

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

J Mark Hayes, II, Circuit Court Judge

RECEIVED

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S C Supreme Court

ORIGINAL

LAMAR A GRAVES,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

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Lamar Graves - Direct examination
by Mr Neal

1 Q Are there any other basis that we haven't covered?

2 A Yes, sir, I would like to -- was counsel, ineffective
3 assistance of counsel for not objecting to the jury that
4 was picked all white and one black, and it was on Page,
5 Transcript Page 444 and 445

6 Q Okay You're an African-American, is that correct?

7 A Yes, sir

8 Q It's your position -- I believe Juror Number 47 is the
9 only African-American on the jury?

10 A Yes, sir

11 Q To your knowledge, did your attorneys raise any
12 objections to that?

13 A No, sir

14 Q And you're entitled to a -- you believe you're
15 entitled to a jury of your peers?

16 A Yes, sir

17 Q All right

18 A At least a equal balance

19 Q And you believe that effected the outcome of your
20 trial?

21 A Yes, sir

22 Q You believe you should be entitled to a new trial
23 based on that?

24 A Yes, sir

25 Q All right Is there any other basis for your---

Lamar Graves - Direct examination
by Mr Neal

1 A Yes, sir, was counsel, ineffective assistance of
2 counsel, I would like to raise it on appellate counsel too
3 for failing to object and plea trial transcripts
4 specifically that of the jury impaneling Transcript Page
5 119, Lines 4

6 Q Your -- you were appointed appellate counsel by the
7 Office of Indigent Defense, is that correct?

8 A Yes, sir

9 Q And they filed what's called an Anders brief on your
10 behalf?

11 A Yes, sir

12 Q The only issue raised in that Anders brief was the
13 identification testimony, is that correct?

14 A Yes, sir

15 Q Did you discuss the appellate brief with your
16 appellate counsel?

17 A I'm saying, you know, we write it in letters So, I
18 guess

19 Q But you did communicate with that attorney?

20 A Yes, sir

21 Q And it's your position that you communicated other
22 potential reasons for appeal to that attorney?

23 A Yes, sir

24 Q And no brief was filed on those issues?

25 A No, sir

Lamar Graves - Direct examination
by Mr Neal

1 Q And you believe that constitutes the ineffective
2 assistance of appellate counsel?

3 A Yes, sir

4 Q Was your appeal denied?

5 A Yes, sir

6 Q Specifically you're saying the issues with the jury
7 and the way the jury was impaneled?

8 A Specifically I'm saying it wasn't in there It's not
9 in the transcript where they picked out the jury impaneling
10 it It's not in my transcript

11 So, how would my lawyer be able to go ahead with my,
12 my appeal and that thing going on?

13 How could they go on with it when it's a piece missing
14 out of the transcript, and that's what I showed you on
15 Transcript Page 119, Lines 4?

16 Q Are there any other reasons that we haven't covered
17 that you should be granted PCR?

18 A Yes, I'm thinking -- I don't know how to say this
19 right, but I'm gonna say it by saying it right The
20 peoples that's in the back of the transcript, it's not,
21 it's not, it's not in there where they strike them out
22 It's not in the -- the voir dire, the peoples that's in the
23 voir dire on Transcript Page 444 and 445, they are not the
24 people who was picked out It's, it's a whole piece
25 missing out in the back in the jury qualification I think

Lamar Graves - Direct examination
by Mr Neal

1 it's only two people on there

2 Q So, you believe that's an error and that you should be
3 granted a new trial based on that fact?

4 A Yes, sir

5 Q Do you have anything else that we haven't covered?

6 A Could I ask you a question real quick?

7 Q I don't believe you can

8 A Okay well, I have one to ask you But I think, I
9 think you already said about the identification

10 So, could I get my, my transcript, my transcript?

11 (Pause)

12 A I just wanted to see if this was anything SC, SC
13 Code Ann 7-15-30

14 Q Are you, are you looking at the transcript right now?

15 A Yes -- no No, I'm not It's a piece of paper

16 Q All right

17 A Do you want me to go ahead and speak?

18 Q Yes

19 A It states if there's a victim involved who has
20 appeared at bond hearings make note of it because this may
21 affect the credibility and later identification of the
22 client as the perpetrator I'm saying I think my, was also
23 ineffective for not bringing it to the Court's attention

24 Q Okay So, the, the alleged victims appeared at your
25 bond hearing?

Lamar Graves - Direct examination
by Mr Neal

1 A Yes, sir

2 Q And that was not addressed at your trial?

3 A No, sir

4 Q And you believe that's ineffective assistance of
5 counsel?

6 A Yes, I'm asking, yes, sir

7 Q All right Do you have anything else that we haven't
8 covered?

9 A I would like to just present what I have on paper
10 cause I don't know if you actually did it, but like on --
11 well, like, just presented it as was counsel ineffective
12 for not asking for a motion for change of venue

