

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable R. Keith Kelly, Circuit Court Judge

KERWIN S. PARKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001575

APPENDIX

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ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED SEPTEMBER 14 – 18, 2009.....	1
SENTENCING HEARING TRANSCRIPT DATED OCTOBER 21, 2009.....	882
INDICTMENTS AND SENTENCING SHEETS	917
RECONSTRUCTION HEARING TRANSCRIPT DATED OCTOBER 3, 2011.....	923
APPLICATION FOR POST-CONVICTION RELIEF	1012
RETURN.....	1024
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOV. 10, 2016	1034
ORDER OF DISMISSAL	1126
MOTION TO RECONSIDER	1147
FORM 4 ORDER DENYING MOTION TO RECONSIDER	1150

1 protected. Our trial transcript should be adequate to
2 accord effective appellate review and sufficient to
3 enable our appellate lawyers to identify possible errors
4 and formulate appropriate argument for appellate court
5 and other court's consideration. When we are represented
6 on appeal by counsel not involved at trial, counsel
7 cannot reasonably be expected to show specific prejudice.
8 In such a case to require our new counsel to establish
9 the irregularities that may have taken place were
10 rendered illusory our appellate rights to notice plain
11 errors or defects and render merely technical our right
12 to appeal.

13 Your Honor, Your Honor, you said that we are not
14 going to alter or change anything, even if it was
15 misquoted or missaid, right or wrong. Now, I feel that
16 we are groping in the dark to what witnesses Mr. Blue,
17 and Mr. Walter Gadson were actually questioned on and
18 testified to. Even the State and our lawyers said that.

19 They don't remember any objections. I clearly
20 recall they had objections and made a couple arguments.
21 But they said there was no objections, but as you can see
22 in the trial transcript you have many witnesses and there
23 were objections made on witnesses who were not even main
24 witnesses.

25 Also, like Elana's testimony, portions are missing.

1 That Amy told her the other two shotguns and drugs were
2 hidden. Ms. Fullwood can tell you, as I was talking to
3 her earlier, she says that she doesn't have any of her
4 notes. She can't remember everything she questioned
5 Elana on, but as I pointed to you in the trial transcript
6 there was more that she was questioned on.

7 Even Mr. McDougal has a statement from Elana saying
8 her sisters, Amy and Rebecca, they hid the shotguns, the
9 other two shotguns that I was saying that was there
10 present when this situation happened.

11 Like I said before, it would prove when I say there
12 was more than one shotgun at the scene of the crime.

13 THE COURT: All right.

14 MR. JOHNSON: Your Honor, I truly feel that we can
15 sit here and try our best effort to try to fix the
16 transcript, which we all are doing, which is actually
17 good, and the court of law we're supposed to do, but once
18 we sit here and just grope in the dark and just speculate
19 and think this happened and that happened, say, okay,
20 this objection didn't happen, then it's not right.

21 I feel like this, Your Honor. See, the law,
22 especially the federal law it says correction or
23 modification of the record. I would have State law but
24 the law library in South Carolina in our prison system at
25 Broad River is not up to date and doesn't have everything

1 that a defendant needs to actually try to find errors in
2 their case, or anything to work on to help them out in
3 their case in that situation.

4 Now, from what I see from federal law what I do
5 have, correction or modification of the record if any
6 difference arises about whether the record truly
7 discloses what occurred in district court the difference
8 must be submitted to and settled by that Court and the
9 record confirmed accordingly. If anything material to
10 either party is omitted from or misstated in the record
11 by error or accident, this omission or misstatement may
12 be corrected and a supplemental record may be certified
13 and forwarded on stipulations of the parties to the
14 district court before or after the record has been
15 forwarded or by the Court of Appeals. All other
16 questions as to the form and content of the record must
17 be presented to the Court of Appeals.

18 Now, Your Honor, it says right here things must be
19 fixed basically that were omissions and misstatements.
20 But as you said earlier we're not going to get into that.
21 And there was a lot more issues of wordings that -- in
22 your transcript that was misquoted and misstated. And
23 when I was telling y'all earlier that I was actually
24 verbalizing some of those things that was misquoted and
25 misstated, but you said you would not take notice of

1 things that were -- things that were actually changed or
2 altered, we would not change them at all. I would like
3 to get that on record, Your Honor.

4 THE COURT: I understand. Thank you, Mr. Johnson.
5 I appreciate that, sir.

6 MR. DUNCAN: And, Your Honor, to clear up the record
7 whenever there have been references made to Dave and Mr.
8 McDougall, Mr. McDougall was the investigator for Mr.
9 Parker and he did testify. So that's the person that's
10 being referred to.

11 THE COURT: Okay.

12 MS. DIXON: Your Honor, just to protect the State's
13 position, I don't know if it's necessary or not, but we
14 disagree with Mr. Johnson's contention that there are
15 additional portions of the record missing other than what
16 we have attempted to reconstruct here. I think that
17 after having reviewed the record on my own I state as an
18 officer of the Court that the three witnesses we have
19 tried to reconstruct today are the only portions of the
20 record that I can tell are missing. I think everything
21 else is -- has been completed by the court reporter.

22 THE COURT: Okay. All right.

23 MR. JOHNSON: Your Honor?

24 THE COURT: Yes, sir.

25 MR. JOHNSON: Can I have Ms. Fullwood, Ms. Fullwood,

1 can you actually stand, please, and tell the Court what
2 you told me earlier, that you cannot remember every
3 single last thing that you questioned Elana on and that
4 those portions are missing when you did question her
5 about the other shotguns and were they hidden?

6 MS. FULLWOOD: I would have to refer to it again.
7 And he is correct, I don't remember everything that
8 happened.

9 THE COURT: Yeah, and I can ---

10 MS. FULLWOOD: I don't think any of us did. And
11 earlier this morning he did show me a portion of the
12 testimony where it looked like maybe there had been a
13 little something that hadn't been transcribed concerning
14 that, either that witness or a witness I used to impeach
15 that witness. It didn't look like a major portion of it,
16 but it looked like -- it looks like, you know, we have
17 some major omissions of testimony, or portions of
18 testimony. And in going through things with Mr. Johnson
19 this morning, he did point out a couple of things where
20 it looks like things might have been cut short, if you
21 know what I mean, where we don't have big gaps but maybe
22 the court reporter stopped taking down testimony a little
23 prematurely.

24 MS. DIXON: Your Honor, I'm sorry. To protect the
25 Court's -- the State's position I have to object to that

1 characterization of the transcript.

2 THE COURT: I understand.

3 MS. DIXON: I know that there are portions where
4 things were being said that were cut off. I think that
5 that happens a lot in trials where the court reporter
6 starts to take down what we're saying maybe outside, are
7 you ready for the jury, and then stops. So there are
8 portions such as that. There are questions that don't
9 get fully asked. Answers that don't get fully given
10 because of the give and take of examination. And I just
11 don't want the appellate court to look at this record
12 that we've done on reconstruction and say that there are
13 portions that are missing that we don't know about.

14 THE COURT: Okay. Good enough. All right. All
15 right. With respect to Mr. Blue's testimony, I do find
16 that the recitation of, or the account of the testimony
17 given by counsel is a fair and accurate representation of
18 the salient, relevant portions of that testimony. As a
19 matter of fact I think that both of counsel, both State's
20 and defense counsel's notes together with their -- with
21 their recollection on the record of not only the
22 questions that were asked but the responses do marry up
23 with my recollection, with the Court's recollection of
24 the testimony that was elicited from Mr. Blue at the
25 time. So I do find that that is a sufficient --

1 sufficient reconstruction of Mr. Blue's testimony.

2 I will, because he is not here, I will leave the
3 record open for 10 days and you can recount to him those
4 salient portions of the testimony. If he wishes to take
5 exception to it he may do so by affidavit, which I'll
6 accept into the record as well. And if we have to have a
7 hearing after that, or if we have to have written
8 submissions then we'll do that after the fact. But as we
9 sit here I'm confident in the -- in Mr. Blue's testimony.

10 I also -- I don't find any evidence that there are
11 omissions in the transcript that we have not addressed
12 here today. I know that there are anecdotal suggestions
13 that perhaps there are some sentences, words, portions
14 missing, but based on what I've heard today I can't make
15 a finding that there are any portions that have been
16 omitted that are material to the appellate issues in this
17 case. Therefore as I suggested earlier I'm not going to
18 make any omissions -- or excuse me, I'm not going to make
19 any revisions or amendments to the transcript record
20 because I just don't have any evidence in front of me
21 that, first of all, they should be made, and second of
22 all that they are relevant to any appellate issues in
23 this case.

24 It maybe -- may have been after the fact relevant to
25 a jury's decision but the jury, as I have stated already,

1 didn't read the transcript, they heard the actual
2 testimony at trial. So in as much as it's not relevant
3 to any appellate issue that has been brought to this
4 Court's attention, I'm not going to make any amendment or
5 revision to the transcript. I find that none other than
6 the ones that we have specifically addressed are
7 necessary, material or relevant to the appellate process.

8 Some of the issues, Mr. Johnson, that you have
9 raised are probably, and I won't say probably, are more
10 appropriate for a post conviction relief application as
11 opposed to this hearing. All right. Because you read
12 some matters of law which are absolutely true. They just
13 may not necessarily be appropriate for this proceeding.
14 Okay. All right.

15 All right. Ladies and gentlemen, is there anything
16 else that we need to put on the record today?

17 MS. DIXON: Nothing from the State.

18 THE COURT: Okay. Good enough. Well, then I'm
19 going to consider this matter concluded with the
20 exception of the 10 day window for supplementation of the
21 record. At the conclusion of 10 days we can prepare the
22 record and send it back to the Court of Appeals. Okay.

23 MS. DIXON: Your Honor, just to be clear, can we
24 call off Mr. Blue for tomorrow, or call off my
25 investigator trying to find him?

1 THE COURT: You can try to find him for the rest of
2 the day. I don't think he needs to burn the midnight oil
3 trying to find him, you know ---

4 MS. DIXON: Yes, sir.

5 THE COURT: --- at the four corners of the earth.

6 MS. DIXON: Yes, sir.

7 THE COURT: But I really feel -- to be honest I feel
8 very comfortable that what y'all put into the record is a
9 very, very accurate account of what happened at trial.
10 And I don't remember, and I don't think there were any
11 objections either.

12 And Mr. Johnson, to your point, I don't think these
13 attorneys were suggesting that there were no -- they
14 don't remember any objections and there were no
15 exceptions taken in the trial, I think they were talking
16 specifically with respect to Mr. Blue's testimony. I
17 don't think they're making a blanket comment that there
18 were no objections and there were no exceptions taken.
19 Just during Mr. Blue's testimony, and that's all I was
20 concerned about at that point. Okay.

21 All right. All right. I have marked and accepted
22 for the record Court's Exhibits number 4 and 5 and I'm
23 going to hand back to you the original defendant's
24 Exhibits -- or actually, no, we made them a part of the
25 record, number 6 and 7, which are the pictures that were

1 introduced during Mr. Blue's testimony.

2 (Court's Exhibit Numbers 4 through 7 were filed.)

3 THE COURT: All right. Thank you, ladies and
4 gentlemen.

5 MS. DIXON: Thank you, Your Honor.

6 MR. DUNCAN: Thank you.

7 THE COURT: Good luck to y'all.

8 - - -END OF TRANSCRIPT OF RECORD- - -
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C E R T I F I C A T E

I, the undersigned Mary E. DiGirolamo, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General sessions for Lexington County, South Carolina, on the 3rd day of October, 2011.

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

November 29, 2011



Mary E. DiGirolamo

Official Court Reporter

FORM 5

ORIGINAL

STATE OF SOUTH CAROLINA

County of Lexington) **FILED** IN THE COURT OF COMMON PLEAS

2014 SEP -2 P 2:52

Michael S. Parker #3375411

Full name and prison number (if any) of Applicant

) BETH A. CARRIGG
) CLERK OF COURT
) LEXINGTON SC

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

2014CP3203172**INSTRUCTIONS B READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution
2. Name and location of Court which imposed sentence Lexington County General Sessions
3. Name(s) of co-defendant(s) (if any) Mr. Curtis T. Johnson #5375413
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

A TRUE COPY2007 G.S. 32-1542 (ABW/ILH)

- (b) 2007-C.S. 32-1542 (possession of a firearm)
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence **FILED**
- (a) Oct 21, 2009-2007-1542 (ABWIK)-20 years (concurrent) 2009 SEP 22 P 2:52
- (b) Oct 21, 2009-2007-1542 (possession of a firearm)-5 years (concurrent) BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty Yes
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal dismissed
- ii. Petition for rehearing denied
- iii. Petition for writ of certiorari denied
- (c) the date of each such result:
- i. Oct 30, 2013
- ii. Dec 27, 2013
- iii. July 24, 2014
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. unpublished opinion no 2013-UP-495 (S.C. Ct App filed 10-30-2013)
- ii. petition for rehearing order of denial (S.C. Ct App filed 12-23-2013)
- iii. petition for writ of certiorari order of denial (S.C. Ct App filed 7-24-2014)
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) N/A

(c)

SEP-2 P 2:52

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CLERK OF COURT
LEXINGTON SC

(a)

(b)

(c)

(a)

(b)

(c)

(a)

(b)

(c)

(d)

(a)

i.

ii.

iii.

iv.

(b)

i.

ii.

iii.

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iv.

(c) the disposition thereof:

FILEDi. ii. iii. iv.

2014 SEP -2 P 2:52

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LEXINGTON SC

(d) the date of each such disposition:

i. ii. iii. iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. ii. iii. iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. ii. iii.

(b) the proceedings in which each ground was raised:

i. ii. iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why ^{such} ground has not previously been presented:

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- (a) This is initial P.R. 2014 SEP -2 P 2:52
 (b) _____
 (c) _____

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? No
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered Ayes@ to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

- i. John Duran (137 East Butler St, Lexington, SC 29672)
 ii. Wanda J. Carter (1336 Lady St, Suite 461, Columbia, SC 29201)
 iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. Trial, Sentencing, Reconstruction Hearing (J. Duran)
 ii. Reconstruction Hearing, Direct Appeal, Petition for Rehearing, Petition for writ of certiorari, Petition to Transparence Records on Appeal (W. Carter)
 iii. _____

A TRUE COPY

19. State clearly the relief you seek in filing this application:

for convictions sentences vacated and to be released from
custody, or convictions and sentences reversed and
remanded for new trial.

20. Are you now under sentence from any other court that you have not challenged?

No.

* Petitioner believes he has additional claims for post conviction relief, but does not yet have collateral counsel, access to the discovery process, or funds for expert services to investigate the claims. As such I, the Petitioner, would respectfully reserve the right to amend application for further issues. Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Lexington)

VERIFICATION

ORIGINAL

I, Mr. Herman S. Parker # 337544, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Mr. Herman S. Parker

SWORN to and subscribed before me this 28 day of August, 2014.

Audrey H. Zipe (L.S.)
 Notary Public

My Commission Expires: _____

Expires
 2018

2014 CP 3203 172

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 2014 SEP -2 P 2:52
 BETH A. CARRIG
 CLERK OF COURT
 LEXINGTON SC

ORIGINAL

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, McKenna S. Parker #201544, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

McKenna S. Parker
Applicant

SWORN or affirmed to and subscribed before me this

20th day of August, 2014.
Susan N. Zup
Notary Public

My Commission Expires: _____

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2014 SEP -2 P 2:52
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CLERK OF COURT
LEXINGTON SC

2014 CP3203172

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Lex. Co. C.C.P., C.S. & F.C.

Attachment 11 (a) - Ineffective Assistance of Trial Counsel**FILED**

(1) Trial counsel failed to motion for a new trial when the trial court declared that the jury's verdict was a compromise verdict and that the trial court's sentence would not serve justice. 2016 SEP -2 P 2:53

(2) Trial counsel failed to motion for an acquittal when the trial court declared that the jury's verdict was a compromise verdict and that the trial court's sentence would not serve justice. BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

(3) Trial counsel failed to file for a sentence reconsideration after sentencing, when the trial court declared that the jury's verdict was a compromise verdict and the trial court's sentence won't service justice.

(4) Trial counsel ineffective for advising petitioner not to testify at trial.

(5) Trial counsel failed to motion for a new trial on the grounds that evidence was insufficient to support convictions.

(6) Trial counsel failed to object to prosecutor's unconstitutional, burden shifting, and prejudicial closing argument and motion for a mistrial.

(7) Trial counsel failed to object to prosecutor, victim and witness perjured testimony.

(8) Trial counsel failed to pre-trial interview victims and witnesses that testified.

(9) Trial counsel failed to contact, interview and subpoena potential witnesses.

(10) Trial counsel failed to call witnesses that were subpoena to testify.

(11) Trial counsel failed to present character witnesses.

(12) Trial counsel failed to present evidence of petitioner's good character.

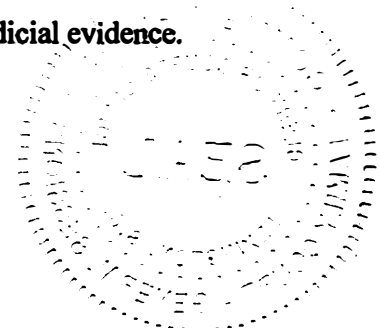
(13) Trial counsel failed to impeach witnesses and victims.

(14) Trial counsel failed to present expert witnesses to testify that petitioner's behavior was consistent with the defenses of Defense of another and Self-defense.

(15) Trial counsel failed to present favorable evidence in support of defenses.

(16) Trial counsel failed to file pre-trial motion to suppress prejudicial evidence.

(17) Trial counsel failed to object to prejudicial evidence.



FILED

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

- (18) Trial counsel failed to object to the State's evidence of mutual combat.
- (19) Trial counsel failed to request tailored jury instructions to support defenses.
- (20) Trial counsel failed to object to erroneous, prejudicial and burden shifting jury instructions.
- (21) Trial counsel ineffective for requesting erroneous, prejudicial and burden shifting jury instructions.
- (22) Trial counsel ineffective for not filing a pre-trial motion for the "Protection of Person's and Property Act".
- (23) Trial counsel failed to present evidence to show that omissions and errors were in petitioner's transcript during the reconstruction hearing.
- (24) Trial counsel failed to submit favorable evidence into evidence.
- (25) Trial counsel failed to investigate backgrounds of victims and witnesses.
- (26) Trial counsel failed to motion of mistrial due to erroneous and prejudicial jury instructions, which were burden shifting and denied petitioner of a fair trial.
- (27) Trial counsel failed to investigate and test evidence.
- (28) Trial counsel failed to object to hearsay testimony.
- (29) Trial counsel failed to investigate facts and circumstances of case.
- (30) Trial counsel failed to prepare for case.
- (31) Trial counsel failed to argue favorable evidence during closing arguments.

* (I, Petitioner, respectfully reserve the right to amend application for further issues.)

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Co. C.C.C.P., G.S. & E.C.

FILED**Attachment 11 (b) - Ineffective Assistance of Trial Counsel**

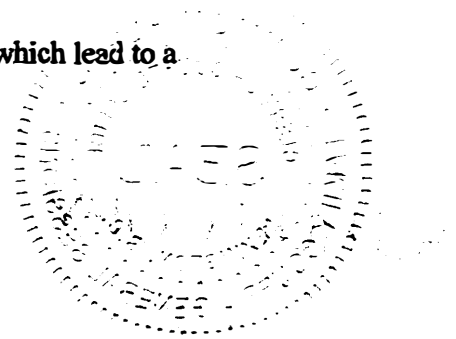
- (1) Appellant counsel ineffective for not briefing the issue of Directed Verdict for acquittal.
- (2) Appellant counsel ineffective for not briefing the issue of insufficient evidence to convict.
- (3) Appellant counsel ineffective for failing to file motion to fix errors in reconstruction transcript.

