the jury gives little if any weight to the testimony and does not believe the witness is telling the truth Further the co-defendant was unavailable at trial because he asserted his Fifth Amendment right to remain silent Additionally even if trial counsel made a successful objection the Applicant has not proven that the outcome of the trial would have been different Trial counsel testified that he successfully impeached the co-defendant during his cross-examination of the co-defendant and destroyed the co-defendant's credibility Trial counsel asserts that this style of cross examination harmed the Applicant in the second trial because the co-defendant's lack of credibility negatively impacted the Applicant under the hand of one theory However the Court does not find this reasoning to be persuasive It is highly probable the Co-defendant's lack of credibility had a positive impact and did not negatively affect the Applicant, because even without the Co-defendant's testimony the jury could have found that the Applicant was the lone shooter and was guilty of murder or that the Applicant was not the shooter but was involved in the murder Additionally it is more likely and highly probable that the Co-defendant's lack of credibility positively impacted the Applicant which is precisely why trial counsel attempted to

destroy the Co-defendant's credibility in the first trial. The co-defendant's lack of credibility was more likely exculpatory than inculpatory of the Applicant. In fact, it is more likely a lack of credibility inculcated the co-defendant as the lone actor. Such a lack of credibility is more likely to have had the effect of reinforcing the co-defendant's attempt to insulate himself from his criminal actions by shifting the blame to someone else. Regardless of the co-defendant's testimony, ample evidence existed that would have supported a jury finding that the Applicant was guilty of murder. The Court also notes that the Applicant failed to prove that he was prejudiced by not objecting to the State's change in theory in the second trial because the Applicant did not prove that he had any basis to object to the State's theory.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, reviewed the discovery materials with Applicant, conducted a proper investigation, and was thoroughly competent in their representation of the Applicant. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

Accordingly, in regards to all of Applicant's allegations regarding ineffective assistance of counsel, this Court finds that Applicant has failed to prove the first prong of Strickland, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds the Applicant has failed to prove the second prong of Strickland, specifically that he was prejudiced by plea counsel's performance. Applicant's

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[Signature]

complaints concerning counsel's performance are without merit and are denied and dismissed

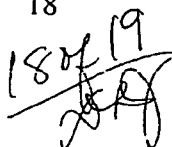
Ineffective Assistance of Appellate Counsel

The Applicant alleges ineffective assistance of appellate counsel for failure to correct the factual record on appeal.⁸ A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). However, appellate counsel is not required to raise every non-frivolous issue. Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 523; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). This Court finds that appellate counsel William J. Watkins, Esq., is an experienced attorney. This Court finds that if an error existed in the record and any meritorious reason to correct the record existed, then Mr. Watkins would have taken appropriate measures to correct the record. The Court finds that appellate counsel did a thorough job representing the Applicant on appeal. Further, the Court finds that the Applicant has failed to show that appellate counsel's representation was deficient in any manner.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, specifically the allegation that the Applicant's procedural and substantive due process rights were violated, this Court finds the Applicant failed to present sufficient evidence regarding such allegations. Accordingly, this

⁸ Applicant's Amended PCR Application states that the appellate record contained incorrect facts, specifically that the victim was killed while the two cars were shooting at each other.

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Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

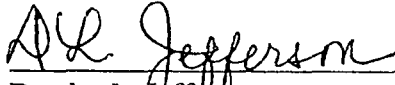
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

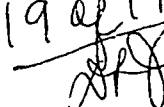
IT IS THEREFORE ORDERED

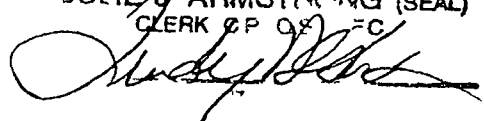
- 1 That the application for post-conviction relief be denied and dismissed with prejudice, and
- 2 That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED


 Deadra L. Jefferson
 Presiding Judge
 9th Judicial Circuit

March 3 2011
 Charleston, South Carolina

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THIS IS A TRUE COPY
 JULIE J. ARMSTRONG (SEAL)
 CLERK OF COURT


129 WITNESSES
JOHN BURNETT AND/OR

KEITH HAIR

RICE, CCSO

2003 009998 B

ARREST WARRANT NUMBER

H395140

MAY 12, 2003

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury

VERDICT

Guilty

[Signature]
Foreperson of Petit Jury

6-9-05
Date

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2003

THE STATE

VS

JOHN HENRY WARD, JR

Indictment for

MURDER

FILED
SEP-9 AM 9:01
CLERK OF COURT
BY

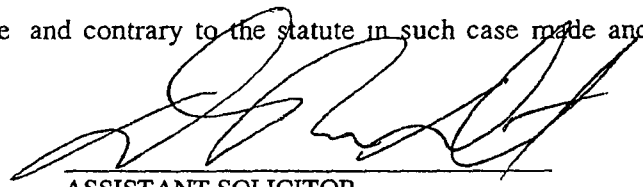
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
MURDER

At a Court of General Sessions convened on September 2 2003 the Grand Jurors of Charleston County present upon their oath

That John Henry Ward Jr while acting in concert with others, did in Charleston County on or about May 11 2003 at 6619 Toogoodoo Rd , feloniously, willfully and with malice aforethought express or implied kill one Jamie Simmons, to wit while armed with a handgun shot the victim about the body and that Jamie Simmons did die in Charleston County as a proximate result on or about May 11 2003 This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended

Against the peace and dignity of the State and contrary to the statute in such case made and provided


ASSISTANT SOLICITOR