13 Q We've already covered that, haven't we?

14 A I think so That's what I wanted to ask I just
15 wanted to make sure

16 MR NEAL I don't think I have any more questions,
17 Your Honor

18 THE COURT Yes, ma'am

19 MS WHITE Thank you, Your Honor

20 CROSS-EXAMINATION

21 BY MS WHITE

22 Q Mr Graves, Mrs Hodges represented you on this case
23 for a while, didn't she?

24 A No, sir I mean no, ma'am, it was someone else
25 appointed to me, and then she was appointed to me

Lamar Graves - Cross-examination
by Ms White

1 Q Okay Somebody in the Public Defender's Office?

2 A Yes, sir I mean yes, ma'am

3 Q So, they had represented you the whole time?

4 A Yes And then like when it was time to go, they got
5 out of my case and then I -- yes, ma'am

6 Q Okay Now, during the trial we talked a lot about the
7 identification issue cause obviously that was a big part of
8 the trial, right?

9 A Yes, ma'am

10 Q And Mrs Hodges actually filed a motion and they had a
11 pretrial hearing trying to get all of the identification
12 dealing with the photo lineup out and not present it to the
13 jury, is that right?

14 A Yes, ma'am

15 Q So, all the, all the pretrial hearings about where
16 they had people testify about identifying you and about the
17 lineup, she had filed a motion and, and argued that with
18 the Court, is that right?

19 A Yes, ma'am, but I don't think it was argued right

20 Q So, your, your allegation here is she should of argued
21 it a different way---

22 A Yes

23 Q ---but she did do some arguments on that?

24 Now, she also argued, at one point, to suppress
25 out-of-court and in-court identifications, right?

Lamar Graves - Cross-examination
by Ms White

1 She wanted to make sure they couldn't point you out
2 during the trial in the courtroom

3 Do you recall that?

4 A In-court identification of me

5 Q Okay And she also several times renewed her
6 objections to the photo lineup during the trial

7 Do you remember that?

8 A why -- say that one more time

9 Q She would, she would object to it, and then if the
10 judge overruled her, she would renew her objections and
11 she, she continued to argue that the identification and the
12 lineup should not be presented to the jury?

13 A She tried She tried, but the judge was not---

14 Q He overruled her, right?

15 A Yes

16 Q Okay Now, there were several witnesses I think we
17 had Troy Fisher, Milton Drummond, Reginald Davis, Stephanie
18 Petty, Demario Mack, and Willie Rice, is that right?

19 About five or six people?

20 A Yes, sir I mean yes, ma'am

21 Q Okay Now, she, she asked them all questions, right?
22 She cross-examined all of those folks?

23 A As far as to my knowledge

24 Q Okay So, while -- once, once they made their
25 statement, she would get up there and ask them questions

Lamar Graves - Cross-examination
by Ms White

1 afterwards trying to either attack their credibility or, or
2 get them to say something different?

3 A As far as to my knowledge I think she did

4 Q Okay And, in fact, I think we talked about Willie
5 Rice having some issues He had some previous convictions,
6 didn't he?

7 A Yes, and about him lying

8 Q Okay And she brought that out in front of the jury,
9 right?

10 A I think as far as I -- I think so

11 Q You think so?

12 A I think so

13 Q And I'm gonna refer to Page 361 of the transcript
14 This is during this -- and I can bring it up and, and show
15 it to you This is just during the transcript when she was
16 cross-examining Willie Rice, and she even got him to say
17 Lamar didn't have a shotgun with him, and he said "oh, he
18 definitely had -- he didn't definitely have a gun when he
19 was in my car, no And, so, he said you never saw Lamar
20 with a shotgun that night, did you? Never, never
21 obviously "

22 So, Mr Rice, during her cross-examination, admitted
23 that you never had a shotgun, is that right?

24 A Yes, but I think in the transcript he also said yes, I
25 did it

Lamar Graves - Cross-examination
by MS White

1 Q So, so, at one point he said you did---

2 A Yes

3 Q ---and at one point -- but, but she got him to show
4 that he was giving two different stories?

5 A Yes

6 Q Okay Now, in addition to arguing the issues about
7 the identification, I think y'all talked about that Demario
8 Mack, in pretrial they said he wasn't gonna be able to
9 identify you, right, but then later during his testimony he
10 did identify you?

11 A Yes, ma'am

12 Q Now, I believe you and your attorney talked about a
13 couple of places or a place that he didn't, or excuse me,
14 your attorney did not object to the identification, and if
15 you'll just follow along with me, page 294 of the
16 transcript, and see it says Demario Mack direct
17 examination And it says "can you pick anyone out in the
18 courtroom today as being the gunman " And when he says
19 "yes" Mrs Hodges says "objection, Your Honor", and it was
20 overruled---

21 A Yeah

22 Q ---right?

23 And then a page or two later, on 301, he says what,
24 "whose picture is in that lineup" and Mr Mack says "Lamar
25 Graves" and Mrs Hodges says "objection, Your Honor" and

Lamar Graves - Cross-examination
by Ms White

1 then the Court overrules her again, is that right?