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 BETH A. CARRIGG
 CLERK OF COURT
 GREENINGTON SC

*** (I, Petitioner, respectfully reserve the right to amend application for further issues.)**

Attachment 11 (c) - Prosecutor Misconduct

- (1) Lead investigator failed to secure and search crime scene when informed that other weapons were present at the crime scene.
- (2) Prosecutor expressing, personal opinions about petitioner's guilt and credibility.
- (3) Prosecutor made unfair and improper remarks about petitioner.
- (4) Prosecutor expressing opinions about matters requiring personal experience and expert knowledge.
- (5) Prosecutor vouching for credibility of victims and witnesses.
- (6) Prosecutor vouching for credibility of government witnesses.
- (7) Prosecutor presenting and failing to correct perjured testimony of victims and witnesses.
- (8) Prosecutor appealing to jurors to act as the conscience of the community.
- (9) Prosecutor made remarks to inflame the passions of the jurors, which lead to a compromise verdict conviction.
- (10) Prosecutor making misstatements of law.



(11) Prosecutor making misstatements of facts.

(12) Prosecutor made unfair, prejudicial, biased statements during trial.

(13) Prosecutor made unfair, prejudicial, biased, burden shifting statements during closing arguments.

(14) Prosecutor failed to limit trial statements and closing argument to evidence admitted into the record.

(15) Prosecutor violated petitioner's due process right to a fair trial and made petitioner's convictions a miscarriage of justice.

*** (I, Petitioner, respectfully reserve the right to amend application for further issues.)**

Attachment 11 (d) - Juror Misconduct

(1) The jury's verdict was a compromise verdict based on passion and prejudice, making the jury's verdict unfair and not impartial to Petitioner, which makes Petitioner's convictions a miscarriage of justice.

Attachment 11 (e) - Due Process Violations

(1) Due Process Violation: Petitioner's convictions re compromise verdicts, which denied the Petitioner the right to a fair trial, making Petitioner's convictions a miscarriage of justice.

(2) Due Process Violation: Petitioner's trial and reconstruction transcripts have omissions and errors.

*** (I, Petitioner, respectfully reserve the right to amend application for further issues.)**

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Lax. Co. C.C.C.P., G.S. & F.C.

FILED

2011 SEP -2 P 2:53

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Mr. Kerwin S. Parker #337544
B.R.C.I. Wateree 267
4460 Broad River RD.
Columbia, S.C. 29210

FILED

8/27/14

2014 SEP -2 P 2:53

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Honorable Beth Carrigg
Clerk of Court
205 E. Main St. Ste. 146
Lexington, S. C. 29072-3557

Ref: Filing P.C.R. Application

2014CP3203172

Honorable Clerk,

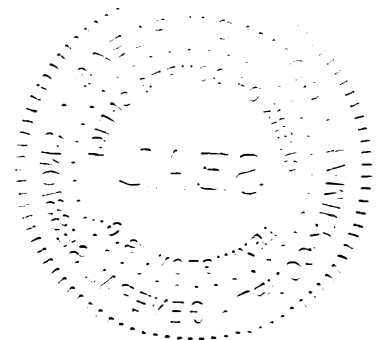
Please find enclosed an application for post-conviction relief to be filed in your office. I would like to have a stamped clocked filed copy returned to me with the name of the attorney that is assigned to handle the above said P.C.R. application. I have enclosed a self addressed envelope to be used for this purpose.

Thank you in advance for your time and consideration in this matter.

Sincerely,



Mr. Kerwin S. Parker
Applicant



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
	)	
Kerwin S. Parker	)	C.A. No. 2014-CP-32-3172
S.C.D.C. No. 337544	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN¹
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief filed September 2, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted by the April 2007 term of the Lexington County Grand Jury for possession of a firearm during the commission of a violent crime (2007-GS-32-1541) and assault and battery with intent to kill (ABWIK) (2007-GS-32-1542). John Duncan, Esq., represented Applicant. On September 14-18, 2009, Applicant proceeded to a trial before the Honorable Robin Stillwell and a jury. He was found guilty as indicted. Judge Stillwell sentenced Applicant to a term of five (5) years imprisonment for possession of a weapon; and to a term of twenty (20) years for ABWIK.

A timely notice of appeal was filed and perfected on Applicant's behalf. Wanda Carter, Esq., represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Parker, Op. No. 2013-UP-403 (S.C. Ct. App. filed

¹ By Order of October 23, 2014, Aimee Zmroczek has been appointed as Counsel.

October 30, 2013). Counsel for Applicant filed Petition for Rehearing on November 14, 2014. By Order filed December 27, 2013, the South Carolina Court of Appeals denied the petition. Counsel for Applicant then filed a Petition for Writ of Certiorari. By Order dated July 24, 2014, the Supreme Court of South Carolina denied the Petition. The Remittitur was issued on August 5, 2014.

II.

In his current Application, Applicant alleges he is being held in custody unlawfully for the following reasons:²

1. "Ineffective Assistance of Trial Counsel"

- a. "Trial counsel failed to motion for a new trial when the trial court declared that the jury's verdict was a compromise verdict and that trial court's sentence would not serve justice"
- b. "Trial counsel failed to motion for an acquittal when the trial court declared that the jury's verdict was a compromise verdict and that the trial court's sentence would not serve justice"
- c. "Trial counsel failed to file for a sentence reconsideration after sentencing, when the trial court declared that the jury's verdict was a compromise verdict and the trial court's sentence won't serve justice"
- d. "Trial counsel [was] ineffective for advising petitioner not to testify at trial"
- e. "Trial counsel failed to motion for a new trial on the grounds that evidence was insufficient to support convictions"
- f. "Trial counsel failed to object to prosecutor's unconstitutional, burden shifting, and prejudicial closing argument and motion for mistrial"
- g. "Trial counsel failed to object to prosecutor, victim and witness perjured testimony"
- h. "Trial counsel failed to pre-trial interview victims and witnesses that testified"
- i. "Trial counsel failed to contact, interview and subpoena potential witnesses"
- j. "Trial counsel failed to call witnesses that were subpoena [sic] to testify"
- k. "Trial counsel failed to present character witnesses"
- l. "Trial counsel failed to present evidence of petitioner's good character"
- m. "Trial counsel failed to impeach witnesses and victims"
- n. "Trial counsel failed to present expert witnesses to testify that petitioner's behavior was consistent with the defenses of defense of another and Self-defense"
- o. "Trial counsel failed to present favorable evidence in support of defenses"
- p. "Trial counsel failed to file pre-trial motion to suppress prejudicial evidence"
- q. "Trial counsel failed to object to prejudicial evidence"

² Respondent has been unable to locate said attachment.

- r. "Trial counsel failed to object to the State's evidence of mutual combat"
- s. "Trial counsel failed to request tailored jury instructions to support defenses"
- t. "Trial counsel failed to object to erroneous, prejudicial and burden shifting jury instructions"
- u. "Trial counsel ineffective for requesting erroneous, prejudicial and burden shifting jury instructions"
- v. "Trial counsel ineffective for not filing a pre-trial motion for the 'protection of person's and property act'"
- w. "Trial counsel failed to present evidence to show that omissions and errors were in petitioner's transcript during the reconstruction hearing"
- x. "Trial counsel failed to submit [sic] favorable evidence into evidence"
- y. "Trial counsel failed to investigate backgrounds of victims and witnesses"
- z. "Trial counsel failed to motion of mistrial due to erroneous and prejudicial jury instructions, which were burden shifting and denied petitioner of a fair trial"
- aa. "Trial counsel failed to investigate and test evidence"
- bb. "Trial counsel failed to object to hearsay testimony"
- cc. "Trial counsel failed to investigate facts and circumstances of case"
- dd. "Trial counsel failed to prepare for case"
- ee. "Trial counsel failed to argue favorable evidence during closing arguments"
- 2. "Ineffective Assistance of Appeal Counsel"
 - a. "Appellant counsel ineffective for not briefing the issue of Directed Verdict for acquittal"
 - b. "Appellant counsel ineffective for not briefing the issue of insufficient evidence to convict"
 - c. "Appellant counsel ineffective for failing to file motion to fix errors in reconstruction transcript"
- 3. "Prosecutor (Solicitor) Misconduct"
 - a. "Lead investigator failed to secure and search crime scene when informed that other weapons were present at the crime scene"
 - b. "Prosecutor expressing, personal opinions about petitioner's guilt and credibility"
 - c. "Prosecutor made unfair and improper remarks about petitioner"
 - d. "Prosecutor expressing opinions about matters requiring personal experience and expert knowledge"
 - e. "Prosecutor vouching for credibility of victims and witnesses"
 - f. "Prosecutor vouching for credibility of government witnesses"
 - g. "Prosecutor presenting and failing to correct perjured testimony of victim and witnesses"
 - h. "Prosecutor appealing to jurors to act as the conscience of the community"
 - i. "Prosecutor made remarks to inflame the passions of the jurors, which lead to a compromise verdict conviction"
 - j. "Prosecutor making misstatements of law"
 - k. "Prosecutor making misstatements of facts"
 - l. "Prosecutor made unfair, prejudicial, biased statements during trial"

- m. "Prosecutor made unfair, prejudicial, biased, burden shifting statements during closing arguments"
- n. "Prosecutor failed to limit trial statements and closing argument to evidence admitted into the records"
- o. "Prosecutor violated petitioner's due process right to a fair trial and made petitioner's convictions a miscarriage of justice"
- 4. "Juror Misconduct"
 - a. "The jury's verdict was a compromise verdict based on passion and prejudice, making the jury's verdict unfair and not impartial to Petitioner, which makes Petitioner's convictions a miscarriage of justice"
- 5. "Due Process Violations"
 - a. "Petitioner's convictions re compromise verdicts, which denied the Petitioner the right to a fair trial, making Petitioner's convictions a miscarriage of justice"
 - b. "Petitioner's trial and reconstruction transcripts have omissions and errors"

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRPC.

Attached to this return and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction(s), Applicant's first PCR application, records regarding Applicant's Motion to Reconsider, Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

Respondent submits that Applicant's claim of ineffective assistance of trial counsel is without merit. In a PCR action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective

assistance of trial counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." *Id.* (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Id.* (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. *Id.* at 117, 386 S.E.2d at 625. First, the Applicant must prove trial counsel's performance was deficient. *Id.* Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing Strickland, 466 U.S. at 688). 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." *Id.* at 117-18, 386 S.E.2d at 625.

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

IV.

Respondent submits Applicant's second claim of ineffective assistance of appellate counsel is without merit. Respondent submits that appellate counsel rendered effective assistance. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.* 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). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to

fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant next alleges prosecutorial misconduct and juror misconduct. Prosecutorial misconduct and juror misconduct are not appropriate issues for post-conviction relief. Rather, they are direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised these issues on appeal. The failure to do so has waived this allegation as a ground for relief. Therefore, Respondent request that these allegations be dismissed pursuant to Rule 12(b)(6), SCRCP.

VI.

Applicant's remaining claims are allegations of due process violations. In the event Applicant alleges independent claims of due process violations, he fails to set forth with specificity any facts supporting his claim that he was denied due process of law. 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 a post-conviction relief application, the applicant must 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, 260, 143 S.E.2d 455, 456 (1965) ("It is, therefore, incumbent upon the applicant to make at least a *prima facie* showing entitling him to relief." (citing Babb v. State, 240 S.C. 235, 125 S.E.2d 467 (1962); Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962); Tillman v. Manning, 241 S.C. 221, 127 S.E.2d 721 (1962); Blandshaw v. State, 245 S.C.

385, 140 S.E.2d 784 (1965))).

Since Applicant has failed to make even a *prima facie* showing, Respondent would submit this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCP, for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. In the alternative, Respondent would submit Applicant should be required to provide a more definite statement pursuant to Rule 12(e), SCRCP, because this allegation is so vague and ambiguous Respondent cannot reasonably be required to frame a response.

VII.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

(SIGNATURE BLOCK ON NEXT PAGE)

VIII.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Sept. 23rd, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	
	)	2014-CP-32-3172
KERWIN S. PARKER, #337544,	)	
	)	
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** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Aimee Zmroczek, Esquire
A.J.Z. Law Firm, LLC.
PO Box 11961
Columbia, SC 29211

DATED this 2nd day of September, 2015.



 Ashley Haworth, Legal Assistant
 For Respondent

1 State of South Carolina Court of Common Pleas
2 County of Lexington Eleventh Judicial Circuit
3
4 Kerwin S. Parker,) Transcript of Record
5 Applicant,) 2014-CP-32-03172
6 vs.)
7 State of South Carolina,)
8 Defendant.)

9
10 November 10, 2016
11 Lexington, South Carolina
12

13 B E F O R E:

14 The Honorable R. Keith Kelly, Judge
15

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

17 Aimee J. Zmroczek, Esquire
18 On behalf of the Applicant

19 Johanna C. Valenzuela, Esquire
20 On behalf of the State of South Carolina
21
22

23 Stacy S. Johnson
24 Circuit Court Reporter
25

I N D E X

WITNESS	PAGE
John E. Duncan	
Direct Examination by Ms. Zmroczek	10
Cross-Examination by Ms. Valenzuela	41
Redirect Examination by Ms. Zmroczek	77
Wanda H. Carter	
Direct Examination by Ms. Valenzuela	81
Cross-Examination by Ms. Zmroczek	84
Certificate of Reporter	92

1	E X H I B I T S			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
3	Applicant's 1	(CLE Handout)	18	18
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1 (Whereupon, the following proceedings were held on
2 November 10, 2016, beginning at 10:04 AM.)

3 **BAILIFF:** All rise. Court's now in session.

4 **THE COURT:** Thank you. Thank you. Please be seated.
5 Good morning. Good morning.

6 Yes, ma'am.

7 **MS. VALENZUELA:** May it please the Court, Your Honor?
8 This is the case of Kerwin Parker versus the State of South
9 Carolina, Case Number 2014-CP-32-3172. Mr. Parker filed
10 his application for PCR on September 2nd of 2014, Your
11 Honor, and he is currently still confined at the Department
12 of Corrections. He is present in the courtroom with his
13 attorney, Aimee Zmroczek.

14 He is before you based on the fact that the Lexington
15 County grand jury indicted him for possession of a firearm
16 during the commission of a violent crime and assault and
17 battery with intent to kill in the April 2007 term. He
18 proceeded to trial on September 14th through 18th of
19 2009. At that trial he was represented by Mr. John Duncan.
20 That was a joint trial between Mr. Kerwin Parker and his
21 co-defendant. They both proceeded to trial in front of
22 the Honorable Robin Stillwell and a jury.

23 At the conclusion of the trial, the jury ended up
24 coming back with guilty verdicts for Kerwin Parker as
25 indicted and Judge Stillwell ended up sentencing him to a

1 term of five years for the possession of a weapon charge
2 and twenty years for the ABWIK charge.

3 A notice of appeal was filed on behalf of the
4 Applicant and the Court of Appeals ended up confirming
5 that conviction and sentence around October of 2013. A
6 petition for re-hearing was filed. The South Carolina
7 Court of Appeals denied that petition and then there was
8 a writ of certiori filed with the Supreme Court and in
9 July of 2014 the Supreme Court denied need that writ.

10 The Applicant has made -- in his original application,
11 it fills up about two and a half pages of allegations.
12 His counsel provided me this morning with a boiled down
13 version of what the four main allegations are, and I
14 will read those out, and then if Ms. Zmroczek has any
15 corrections, we can go from there.

16 One of them will be a challenge -- or an allegation
17 that counsel was ineffective for using the Protection of
18 Persons and Property Act in defense of the Applicant; that
19 there was, I guess, legal error with the reconstruction of
20 the transcript. This is a case where when it went up on
21 direct appeal it was found out that there were portions
22 missing and so they had to do a reconstruction, so there
23 are allegations related to that.

24 And then that counsel was ineffective for not
25 objecting to comments made by the solicitor in the closing

1 argument and PCR counsel has indicated that those comments
2 go both to the last issue, which is a Belcher issue, and
3 some of the comments stand on their own as being either
4 inflammatory or trying to appeal to the passions of the
5 jury.

6 And then that last issue is under Belcher that there
7 should have been an objection to the charge made which
8 would have ended up preserving the issue for a direct
9 appeal.

10 **THE COURT:** Two of the four again -- and let me, for
11 the record, I've read everything that you've sent to me,
12 so --

13 **MS. VALENZUELA:** And they're not in there, so.

14 **THE COURT:** Right. Okay. So the first one is the
15 lawyer was ineffective and something about --

16 **MS. ZMROCZEK:** In failing to make a motion or even
17 to preserve an issue under the Protection of Persons and
18 Property Act.

19 **THE COURT:** Okay.

20 **MS. ZMROCZEK:** And then the second one was the
21 reconstruction -- the errors in the reconstruction of some
22 of the testimony.

23 **THE COURT:** Okay.

24 **MS. ZMROCZEK:** The third would be ineffectiveness for
25 improper -- or for failing to object to improper comments

1 in closing statement, not only regarding the law which
2 deals with the fourth issue, but also with just improper
3 comments made to inflame the passions of the jury.

4 And then the fourth one, Your Honor, is a Belcher
5 issue.

6 **THE COURT:** Okay. Got it.

7 **MS. ZMROCZEK:** And I did want to correct one thing.
8 She said that Mr. Parker was found guilty as indicted, but
9 that's actually not correct. He was indicted for murder,
10 but not -- but found not guilty on that charge --

11 **THE COURT:** Right.

12 **MS. ZMROCZEK:** -- so I wanted to make that correction.

13 **MS. VALENZUELA:** And I just spent time -- I was trying
14 to look through the sentence in the court's record and I
15 thought he had been convicted of murder and then I couldn't
16 find it, so I'm sorry for not --

17 **THE COURT:** That's okay. I've already read it, so I
18 understood what it was.

19 **MS. VALENZUELA:** Thank you, Your Honor.

20 **THE COURT:** Okay.

21 **MS. ZMROCZEK:** Yes, and these -- and, Your Honor,
22 this obviously -- before we get started because I'm
23 actually not gonna call my client, he hasn't testified
24 before, I'm gonna call Mr. Duncan. And I've already
25 marked for the Court's -- for an exhibit that I gave to

1 Ms. Valenzuela previously something, so we'll hand that
2 up once Mr. Duncan identifies it.

3 But I also wanted to go ahead before I forget because
4 I have a million papers over here, I believe that there's
5 a case right on point regarding the Belcher issue and it's
6 just a very recent 2016, like as in a couple of months ago,
7 case, and it Gibson v. State, and I have provided a copy to
8 the AG's office as well.

9 Your Honor, Mr. Parker and I -- I'm sorry, I know
10 you're it reading.

11 **THE COURT:** No, and we'll talk about it a little bit
12 later, but Mr. Duncan did raise that issue talking about a
13 case when I read the transcript.

14 **MS. ZMROCZEK:** Right. Well, he did in the sentencing
15 part of it and so that's what -- I think that's one of the
16 issues that -- that the -- one of the main reasons why
17 we're gonna put him up is to talk about that was aware of
18 it, actually had received -- gone to a CLE and received a
19 handout on it and just forgot to raise it.

20 **THE COURT:** Okay.

21 **MS. ZMROCZEK:** So we believe that that's really -- I
22 know -- because, yeah, it wasn't raised, which I know is
23 why the Court said it wasn't raised. But I wanted to
24 also address that Mr. Parker and I -- he did fill out his
25 application prior to obviously getting appointed a lawyer

1 and he had listed all of these issues that you have read.

2 **THE COURT:** Yes, ma'am.

3 **MS. ZMROCZEK:** And, Your Honor, he and I have
4 discussed it and it's not -- we've discussed all of those
5 issues and it's not -- he understands that PCR is kind of
6 your one chance and then he and I -- I've explained --
7 especially just him relying on the fact that I've done this
8 so many times, that when you have some real cognizable
9 issues that the little issues that he raised kind of seem
10 to cloud the bigger issues and so, Your Honor, that's why
11 he and I discussed that and focussed on just --

12 **THE COURT:** Okay.