2 She objected to when he identified you in the lineup?

3 A Yes

4 Q Okay So, she made several objections when Demario
5 Mack identified you in the courtroom that day, didn't she?

6 A She made a couple

7 Q Yeah

8 Now, in regards to Troy Fisher, you've testified today
9 that you think your case was prejudiced because the jury
10 knew that his father was public safety director?

11 A She -- yes

12 Q Okay Now, did you ever discuss with Mrs Hodges a
13 strategy about letting the jury know that that was his
14 father?

15 A I asked for a change of venue

16 Q You asked for a change of venue---

17 A Yes

18 Q ---didn't you?

19 A Yes

20 Q Did you ever talk with her about a strategy of letting
21 the jury know that his father was Tony Fisher?

22 A She told me I was going to help her pick the jury I
23 never did That's why I don't never see it in my
24 transcript where I was asking them about the jury panel I
25 asked her, I asked her about that I was like I thought we

Lamar Graves - Cross-examination
by Ms White

1 was gonna pick the jury as I was told from her, but I
2 didn't, I didn't do none of that

3 Q Okay Let me try to rephrase my question when
4 Tony -- when Troy Fisher was testifying originally, and
5 during -- and y'all -- Mrs Hodges brought up the fact that
6 his dad was the director of Public Safety for the city

7 Had you ever talked with her previously about
8 before -- you know, during the time when y'all were talking
9 about trial strategy and, and what your defenses were, had
10 y'all talked about bringing that up in front of the jury
11 for a strategy?

12 Do you recall?

13 A No, I don't At the, at the point I didn't even know
14 of him until it was said in there about him being the
15 father, I mean the police---

16 Q So---

17 A ---chief of police, no

18 Q So, you didn't know who Tony Fisher---

19 A No, till I, till I---

20 Q ---that his---

21 A I read it in my transcript

22 Q So, you didn't know, until the day of the trial, that
23 his dad was Tony Fisher?

24 A When it, when it was present in my transcript

25 Q Okay Now, in regards to closing arguments, you've

Lamar Graves - Cross-examination
by Ms White

1 testified a couple of times that you think the prosecutor
2 vouched for the witnesses by talking about Mr Fisher and
3 him coming down from Maryland and other things, right?

4 I think y'all talked about his education and---

5 A Yes, ma'am, 389, Lines 10 through 25, yes, ma'am

6 Q There were a couple of places y'all talked about that
7 Now, you think that the identification of, of Troy
8 Fisher, you think that was a key part of your trial?

9 A Yes, ma'am

10 Q Okay And did he have a real clear identification of
11 you?

12 A As it was in my transcript it was said

13 Q Okay Did Mrs Hodges try to argue or, or
14 cross-examine him on the fact that his identification of
15 you -- I think originally he had identified someone else as
16 being someone that came in the house, is that right?

17 Do you recall him, them talking about him identifying
18 an Antwan Smith originally?

19 A I believe I know Demario Mack and them did

20 Q Okay

21 A I'd have to look

22 Q Okay well, and that's just -- there were some
23 questions as to the identification of you because they had
24 actually named someone else previously?

25 A Yes

Lamar Graves - Cross-examination
by Ms White

1 Q Right?

2 A Yeah

3 Q And she, she argued that fact and brought that up
4 before the jury, the fact that they had first said it was
5 somebody else and then said you?

6 A I noticed on, on some, some victim identification she
7 did

8 MS WHITE Okay That's all the questions I have at
9 this time, Your Honor

10 THE COURT Any redirect limited to what she went
11 into?

12 MR NEAL Yes, Your Honor

13 REDIRECT EXAMINATION

14 BY MR NEAL

15 Q Your attorney did make several objections, didn't
16 she---

17 A Yes, sir

18 Q ---to the identification testimony?

19 A Yes, sir

20 Q But at the end of that pretrial hearing she limited
21 her objection to excluding the, the testimony because it
22 was inherently unreliable

23 Is that your understanding?

24 A Yes, sir

25 Q But the police had everybody assemble at or took the

Lamar Graves - Redirect examination
by Mr Neal

1 identifications at a home?

2 A Yes, sir

3 Q And you believe while the police were there that the
4 witnesses had a chance to overhear the identifications and
5 to talk amongst themselves, is that correct?

6 A Yes, sir

7 Q And you believe that the police were in a position to
8 prevent people from doing that, is that correct?

9 A Yes, sir

10 Q we've talked about the people who've identified you,
11 Troy Fisher, Demario Mack, and Willie Rice, is that
12 correct?

13 A Yes, sir

14 Q And we've gone into Demario Mack was not certain He,
15 during both the trial and the pretrial hearing, he kind of
16 hemmed and hawed, is that correct?

17 A Yes, sir

18 Q So, you believe he had some credibility issues?

19 A Yes, sir

20 Q we also talked about Troy Fisher
21 He has an extensive criminal history, doesn't he?

22 A Yes, sir

23 Q So, you believe he has some credibility issues?

24 A Yes, sir

25 Q So, if the identification of Mr Fisher is excluded,

Lamar Graves - Redirect examination
by Mr Neal

1 do you believe it could potentially effect the outcome of
2 your trial?

3 A Yes, sir

4 Q And it's your position that your attorney did not
5 state the correct basis for her objection?

6 A Yes, sir

7 Q And it's your position that you did -- the day of the
8 trial you were not aware that Mr Fisher was the son of the
9 Department of Public Safety?

10 A No, I wasn't aware until it was said in the, in the
11 transcript

12 MR NEAL I have no further questions, Your Honor

13 MS WHITE Nothing further, Your Honor

14 THE COURT Thank you, sir You may step down

15 WITNESS I would like to ask one question before I
16 step down It was like -- we talked about the
17 identification, right, and the error, but I never did tell,
18 I'm saying, make sure this was on the record about the
19 pages where it was all done at

20 THE COURT I tell you what

21 Any objection to just taking the documents he has in
22 his hands and making it an exhibit to the record?

23 WITNESS No objection, Your Honor

24 MR NEAL None, Your Honor

25 WITNESS I can go?

Lamar Graves - Redirect examination
by Mr Neal

1 THE COURT Give it to your lawyer and he will admit
2 it into evidence

3 MR NEAL Shall we do this as one?

4 THE COURT Do you want to show it to the State and
5 see if she has any objection?

6 MS WHITE No objections, Your Honor

7 THE COURT Without objection, it can be Applicant's
8 1 Thank you, sir You can step down

9 (whereupon, the document was marked as Applicant's
10 Exhibit No 1 and received into evidence at this time)

11 THE COURT The Applicant have any other witnesses to
12 call?

13 MR NEAL Your Honor, we would like to call
14 Mrs Hodges

15 THE COURT Come on around, ma'am

16 KATHLEEN HODGES, having been first
17 duly sworn, testified as follows

18 DIRECT EXAMINATION

19 BY MR NEAL

20 Q Please state your name for the record

21 A My name is Kathleen Johnson Hodges

22 Q And you represented Lamar Graves during this trial?

23 A That's correct

24 Q Let's start with the different witnesses that were
25 called

Kathleen Hodges - Direct examination
by Mr Neal

1 During the pretrial hearing, the first witness was
2 Troy Fisher, is that correct?

3 A That's correct

4 Q And he ID'd Lamar Graves as the gunman?

5 A That's true

6 Q Milton Drummond was unable to ID Lamar Graves, is that
7 correct?

8 A That's my recollection, yes, sir

9 Q Reginald Davis was unable to identification, identify
10 Mr Hodges or Mr Graves?

11 A That's correct

12 Q Demario Mack, during this hearing, did not -- it
13 wasn't sure with Lamar Graves?

14 A That's correct

15 Q Willie James Rice says he knows Lamar Graves, is that
16 correct?

17 A That's correct

18 Q And there were, there were quite a few other David
19 Cockrell, he's the investigator, but he wasn't necessarily
20 there for identifying anybody?

21 A That is correct

22 Q He just---

23 A I guess he either just put the lineup together and
24 then, and then showed the lineups to the individual
25 witnesses

Kathleen Hodges - Direct examination
by Mr Neal

1 Q Okay During the trial there were quite a few
2 witnesses We've talked about Troy Fisher, Milton
3 Drummond, Reginald Davis, and Stephanie Petty, Demario
4 Mack, and I believe the last witness was William Rice?

5 A That's correct

6 Q During the trial, the ones that identified Mr Graves
7 were Troy Fisher, Demario Mack, and Mr Rice?

8 A That's correct

9 Q Why were the other witnesses called during the trial?

10 A Well, the other witnesses would have been called, I
11 presume, for the State to be able to establish the other
12 elements of the crime of armed robbery in terms of the
13 property that was taken

14 Q So, whether an armed robbery occurred was not
15 necessarily a, a major issue for your case?

16 A No, I, I think it was pretty much a foregone
17 conclusion that an armed robbery occurred The question
18 was who was involved in the armed robbery

19 Q And if you could get some of this identification
20 testimony excluded it would potentially effect the outcome
21 of the trial?