13 **MS. ZMROCZEK:** -- trying to focus on those issues.

14 **THE COURT:** All right. Ready when you are.

15 **MS. ZMROCZEK:** Thank you, Your Honor.

16 We call Jack Duncan.

17 (Whereupon, John E. Duncan was duly sworn by the Clerk
18 of Court.)

19 **THE CLERK:** Have a seat and state your full name.

20 **THE WITNESS:** Thank you.

21 **THE COURT:** Mr. Duncan, tell us who you are and spell
22 your last name for Madam Court Reporter, please.

23 **THE WITNESS:** John, J-O-H-N, E, as in Earl, Duncan,
24 D-U-N-C-A-N.

25 **THE COURT:** Yes, ma'am.

1 **MS. ZMROCZEK:** Thank you.

2 JOHN E. DUNCAN,

3 having been duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MS. ZMROCZEK:

6 Q. Mr. Duncan, how long have you been an attorney?

7 A. Since November 22, 1976.

8 Q. And since 1976, what's been the majority focus area
9 of your practice?

10 A. Minimum 50 percent criminal.

11 Q. Okay. Do you recall back in 2009 where you were
12 working?

13 A. I was a sole practitioner.

14 Q. Okay. And had you -- prior to being a sole
15 practitioner, where were you working?

16 A. I was with -- I was originally in a firm, went to sole
17 practitioner, public defender's office, sole practitioner,
18 so.

19 Q. Okay. And so you had worked with the public
20 defender's office before?

21 A. That's correct.

22 Q. And do you recall this case in particular, Mr. Parker?

23 A. Oh, I do. Yes.

24 Q. Now were you retained or were you appointed?

25 A. I was appointed as a -- as I remember, it was a

1 conflict with the PD's office, but it was before the 608's.

2 Q. Before the contract system?

3 A. Correct.

4 Q. Okay. And so the conflict, do you recall what the
5 conflict was? Was his brother also --

6 A. Well, there were -- there was a possibility of
7 conflicting or inconsistent defenses and it was just such
8 serious charges that out of an overabundance of caution
9 Ms. Fullwood, who was the chief public defender at the
10 time, thought it better to have independent counsel
11 appointed.

12 Q. Now did y'all actually go to trial together?

13 A. Yes.

14 Q. And did you have inconsistent defenses when you went
15 to trial?

16 A. I hadn't thought about that in a while. That's hard
17 to say. The -- both defendants were charged with murder.
18 Mr. Johnson testified -- testified and he exculpated
19 Mr. Parker and then there were -- there were witnesses who
20 emphasized one defendant over the actions of another, so I
21 guess you could say there was a -- there was some conflict,
22 yes.

23 Q. Some conflict. But as you said, Mr. Johnson
24 testified, right?

25 A. That's correct.

1 Q. And he admitted to doing the shooting and actually
2 also to --

3 A. To the driving of the car that struck one of the
4 alleged victims.

5 Q. Right. And -- and so that his brother was -- he was
6 actually concerned about his brother?

7 A. They were half-brothers as I recall and, yeah, there
8 was some -- you know, there was -- there wasn't an
9 estrangement in the family, if that's what you're asking.

10 Q. Right. And, well -- and also what I'm asking is they
11 had similar defenses in that they were both raising a
12 self-defense kind of protection issue; is that correct?

13 A. Yes. I guess perfect and imperfect is what I recall
14 of self-defense and self -- defense of others.

15 Q. Okay. And do you recall back in 2006, June 9th of
16 2006, the Protection of Persons and Property Act becoming
17 in effect?

18 A. Oh, yes.

19 Q. Okay. Is that something that you considered with this
20 case?

21 A. Not in the least.

22 Q. Okay. Why -- why is it that you did not consider
23 that?

24 A. It just never came to mind. I mean, I don't -- I saw
25 the passage date and I saw the date of the trial and I

1 don't -- I don't have any idea. I didn't have access to
2 my file when I was reviewing and so I -- I don't recall
3 talking about it, thinking about it.

4 Q. Okay. And you would agree though that looking at
5 it now that that's a motion that could have been -- I
6 know that there have been a lot of issues with cases with
7 pre-trial motions versus, you know, immediately pre-trial.
8 I know that the law has changed recently, but at that time
9 you would agree with me that that would have been a motion
10 that could have been raised in this case?

11 A. Oh, yeah, and it would have been -- there would have
12 been an interim appeal by either party.

13 Q. Okay. Yeah, at that time --

14 A. Yes.

15 Q. -- because there had been no law on the appeal.

16 A. Right.

17 Q. So had -- so had that motion been made pre-trial, you
18 would have had the opportunity to -- to kind of get some
19 facts on the record and then depending on -- I mean, he
20 could have been immune -- Mr. Parker could have been immune
21 from prosecution -- or Mr. Johnson could have been immune
22 from prosecution at least?

23 A. I would say that to me it was a legitimate issue that
24 should have been raised.

25 Q. Okay. And then I want to -- I'm kind of trying to

1 go in order of the way that we framed the issues here
2 just so it's kind of clear. I want to talk about the
3 reconstruction issues. Do you remember what issues you
4 had with the reconstruction of the -- first of all, do you
5 recall why parts of the transcript were missing?

6 A. Well -- and I don't -- I don't want to impugn court
7 reporters, I have the highest respect for them, but as I
8 recall the court reporter took off or she disappeared or
9 there were tapes missing and it -- I don't believe this
10 was the only case that it affected and it just -- there
11 were parts of the testimony that just didn't exist anymore.

12 Q. And so you got word of this from appellate defense,
13 correct, two years --

14 A. Yeah, and that was a long time -- yeah, two years or
15 so after the fact.

16 Q. And -- yeah. So I think -- I believe that the
17 transcript, and I believe Your Honor has a copy, the
18 reconstruction was October 3rd of 2011, which was almost
19 two years to the date of the trial. And were you able to
20 find a lot of your notes from that trial?

21 A. I don't remember. I -- and I apologize. I don't
22 remember going back over the reconstruction issue. I
23 wasn't really aware of that being an issue -- a possible
24 issue. I do remember that there were -- there was at least
25 one witness who testified that was not amenable to -- not

1 subject to compulsory process -- or, I'm sorry, they --
2 they were out of state and so it -- it made it a lot more
3 complicated and being out of state we had -- we had no
4 notice that they were out of state --

5 Q. Right.

6 A. -- so they didn't appear.

7 Q. And that -- was that an issue really raised under
8 appellate defense?

9 A. I don't remember talking to anybody about that.

10 Q. Okay.

11 A. And I didn't -- I didn't see that as an issue. It
12 didn't seem important to me considering the -- considering
13 the testimony that was made, the testimony that was
14 recreated, what was left out was insignificant to me.

15 Q. Okay.

16 A. That was my opinion.

17 Q. Right. And a lot of that had to do with Mr. Johnson
18 and his testimony and some of your cross though, correct?

19 A. Yeah, Mr. Johnson was -- and I don't remember
20 everything, but Mr. Johnson was quite upset about it and
21 I just -- on Mr. Parker's behalf I didn't -- I didn't see
22 that -- that issue.

23 Q. Okay.

24 All right. And then I want to talk about the -- you
25 recall being in the trial, right?

1 A. Oh, yeah.

2 Q. How many days was it?

3 A. Five days.

4 Q. All right. Did you work -- I believe -- do you
5 recall like what hours you were working to prepare for
6 this or how long you spent preparing?

7 A. Oh, well, the -- as I recall, I got an order of
8 protection for at least the week before. I know I was
9 meeting with Ms. Fullwood at the public defender's office
10 for probably every day for about two weeks before and then
11 during the trial we were working 16 to 18-hour days through
12 the whole -- the whole trial.

13 Q. So -- so what was your kind of mental state or
14 demeanor toward the end of the trial, toward the last days?

15 A. Oh, I wanted a nap. I mean, I was tired. It was
16 exhausting. The jury came back, I believe, late Friday
17 night. I don't remember the hour, but I -- I know that I
18 drove home and went to bed.

19 Q. And do you recall -- you've been in trial -- have you
20 been in trial with Mr. Myers before?

21 A. Two weeks, twelve days, ten days, yes. Several death
22 penalty trials. Yes, many times.

23 Q. And you're familiar with -- well, I want to --
24 actually let's talk about the Belcher issue first. So
25 you had -- prior to closing arguments you had a charge

1 conference, correct?

2 A. Yes.

3 Q. And y'all handed up -- or you had some -- some
4 charge requests that dealt with self-defense and I believe
5 Mr. Myers had asked for a charge which kind of -- y'all
6 asked for mutual combat?

7 A. Yes, the mutual combat issue.

8 Q. Right. And then I want to show you defense -- or
9 excuse me, I always do that -- Applicant's Exhibit 1 and
10 ask if you recognize that?

11 A. I do.

12 Q. Okay. What is that?

13 A. This was Rauch, R-A-U-C-H, Wise's -- this was his
14 materials that he gave for a CLE presentation at a public
15 defender conference.

16 Q. And was that public defender conference in 2008?

17 A. It was -- yes.

18 Q. It was right prior to --

19 A. It was prior to our trial in 2009.

20 Q. Okay.

21 **MS. ZMROCZEK:** Your Honor, at this time we would move
22 Applicant's Exhibit 1 into evidence.

23 **THE COURT:** Any objection?

24 **MS. VALENZUELA:** I would like to have some testimony
25 laid out as to how the CLE material relates to the

1 witness's knowledge before I agree to admitting it.

2 **THE COURT:** Okay. Lay a foundation.

3 **MS. ZMROCZEK:** Yes, sir.

4 BY MS. ZMROCZEK:

5 Q. So, Mr. Duncan, when you -- you say that this was his
6 material that was presented at a conference, did you attend
7 that conference?

8 A. I did.

9 Q. Did you receive this material?

10 A. I did.

11 Q. And did you actually have a copy of this material in
12 your office or in your files?

13 A. I did.

14 Q. Okay. And this accurately reflects a copy of that
15 presentation that was given -- that handout that was given
16 at the presentation?

17 A. Yes. I mean, I don't -- I don't know as a fact that
18 it is word for word, but it is -- it certainly looks like
19 it is the substance of what Rauch presented.

20 **MS. VALENZUELA:** No objection.

21 **THE COURT:** It's admitted without objection.

22 **MS. ZMROCZEK:** Okay. Thank you.

23 (Applicant's Exhibit Number 1, CLE Handout, was marked
24 and admitted into evidence.)

25 **MS. ZMROCZEK:** And I'll just hand it up, Your Honor.

1 BY MS. ZMROCZEK:

2 Q. And are you a member of any organizations that keep
3 up with current events or kind of current issues in
4 criminal law?

5 A. Yes.

6 Q. Okay. And so was this Belcher issue a topic of
7 discussion amongst your peers with you?

8 A. Yeah, there were -- there were -- I was on three
9 different Listservs at the time. One was the South
10 Carolina Association for Justice or SCTLA and criminal
11 issues came up on that probably about 10 to 20 percent
12 of the time and then also the Criminal Defense Lawyers
13 Listserv and then also the National Association of
14 Criminal Defense Lawyers Listserv and so there were
15 discussion about inferences and -- and I don't remember
16 specifically the name "Belcher", but I do remember there
17 being discussions about inferences.

18 Q. Okay.

19 A. Because Rauch was -- Rauch was -- how do I say this?
20 He was focussed.

21 Q. He was leading a crusade?

22 A. He was pretty intense, yes.

23 Q. Okay. And this was an issue that was pending at the
24 time of this case, correct?

25 A. That's correct.

1 Q. Okay. And so -- but during the charge conference
2 neither you nor Ms. Fullwood raised the issue of -- of
3 malice and inferences and guns, correct?

4 A. I remember talking to Beth, but I remember that we --
5 we didn't -- we didn't discuss the pending case or the --
6 the CLE. I mean, I remember Beth being at the CLE, but we
7 -- we did not discuss that issue before we talked to Judge
8 Stillwell.

9 Q. Okay. And then, in fact -- and, Your Honor, I'm
10 looking at the sentencing -- do you have a copy of the
11 sentencing hearing transcript with you?

12 A. No.

13 Q. Okay.

14 **MS. ZMROCZEK:** Your Honor, I'm looking at the
15 sentencing hearing transcript, which was October 29, 2009.
16 BY MS. ZMROCZEK:

17 Q. And, in fact -- and I'll hand you a copy just so you
18 can flip through it real quick, but I believe you said that
19 the jury came back late in the night so you actually had
20 the sentencing hearing at a later time, correct?

21 A. That's correct.

22 Q. And so at that time did you realize your mistake of
23 not --

24 **MS. VALENZUELA:** Objection to the phrasing of the
25 question.

1 BY MS. ZMROCZEK:

2 Q. Well, in the transcript --

3 A. I mean, it's -- the transcript speaks for itself. I
4 mean, I -- I raised -- belatedly raised the Belcher issue
5 because the decision hit home to me that I should have --
6 should have said something prior, but I -- I mean, I don't
7 -- and, again, I haven't had time to read this real quick,
8 but whatever I said, I said.

9 Q. Okay. So in the sentencing transcript you recall
10 trying to raise it at that point, correct?

11 A. That's correct.

12 Q. And, in fact, Mr. Myers was objecting saying that the
13 case was final?

14 A. That's correct. I presume so. I mean, I -- because
15 I know one of my arguments was that it was not final
16 according to Supreme Court precedent.

17 Q. Okay. And so -- and so --

18 **MS. ZMROCZEK:** And, Your Honor, I'm referring
19 specifically in the sentencing transcript at Page 5.

20 BY MS. ZMROCZEK:

21 Q. And, Mr. Duncan, that's where you raise the issue
22 about the -- the Belcher issue at that point, correct,
23 beginning at Line 19?

24 A. If you say so, yeah.

25 Q. And I'll show you it.

1 A. Yes.

2 Q. Okay. And you specifically asked the Court to
3 readdress that issue, correct?

4 A. Yeah, and I -- yes.

5 Q. And, in fact, for several pages of that transcript
6 y'all had discussion about specifically the Belcher case,
7 and I'll show you Page 8, beginning at -- beginning
8 Line 5, and ask if that's what's reflected in the
9 transcript?

10 A. Yes.

11 Q. Okay. And so it seems that the Court had had -- had
12 said that they had had an opportunity to read that case as
13 well?

14 A. And I believe I'd sent it to the judge. I mean, we
15 -- Judge Stillwell was -- as I remember, he wasn't -- he
16 wasn't our resident or visiting judge -- I'm sorry, chief
17 administrative judge, and so he was not in Lexington all
18 that often and so it was about a month between the trial
19 and the sentencing and so I -- I -- I seem to remember
20 that I sent him a copy of that case as soon as it came
21 out.

22 Q. And I believe that that case came out -- I don't
23 have the first page, but it came out in between that --
24 in between that time, correct?

25 **MS. VALENZUELA:** We -- we stipulate that Belcher was

1 decided on October 12th of 2009.

2 **MS. ZMROCZEK:** Right. October 12, 2009.

3 BY MS. ZMROCZEK:

4 Q. And do you recall having any discussions with
5 appellate defense about that issue or did you have --
6 once -- you said that you didn't have an opportunity to
7 -- to have your file. What did you do with your file
8 once the case was over and given to appellate defense?

9 A. Well, I -- my habit at the time was to -- I mean,
10 you're talking about multiple bankers boxes. I mean, it
11 was in four or five bankers boxes of materials, and my
12 habit at the time was to give it back to the public
13 defender's office since it had originally come from them
14 because I knew that they had a rather large physical
15 storage facility. I -- there was -- I thought at one
16 time that I had turned it over to appellate defense, but
17 I don't -- I don't believe that actually happened, that
18 -- so it -- it most probably was given to Beth because I
19 know I did not store it. I did not keep it.

20 Q. Okay. And obviously there was some time -- a
21 significant amount of time between the trial and then the
22 appeal with the whole reconstruction and by the time it
23 got to here, correct?

24 A. Well, in fact -- yeah. I didn't even know that the
25 appeal had been -- had been heard until much later.

1 Q. Okay. And you actually -- did you -- you actually
2 did find out the result of that opinion, correct?

3 A. I want to say I found out the same time that the PCR
4 was filed.

5 Q. Okay.

6 **MS. ZMROCZEK:** And, Your Honor, I believe that it
7 was a -- it was a -- not reported, but I think that
8 there was a copy of the opinion, but I'll go ahead and
9 hand it up. It's front and back.

10 **THE COURT:** Yeah, I have it. It's in the --

11 **MS. ZMROCZEK:** Okay. I wanted to make sure it was a
12 part of the record as well.

13 BY MS. ZMROCZEK:

14 Q. And in that -- you have -- have you had an opportunity
15 to read the opinion since then?

16 A. Oh, I have, yes.

17 Q. Okay. And it -- it says that they -- since the
18 request wasn't made they couldn't address that issue of
19 Belcher, right?

20 A. Right.

21 Q. But you would agree that you had -- especially before
22 sentencing had tried to raise and preserve that issue?

23 A. Certainly.

24 Q. Okay. Now I want to go back to the trial and the
25 closing. Do you remember that Mr. Myers did the closing?

1 A. Yes.

2 Q. What was his typical closing presentation?

3 A. Over the top, aggressive, flamboyant, excessive.

4 Q. And would you agree that that was -- I know that we
5 have the words on paper that he said, and I want to talk
6 about those in a minute, but is that your recollection of
7 what he did in this trial as well?

8 A. Well, actually I -- I had been involved in several
9 capital cases with Mr. Myers and he's a great lawyer, but
10 he -- he -- comparatively speaking here was nothing like
11 his -- his closings that he was reversed for and that I
12 guess he was famous or infamous for, so comparatively
13 speaking it was rather mild.

14 Q. And I want to talk about -- so you would agree
15 though --

16 **MS. ZMROCZEK:** And, Your Honor, specifically I can
17 point out the pages, but --

18 **THE COURT:** Okay.

19 BY MS. ZMROCZEK:

20 Q. Beginning at Page 805 of the transcript, he
21 emphasized the use of a weapon as malice -- as being an
22 example of malice throughout his -- throughout his
23 argument, correct?

24 A. As I remember.

25 Q. Okay. And, in fact, I'm gonna show you on Page 807,

1 beginning at Line 6 --

2 **MS. VALENZUELA:** And, Aimee, I just want to -- so
3 the Court has the record on appeal and you're referencing
4 the smaller page number that's in the inside of it, I just
5 want to make sure so the --

6 **THE COURT:** What is the smaller number?

7 **MS. ZMROCZEK:** The smaller number is 807. The bigger
8 number, Your Honor, is 671. I guess is that what you mean,
9 smaller or bigger? Like --

10 **THE COURT:** Yes.

11 **MS. ZMROCZEK:** Okay.

12 **THE COURT:** 671, 8 --

13 **MS. ZMROCZEK:** I'm sorry. I know there are a lot of
14 numbers. And I'm going to hand -- I don't know what page
15 number to call it now, Your Honor.

16 **MS. VALENZUELA:** If we just go consistently with one,
17 I think we'll all end up being on the same page.

18 **THE COURT:** Use the -- use the appellate number, if
19 you will. The large number --

20 **MS. ZMROCZEK:** The larger number. Okay.

21 **THE COURT:** -- in the top.

22 BY MS. ZMROCZEK:

23 Q. Okay. So I'm gonna hand you Page 601 and ask you just
24 to read briefly beginning at Line 6.

25 A. Solicitor Myers --

1 Q. Oh, you can read it to yourself, if you don't mind.

2 A. Okay.

3 Q. Okay. So at that point Solicitor Myers was doing his
4 closing argument and basically -- or what he was saying was
5 if you want to find them -- or give them a lesser sentence
6 or find them guilty of a smaller charge, to go ahead and do
7 that. Is that what he was telling the jury?