22 A It certainly would of helped the outcome of the trial
23 if we could have excluded the identification of Mr Graves,
24 Lamar Graves as the actual gunman, which is what the, some
25 of the State's witnesses were saying

Kathleen Hodges - Direct examination
by Mr Neal

1 Q Do you live here in Spartanburg?

2 A I do not

3 Q Troy Fisher's father, would you say he's a well known
4 figure?

5 A Director Fisher is well known in Spartanburg, yes,
6 sir

7 Q He's the director of the Spartanburg City Department
8 of Public Safety?

9 A That's correct The Department of Public Safety
10 comprises both the police department as well as the fire
11 department for the City of Spartanburg

12 Q And that issue or that fact did come out during the
13 trial?

14 A Yes, sir, it did

15 Q Now, during voir dire the judge asked numerous
16 questions of the potential jurors?

17 A Yes, he did

18 Q Were any questions about Mr Fisher asked?

19 A Which Mr Fisher, Troy Fisher?

20 Q The director of the Department of Public Safety

21 A No, there were no questions asked specifically
22 regarding the director of the Public Safety as to whether
23 anybody knew Director Fisher I honestly do not remember
24 whether I even knew that Troy Fisher was Director Fisher's
25 son until the pretrial testimony in terms of the

Kathleen Hodges - Direct examination
by Mr Neal

1 identification issues I honestly just don't remember
2 whether I knew that the day of trial or prior to trial
3 Judge Cole did voir dire each of the individual jurors
4 as to whether they knew any of the witnesses in the case
5 There were several jurors that did know witnesses in the
6 case Milton Drummond, Reginald Davis were the two that I
7 had noted in my notes Nobody indicated that they knew
8 Troy Fisher or that their opinion of the case or their
9 ability to serve as an impartial juror would be effected by
10 Troy Fisher if he testified But there were no questions
11 as to whether anybody knew Director Tony Fisher, and if his
12 son testified, if it would affect their ability to, to be
13 fair and impartial

14 Q So, at that point I believe -- Tony Fisher was not
15 brought into the courtroom, was he?

16 A I don't remember seeing Director Fisher in the
17 courtroom, no, sir

18 Q No, I mean---

19 A Troy Fisher, I believe Troy Fisher -- I don't have a
20 good recollection as to whether Troy Fisher was present
21 during the voir dire or not I presume that he was there
22 because we already had the pretrial hearing prior to the
23 jury qualification and jury selection So, I presume that
24 Troy Fisher was in the courtroom because that's standard
25 practice for the solicitor's office to have their witnesses

Kathleen Hodges - Direct examination
by Mr Neal

1 there, if available, for the jury to view them so that they
2 can see, not only by name, but by face if they know
3 somebody

4 Q Now, Director Fisher is a public figure?

5 A Yes

6 Q Well, a potential juror could be aware of who he is
7 because he's a public figure?

8 A Correct

9 Q And not know who his son is?

10 A Absolutely

11 Q Do you believe that, once a potential juror finds that
12 fact out, it could affect their judgment?

13 A I suppose it could You know, I don't know of any way
14 of being able to measure to what extent it would or could

15 Q Well, I mean we don't know to what extent a person's
16 relationship to a police officer or giving to the Trooper's
17 Association could affect their judgment

18 A No, that's true But we do ask those questions to
19 ensure that if somebody does, so we can make a decision as
20 to whether, given all the circumstances that we also know
21 about a juror, whether that's somebody, you know, that we
22 want to serve on a jury or not

23 Q And, so, those questions about Director Fisher were
24 never asked?

25 A They were not

Kathleen Hodges - Direct examination
by Mr Neal

1 Q So, we, we don't know to what extent, but it could of
2 had an impact on a potential, a potential juror's judgment?

3 A It could have

4 Q Okay You did not ask for a venue change?

5 A No, I did not

6 Q And there were no questions during voir dire?

7 The issue never came up during voir dire of Director
8 Fisher?

9 A No, it did not

10 Q Potentially, if you had asked for a venue change, the
11 issues of---

12 MS WHITE Your Honor, I would object to speculation
13 she doesn't know what, what would have happened had she
14 asked for a venue change

15 THE COURT All right Do you want to just rephrase
16 the question then?

17 Q During your experience, the two times for that issue
18 to be taken, to, for that issue to be addressed would be a
19 venue change or during voir dire?

20 A Yes, although, quite frankly, the, the only time that
21 I think a change of venue would of been appropriate is had
22 something occurred during voir dire that indicated that
23 jurors would of been swayed This case did not get a lot
24 of publicity at the time that, that it happened to my
25 knowledge I was not the original attorney assigned to the

Kathleen Hodges - Direct examination
by Mr Neal

1 case I adopted the case when that attorney left the
2 Public Defender's Office and I assumed his case load

3 But there was no indication in the file given any sort
4 of press that had already been heard I, quite frankly,
5 don't think just because Director Fisher was or his son was
6 involved as a witness in this case would necessarily have
7 been sufficient grounds for say a change in venue We
8 don't know the answer to that question because that
9 question wasn't asked But I have been involved in change
10 in venue motions in several cases, including death penalty
11 cases, that did garner a great deal of publicity, and, you
12 know, venue was not, the change of venue was not granted

13 Q So, in your experience, you have your dire If the
14 issues are raised, they become, become a concern, then a
15 request for venue change would be addressed?

16 A That's correct

17 Q Okay But the questions were never asked in your
18 dire?

19 A No, they were not

20 Q You had sufficient time to prepare for this case?

21 A Yes, I did

22 Q And you had an opportunity to assess the, the
23 witnesses that, that ID'd Lamar Graves?

24 A Yes

25 Q Mr Rice had some, a criminal background?

Kathleen Hodges - Direct examination
by Mr Neal

1 A Yes, he did

2 Q Demario Mack, as we've discussed, hemmed and hawed
3 about whether he could identify Lamar Graves?

4 A Yes, that's correct

5 Q So, in your opinion, Troy Fisher was the most credible
6 witness?

7 A He was the most credible witness and he was the
8 witness that had the, presented as giving the strongest
9 identification of Mr Lamar Graves as the gunman in that
10 particular incident

11 Q And he's the witness that's also director, related to
12 the director of Public Safety?

13 A He is

14 Q During -- let's move on to just identification in
15 general

16 You filed a motion for a suppression hearing?

17 A That's correct

18 Q What was the basis for your motion?

19 A The basis for the motion is that the identifications
20 were not essentially strong enough in terms of out-of-court
21 identifications My concern was, is that, as during the,
22 the -- number one, just in reviewing the voir dire, it was
23 clear that an Antwan Smith had been originally identified
24 as the person that they felt was the gunman They, being
25 the witnesses, felt was the gunman involved in this

Kathleen Hodges - Direct examination
by Mr Neal

1 particular incident Then a second lineup is done several
2 days later that witnesses then identified Lamar Graves as
3 the gunman

4 My concern was that there may have been some concerns
5 in terms of whether the witnesses had talked to each other,
6 whether they had been influenced, influenced prior to
7 making those identifications as to whether those
8 identifications were then reliable And, so, that was the
9 basis of the motion I was not concerned with the physical
10 creation, if you will, of the lineups in terms of the six
11 people that were in each of the lineups I didn't find
12 that those lineups, in and of much themselves, were unduly
13 prejudicial or, were designed in a particular way in order
14 to be improper in terms of influencing the identification

15 But I was concerned about whether the witnesses were
16 going to be able to clearly identify, at the time that they
17 made the pretrial identifications, as well as in-court
18 identifications, and whether those in-court identifications
19 were gonna be affected by any sort of pretrial procedure
20 I did it as a matter of course because this was essentially
21 all the evidence that the state had against Lamar Graves
22 was identifications, and if we could get them suppressed,
23 that would make the case, the state's case much weaker

24 Q Let's start with the actual picture lineups Several
25 of the witnesses came to the sheriff's -- Lamar Graves was

Kathleen Hodges - Direct examination
by Mr Neal

1 not identified that first night?

2 A He was not

3 Q Several of the witnesses came to the Sheriff's Office
4 about three days later and reviewed a picture lineup?

5 A That's correct

6 Q Those were six different pictures on a page?

7 A That's correct

8 Q Have you seen and reviewed those picture lineups?

9 A Yes, sir

10 Q The picture lineup that was showed to each individual
11 potential witness, were they the same?

12 A Yes, they are each shown the same lineup

13 Q So, in each position or each one Lamar Graves I
14 believe is in the top right corner?

15 A I don't remember if he's in the top right corner or
16 bottom left I mean the, the, the three different lineups
17 are there, are different, but he's a, he's in the --
18 each -- he's -- they are each given the same copy of the
19 same lineup So, yes

20 Q Okay So, he's in the same position on every one?

21 A Same position in every one

22 Q It just basically looks like a photocopy?

23 A Right

24 Q And there's potential for or -- based on the
25 identification of Antwan Smith, you explored the issue of

Kathleen Hodges - Direct examination
by Mr Neal

1 whether the witnesses had discussed these between each
2 other?

3 A Yes, sir

4 Q But the objection you raised, ended up raising was not
5 that the police had done something wrong in presenting the,
6 the lineups, but that the witnesses had discussed it
7 between themselves and it was therefore unreliable?

8 A Right I still don't believe that necessarily the
9 police did something wrong

10 Q Okay The night of the incident that took place, you,
11 you questioned Detective Cockrell about the procedures she
12 used?

13 A Right

14 Q where the identification took place?

15 A Right

16 Q And this was at -- everyone was together, is that
17 correct?

18 A I don't know if everyone was together The, the
19 testimony was kind of muddled as to whether everyone was
20 together or whether everyone was separate

21 Q But the police were present and you did ask the
22 questions about whether they kept everyone separate and
23 told them not to discuss that?