8 A. Correct.

9 Q. And was there any objection at that point?

10 A. No.

11 Q. Okay. Is that something -- when you talk about the
12 flamboyance and things like that, is that -- is that what
13 you were referring to, kind of those -- telling the jury
14 not --

15 A. I did not consider that to be excessive and it was
16 something that tactically I thought that I probably would
17 be overruled by Judge Stillwell and that I -- I didn't want
18 to call attention to it, so it was a -- it was a decision
19 that I made not to object as I recall through the whole
20 closing because it just wasn't -- it wasn't Donnie at his
21 best slash worse.

22 Q. Right. Right. Right. But you would agree that he
23 -- there were times that -- that the comments that he made
24 could have been objected to?

25 A. Yes.

1 Q. For example, telling them to give a lesser sentence?

2 A. Yes. And I -- I thought that -- my -- my experience
3 is that jurors and the public almost uniformly think that
4 manslaughter is a form of a murder and so I didn't see
5 that a -- that manslaughter would be seen as something --
6 you know, a slap on the wrist since -- since -- I mean,
7 everybody talks about manslaughter and -- a lay person as
8 being a type or a form of murder.

9 Q. Right. And so -- so that's why I want to go back to
10 kind of the importance of how many times he referenced a
11 gun with malice.

12 **MS. ZMROCZEK:** And you don't -- do you have --
13 (Discussion between Counsel and Applicant.)

14 **MS. VALENZUELA:** Do you --

15 **MS. ZMROCZEK:** Yeah, I just need a copy of the
16 transcript so I can ask him questions about --

17 **MS. VALENZUELA:** Volume 2 or Volume 1?

18 **MS. ZMROCZEK:** Volume 2. And I'll ask you to start
19 -- and we're looking at the big numbers so I guess we
20 don't get confused.

21 **MS. VALENZUELA:** Can I have just one second to pull
22 up the digital copy so I have one to go along with?

23 **THE COURT:** Yes. What page are you on?

24 **MS. ZMROCZEK:** Okay. So I'm going with the big
25 numbers, Your Honor. 669 is where we're gonna start.

1 **THE COURT:** 669?

2 **MS. ZMROCZEK:** Yeah.

3 **THE COURT:** It going to be on Page 175 on the
4 computer.

5 **MS. VALENZUELA:** Thank you. Okay. Thank you.

6 BY MS. ZMROCZEK:

7 Q. Okay. And I'm looking at line -- well, beginning at
8 Line 11 where he starts talking about murder is taking --
9 he starts discussing malice and then he goes down to lines
10 18 and 19 and he begins you would -- would you agree with
11 me he begins talking about pulling the trigger and using a
12 gun?

13 A. Yes.

14 Q. Okay. And then -- and then on the next -- on the next
15 page, Page 670, at lines -- beginning at lines 16 -- or
16 beginning Line 16 he, again, takes -- talks about malice
17 with holding the pistol and shooting the fourteen rounds,
18 correct?

19 A. Yeah. I mean, he doesn't use the word malice, but --

20 Q. But you would agree that that's a continuation of the
21 discussion of the charge from earlier?

22 A. Oh, yeah. His -- Mr. Myers's impression or his -- his
23 version of the facts.

24 Q. Okay. And then it included -- pointing out malice
25 using not only the automobile, but the gun as well?

1 A. Yes.

2 Q. Okay. And then if you'll flip, again, to Page 675,
3 he talks about -- beginning at Line 2, he goes, you go to
4 somebody's house, you're on their curtilage, which means
5 surrounding area, you have brass knuckles, a metal pipe
6 and --

7 A. I'm sorry, where? Where?

8 Q. Beginning at Line 2.

9 A. I'm sorry, what page?

10 Q. 675. You have to look at the bigger numbers.

11 A. Oh, okay. I got you. I'm sorry.

12 Q. And he's talking about -- he's trying to refute the
13 claims of self-defense at that point.

14 A. Right.

15 Q. And I think we already talked about it, but that's
16 also kind of an area that would have been ripe under the
17 Persons and Property Protection Act because it's not just
18 at your home anymore, it could be -- it could be a stand
19 your ground --

20 **MS. VALENZUELA:** I'm gonna object here because --
21 and I know that we've been leading with some of it, but
22 when it comes to the -- this is getting straight to the
23 allegations, so I'm gonna object to leading.

24 **MS. ZMROCZEK:** I'll rephrase it, Your Honor.

25 **THE COURT:** Okay.

1 BY MS. ZMROCZEK:

2 Q. When you read that line and looking back at not
3 raising the property protections act, do you see an
4 argument that could have been made had there been a
5 decision on that?

6 A. Oh, yeah. If you -- you've got the framework of the
7 stand your ground law is what I call it. You've got the
8 framework of that and then into that framework you can fit
9 certain facts and these are facts that would fit into that
10 framework.

11 Q. Okay. Thank you. On Page 677, and specifically at
12 -- beginning the Line 14 --

13 A. Okay.

14 Q. -- where it reads they have brass knuckles, they have
15 a pistol that holds fourteen rounds, that's malice right
16 there, that's meanness, and what I'm trying to do -- I know
17 that it's repetitive, but I'm trying to point out each and
18 every time during Mr. Myers's closing how many times he was
19 referring to malice and the pistol, so you would agree with
20 me that the record is what it is, correct?

21 A. Yeah.

22 Q. Okay. On Page 678 -- did you feel -- I know that Mr.
23 -- you said that Mr. Myers, this was kind of not over the
24 top as compared to some of his death penalty cases, but
25 when he talks about the -- the nature of the injuries and

1 things like that, what was the reason that y'all didn't
2 object to that over and over -- or that you didn't object
3 to it, just about like the bone sticking out?

4 A. Well, where things were, I guess, not antagonistic,
5 but defenses were different is that with Kerwin, Curtis
6 Johnson had pointed the finger at himself, and so we wanted
7 to encourage that and these facts did not apply to Kerwin,
8 so I -- I did have an inconsistent -- you know, I mean,
9 anything that was said I -- my point had been to emphasize
10 that it was Curtis --

11 Q. Right. So --

12 A. -- and not -- and not Mr. Parker.

13 Q. So your thought was to allow that to fall on Curtis
14 and not Mr. Parker?

15 A. Yes.

16 Q. Okay. On Page 680 -- I'm sorry. Again, that's just
17 the bone sticking out of the leg. If you will you flip
18 to Page --

19 A. Because Walter I thought had been -- Walter was not a
20 good witness for the State. He --

21 Q. It was Walter Gadsden, I believe?

22 A. Yeah. He was not a good witness for the State.

23 Q. And was -- and just to -- in your memory, just to go
24 back to the reconstruction part, was -- actually Walter's
25 testimony was some of the testimony that was missing that

1 had to be reconstructed?

2 A. I don't remember that.

3 Q. Okay.

4 A. I don't -- I don't know that.

5 Q. Okay. And I'll come back to that with appellate
6 defense.

7 Sorry, but I want to make sure I get these page
8 numbers right. On Page 683, beginning the Line 13 -- or,
9 excuse me, Line 15, the malice definition that the judge
10 was going to give talked about -- it was the standard
11 malice prior to Belcher about the wickedness, meanness and
12 that it could be inferred through the use of a gun. That's
13 the charge that was given, correct?

14 A. Right.

15 Q. And then beginning on Line 15 where he talks -- where
16 Mr. Myers is saying wickedness, meanness, a heart fatally
17 bent on mischief, malice, it's wrapped up in that a
18 short-haired man walks out with a gun, and so you would
19 agree that over and over -- and I know that we have to
20 keep pointing it out, but that over and over throughout
21 his closing he emphasized what exactly you -- when you
22 raised it in sentencing were trying to prevent, which was
23 the combination of malice being able to be inferred from
24 the gun, correct?

25 A. That's -- that's true. And, I mean, I -- I always

1 make a distinction between what the judge charges, and I
2 think juries do, and when an argument is made, I mean,
3 it's argument, so that's -- that's the distinction I make.

4 Q. Okay. And then on Page 695 where -- beginning at
5 Line --

6 A. 695?

7 Q. 695, yeah, beginning down at Line 22 -- or, excuse me,
8 at Line 19 --

9 A. Right.

10 Q. -- where he talks about the number of shots and then
11 he says isn't that malice -- that isn't malice, that's
12 overkill. So but you would agree had that charge -- had
13 the charge been given on Belcher or was going to be given
14 that he couldn't -- he, Mr. Myers, couldn't have made these
15 arguments, correct?

16 A. It would have been a lot more difficult.

17 Q. Okay. Because that would have been inconsistent with
18 the law that the judge would have been charging?

19 A. Exactly.

20 Q. Okay.

21 A. And Judge Stillwell, you know, I thought he was a --
22 I always liked trying cases in front of Judge Stillwell.
23 He was very conscientious and does a good job.

24 Q. And so when lawyers -- so if he sees that lawyers
25 are going outside of his charge, he would have actually

1 probably stopped it before you had to object as well?

2 A. Oh, I don't have any doubts about that because he --
3 he was very conscientious, very -- very focussed during a
4 trial in trying to make things fair.

5 Q. Okay. And then on Page 698, beginning at Line 4
6 where it appears that he's finishing up his closing,
7 there was no objection to when Mr. Myers asked about
8 giving justice, justice for -- for Curtis and A.J. and
9 Walter and Isaac. And which one of those -- were one of
10 those actually deceased?

11 A. Yes.

12 Q. Okay.

13 A. That was Isaac.

14 Q. That was Isaac. And that was how he ended his --
15 his, I guess, argument was to make sure that the jury
16 would give justice for somebody who was dead, correct?

17 A. Correct.

18 Q. Okay. And there was no objection there either, right?

19 A. No.

20 Q. All right. And I know that this went on for several
21 pages. Do you recall how long his closing argument was?
22 Was it longer or --

23 A. I know Beth and I both had separate arguments and I --
24 I don't remember how long it went, no.

25 Q. Okay. Now you didn't put any evidence in for your

1 case, correct?

2 A. That's correct.

3 Q. But because the co-defendant had, you had lost last
4 argument, I guess, for the --

5 A. Yes, and then I -- you know, I mean, I got in -- I
6 got in a lot of what I wanted to get in through the
7 State's witnesses.

8 Q. Okay. And I know that we -- we talked about this
9 Belcher issue, and I know I'm beating it with a dead horse,
10 but I'm just trying to -- not beating it with a dead horse,
11 but beating a dead horse, but I'm just trying to -- to make
12 sure that -- so y'all had the charge conference and I
13 believe that that began -- that was prior to the closing
14 argument that you had the charge conference?

15 A. Oh, yeah. Yes.

16 Q. And so then when the judge goes to give his -- his
17 charge, I want you to turn to Page 707. No, sorry. Wrong
18 page. Oh, yeah. I'm sorry. No, that's correct. 707, if
19 you have that in front of you. And there was a discussion
20 about intent. There was a charge on intent, correct?

21 A. Yes.

22 Q. And I think that he does mention -- Judge Stillwell
23 does mention it later on about intent, criminal intent
24 having to be proved beyond a reasonable doubt, but at the
25 end of his first initial criminal intent charge that is

1 on Page 707 at the end -- or it ends at Line 15 if you
2 want to read through that -- through that criminal intent
3 charge, he doesn't actually charge that it has to be proved
4 beyond a reasonable doubt. Oh, actually he does. Sorry.
5 That's why I had it marked. It does on the previous page.
6 Ignore that question. Let me move on, Your Honor.

7 On Page 715 and beginning, I guess, on Line 2, this
8 is where he gives that malice charge, correct?

9 A. Yes.

10 Q. And he talks about how it may be express or inferred
11 and then he goes on to Page 716, at Line 7, and he says the
12 implication about the use of a deadly weapon and then he
13 lists an instrument that uses a deadly weapon depends on
14 the facts of each circumstance of the case and then goes
15 on to say that a pistol or a shotgun is a deadly weapon.

16 A. Correct.

17 Q. Okay. And had he given that charge obviously that
18 wouldn't have been in there, but also even if he had given
19 the charge over your objection would you have objected at
20 that point if you had remembered to ask for the other
21 charge?

22 A. Oh, yeah. I mean, I think it's clearly an improper
23 charge under Belcher.

24 Q. Okay. And then -- now Mr. Parker was actually found
25 not guilty of murder; is that correct?

1 A. Yes.

2 Q. But the same malice charge applied to assault and
3 battery with intent to kill?

4 A. To the ABWIK, yes.

5 Q. Okay. And I understand that right now there's a case
6 pending -- like as in 2016 there's a case pending as to
7 whether Belcher implies -- or Belcher applies to those
8 facts as well, but obviously at the time you couldn't have
9 anticipated that, right?

10 A. No.

11 Q. Okay.

12 **MS. ZMROCZEK:** But, Your Honor, I did want to put on
13 the record that I know that as we're arguing this case that
14 a case -- it's the State v. Michael Juan Smith. It's in
15 the Court of Appeals and I believe that the attorney
16 general's office just applied for cert on the issue of
17 whether this malice -- this Belcher malice charge applies
18 to what is now attempted murder, but what back then was
19 assault and battery with intent to kill. The reason I
20 know that, Judge, is because I was the trial attorney in
21 that case, so.

22 **THE COURT:** Okay.

23 **MS. ZMROCZEK:** But appellate defense made me aware
24 because I, too, did not request that charge.

25 **BY MS. ZMROCZEK:**

1 Q. The jury then -- and I'm on Page 734, I guess, on
2 Line 14. They begin their deliberations, but then they
3 came back with specific questions, so that was Page 734 at
4 around Line 14 where they were specifically asking about
5 the differences between murder and voluntary manslaughter
6 and the judge -- I think y'all had some discussions about,
7 you know, he didn't want to get some charges sent -- some
8 judges send their charges back, but obviously, like you
9 said, that some jurors get confused about manslaughter and
10 murder and killings like that, but you would agree that the
11 difference in between murder and manslaughter would be the
12 malice issue?

13 A. Oh, yes. Correct. Oh, yeah.

14 Q. And I think that he actually reread that malice charge
15 again beginning -- or he read the two different charges
16 beginning at -- at that time when they had that question.
17 So, again, they were charged on the malice and it could be
18 inferred from the use of a gun?

19 A. Right.

20 Q. Okay. And then obviously there were no objections
21 made to that?

22 A. No, by this time this was, as I remember, late in the
23 evening and I -- Beth and I were both exhausted.

24 Q. And then -- and you said that once that came out you
25 believe that you did e-mail it to the judge and that came

1 out October 12th?

2 A. I don't know if I was computer literate enough to do
3 that.

4 Q. Okay. Or someone had sent it to the judge?

5 A. I think it was probably more likely -- I mean, I can
6 do it now, but probably more likely it was U.S. Postal
7 Service or fax because -- yeah.

8 Q. But regardless of whether or not that opinion had come
9 out at that time, you were aware of the -- of the fact that
10 it was pending?

11 A. I should have -- well, I mean, I should have -- yeah,
12 I did. I was at the seminar and I -- yeah, I knew about
13 it.

14 Q. Okay. Thank you.

15 **MS. ZMROCZEK:** Your Honor, we have no further
16 questions at this time.

17 **THE COURT:** Let me get my dates clear just real quick
18 here. This trial was September 14th through 18th, 2009?

19 **MS. VALENZUELA:** Let me make sure.

20 **THE COURT:** The trial before Judge Stillwell here was
21 September 14th through 18th, 2009?

22 **MS. VALENZUELA:** Yes.

23 **MS. ZMROCZEK:** That was the trial, correct.

24 **THE COURT:** That was the trial. Okay. Belcher comes
25 out in October. It comes out in -- October 12th of 2009.

25 Q. Okay, Jack. So let's focus on the Protection of

1 Persons and Property Act allegation. You seem eager to
2 admit that you just missed it and should have raised it.
3 Is that a fair --

4 A. Well, not eager. I mean, until I saw the --
5 literally until I saw the PCR I had no idea -- and which
6 surprises me because Dave MacDougall was my investigator
7 and Dave and I -- I appeared on his radio show because he
8 did that part-time and we talked about it ad infinitum and
9 so -- I mean, personally I think it was because it was --
10 just wasn't on anybody's radar screen at the time.

11 Q. When you say that you spoke to the investigator on
12 the radio show about it constantly, are you saying that
13 you spoke to him about it after the trial or what's the
14 timeline?

15 A. Oh, yeah. Yes, yes, yes, because it -- there were
16 -- it started hitting the newspapers and -- and I can't
17 remember if it was the -- or the appellate opinion, but it
18 started hitting the public consciousness and so Dave was a
19 talk show host and so I -- I appeared several times and
20 there were people calling in left and right and we had lots
21 of discussions about it, but, yeah, it was after. I mean,
22 it just wasn't on anybody's radar back then.

23 Q. Okay. So after the trial you come to know this --
24 this defense, but let's talk about you -- are you saying
25 that you feel like in hindsight now that you should have

1 raised it?

2 A. Well, what I know now, but, I mean, at the time nobody
3 was talking about it and it wasn't like Rauch Wise or
4 anybody else gave a seminar on that. It -- I don't think
5 it -- it just wasn't in anybody's consciousness at the
6 time.

7 Q. Okay. So the statute existed at the time?

8 A. Well, apparently. I mean, I didn't -- I didn't know
9 that.

10 Q. And so now looking in hindsight, what about the facts
11 of this case -- and actually, if you could, just give a
12 very brief snapshot of the facts -- or the allegations in
13 this case.

14 A. Well, it was a complicated, chaotic scene, complicated
15 story. There were parallel -- there were parallel stories
16 going on and it was -- it was hard to -- to prepare.

17 Q. Okay. So -- and I actually forgot that I was on
18 cross. I'm gonna make this a little bit more efficient.

19 A. Thank you.

20 Q. So the allegations are that the co-defendant, Curtis
21 Johnson, was in a car and has some sort of scuffle with
22 some of the victims earlier in the day, maybe an hour
23 earlier?

24 A. It was -- I thought -- I thought I remembered it was
25 the day before, but, yeah, it was sometime prior, yes.

1 Q. Okay. So it was sometime prior, but it was the
2 co-defendant and not your client?

3 A. He was --

4 Q. Your client is not present there?

5 A. He was not there, no.

6 Q. Okay. Co-defendant said yes. He testifies at trial,
7 right?

8 A. Yeah, Curtis did.

9 Q. The co-defendant says that what happened in that
10 scuffle is that he had a small nick to his lip, he got dirt
11 in his eye and he was emotionally upset by it?

12 A. Yeah, and --

13 Q. So yes?

14 A. Yeah, there's something about being pulled out of
15 the window and there was -- of the car and there was
16 some independent -- I don't remember, some independent
17 corroboration that there had been a scuffle.

18 Q. Okay. But the co-defendant -- and those are the
19 co-defendant's extent of his own self-defined injuries
20 from that scuffle?

21 A. I don't remember, but it -- I won't argue with you.

22 Q. Okay. So -- and then the day of the incident the
23 co-defendant and your client go to the victim's property?

24 A. Yes.

25 Q. Okay. So it's not their -- it's not the co-defendant

1 or the defendant's home that they're at?

2 A. That's correct.

3 Q. Okay. They drive there in their truck?

4 A. I -- yeah.

5 Q. One of them had a --

6 A. I mean, they drove -- somebody drove there, yes. I
7 don't remember who.

8 Q. Okay. And then at the end of all of this one -- one
9 man is hit by a truck and it breaks his femur, right?

10 A. Right, right.

11 Q. Another man is shot somewhere around five times and
12 ends up having a shot to the hand, the spine --

13 A. I know he had some paralysis.

14 Q. Let's see. Testimony -- testimony from the doctor on
15 pages 507 or 6 --

16 **MS. VALENZUELA:** And, Your Honor, I wrote both of
17 these down. I think it's 615 is the larger one.