24 A Right

25 Q Did you ask questions about how far the -- were the

Kathleen Hodges - Direct examination
by Mr Neal

1 identifications made in the kitchen of this home?

2 A Again, some people say that it was made in the
3 kitchen Some people say it was made in the dining room
4 It's, it's, you know, depending on the witness' perspective
5 and their memory, you know, the testimony is, varies

6 Q Okay Once that identifications were made, did the
7 potential, did the potential -- let's put it this way

8 To your knowledge -- you asked, you asked Detective
9 Cockrell what he did or what he told the people to do after
10 the identifications were made?

11 A Right

12 Q And you don't know -- we don't know what happened?

13 A No, we don't know what happened

14 Q You don't know whether they were within earshot, you
15 don't know where people were, things like that?

16 A No, I don't The one thing that, that gave me concern
17 then and still gives me concern now, in reading the
18 transcript, is the testimony -- and I do not remember which
19 witness testified as to this, but essentially one witness
20 testifies about the fact that the reason why he made an
21 identification of Antwan Smith is because he figured that
22 Troy got it right These guys knew each other They
23 played football together in school

24 The implication and inference was given that there had
25 been some discussion and that's what we tried to explore

Kathleen Hodges - Direct examination
by Mr Neal

1 and that's the reason why we felt that the identification,
2 not necessarily the process in terms of what the police did
3 and their procedures that they utilized, but the process by
4 which the witnesses talked amongst themselves That was
5 the concern and that's what was inherently unreliable and
6 that's why we felt that the pretrial identifications, and,
7 therefore, in-court identification should have been
8 suppressed I don't think I articulated that as, as
9 clearly in the record as I hope I'm doing a better job of
10 today But, but that was our concern

11 Q Okay And the record shows that at the end of this
12 hearing you had a, an exchange, discussion with Judge Cole?

13 A Yes, sir

14 Q And he kind of pressured, pressed you on the issue of
15 you're not objecting to the procedures used by the police?

16 A That's correct

17 Q So, you dropped that basis of your objection?

18 A Yes

19 Q And only proceeded on the issue of the unreliability
20 based on the discussion between the parties?

21 A That's correct

22 Q Okay So, when you're renewing that objection during
23 trial, you're renewing the objection based on the
24 unreliability because of the discussion between the
25 parties?

Kathleen Hodges - Direct examination
by Mr Neal

1 A Right

2 Q You're not objecting based on the other grounds of the
3 procedures, the police procedures?

4 A Correct

5 Q How long have you practiced as an attorney?

6 A I have been an attorney almost 16 years

7 Q How long have you worked for the Public Defender's
8 Office?

9 A I worked for the Public Defender's Office since
10 February of 2005

11 Q So, you're familiar with the issues surrounding
12 voucher?

13 A Yes, I am

14 Q Did you -- you did not object during the closing
15 arguments?

16 A I did not

17 Q Okay Now, as we have seen in the record on a couple,
18 a couple of occasions, the solicitor, during his closing
19 argument, said nobody is testifying that he wasn't there

20 A That's true

21 Q But you did not believe that rose to the level of
22 voucher?

23 A I don't believe that that rose to the level of
24 voucher, no I think that the closing argument that the
25 solicitor has some lead-way and an attorney has some

Kathleen Hodges - Direct examination
by Mr Neal

1 lead-way in terms of arguing the inferences from the
2 testimony, and nobody -- there, there was no testimony and
3 no witness to say that Lamar Graves wasn't there Nobody
4 said positively I know for a fact that Lamar Graves wasn't
5 there The closest you come to that were the witnesses
6 that said we couldn't see the person that was wearing the
7 hoody and holding the gun, we're not sure who that was

8 Q Are you familiar with the issues that Mr Graves
9 raised about the golden rule?

10 A I am familiar with that issue

11 Q And you didn't raise any objections during the closing
12 arguments to anything concerning a golden rule?

13 A I did not The passage that he, he pointed out as
14 being violative of the golden rule I didn't interpret as
15 being, being that way I interpreted that portion of the
16 solicitor's argument as talking about the force and that
17 was used in terms of, of, and essentially arguing an
18 element of the armed robbery in terms of taking, taking
19 property from either the person or immediate presence of
20 another by use of force

21 Q Let me go back to the voucher issue real quick

22 This other passage, why would Mr Fisher travel back
23 from Maryland, no, he wouldn't, he's a smart guy, he's an
24 educated guy, does that, does that not seem like an issue
25 of voucher?