18 BY MS. VALENZUELA:

19 Q. His vertebrae, face, mouth, extremities, shoulder,
20 flank, wrist and thumb, and he is left paralyzed?

21 A. Yes.

22 Q. Okay. And then there's another person who is dead
23 from two bullet wounds?

24 A. Isaac, yes.

25 Q. Okay. And the co-defendant is found either close or

1 near the scene, Curtis Johnson?

2 A. Yes, as I -- yes.

3 Q. Okay. And then later your client is found and then
4 the dead man's blood is found on his shoes, your client's
5 shoes?

6 A. Yes.

7 Q. There was testimony at trial about that?

8 A. Yes.

9 Q. Okay. So what about the facts of this case where your
10 client was never attacked by these men and he goes to their
11 home would suggest to you that the defense of property act
12 would have been successful?

13 A. The -- this was a really chaotic scene and there were
14 I want to say three -- I don't want to mischaracterize
15 them -- three ladies were there and there was -- there
16 was a lot of activity outside on the sidewalk and in the
17 common area of the apartments and as I remember even on
18 the street, and Mr. Johnson, as I remember, testified
19 that there were more than two shotguns being pointed at
20 -- immediately whenever -- Mr. Parker -- the -- one of
21 the ladies and then I think Curtis also testified that
22 Mr. Parker came up and said I want to talk and threw up
23 his hands when the shotgun was pointed at him and then --
24 and my -- my under -- my impression was that -- and one
25 that we tried to -- to make was that Mr. Parker -- Kerwin

1 wanted to talk and they escalated it with shotguns and as
2 I remember Walter pulled the trigger and the gun misfired
3 or the lock was on or something, so Walter committed
4 arguably, you know, attempted murder. I mean, he was
5 trying to -- to hurt Kerwin.

6 Q. Okay. Let -- let me just get this straight because
7 I think there's a lot of characters here, right?

8 A. Yes.

9 Q. So defense of property is if I am lawfully in my home
10 or in my car I can protect my property or someone else
11 from someone who is -- who's -- who comes to me, so the
12 victim --

13 A. My understanding is that it's where -- my
14 understanding now is that it's where you can lawfully --
15 you lawfully are present, so it doesn't have to --

16 Q. Okay. Was your client invited to the victim's home?

17 A. I don't believe so.

18 Q. No, you know. No?

19 A. No, No.

20 Q. Your client was not invited to the victim's home?

21 A. No, and the confrontation started outside the home.
22 It was in the street, on the sidewalk and --

23 Q. With an overhanging patio and that's where one of the
24 victims is found?

25 A. There's no -- I don't remember -- no, there was no --

1 I don't remember -- no, there was no --

2 Q. Overhang?

3 A. -- overhang and there was a wall and Kerwin was
4 outside the wall in the common area. And, in fact, that's
5 where Curtis drove I want to say it was an SUV into a tree
6 and that tree and the SUV were outside of the patio and was
7 in a common area, so it was not their home. It was not
8 inside the apartment, it was not inside the patio. The
9 wall -- there was a wall on the patio, so it was not like
10 just an open concrete pad. There was a door and an
11 entrance into it. I mean, there wasn't -- I don't believe
12 there was a door, it was like just an opening in the
13 concrete, and so the car that hit Walter, which was driven
14 by Curtis, it ended up outside of -- in fact, I want to say
15 the air -- the air-conditioning unit, HVAC unit, for the
16 next apartment was hit, but I'm not -- I haven't read the
17 transcript, but that's -- that's my understanding, my
18 impression.

19 Q. Okay. I want to move on to the second allegation,
20 the reconstruction of the transcript. You were present at
21 the reconstruction of the transcript?

22 A. Oh, yes.

23 Q. The judge -- Judge Stillwell was the same judge that
24 presided over the trial presided over the reconstruction?

25 A. Yes.

1 Q. At the end of that there was a finding by Judge
2 Stillwell that this was the best reconstruction that could
3 be done, right?

4 A. Yes.

5 Q. You joined in that? You don't have any sort of
6 objection to that?

7 A. No, and -- well, I haven't read the trans -- I've --
8 I read the transcript a while back, but I remember my
9 impression was coming out of it that it was at worse the
10 neutral result; that nothing hurt Kerwin, nothing -- there
11 was nothing that we needed in the record and so I didn't
12 see it as affecting Kerwin in any way and -- and I don't
13 see that it had any -- I don't see a problem with the --
14 with the reconstruction at all.

15 Q. Okay. Let's move on to closing argument and you
16 covered the strategy portion of the questions. There was
17 one that I wanted to ask you about specifically because I
18 didn't hear what your -- your answer was. At the end,
19 Ms. Zmroczek pointed out that the solicitor in the case
20 when he was doing his closing argument closes it by asking
21 the jury to, you know, render justice on behalf of the
22 victims and he names each victim out?

23 A. Right.

24 Q. Was there a reason that you -- that you would have
25 felt that you needed to object to that?

1 A. No.

2 Q. No?

3 A. I mean, I -- I've always thought that -- that closing
4 arguments, you get a lot of leeway, and the judge -- well,
5 the judges -- I'll say it this way. Not that you get a
6 lot of leeway, but judges give a lot of leeway and as I
7 understand it the standard of review is a -- is discretion,
8 abuse of discretion, and I don't think I've ever seen the
9 Supreme Court say -- you know, overrules a judge in a
10 closing, just abuse of discretion. I mean, Donnie, when
11 he gets reversed it's something highly inflammatory and I
12 didn't, -- of all of the arguments I've seen of Donnie Myers
13 this was not one of them, this was not one of the worst --
14 or best.

15 Q. Thank you. And then you covered the strategy on most
16 of the -- on all of the ones that Ms. Zmroczek brought up.
17 There was one point where it dealt with language talking
18 about if you want to find -- the solicitor saying to the
19 jury if you want to find him guilty of -- you know, not
20 of murder, but of some pidley assault charge, then you go
21 ahead and find him guilty of a little assault charge, and
22 so I think this is an important point, is your client
23 convicted of the murder charge that he was facing?

24 A. He was not. He was acquitted.

25 Q. So what prejudice is there?

1 A. Well, the assault and battery with intent to kill,
2 the same thing applies to that.

3 Q. So the language -- the language of if you want to
4 find someone guilty of murder -- instead of murder, you
5 want to find him on a small assault charge, your client
6 is found not guilty on that, so there's no way that was
7 persuasive to them because they ended up just saying not
8 guilty on the murder.

9 A. Well, ABWIK's not a -- not a lesser included.

10 Q. I'm just focussing on the murder right now.

11 A. Yes. Okay.

12 Q. We'll talk about the ABWIK in a minute.

13 A. Well, I didn't think the murder was even close. I
14 always question -- and, I'm sorry, I can't remember her
15 last name, Colleen, the assistant solicitor --

16 Q. Dixon?

17 A. I'm sorry?

18 Q. Is it Dixon?

19 A. Yes, yes, yes, yes. She -- she was the one who
20 prepared the case and I never -- I always asked Colleen
21 why are you charging him with murder? I mean, I understand
22 it, but, you know, it's just not there. So I didn't see
23 that as a strong charge.

24 Q. And the co-defendant was facing murder. Someone did
25 -- was shot two times, but the co-defendant is also not

1 found guilty of murder. He's found guilty of the lesser
2 included voluntary manslaughter.

3 A. I didn't remember that, but, yeah. I mean, I just
4 didn't pay much attention to Curtis other than trying to
5 keep the focus on him. That's what I wanted. I mean,
6 which I think was probably against my client's wishes
7 because it was his brother, so -- but I -- I didn't have
8 any compunctions about pointing the finger.

9 Q. Okay. So let's get to the point that you want to
10 talk about, which is the ABWIK charge. And let's talk
11 about you -- you told us about the Rauch Wise CLE and
12 that's entered in here. Did you actually attend Rauch's
13 presentation at the public defender's conference?

14 A. Yes, always. Rauch is always one of the most
15 entertaining and most informative speakers at all of those
16 seminars.

17 Q. Okay. And had you reviewed those materials before
18 that trial -- this current trial that we're talking about?

19 A. The materials were in my file, I remember that, but --

20 Q. Well, that's not --

21 A. -- but it was all of -- and the materials were not --
22 it was a -- as I remember, it was with other items also,
23 with -- not -- it wasn't a separate handout or a separate
24 booklet.

25 Q. Okay. Had you reviewed Rauch Wise's materials that

1 are entered in as an exhibit in this PCR prior to going to
2 trial for your client?

3 A. At some time, yes, because it was -- we had such a
4 long preparation time. I mean, I think -- as I remember,
5 I was appointed -- as I recall the murder was -- or the
6 shooting was in November of 2006 and I think I was
7 appointed no later than New Year's. I mean, it was within
8 a month and I immediately started working and -- and, I
9 mean, I put in several hundred hours -- hundreds of hours
10 on this case and talked to Dave MacDougall and we talked
11 virtually every day when we were preparing this case.

12 Q. And he was your investigator?

13 A. Yes.

14 Q. And he's dead now?

15 A. Yeah. Rest his soul, yes. I still miss him.

16 Q. Okay. So it sounds like you were telling us that
17 you reviewed -- you participated in the CLE, you reviewed
18 the materials, you took part in some sort of, you know,
19 discussion where it was a big issue on different messaging
20 boards, so why did you not object to the charge?

21 A. I think it was exhaustion. Part of it -- well, I
22 think it was -- well, it still haunts me, but I think it
23 was exhaustion. I just -- we had been working too many
24 hours and too little sleep and that week was just -- you
25 know, by 8:00 we had already been -- already been working

1 two or three hours. We had five days of trial and this
2 was -- this was late Friday evening that it went to the
3 jury, as I recall.

4 Q. Okay. Now you have been planning a PCR for your
5 client since the sentencing of this case?

6 A. I have not, no.

7 Q. You told the sentencing judge -- you told Judge
8 Stillwell that he could either resolve the Belcher issue at
9 sentencing or it would be -- come back on post-conviction
10 relief.

11 A. Yeah, but I don't -- I don't --

12 Q. Yes. And that's part of the sentencing transcript.

13 A. -- I don't handle PCR's, so.

14 Q. No, but you did tell Judge Stillwell that he could
15 either resolve the Belcher at -- with your objection at
16 sentencing or this case would come back on post-conviction
17 relief.

18 A. I felt certain that it would with the Belcher
19 language.

20 Q. And then when you and I talked, you let me know that
21 you were -- you were gonna say that this was your fault?

22 A. Yeah, it is.

23 Q. Okay. So let's talk a little bit about your long
24 history in criminal defense work. Tell me about -- give
25 me a snapshot into how you prepare for a case of this size.

1 A. I immediately move for funding for experts -- well,
2 after reviewing what I have, I identify issues, gunshot
3 residue, forensic pathologist, blood splatter, you know,
4 all the various experts that I -- that I've used in the
5 past, review the evidence at the -- at the jail, meet
6 constantly with my investigator, review the discovery.
7 The Eleventh Circuit Solicitor's Office habit has always
8 been that you don't get all of the discovery at once and
9 they dribble --

10 Q. Okay. Is that what happened here? I just want to --

11 A. Yeah, they dribble it out. Yeah, they dribble it
12 out. I mean, Friday afternoon -- we had a joke that you
13 don't answer the phone or the door Friday afternoon after
14 three because it will be the solicitor's office delivering
15 something for a trial on Monday.

16 Q. Okay. So you review the discovery that you get at
17 different times before the trial. What else do you do
18 preparing a case for trial?

19 A. The -- I go to the scene. Mr. MacDougall usually
20 contacted -- my habit was for him to contact the different
21 witnesses. We would identify the witnesses and then I
22 would go with him and we would talk to the witnesses
23 because I wanted to be able to evaluate them, look and
24 see what kind of presentation they made. I'd talk to
25 co-counsel. I talked to Ms. Fullwood a lot because Beth

1 -- Beth was with appellate defense, so she's always been
2 a great resource for identifying -- identifying problems
3 in trials. I've tried two death penalty cases with her,
4 so you -- and in a case with multiple defendants you
5 sometimes divide up -- you have a division of labor. You
6 might take the gunshot residue guy and then, you know, the
7 pathologist was usually my person that I talked to and --
8 and I don't remember specifically the strategy meetings,
9 but we would meet for strategy sessions, Beth and I would.
10 I mean, understanding that, you know, we didn't -- it
11 wasn't a joint defense agreement, but understanding that
12 we had -- you know, there were potential areas that we
13 didn't -- potential emphasis that we were gonna -- it was
14 gonna be different because Kerwin I thought was just caught
15 up in this and that he was trying to protect his brother
16 and -- and I didn't anticipate what I considered a bizarre
17 witness that -- I mean, this fellow sees a murder at 2:00
18 in the morning, describes an execution, and then he goes
19 right back to watching soap operas at 2:00 in the morning,
20 and I just thought it was --

21 Q. And we'll talk about Jose later. So --

22 A. Yeah, I thought he --

23 Q. -- so what else do you do in terms of prepping other
24 than the things that you've just explained?

25 A. Well, I mean, I tried to read advance sheets.

1 Q. Of cases that are already decided and published?

2 A. Yeah. Yes. I -- my habit is to -- you know, I check
3 online now, but I used to get the paper version and read
4 the advance sheets. I'd check every Monday for the Supreme
5 Court or Court of Appeals issuing some kind of an opinion.
6 The -- oh, and then I -- I also keep pretty close tabs with
7 the family of my client because they -- they have a lot
8 more contact with the client than I do, even as much as I
9 like to think about it, and so they talk to them a lot and
10 they -- and they see them a lot, so I'm always looking if
11 they've got an issue and -- because they -- they can be
12 very helpful. Just say hey, what about this, what about
13 that. Family and friends. Because in this case, Kerwin
14 had -- had just led an exemplary life and his coworkers
15 thought he was just a great fellow and that everybody was
16 just -- wanted to be helpful with Kerwin because he was
17 such a good guy.

18 Q. Now in preparing for the trial, did you prepare
19 checklists?

20 A. Well, not like I should. I mean, I -- I --

21 Q. Do you prepare a list of what you're gonna cover in
22 pre-trial?

23 A. Well, you know, I -- I make -- what I do is I make
24 lists of witnesses that I anticipate and then I -- I look
25 for what that witness is going to say or -- and I have a

1 witness notebook, I still do this, and every reference to
2 a particular person I put in that part of the notebook. I
3 pull it out and if something comes to mind when I see a
4 case, I put that case with that witness also. So I don't
5 do -- I think I should do it, but I don't do written
6 checklists. I do it kind of by witness and if I identify
7 issues.

8 Q. Okay. And so everything that you've just covered with
9 us in terms of trial prep, your traditional trial prep and
10 then preparing the witness notebooks, did you do that in
11 Kerwin Parker's case?

12 A. Yes.

13 Q. Okay. And then you have -- you have at least some
14 sort of notes on what you're gonna argue pre-trial?

15 A. (Nods head.)

16 Q. And I believe you testified earlier that you had
17 met with Beth Fullwood, the opposing -- sorry, your
18 co-defendant's -- the co-defendant's counsel for the
19 two weeks leading up to the trial?

20 A. Oh, yeah, we -- we would constantly, yeah.

21 Q. Okay. So you've been meeting with her and so did
22 y'all have a list of what pre-trial arguments or motions
23 y'all anticipated making?

24 A. Pre-trial we don't argue anything. I mean -- I mean,
25 they -- there's -- you don't get anything.

1 Q. And then do you keep track of your jury selection
2 notes?

3 A. Yeah. I mean, I -- I -- you know, I -- what I do is,
4 and what I did at that time, was my brother in Aiken was
5 self-employed, but he had free time and so I had him go to
6 the clerk of court's office in Lexington and check the
7 public record for all of the potential jurors and so I --
8 I had him check judgments, tax liens, hospital liens,
9 family court cases. And so, yeah, we -- I did a lot -- I
10 did probably more jury preparation than most people do.

11 Q. Did you have -- did you -- you didn't enter any
12 exhibits in this case, right? You didn't put up a case?

13 A. That's correct, yeah. No, just cross-examination
14 and --

15 Q. And do you have notes on the elements that the State
16 has to prove in case you need to use that in your -- in
17 support of your DV motion?

18 A. Well, I mean, I keep the statutes handy.

19 Q. Okay.

20 A. But I don't remember specifically -- I don't remember
21 specifically here, but I -- I usually do that, yes.

22 Q. Okay. And then you made a directed verdict motion
23 here. You joined in Beth -- Beth Fullwood's?

24 A. I presume.

25 Q. Okay.

1 **MS. VALENZUELA:** And that's in the transcript, Your
2 Honor.

3 BY MS. VALENZUELA:

4 Q. And do you have a list or notes on what post-trial
5 motions you don't want to forget to make?

6 A. No.

7 Q. No. And do you -- what do you do in terms of getting
8 ready for what jury charges you anticipate asking the
9 judge for or ones that you expect to object to?

10 A. As I remember, I can't -- some judges will give you
11 their -- their notebook. I mean, they'll give you what
12 they -- in writing and I don't remember if Judge Stillwell
13 did that or not. I don't think he did. And I remember --

14 Q. Well, before we even get to Judge Stillwell, before
15 the trial even starts, what do you do in preparation for
16 the jury charges?

17 A. Well, I have -- I have -- I had for many years Judge
18 Price's charge notebook. Judge Price was a -- the father
19 of a friend of mine and so he was a circuit judge for many
20 years and so I -- I had a copy of his book that I -- that
21 I used. And it was like, you know -- I mean, it was stuff
22 he'd accumulated. It was three or four inches thick.

23 Q. Okay. And what notes do you have in your file about
24 -- or, if you do, about Belcher and bringing that up or
25 planning to bring that up in closing?

1 A. Just the seminar materials and -- and -- well, nothing
2 -- nothing in writing other than the seminar materials.

3 Q. Okay. And where's your case file?

4 A. I have no idea. I think it's with the -- I think it's
5 with the public defender because that was my practice.

6 Q. And you were served with a subpoena to be here today?

7 A. No, I was not.

8 Q. Okay.

9 A. I mean, I was months and months ago, but not this
10 time. I remember --

11 **MS. VALENZUELA:** And, Your Honor, I have --
12 unfortunately it's digital, but I have a copy in the car
13 that I could get and I would just ask for a break to be
14 able to enter it in as an exhibit.

15 **MS. ZMROCZEK:** I mean, I've never seen it. Obviously
16 I'd like to see it before that.

17 **MS. VALENZUELA:** Right. May I approach the witness?

18 **THE COURT:** Is it a subpoena?

19 **MS. VALENZUELA:** Yes.

20 BY MS. VALENZUELA:

21 Q. Is your name on there?

22 A. Oh, office manager, yes. Okay.

23 Q. Yes. October 26th of this year. This is a sworn
24 statement by the sheriff's office.

25 A. Okay.

1 Q. And then this is a subpoena and does that have your
2 name on it?

3 A. Yes.

4 Q. Is that your address?

5 A. It is.

6 Q. Date and time, today at 9 AM?

7 A. Today? No.

8 Q. Uh-huh.

9 A. No, I never --

10 Q. That's not November 10th at 9 AM?

11 A. Yeah, but --

12 Q. Yes. Because originally --

13 A. I mean, it's on there.

14 Q. -- originally we were set to go forward today, so is
15 that what it says on the subpoena?

16 A. Oh, okay. All right.

17 Q. And it says you're commanded to bring your criminal
18 defense file.

19 A. Which I didn't have.

20 Q. Okay.

21 A. I mean, I'd been served with that many -- many times
22 in the past and that's when I was trying to find it because
23 at one time I thought that we had given it to Wanda Carter
24 with appellate defense.

25 Q. Right. So we've had conversations about your defense

1 file?

2 A. Yeah. Yes.

3 Q. Yes. And you are confirming that you were served with
4 a subpoena that asked you to bring your defense file to
5 court today?

6 A. That's correct.

7 Q. And you did not bring your defense file?

8 A. Because I didn't have it. I mean, I brought what I
9 have, which is right here, but --

10 Q. Did you ask the public defender's office to get it
11 out of records for you?

12 A. I talked to Beth and their system as I -- and this
13 was a long time ago, maybe a year or so ago, because I
14 think this was supposed to come up last year.

15 Q. Yes, it's been rescheduled.

16 A. And as I -- I think I remember from my conversation is
17 that they lost records in a flood, we've had several here
18 in Lexington, so that -- she said that they had to throw
19 away boxes and boxes of just melted records.

20 Q. And so we can't see any notes that you would have had
21 in your file for this case?

22 A. I don't have them.

23 Q. Okay. And then -- let's see. Who comes with you --
24 who do you bring with you to the trial? Do you bring a
25 paralegal, an assistant, your brother that you mentioned?

1 A. No, Dave MacDougall.

2 Q. Okay. So you bring your investigator with you?

3 A. Yeah, I always -- I always got an order for Dave to
4 be -- to be present, yes.

5 Q. Okay. And so it's not just you alone, it's
6 Investigator MacDougall. And does your investigator remind
7 you of things, bring things up to you?

8 A. When he's present, yes. Yeah. I mean, he would not
9 be present during the whole thing because we would have
10 him doing things, going out and doing things and serving
11 subpoenas and stuff during the trial.

12 Q. Okay. And then you said this was a five-day trial,
13 right?

14 A. Yes.

15 Q. But you've participated in death penalty trials
16 before?

17 A. Yes.

18 Q. And sometimes those have lasted five days or more?

19 A. Two weeks, yes.

20 Q. Yes. So two weeks. Do you feel that you give your
21 clients in those death penalty cases that last two weeks
22 good representation?

23 A. I do.

24 Q. Do you feel that you have a continuing problem with
25 stamina in terms of lasting throughout a five-day trial?

1 A. I have a continuing problem because I'm getting older.
2 I'm 65, so I -- yeah, I mean, I have -- I was exhausted.

3 Q. Do you indicate to the new clients who come to hire
4 you that you have stamina issues that might affect your
5 representation at the end of a five-day trial?

6 A. No, because those are rare.

7 Q. Rare as in only when --

8 A. Five-day trials.

9 Q. -- only when we are dealing with a case where you
10 indicate that you're going to do a post-conviction relief
11 if you don't get the relief that you're asking for in a
12 sentencing hearing or have you also had stamina issues in
13 other trials?

14 A. No. I mean, I was -- the death penalty cases I was
15 much younger.

16 Q. So I just want to make sure that I'm clear here. The
17 only case -- the only time where you have felt that you had
18 stamina issues in a trial is Kerwin Parker's trial?

19 A. No. No, I've had -- you know, I mean, I've gone home
20 from trials exhausted, but I didn't -- I didn't think that
21 I had a stamina issue, no.

22 Q. Okay.

23 A. I mean, I was joking with Colleen as I remember the
24 last day and she was -- Colleen was like thirty and she was
25 saying yeah, I have problems, you know, she was tired, too.

1 We were all tired.

2 Q. Okay. So everybody was tired, so a normal level of
3 tiredness, but you think that this level of tiredness is
4 what led you to not object that day?

5 A. That's the only thing I can think of. I don't know of
6 any other reason.

7 Q. Okay. Let's move to the preservation issue here,
8 okay? So the status of the law is undisputed that at the
9 time Belcher had not -- at the time of the jury charges
10 Belcher had not come out?

11 A. That's correct.

12 Q. Okay. So you make an objection to Judge Stillwell.
13 Let's assume you make an objection to Judge Stillwell.

14 A. Okay.

15 Q. You make an objection based on a case that has not
16 come out?

17 A. As I've done before.

18 Q. Okay. So if Judge Stillwell -- if you -- if based on
19 -- how long was the precedent that Belcher overruled?

20 A. Oh, I don't --

21 Q. Was it significant? Is it fair to say that Belcher
22 overruled significant case law?

23 A. I think so. I mean, I don't remember, but, yeah, it
24 had been around a while.

25 Q. Okay. And the Court of Appeals has looked at -- or

1 maybe -- let me see.

2 **MS. VALENZUELA:** Your Honor, may I approach?

3 **THE COURT:** Yes.

4 BY MS. VALENZUELA:

5 Q. And I've just handed opposing counsel a copy. This
6 is State v. Price, 400 SC 110. It's a Court of Appeals
7 case decided in 2012. There have been decisions issued
8 that have already -- well, are you familiar with State v.
9 Price?

10 A. No.

11 Q. Okay.

12 **MS. VALENZUELA:** And, Your Honor, I'll just save that
13 for argument, but it ends up coming up a little bit later.

14 BY MS. VALENZUELA:

15 Q. So you -- you argue that you would have raised a case
16 that had not come out yet to Judge Stillwell on case law
17 that had been established that was -- had a significant
18 history in the state and we don't know whether he would
19 have overruled or sustained your objection to that charge,
20 right?

21 A. I couldn't read his mind, correct.

22 Q. We don't know. What we do know is that the jury gets
23 the inferred malice instruction, right?

24 A. Whatever the record says, yes.

25 Q. Yes. Well, I mean, that's why we're here today. The

1 jury gets it.

2 A. Yes.

3 Q. And then the co-defendant, who's facing a murder
4 charge, and he's also facing assault and battery with
5 intent to kill charges, right?

6 A. I don't remember the ABWIK for him, but, yeah, I'll --

7 Q. And the co-defendant, he gets convicted of the
8 lesser included of involuntary manslaughter and the lesser
9 included of ABHAN?

10 A. If you say so. I don't -- I know he got --

11 **MS. ZMROCZEK:** I don't think it was -- I think she
12 said he got convicted of involuntary, but --

13 **MS. VALENZUELA:** Voluntary. Sorry. I misspoke.

14 **THE WITNESS:** Okay.

15 BY MS. VALENZUELA:

16 Q. He gets convicted of the lesser included offense of
17 voluntary manslaughter and assault and battery of a high
18 and aggravated nature, he does not get convicted of ABWIK?

19 A. I believe that's correct, yes.

20 Q. And then your client has a not guilty on murder, but
21 he does get convicted of the ABWIK charge?

22 A. And the weapon charge, yes.

23 Q. Yes. Oh, and that's important. The co-defendant also
24 gets convicted of a weapons charge?

25 A. I don't remember that, but, yeah, I mean it --

1 **MS. VALENZUELA:** And that's in the record, Your Honor.

2 BY MS. VALENZUELA:

3 Q. And so the co-defendant -- so you've got a jury that
4 hears the inferred malice charge for both defendants, a
5 jury that comes back and says we are finding that both
6 defendants had possession of a deadly -- of a violent -- of
7 a deadly weapon in the commission of a violent crime, but
8 we are finding this co-defendant guilty of ABHAN even
9 though we heard the implied malice charge and we're gonna
10 find this other defendant guilty of ABWIK?

11 A. Well, the ABHAN, as I remember now, was based upon the
12 car and it was not -- had nothing to do with the weapon.
13 The weapon -- I mean, the weapon charge --

14 Q. Well, let me remind you of something.

15 **MS. ZMROCZEK:** Your Honor, I just ask that he be
16 allowed to finish answering.

17 **THE COURT:** Let him answer. Yes.

18 A. We had strong evidence that Kerwin never had a gun,
19 that there was no gunshot residue. Donnie tried to impeach
20 his own witness and so it was -- I was really disappointed
21 in that because I thought we had -- I mean, we actually
22 had evidence, too, that Kerwin had been shot during this
23 process, that he had blood on the inside of a sweatshirt
24 sleeve that the State had not bothered to look at or the
25 pathologist had not bothered to look at, so I didn't -- I

1 was really upset at the weapon result.

2 Q. I'm confused. You -- you say you thought the weapon
3 was only dealing with the car, but I thought you testified
4 earlier that the co-defendant got on the stand and said I
5 am the one who shot both people?

6 A. He did two things. He said I shot -- I fired the gun
7 and I drove the car. He did two separate acts. And the
8 ABHAN was the vehicle, which resulted in a broken leg, and
9 the other charge was the gun, was the -- was the pistol.

10 Q. Okay. And you were talking about the -- earlier the
11 victims and the allegations of shooting and how you were
12 upset about that, but there was no gunshot residue that
13 was found on the victims, right? That was part of the
14 evidence that came in?

15 A. They were -- the victims were -- that was one of
16 the things I really strongly objected to was that -- and
17 talked to the officer is that no gunshot residue tests
18 were run on anybody but Kerwin and Curtis.

19 Q. And there were no injuries found on Curtis when he
20 was arrested? There were three different witnesses who
21 said that?

22 A. Well, they testified they didn't see any, but they
23 also, as I remember, didn't check him closely? And we
24 showed -- we -- the sweatshirt of Curtis's -- I mean, I'm
25 sorry, of Kerwin's that the State put into evidence, I

1 turned it inside out and showed the witness the dried
2 blood and the -- that they never tested and Kerwin actually
3 has a scar on his forearm from where he was shot during
4 that process, which I thought was even more stronger
5 evidence that he did not have the gun and that he was shot
6 during the process, during this -- this chaos.

7 Q. Okay. Well, let's talk a little bit more about the
8 evidence that was presented against your client in that he
9 was specifically -- he was identified by several different
10 witnesses as having short hair versus his co-defendant
11 having long hair.

12 A. I believe so, yes.

13 Q. Okay. And then Jose Hernandez, who I think you were
14 talking about earlier that you have questions about his
15 testimony, but regardless Mr. Hernandez testified that he
16 observed the shorthaired man on the patio with a gun
17 pointing down and he heard someone say please don't shoot
18 and then heard gunshots following that?

19 A. He also testified the shooter had a white T-shirt on.

20 Q. Mr. Duncan, I need you to answer my question and then
21 you can answer if you want to answer something else.

22 A. Sure. I think I remember that testimony, but he also
23 I specifically remember saying that the shooter had a white
24 T-shirt on, which everybody agreed Kerwin did not.

25 Q. And the person who was shot out on the patio was the

1 victim, A.J. Wilson, who had five different shots in his
2 body and ended up paralyzed?

3 A. I -- I don't remember where -- where he was shot.

4 Q. So this was testimony from Hernandez or Hernandez
5 related to seeing the shorthaired person, who we've
6 established as identifying your client, on the patio
7 pointing his gun down at someone who says don't shoot and
8 then firing shots and then testimony from the doctors at
9 pages 507 and 615 saying that A.J. Wilson had five
10 different shots in his body and ended up paralyzed, right?

11 A. Whatever the testimony is, yes.

12 Q. Okay. And then Isaac's blood is found on your
13 client's shoes and Isaac is the person who is shot twice
14 and killed and is dead?

15 A. That's correct. There was blood everywhere though.
16 This was just a total -- I mean, there was blood on the
17 grass, there was blood on the walls, there was blood on
18 the carpet -- I mean, the patio. I mean, there was blood
19 everywhere.

20 Q. Okay.

21 **MS. VALENZUELA:** May I approach the witness? Aimee,
22 I'm just looking at your exhibits.

23 **MS. ZMROCZEK:** Uh-huh.

24 **BY MS. VALENZUELA:**

25 Q. Okay. Mr. Duncan, I'm looking at Plaintiff's

1 Exhibit 1.

2 A. Okay.

3 Q. Yes. Page 4. And this is -- what we're looking at is
4 Rauch Wise's CLE materials; is that right?

5 A. Yeah.

6 Q. Okay. And on that bottom part of the paragraph Rauch
7 Wise is saying in many, if not most, murder cases the
8 charge will be harmless. What charge is he talking about
9 there?

10 A. A charge that the --

11 Q. Is it the malice charge?

12 A. That's what -- that's what I'm trying to -- he's got
13 the charge without -- I'm trying to figure out which
14 charge.

15 Q. Well, is his CLE material about the implied malice
16 charge?

17 A. Oh, well, I'm -- but here it says the charge. Yeah,
18 the charge will be harmless with a presumption, but because
19 -- what he -- you know, my --

20 Q. Well, first let's establish are we talking about --
21 Rauch Wise is talking about the charge that we're all
22 talking about here today?

23 A. Well, it's -- I mean, the -- the CLE materials speak
24 for themselves. I mean, yeah.

25 Q. Yes. Okay. And then what were you gonna say?

1 A. The difference which is present here is that this is
2 not somebody walking into a grocery store on video and
3 shooting -- shooting the manager while he takes the -- the
4 till, so.

5 Q. Okay. But Rauch Wise does say that in -- what is it?
6 In many, if not most, murder cases the charge will be
7 harmless.

8 A. Well, yeah, that's -- that's true, but this is not
9 most cases.

10 Q. Okay. Let's look at Page 7 of the same material.

11 **MS. VALENZUELA:** I'm sorry, Your Honor. I'm sorry.
12 I need to take just a moment. I wrote down the wrong page.
13 May I have just a moment?

14 **THE COURT:** Yes, ma'am.

15 **MS. VALENZUELA:** I'm sorry for the delay, Your Honor.

16 **THE COURT:** That's okay.

17 **MS. ZMROCZEK:** Your Honor. While she's looking for
18 that, my client needs to go to the restroom again.

19 **THE COURT:** Okay. Well, it's 12:00. Let's just take
20 about ten minutes for everybody. How about that?

21 **MS. ZMROCZEK:** Thank you.

22 (Recess taken.)

23 **THE COURT:** Okay. We're back on the record.

24 Yes, ma'am.

25 **MS. VALENZUELA:** Thank you, Your Honor.

1 BY MR. VALENZUELA:

2 Q. Mr. Duncan, do you have a copy of the sentencing
3 transcript --

4 A. No.

5 Q. -- in this case?

6 **MS. VALENZUELA:** May I approach the witness, Your
7 Honor?

8 **THE COURT:** Yes, ma'am.

9 BY MS. VALENZUELA:

10 Q. Okay. So this is the sentencing transcript from
11 October 21, 2009, for the case at issue, right?

12 A. (Nods head.)

13 Q. Yes?

14 A. Yes.

15 Q. And earlier we were talking about how you had told
16 the Court that -- that this was gonna come back on
17 post-conviction relief. Do you see on Page 8 where you
18 said judicial economy, whether it's here through an
19 ineffective assistance claim, the remedy would be a new
20 trial and so on those bases we would renew the motion to
21 the Court?

22 A. Yes.

23 Q. That's you speaking when you say that?

24 A. Yes.

25 Q. Okay. And then Judge Stillwell -- because we talked

1 about this a little bit about how you were saying that,
2 you know, if you just had not been tired you would have
3 made this -- this motion to the judge on the charge. Judge
4 Stillwell actually addresses that further down on that same
5 page. On Page 8 he says that he's read the case of Belcher
6 before coming to the sentencing hearing, right?

7 A. Yes.

8 Q. And then he says certainly you could not or would not
9 have objected to the charge under the circumstances because
10 just like you had indicated it, it would have been specious
11 because that was well-settled South Carolina law, right?

12 A. Okay.

13 Q. Is that what Judge Stillwell, the presiding judge who
14 you would have been making the objection to, says after he
15 has read Belcher?

16 A. Sure.

17 Q. And in the context of you making the argument at the
18 sentencing hearing?

19 A. (Nods head.)

20 Q. Yes?

21 A. Yeah, yeah. I'm sorry.

22 Q. And in the sentencing transcript, there's no reference
23 to the only reason you didn't make the objection at the
24 time is because you were exhausted.

25 A. That's correct because as I recall I did not even find

1 those materials that jogged my memory about Belcher until
2 sometime later. It was sometime later after that hearing,
3 the sentencing hearing.

4 **MS. VALENZUELA:** Thank you. Nothing further, Your
5 Honor.

6 **THE COURT:** Okay. Anything?

7 **MS. ZMROCZEK:** Just very briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. ZMROCZEK:

10 Q. The protection -- actually about the Protection of
11 Property Act, you would agree with me that the theory,
12 especially with regards to Mr. Parker, was hand of one
13 hand of all, right?

14 A. Yes.

15 Q. Okay. And your argument was always that he was just
16 merely present?

17 A. Yes. Yes.

18 Q. Okay.

19 A. Well, no, that -- that he was -- he was present and
20 that he was justified as to what he did --

21 Q. Right.

22 A. -- under the Belcher case to explain, justify or
23 mitigate.

24 Q. Right, right, right. So even though whatever was
25 said at sentencing and she -- she asked you have you been

1 planning this PCR, but when you realized your mistake,
2 that's when you brought it to the attention of the Court,
3 right, was when the Belcher case came out or at the
4 sentencing when you realized that --

5 **MS. VALENZUELA:** Objection to leading, Your Honor.

6 **THE COURT:** Okay. Just ask him some questions.

7 BY MS. ZMROCZEK:

8 Q. Why did you bring Belcher to the attention of the
9 Court at sentencing?

10 A. Well, because the case had come out and I read it and
11 I said oh, my God, you know.

12 Q. And it wasn't just that one presentation that you had
13 attended at the PD conference, correct?

14 A. No. I mean -- and I can't pinpoint it. I went back
15 and tried to look in the archives and I couldn't. As I
16 remember, the archives only started like two years or so
17 ago.

18 Q. And those are archives in different -- of different
19 groups that you're involved in?

20 A. The trial -- the criminal defense lawyers's Listserv
21 was not archiveable, had no archives up until about two or
22 three years ago, so.

23 Q. And you attended the Blues Barbecue and whatever it's
24 called conferences?

25 A. I've been to two, yes, but not -- not all that many,

1 no.

2 Q. Okay. But you've been to presentations where Rauch
3 had presented this issue several -- several times, not just
4 at the PD's conference?

5 A. I really don't -- well, I've had lots of conversations
6 with Rauch. I don't remember the presentation other than
7 at the PD conference.

8 Q. But you specifically remember that one?

9 A. Oh, no doubt.

10 Q. Okay. And she asked you about gunshot residue and
11 that there wasn't -- this case -- was there overwhelming
12 evidence of --

13 **MS. VALENZUELA:** Objection. That's a legal
14 conclusion.

15 **THE COURT:** Well, what's the question?

16 **MS. ZMROCZEK:** Well, the question was she asked about
17 gunshot residue. The question was, was there overwhelming
18 evidence of guilt of either of the defendants.

19 **MS. VALENZUELA:** That's my same objection. I think
20 overwhelming evidence is a legal conclusion.

21 **THE COURT:** Yes, ma'am. That's sustained.

22 **MS. ZMROCZEK:** Okay. I'll move on.

23 BY MS. ZMROCZEK:

24 Q. She asked you about your habits in preparation and
25 she asked you about exhaustion. How many death penalty or

1 capital cases have you done?

2 A. Six.

3 Q. You've been involved in six?

4 A. Yes.

5 Q. And how many of those have been reconsidered on PCR?

6 Let me ask it this way.

7 A. I think only one.

8 Q. Right.

9 A. Yeah, just one. And that was --

10 Q. Jody Ard?

11 A. -- Jody Ard. None of the others have -- I've never
12 testified in a capital PCR.

13 Q. Okay. Those were all handled with direct appeal
14 issues, not with your issues, right?

15 A. Yeah, I don't -- I'm first to admit I'm not an
16 appellate lawyer.

17 **MS. ZMROCZEK:** Okay. Thank you. I have no further
18 questions.

19 **THE COURT:** Okay. Anything?

20 **MS. VALENZUELA:** No.

21 **THE COURT:** Sir, you may step down.

22 **THE DEFENDANT:** Thank you, Judge.

23 (Witness excused.)

24 **MS. ZMROCZEK:** Those are all the witnesses that we
25 have, Your Honor.

1 **THE COURT:** Okay. Applicant has rested.

2 **MS. VALENZUELA:** Yes, Your Honor. I just have one.

3 Ms. Wanda Carter.

4 **THE COURT:** Okay.

5 (Whereupon, Wanda H. Carter was duly sworn by the
6 Clerk of Court.)

7 **THE CLERK:** Have a seat and state your full name for
8 the record.

9 **THE COURT:** Tell us your full name, please, and spell
10 your last name.

11 **THE WITNESS:** Wanda, W-A-N-D-A, H. Carter,
12 C-A-R-T-E-R.

13 **THE COURT:** Thank you.

14 WANDA H. CARTER,

15 having been duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MS. VALENZUELA:

18 Q. Okay. Ms. Carter, how did you come -- how are you
19 involved in the representation of Kerwin Parker?

20 A. I was assigned the case on direct appeal.

21 Q. And you handled his direct appeal and what issues did
22 you raise in that direct appeal?

23 A. I raised one issue and that was the Belcher issue.

24 Q. Okay. And it was -- it ended up -- the Court ended
25 up ruling against you, correct?

1 A. That's correct.

2 Q. Okay. Now in the process of doing the appeal, did
3 you come -- did y'all end up having to reconstruct the
4 transcript?

5 A. That's correct. We realized that some testimony was
6 missing from the transcript and reconstruction motions
7 were filed and granted by the Court and a reconstruction
8 hearing was held.

9 Q. Okay. And so it was only portions of the transcript,
10 it wasn't the entire trial that had to be reconstructed?

11 A. Exactly. It was just a small portion that we had to
12 reconstruct, yes.

13 Q. Okay. And then at the conclusion of that
14 reconstruction, was it determined by your office that you
15 could go forward with the appeal based on the reconstructed
16 transcript or did you feel that you had to do something
17 different based on the reconstructed transcript that you
18 received?

19 A. We were able to successfully reconstruct the record,
20 all of the parties were present and there was no problem
21 with reconstructing the record.

22 Q. Okay. Do you feel that the record needing to be
23 reconstructed affected your strategy or your ability to
24 appeal on behalf of the Applicant?

25 A. Oh, no. No, not at all. That portion did not harm

1 or affect the appeal in any way.

2 Q. Okay. Do you -- do you raise issues even when there
3 is an objection made in circumstances where you think that
4 it is particularly important to raise that issue before the
5 appellate court?

6 A. We can only raise issues on appeal that have been
7 preserved through objections at the trial level. Of
8 course, if there are meritorious issues we raise them if
9 there's an objection. Some issues have merit and there's
10 no objection and that's just a judgment call with appellate
11 counsel as to whether or not to raise that issue foreseeing
12 PCR or envisioning a PCR action later.

13 Q. Okay. And so there are some instances where the issue
14 would be meritorious -- and I'm just stepping closer
15 because I know it's hard to hear me -- that the issue is
16 considered meritorious and even though there's not an
17 objection you still brief and argue that issue to the
18 Court?

19 A. Like I said, it's a -- it's a judgment call because we
20 can't raise frivolous issues on appeal and the Court will
21 not entertain issues that haven't been preserved, but each
22 attorney makes -- makes that judgment call on appeal.

23 **MS. VALENZUELA:** Okay. No further questions, Your
24 Honor.

25 **THE COURT:** Okay. Yes, ma'am.

1 CROSS-EXAMINATION

2 BY MS. ZMROCZEK:

3 Q. You said that the only issue that you raised was the
4 Belcher issue, right?

5 A. Yes, that's correct.

6 Q. And that issue was preserved at the sentencing while
7 this case was still pending, correct?

8 A. That's correct.

9 Q. Okay. And you did not preserve or raise -- well, it
10 wasn't preserved, but you did not raise any motions about
11 the Protection of Persons and Property Act, did you?

12 A. No, I did not.

13 Q. Okay. And you knew that that act had been placed some
14 years earlier, correct?

15 A. I -- I would say that I did, yes.

16 Q. Okay. And there were cases -- in the appellate
17 community y'all also go to like --

18 A. Conferences.

19 Q. Yeah, the PD conference is what I was trying to think
20 of, PD conferences and trainings, right?

21 A. That's correct.

22 Q. Did you happen to attend the one in 2008 where Rauch
23 Wise gave this presentation or do you remember?

24 A. You know, I don't recall specifically, but I remember
25 that Mr. Duncan and I talked about the Belcher issue at one

1 conference. I can't tell you the year.

2 Q. Okay. So this is an issue that's been brewing for --
3 that everybody was aware had been brewing for a while,
4 correct?

5 A. I believe so, yes.

6 Q. Okay. Are you a member of any of the Listservs or do
7 you participate in any of those conversations?

8 A. SCTLA, the Listservs. I'm familiar with them, yes.

9 Q. Okay. So you know that outside of just official
10 presentations that these are -- that issues that are
11 currently pending that could have an effect on a case even
12 though they haven't been ruled on are discussed throughout
13 the defense community routinely, correct?

14 A. Discussions are had among defense attorneys about
15 issues that are percolating before the decisions are
16 reached, yes.

17 Q. Okay. And this -- Belcher was actually argued much
18 earlier than it was decided, correct? Obviously. I
19 mean --

20 A. That's correct.

21 Q. I mean, obviously that's how it happens, correct?

22 A. That's correct, yes.

23 Q. So it was pending at least at the -- you know, during
24 the course of this trial?

25 A. Pending, I think it was.

1 Q. The opinion was --

2 A. I think it was.

3 Q. Okay. And so -- and I wanted to just talk to you
4 briefly about the reconstruction issue. You were there as
5 well?

6 A. I was, yes.

7 Q. Okay. So you remember Ms. Fullwood talking about
8 issues that she had with her -- with the computer crashing
9 at the public defender's office?

10 A. I remember, yes.

11 Q. Okay. And so she couldn't find a lot of her notes?

12 **MS. VALENZUELA:** Objection to hearsay, Your Honor.
13 Ms. Fullwood is not here and I know it's in the form of a
14 question, but it's still putting out hearsay.

15 **THE COURT:** Well, it's -- go ahead.

16 **MS. ZMROCZEK:** It's in the transcript.

17 **THE COURT:** Okay. Go ahead.

18 BY MS. ZMROCZEK:

19 Q. So you would agree that you've read the reconstruction
20 transcript?

21 A. Oh, of course. Yes.

22 Q. Okay. And so everything that is said in there was
23 done on the record under oath?

24 A. I believe Ms. Fullwood represented the co-defendant,
25 so.

1 Q. Okay. Right, Mr. -- Mr. Johnson.

2 A. Johnson, yes.

3 Q. Right. And you didn't handle his appeal?

4 A. No, I did not.

5 Q. Okay. So when appeals come in with co-defendants, is
6 it typical that appellate counsel gets both cases or do
7 they go to --

8 A. We separate the cases.

9 Q. Okay. And you said that there weren't -- it was
10 reconstructed completely, but you would agree that there
11 were some witnesses that weren't present at the
12 reconstruction?

13 A. At the reconstruction hearing, the solicitors and
14 defense attorneys try to recollect pretty much what
15 happened below and Mr. Parker was there, Mr. Johnson was
16 there. All parties were there. I don't think there was a
17 problem with the reconstruction hearing.

18 Q. Okay.

19 A. We were able to reconstruct the record.

20 Q. But you had -- and you would agree if it reflected
21 that people weren't there -- that if people were saying
22 that they were trying to rely on notes and some of those
23 notes didn't exist that the record would reflect what
24 happened there, right? Whatever -- whatever was said on
25 the record is accurate, correct?

1 A. The record would be accurate, yes.

2 Q. Okay. Thank you. And then is the reason that you
3 raised the Belcher issue even though it wasn't preserved
4 at the -- during the charge conference was because it was
5 raised at the sentencing?

6 A. That's correct.

7 Q. And you read Mr. Duncan's argument about how the case
8 was not considered final and he was renewing his motion for
9 a new trial at this point?

10 A. If that's what the record reflects --

11 Q. Right.

12 A. -- that would be fine.

13 Q. Did you feel like it was preserved at that point?

14 A. Absolutely. Absolutely.

15 Q. Okay.

16 A. My argument was that the issue was preserved and that
17 it was alive pending direct appeal or direct review. That
18 was my argument in the Court of Appeals and in the Supreme
19 Court.

20 Q. Okay. And both times they said that -- do you recall
21 what they said? That it wasn't probably preserved?

22 A. The convictions were affirmed and the issue was never
23 entertained.

24 Q. Okay.

25 **MS. ZMROCZEK:** Thank you. No further questions.

1 **MS. VALENZUELA:** Nothing further, Your Honor.

2 **THE COURT:** Okay. Ma'am, you may step down. Please
3 be careful.

4 (Witness excused.)

5 **MS. ZMROCZEK:** Your Honor, in -- I'm sorry, do you
6 have any more witnesses?

7 **MS. VALENZUELA:** Oh, I'm sorry. No, I do not.

8 **THE COURT:** Okay.

9 **MS. ZMROCZEK:** Your Honor, in the light of the time
10 and just the complicated page numbers, et cetera, if the
11 Court would allow instead of making oral argument because
12 I believe that they're gonna probably be -- I think you
13 probably know what both of us are gonna argue, I would ask
14 that we be able to submit a written memo to maybe, A, cut
15 down on time, but, B, to keep it more -- with all the
16 different page numbers and all the different cites to keep
17 it more organized, that would be my suggestion.

18 **MS. VALENZUELA:** Could we just -- instead could we --
19 I'm sorry. Could we just do proposed orders instead? If
20 we're gonna do written motions, I just want to --

21 **THE COURT:** You know, actually I was gonna ask for
22 some written bullet points, but let me do this. I don't
23 want any -- I don't want a law school brief, okay?

24 **MS. ZMROCZEK:** Certainly.

25 **THE COURT:** And I don't want an appellate brief, okay?

1 **MS. VALENZUELA:** Okay.

2 **THE COURT:** Feel free to do this on an e-mail to
3 Jonathan. Of course, copy each of us, but send it to my
4 law clerk. But feel free to do this in a very informal
5 e-mail, bullet points, page numbers, but if you're gonna
6 use the page numbers, give me either the -- the big number
7 or the page number or something and let me know where it is
8 so I can find it over here.

9 **MS. ZMROCZEK:** Okay. And I think I have the one with
10 the big -- what I was planning on doing is putting the big
11 number and then the tiny number in parentheses just in case
12 there was any confusion.

13 **THE COURT:** Okay. That's fine. That's fine. But
14 just feel -- I want this to be very informal.

15 **MS. ZMROCZEK:** Certainly.

16 **THE COURT:** Just send an e-mail, very informal, copy
17 each other and then each of you can respond to the other
18 one back and forth a time or two. Don't get into a war of
19 words now.

20 **MS. ZMROCZEK:** Right. Right. No.

21 **THE COURT:** Don't do that. How much time do you want
22 to do that? Ten days?

23 **MS. ZMROCZEK:** This case has been pending for a while
24 and I know that I've laid out my argument fairly well in my
25 head, so I think it would be fairly -- I would only need

1 about seven days.

2 **THE COURT:** Well, why don't I give you two weeks?

3 How about that? Does that suit everybody, two weeks?

4 **MS. VALENZUELA:** Yes, sir. Yes, sir.

5 **THE COURT:** Okay. Let's do that because we've got
6 court next week and then we've got a week of chambers and
7 then we'll be back, so how about something like that?

8 **MS. VALENZUELA:** Okay.

9 **THE COURT:** All right. Anything else?

10 **MS. VALENZUELA:** Nothing from us.

11 **THE COURT:** Thank you very much.

12 **MS. ZMROCZEK:** Thank you.

13 **THE COURT:** That concludes this hearing.

14 (Whereupon, the proceedings were concluded at
15 12:32 PM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 10th day of November, 2016.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

October 5, 2017

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Kerwin S. Parker, #337544,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

C/A No. 2014-CP-32-03172

ORDER OF DISMISSAL

FILED
JUL 15 AM 8:20
CLERK OF COURT
JUL 15 2016

This matter comes before the undersigned by way of a post-conviction relief (PCR) application filed by Kerwin S. Parker (Applicant) on September 2, 2014. This matter convened for an evidentiary hearing on November 10, 2016, at the Lexington County Judicial Center, at which Applicant and appointed PCR counsel Aimee J. Zmroczek, Esquire, were present. Assistant Attorney General Johanna Valenzuela appeared on behalf of Respondent, the State of South Carolina (the State). In addition to the pleadings in this action, this Court had before it at the hearing the records of the Lexington County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the complete transcript of Applicant's trial,¹ and Applicant's remaining direct appeal records. At the hearing, Applicant presented testimony from trial counsel John Duncan, Esquire (trial counsel), and the State presented testimony from appellate counsel Wanda Carter, Esquire (appellate counsel).

After carefully considering the testimony presented at the hearing, the arguments presented by the parties, and the records pertaining to this action, the undersigned denies and

¹ For clarity, Applicant's complete trial record includes not only the trial transcript, but also transcript of a latter sentencing proceeding, and of a latter reconstruction hearing. Each is contained in chronological order within the record on appeal filed in Applicant's direct appeal, and that is the document to which this Court will cite. (See R. pp. 1, 744, and 779).

dismisses the PCR application and this Court issues the following findings of fact and conclusions of law in accord with S.C. Code Ann. § 17-27-80.

I. PROCEDURAL HISTORY

Applicant is serving an aggregate 20-year sentence within the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment by the Lexington County Clerk of Court. This sentence stems from April 2007 indictments for murder (2007-GS-32-1540), assault and battery with intent to kill (ABWIK) (2007-GS-32-1542), and possession of a weapon during commission of a violent crime (2007-GS-32-1541).

Applicant proceeded to a jury trial taking place September 14 through 18, 2009 before the Honorable Robin B. Stillwell. Applicant was jointly tried with Curtis T. Johnson. The jury convicted Applicant as indicted of ABWIK and the weapons offense, and acquitted Applicant of murder. (R. p. 741). Judge Stillwell postponed sentencing to October 21, 2009, at which time Applicant received a sentence of 20 years for assault and battery with intent to kill and a concurrent five years on the weapons charge. (R. pp. 775-76).

A timely notice of appeal was filed on Applicant's behalf and perfected by appellate counsel. During the pendency of the appeal, Applicant's case was remanded to the trial court for the purpose of reconstructing a portion of the record. The reconstruction hearing convened before Judge Stillwell on October 3, 2011. (R. p. 779). Following the submission of appellate briefs, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. *State v. Parker*, 2013-UP-403, 2013 WL 8541548 (S.C. Ct. App. filed Oct. 30, 2013). Applicant subsequently petitioned for rehearing which was denied on December 27, 2013. The Court of Appeals issued the Remittitur on August 5, 2014, and this action commenced thereafter.



II. THE ALLEGATIONS BEFORE THIS COURT

By and through PCR counsel and pursuant to Rule 71.1(d), SCRCP, the claims to be pursued were defined by counsel at the evidentiary hearing as follows:

- i. Ineffective assistance of trial counsel for the failure to move for immunity pursuant to the South Carolina Protection of Persons and Property Act;
- ii. Ineffective assistance of counsel in regards to the reconstruction hearing;
- iii. Ineffective assistance of trial counsel for the failure to object to statements by the prosecution during closing argument;
- iv. Ineffective assistance of trial counsel for the failure to object to a jury instruction issued pursuant to *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

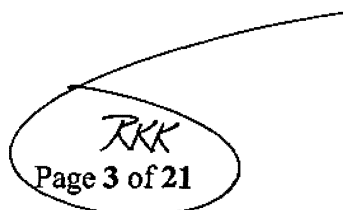
(PCR Tr. pp. 5-9).

III. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

- (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).


 RKK
 Page 3 of 21

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive the assistance of counsel guaranteed them by the Sixth Amendment to the United States Constitution. "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)).

At all times during any PCR proceeding, the applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). A PCR applicant must produce facts or testimony in support of each individual allegation in order to establish that the claim meets the standard warranting relief. S.C. Code. Ann. § 17-27-50. Otherwise, dismissal is appropriate. See *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).

Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). "Judicial

scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate 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." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

As PCR counsel defined the allegations being pursued in this action at the outset of the evidentiary hearing and presented testimony in furtherance of those claims, this Court finds all other claims from the filed *pro se* PCR application inadequately raised and without merit in accord with S.C. Code Ann. § 17-27-90, Rule 71.1(d), SCRCP, and the record in this action. As to the surviving allegations, this Court finds that Applicant has failed to satisfy either requirement of the standard established in *Strickland v. Washington*, *supra*. This Court has reviewed and weighed the testimony presented at the evidentiary hearing after observing the witnesses and evidence presented at the hearing and passing upon its credibility. This Court makes the following findings based upon the probative evidence presented:

As a matter of general impression, this Court finds credible and persuasive the testimonies of trial and appellate counsel, who each presented well-recollected testimony of relevant events leading up to and during Applicant's jury trial and appellate proceedings. This Court accordingly finds applicable the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in their representation of Applicant at all stages. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

i. Counsel's Failure to Pursue an Immunity Hearing

This Court finds that trial counsel did not render deficient performance or prejudice Applicant by failing to request a pre-trial immunity hearing pursuant to S.C. Code Ann. § 16-11-440, South Carolina's Protection of Persons and Property Act (the Act). This Court finds the Act does not apply to Applicant's case such that neither deficient performance nor prejudice results from trial counsel's failure to pursue a pre-trial immunity hearing.

At PCR, trial counsel recalled the basic facts of the case which are compelling to this Court's finding. Applicant was in a car with his half-brother, who alone had engaged in a physical scuffle with some of the victims earlier in the day. (PCR Tr. pp. 43-44). Later on, Applicant and the co-defendant drove over to the house of the victims and things escalated. (PCR

Tr. pp. 44-47). At the conclusion of the incident, one victim suffered a broken femur when the co-defendant intentionally struck him with his truck, another victim was paralyzed from one of several gunshots fired by the co-defendant, and another victim died from two gunshot wounds also fired by the co-defendant. (PCR Tr. pp. 44-46, 70). The jury acquitted Applicant of murder but otherwise found him guilty as indicted for ABWIK and the weapons charge. (PCR Tr. p. 51). Applicant otherwise failed to present any PCR testimony from any witness which rationalized the importance of an immunity hearing in relation to the self-defense claim he presented at trial. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden); *see also Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992).

As explained by trial counsel at PCR, Applicant's defense at trial was rooted in self-defense and in defense of others and was consistent with that posed by his co-defendant who was his half-brother. (PCR Tr. p. 12). Trial counsel testified at PCR that he strategized to emphasize that the co-defendant pointed the finger at himself. Trial counsel sought to encourage that the facts in support of conviction did not apply to Applicant. (PCR Tr. pp. 32, 52). Trial counsel argued that Applicant was merely present at the scene and that if Applicant were to be convicted of any charge, he would have to be found guilty under the hand of one, hand of all. (PCR Tr. p. 77). Trial counsel elsewhere testified that he "had strong evidence that Kerwin never had a gun, that there was no gunshot residue," and there was other evidence in existence that Applicant had

himself been shot to some degree. (PCR Tr. pp. 69, 71). However, another witness testified at trial that he saw the man with shorter hair, which would have been Applicant, "on the patio with a gun pointing down" just prior to the gunshots being fired. (PCR Tr. p. 71). This particular testimony matched the injuries sustained by the paralyzed victim, leaving a question of fact as to Applicant's involvement. (PCR Tr. p. 72).

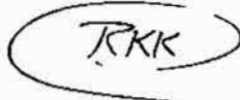
Trial counsel's assessment of the applicability of the Act evolved throughout the course of the evidentiary hearing. Initially, trial counsel testified that he did not recall why he did not consider moving pursuant to the Act but that, at the time of the PCR hearing, he saw immunity "as a legitimate issue that should have been raised." (PCR Tr. pp. 12-13). Then trial counsel later expounded that he appeared on an investigator's radio show sometime after Applicant's trial to discuss the Act because it had become prevalent in the public eye. That experience, he testified, gave him cause in hindsight to think about the Act, but that it was not in "anybody's consciousness at the time" of trial as a viable defense. (PCR Tr. pp. 42-43). Of course, hindsight does not govern the standard for determining effective assistance of counsel. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

As to the relevant, contemporaneous preparation of trial counsel's defense, counsel explained that Applicant's case "was hard to prepare" due to parallel stories given of "a complicated, chaotic scene." (PCR Tr. p. 43). Trial counsel fully acknowledged that Applicant was not invited to the victim's residence where the incident took place. (PCR Tr. p. 47). He described the confrontation as beginning out on the street or sidewalk and moving towards the common areas and arguably the curtilage of an apartment building. (PCR Tr. pp. 47-48). He identified his client's location during the incident as being within a common area at the apartment complex. (PCR Tr. p. 48).

Regardless of whether counsel researched or was informed on the Act pre-trial, this Court finds that the Act did not in fact apply, and thus finds no error or prejudice on the part of trial counsel for the failure to pursue an immunity hearing under the Act. Whether a defendant is entitled to immunity under the Protection of Persons and Property Act must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." *Id.* at 411, 709 S.E.2d at 665. "Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *Id.* "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." *Id.* at 371, 752 S.E.2d at 266.

But in order for the Act to apply, the claimant must have been in a place where he enjoyed either an ownership interest or some other right to be present during the offense charged. S.C. Code Ann. § 16-11-440(A) and (C). On this point, the record fails to establish that the Act applied to Applicant's case. Applicant presented no evidence or testimony to support a finding the presumption afforded by S.C. Code Ann. § 16-11-440(A) would apply. S.C. Code § 16-11-440(A) states:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:



(1) **against** whom the deadly force is used is in the process of **unlawfully and forcefully entering**, or has **unlawfully and forcibly entered** a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; **and**

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A)(emphasis added).

Applicant also presented no evidence or testimony that would support a finding the presumption afforded by S.C. Code Ann. § 16-11-440(C) would apply. S.C. Code § 16-11-440(C) states:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C).

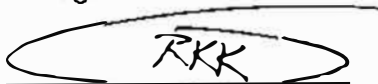
The record in this case provides no evidence bearing significance to any provision of the Act. There was no evidence presented at trial or at PCR that would support a finding that the victims were in the process of unlawfully and forcefully entering Applicant's dwelling, residence, or occupied vehicle. S.C. Code Ann. § 16-11-440. Further, there was no evidence presented at trial or at PCR reflecting the victims were removing or attempting to remove Applicant or his co-defendant against their will from their dwelling, residence, occupied vehicle, or other place where they had a right to be. *Id.* Applicant was not at any location over which he had any dominion or control, or was even invited to be present. (*E.g.* R. pp. 46, 616-17). At best, Applicant was located in a common area of an apartment complex where he did not live and was not invited to. At worst, Applicant was acting with his co-defendant to forcibly encroach upon

the common places and curtilage of the victims' apartment in an unwanted fashion. (*E.g.* R. pp. 59-67, 105-07). Witnesses saw Applicant with a gun. (R. pp. 39, 211, 231-32). And no eyewitness testimony identified any victim as attempting to gain access to the co-defendants' vehicle. (R. pp. 115-16, 153-60). Applicant was in no way entitled to the presumption afforded pursuant to the Act and an immunity hearing was not warranted.

Additionally, insofar as Applicant and his co-defendant decided to drive over and initiate and armed confrontation about a previous altercation, they were at fault in bringing about the difficulty and had no valid claim to self-defense at the victims' apartment complex. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (stating elements of self-defense and concluding appellant's immunity claim was appropriately submitted to the jury); *Duncan, supra* at 371, 752 S.E.2d at 266 (requiring valid self-defense claim in order to succeed at immunity hearing). The record otherwise establishes that Applicant's case was one concerning mutual combat and was properly submitted to the jury as such. *See State v. Young*, 424 S.C. 424, 434, 818 S.E.2d 486, 491 (Ct. App. 2018).

Further, to the extent Applicant posited at the evidentiary hearing that prejudice flows from counsel's failure to pursue an immunity hearing for the purposing of preserving the outcome of that hearing for interlocutory appeal, Applicant cannot prevail. Although not the law at the time of the case, our courts have since decided the denial of a request for immunity under the Act is not immediately appealable. *State v. Isaac*, 405 S.C. 177, 185, 747 S.E.2d 677, 681 (2013).

Based upon the totality of the record in Applicant's case, this Court finds trial counsel's failure to pursue an immunity hearing pursuant to the Act constituted neither deficient



performance nor prejudice because the trial record itself fails to promote Applicant's immunity claim. Accordingly, this court **DENIES and DISMISSES** this ineffective assistance allegation.

ii. Counsel's Alleged Failure to Adequately Reconstruct the Trial Record

This Court finds no basis upon which a finding of deficient performance or prejudice is warranted in relation to trial or appellate counsels' performance at the reconstruction hearing ordered to occur prior to the resolution of Applicant's direct appeal. That hearing took place on October 3, 2011, and included extensive testimony by Applicant's co-defendant and the incorporation of exhibits and witness testimony received at trial. (R. pp. 779-866). It is apparent from the record in this action that the jury heard the complete defense case prior to reaching its verdict and, at the reconstruction hearing itself, the court gave the parties ample opportunity to present everything they wished to allege was incomplete with the trial record. (E.g. R. pp. 789-817). This testimony fails to demonstrate how Applicant could in any way have been prejudiced by the reconstruction procedure.

Nor does the record evidence deficient performance by counsel. Trial counsel's impression of the reconstruction hearing was that it was neutral to his client because nothing was missing from the trial record that affected Applicant, and therefore required reconstruction on his behalf. (PCR Tr. p. 49). Trial counsel testified at PCR that he did not recall there being any potential issues with the reconstruction hearing as it pertained to his client other than the fact that one witness was out of state and could not be compelled to appear for the purposes of reconstructing his or her testimony, which trial counsel felt was insignificant. (PCR Tr. pp. 14-15). Appellate counsel similarly testified that only a small portion of the total record required

reconstruction. (PCR Tr. p. 82). Appellate counsel assessed that the reconstruction was completed without difficulty. (PCR Tr. p. 87). Crucially, appellate counsel recalled that the reconstructed portion had no bearing on Applicant's appeal. (PCR Tr. pp. 82-83).

The undersigned agrees with counsels' assessment. To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). This Court can identify no basis for error by trial counsel during the record reconstruction, which was done for the benefit of Applicant's direct appeal. The full record (including the PCR testimony pertaining to this issue) fails to demonstrate that any potential appellate issue arose during the defense's presentation at trial which was not recorded for appellate purposes. For example, the reconstruction record states that the defense called Walter Gadson to the stand in order to enter into evidence a CD of an interview he conducted, but that the CD, which was part of the record in this case, was entered "without objection" *at trial*. (R. p. 782). And the State's and co-defendant's cross-examinations of co-defendant Johnson were fully contained in the original trial transcript even though a portion of his direct examination required reconstruction. (R. p. 817). And the parties to the reconstruction hearing at that time recalled no objections were lodged to any of missing witness Frankie Blue's testimony or to the exhibits entered through his testimony. (R. p. 856).

The undersigned further finds persuasive on this issue the trial court's express finding at the reconstruction hearing that "unequivocally and without reservation that there were no legal decisions made in [Applicant's] case that weren't put fully on the record during the trial." (R. p. 840). This Court finds the trial court demonstrated a solid recollection of Applicant's trial when conducting the reconstruction hearing. The trial court also found at the conclusion of the reconstruction testimony: "I don't find any evidence that there are omissions in the transcript that

we have not addressed here today. I know that there are anecdotal suggestions that perhaps there are some sentences, words, portions missing, but based on what I've heard today I can't make a finding that there are any portions that have been omitted that are material to the appellate issues in this case." (R. p. 863).

As there is no evidence that any objection preserving an issue for appellate review was omitted from the reconstructed record, this Court can identify no basis for a finding of error or prejudice by Applicant's counsel in regards to the reconstruction hearing and **DENIES and DISMISSES** this allegation.

iii. Counsel's Alleged Failure to Object to The State's Closing Argument

Applicant next asserts trial counsel was ineffective for not objecting to several portions of the State's closing argument which Applicant alleges impermissibly acted to enflame the passion of the jury. (PCR Tr. pp. 25-35). The undersigned finds no merit to this claim.

Trial counsel testified that the portions of the closing pointed to by PCR counsel were the Solicitor's "version of the facts." (PCR Tr. p. 29). Trial counsel exemplified a familiarity with this Solicitor's typical closing argument. He opined that this Solicitor's presentations could be "over the top, aggressive, flamboyant, [and] excessive," but that his closing in Applicant's case was "rather mild" in comparison. (PCR Tr. pp. 25, 50). Trial counsel testified he did not object to the closing, which he "did not consider that to be excessive." (PCR Tr. pp. 27, 50). He further testified he "tactically" made the decision not to object to any portions of the Solicitor's closing which could be perceived as inflammatory because he assessed any objection would be overruled by the trial court and he did not wish to emphasize the jury's attention to any particular part of the closing. (PCR Tr. pp. 27-28). Trial counsel explained that in his experience judges "give a lot

of leeway” in closing argument, which trial counsel believed could be attributed to the applicable abuse of discretion standard of appellate review. (PCR Tr. p. 50).

This Court finds no error or prejudice within trial counsel’s representation of Applicant during the prosecution’s closing. Regarding the alleged failure to object, there remains in this action the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant’s trial. *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland, supra*). “[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel’s strategy is viewed under an ‘objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). Here, trial counsel accurately cited the standard of appellate review pertaining to objections lodged during closing argument. *E.g., State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). Citing both knowledge and experience, counsel reasoned that any objection to the State’s closing argument in this case was likely to fail because he himself did not consider any portion of the argument too excessive, flamboyant, or otherwise outside the bounds of the record presented at trial. Counsel again cited knowledge and experience when he testified that he consciously elected not to object to any portion of the closing argument because he wanted to avoid amplifying the jury’s attention to any particular portion of it. This Court finds that trial counsel exercised objectively reasonable, informed trial strategy in this regard and declines to make a finding of deficient performance.

Also, because Applicant must establish prejudice from counsel’s failure to object in order to garner relief, the underlying question before this Court is “whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”

Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998). “Solicitors are bound to rules of fairness in their closing arguments.” *State v. Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881. “[I]ts content should stay with the record and reasonable inferences to it.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The solicitor’s closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.” *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). However, “[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.” *Humphries v. State*, 351 S.C. at 373, 570 S.E.2d at 166. Further, any excerpt of the State’s closing exists as “one moment in an extended trial.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). Accordingly, a court must conduct an “examination of the entire proceedings” in context. *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt*, *supra* (“We must review the [closing] argument in the context of the entire record.”); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990).

The undersigned finds the portions of the prosecution’s closing argument drawn to this Court’s attention at the evidentiary hearing neither inflammatory nor improper based on the remainder of the record. The entirety of the closing argument closely pertained to evidence properly received at trial and later corroborated through Applicant’s own testimony. (R. pp. 668–98). Insofar as Applicant alleges the State prejudicially referred to the condition of the victims, (e.g. R. pp. 670, 678, 680, 683), this Court finds each reference closely contained to and reasonably inferred from the record of the injuries sustained. (R. pp. 502–03, 509–10, 513–18). As to any other portion of the closing cited by Applicant, this undersigned agrees with trial counsel’s assessment that the Solicitor permissibly argued his version of the facts, and further

notes that the State permissibly asked the jury to return a verdict on a number of possible outcomes favorable to the State. (R. pp. 670-98). This Court finds that the State's closing argument was permissibly offered in furtherance of the State's requesting the jury to find malice in the acts charged and to render a verdict in favor of the State based upon specific facts presented in the testimony received at trial.

This Court **DENIES and DISMISSES** Applicant's ineffective assistance of trial counsel allegation regarding the failure to object to the prosecution's closing argument, finding Applicant has failed to meet his burden of proving either prong of *Strickland*.

iv. Counsel's Alleged Failure to Object to an Impermissible *Belcher* Charge

Applicant asserts trial counsel was ineffective for not objecting to the trial court's instruction to the jury regarding the inference of malice from the use of a deadly weapon. (PCR Tr. pp. 17-24; R. p. 716, 732). This Court finds Applicant's claim without merit.

Applicant's case went to trial in September 2009, which was approximately one month prior to the South Carolina Supreme Court's decision in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (published Oct. 12, 2009). That opinion announced a wholly new rule of law concerning jury instructions on implied malice in trials for murder and ABWIK. It held "that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." *Belcher* at 612, 685 S.E.2d at 810. The court instructed retroactive application to "all cases which were pending on direct review or not yet final where the issue was preserved" at trial. *Id.* The *Belcher* court finally stated that the ruling "will not apply to convictions challenged on post-conviction relief." *Id.* (citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989)).

Applicant argues that trial counsel was put on notice of the pendency of the *Belcher* issue through various CLEs and listervs but omitted any objection to the implied malice instruction until Applicant's sentencing hearing, which was after the issuance of *Belcher* and obviously after the conclusion of the jury trial. (PCR Tr. pp. 17-24, 40). Trial counsel, however, addressed *Belcher's* interim issuance at Applicant's sentencing hearing. At that time, trial counsel moved for a new trial, arguing that the jury instruction on implied malice had been improperly charged under the new *Belcher* opinion and that Applicant's case was not yet final. (R. pp. 748-51). In denying the motion, the trial court noted that the objection "would have been specious because [the pre-*Belcher* implied malice instruction] was well settled South Carolina law" at the time of Applicant's jury deliberations. (R. pp. 751-52). Appellate counsel testified at PCR that she raised the *Belcher* issue in Applicant's direct appeal because trial counsel argued its applicability at the sentencing hearing—and that she felt as though trial counsel's argument preserved the *Belcher* issue because the case was "alive pending direct appeal or direct review." (PCR Tr. pp. 81, 88). In affirming Applicant's convictions and sentence, the South Carolina Court of Appeals found that the *Belcher* objection was not made until after the jury retired from deliberations and was thus not preserved for review. *State v. Parker*, 2013-UP-403, 2013 WL 8541548 at *1 (S.C. Ct. App. filed Oct. 30, 2013).

This Court finds that trial counsel was not ineffective for failing to object to the implied malice instruction at any time prior to Applicant's sentencing hearing because, in the context of a PCR action, our courts have "never required an attorney to be clairvoyant or anticipate changes in the law." *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). Trial counsel's presence at a CLE where another criminal defense attorney presented the *Belcher* issue as a basis for a potentially meritorious objection does not bind trial counsel to act in that manner at trial,

nor does it render his performance deficient when the theory was not established as law in our State at the time of Applicant's jury trial. *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (declining to find trial counsel's performance deficient when "he followed a long-standing and well-settled rule of South Carolina criminal law—even when that rule was under attack in the United States Supreme Court at the time of trial"); *Honeycutt v. Mahoney*, 698 F.2d 213, 216–17 (4th Cir. 1983) (deciding that trial counsel was not ineffective for failing to object to subsequently-overruled, but then long-standing, North Carolina law where such objection would have been based on a recent, non-binding First Circuit decision); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (ruling that trial counsel was not ineffective by failing to raise *Batson* challenge two days before *Batson* was decided), *cert. denied*, 504 U.S. 920, 112 S.Ct. 1967 (1992). Trial counsel acknowledged as much, recognizing at PCR that he could not have, at that time, anticipated the change in the law. (PCR Tr. p. 38). Counsel otherwise acted to bring the *Belcher* holding to the trial court's attention at the first relevant point in time. There can be no finding of deficient performance on this allegation, as counsel did not act "outside the wide range of professionally competent performance." *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-65. This Court accordingly finds that absent any showing of deficient performance, Applicant cannot meet the *Strickland* standard, and **DENIES and DISMISSES** this final claim for relief.

IV. CONCLUSION AND NOTICE OF APPLICANT'S RIGHT TO APPEAL

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violation or deprivation that would require this court to grant his application. "[T]he proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases." *Rutland*

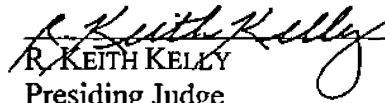
v. State, 415 S.C. at 577, 785 S.E.2d at 353; *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). As to each of these allegations, Applicant has failed to demonstrate that he was burdened by deficient performance in any way. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (“Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Applicant also cannot prove on this record “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry v. State*, 300 S.C. at 117-18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). With Applicant failing to meet the burden established in *Strickland v. Washington*, *supra*, there exists no basis in the record for a grant of post-conviction relief, and the allegations pertaining to trial counsel’s representation at various stages of Applicant’s trial are **DENIED AND DISMISSED WITH PREJUDICE**.

This Court finally notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Applicant is directed to South Carolina Appellate Court Rule 243 and South Carolina Rule of Civil Procedure 71.1(g) for appropriate procedures for service and filing any notice of appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent for completion of his sentence within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 3d day of July, 2019.


R. KEITH KELLY
Presiding Judge
Eleventh Judicial Circuit

, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL DISTRICT

Kerwin S. Parker, #343782)
Applicant,)

2014-CP-32-3172

v.)

MOTION TO RECONSIDER

State of South Carolina,)
Respondent.)

NOW COMES, Applicant, Kerwin Parker, by and through his undersigned counsel, and moves pursuant to Rule 59(e) SCRCP for an order altering or amending the court's prior order filed on June 17, 2019, denying Applicant's claim and dismissing with prejudice. While the court has ruled in the State's favor, the Applicant submits this motion to ensure that he has "enable[d] the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 546, 546 (2000). Specifically all allegations submitted in the memoranda by Applicant regarding:

1. Ineffective assistance of trial counsel for failing to move for immunity pursuant to the South Carolina Protection of Persons and Property Act;
2. Ineffective assistance of counsel in regards to the reconstruction hearing;
3. Ineffective assistance of trial counsel for the failure to object to statements by prosecution during closing arguments; and
4. Ineffective assistance of trial counsel for failure to object to a jury instruction issued pursuant to *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

FILED
2019 JUN 24 PM 3:10
LIS COMER
CLERK OF COURT
LEXINGTON SC

THEREFORE, counsel requests that Order be reconsidered for the above listed specific reasons and issues not specifically listed above but raised during the trial of this matter.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'Aimee J. Zmroczek', written over a horizontal line.

Aimee J. Zmroczek, Esq. #77193
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aimee@ajzlawfirm.com
Counsel for Applicant

Columbia, South Carolina
Dated: July 24, 2019

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
 ELEVENTH JUDICIAL DISTRICT

Kerwin S. Parker, #343782)
 Applicant,)

2014-CP-32-3172

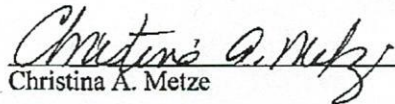
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
 Respondent.)

I certify that, on this date, I served a copy of the Motion to Reconsider dated _____, 2019 by depositing it in the U.S. Mail in an envelope with sufficient postage affixed, addressed as follows:

Caroline Scrantom
 Assistant Attorney General
 SC Attorney General's Office
 PO Box 11549
 Columbia, SC 29211-1549


 Christina A. Metze

Columbia, South Carolina

Dated: 7/24/19

FILED
 2019 JUL 24 PM 3:10
 LISA COWEN
 CLERK OF COURT
 LEXINGTON SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3203172

Kerwin S Parker #337544

The State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

FILED
JUG 19 PM 12:35
S.A.M. JONES
CLERK OF COURT
LEXINGTON SC

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

RELIEF DENIED

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Kerwin S Parker
Circuit Court Judge

2165
Judge Code

8/15/2019
Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Aimee Jendrzewski Zmroczek PO Box 11961 Columbia,
SC 29211

Caroline M. Scrantom PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

- E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.