Kathleen Hodges - Direct examination
by Mr Neal

1 A That probably is an issue of voucher and probably
2 should of been objected to

3 Q And you did not object?

4 A And I did not object to that

5 Q And as we've discussed, Mr Fisher is probably their
6 most credible witness in your opinion?

7 A True

8 Q And in this, in this passage, the solicitor's vouching
9 for probably their most credible witness?

10 A He's -- I think he's arguing some extraneous facts and
11 things that, that aren't in the record, that aren't, have
12 not been testified to, and probably, it probably is beyond
13 the scope of relevant argument and probably is an arbitrary
14 issue that -- and, again, in retrospect and in experience,
15 probably, I probably would of objected to it

16 MR NEAL No further questions, Your Honor

17 MS WHITE Thank you, Your Honor

18 CROSS-EXAMINATION

19 BY MS WHITE

20 Q Mrs Hodges, did Lamar Graves ask you to file a motion
21 of venue?

22 A I don't remember him specifically asking me to file a
23 motion to change venue However, even if he had, I didn't
24 feel that there were sufficient facts to, to, to warrant
25 filing a change in venue motion Even throughout the

Kathleen Hodges - Cross-examination
by Ms White

1 course of voir dire I didn't get the impression that, that
2 we could not impanel a jury that, that would be fair and
3 impartial

4 Q And you testified today and I think Mr Graves
5 testified that you didn't even know that Troy Fisher was
6 Tony Fisher's son until pretrial?

7 A Yeah, I cannot remember at what, what point we learned
8 that information So, I, I, I have a, a sense of, of, of a
9 memory of being kind of surprised to find out that he was
10 Director Fisher's son, but I, I don't -- honestly I don't
11 remember when we knew that information

12 Q In regards to the arguments having to do with the, the
13 lineup, you, you did make a pretty substantial argument
14 against allowing the identification of, of Mr Graves in?

15 A I did

16 Q And did you feel like you had done enough research in
17 preparation for that argument?

18 A I thought I had

19 Q And ultimately you were overruled or ruled against by
20 the judge?

21 A The judge saw it differently than I did

22 Q And each objection you made after that, did you win
23 any of those objections?

24 A Unfortunately not

25 Q So, all the identifications of all of the witnesses of

Kathleen Hodges - Cross-examination
by Ms White

1 Mr Graves ultimately came in?

2 A That's correct

3 Q Okay Now, in regards to the procedures and lineups
4 at the house or, excuse me, they've mentioned the house
5 originally, was that where people saw the lineup and where
6 people made identifications of Mr Graves?

7 A Yeah, it was kind of, kind of muddled, but, but one of
8 the problems in this case is they're actually two Mr
9 Graves, Mr Lamar Graves, who is here today, as well as
10 Mr Roseman Graves, who was identified the night of the
11 incident The incident happened at Whispering Pines
12 Apartments, and the victims in this case, witnesses in this
13 case left Whispering Pines Apartments and actually went to
14 another person's, mother's house, and that's where police
15 actually came into contact with the witnesses, started
16 taking witness statement as, as well as I think conducted
17 the first two lineups One from which Roseman Graves was
18 identified by, by several of the witnesses, and the other
19 one of which Antwan Smith was identified

20 Three days later Detective Cockrell calls witnesses
21 back into the Sheriff's Office, and has people look at a
22 third lineup, and it's from that third lineup witness' are
23 then identifying Lamar Graves It's unclear, both from the
24 testimony of Detective Cockrell as well as these other
25 witnesses, exactly where people were at the witness'

Kathleen Hodges - Cross-examination
by Ms White

1 mother's home, and I think it was Mr Davis' mother where
2 they all were at her home when the interviews and lineups
3 were conducted

4 Q I want to backtrack just a minute back to Troy Fisher
5 You did bring up to the jury that he was Tony Fisher's
6 son at some point in the questioning?

7 A Yes, I did

8 Q Was there a strategy or purpose behind that?

9 A Absolutely Tony, Troy Fisher, for someone who is,
10 claims to have been exceedingly traumatized by the event
11 and based on his demeanor on the witness stand, came across
12 as somebody that that, you know, should have paid more
13 attention to detail based on both the way he came across,
14 his demeanor, as well as his profession, as well as his
15 experience in law enforcement just by virtue of living
16 with, you know, director of Public Safety his dad being a
17 law enforcement officer, it seemed to me that, that those
18 were issues that were ripe for cross-examination and issues
19 to try and impact his credibility in front of the jury
20 You know, again, unfortunately the jury saw it differently
21 Q Okay In regards to the impaneling of the jury as
22 well, no questions were asked about Tony Fisher, is that
23 standards -- do you generally ask questions about witnesses
24 solely?

25 Do you generally ask questions about parents of

Kathleen Hodges - Cross-examination
by Ms White

1 witnesses?

2 How does that generally work?

3 A Ordinarily the, the question is, is asked of the, of
4 the jury pool as a whole if they know any of the witnesses
5 that are involved in the case, are they related to them by
6 blood or marriage, do they have any sort of professional or
7 personal relationship with them such to the extent that,
8 you know, that they cannot be a fair and impartial juror

9 Q Okay

10 A Ordinarily, you know, whether somebody's parents are a
11 public figure or not, you know, I don't know if I've ever
12 had a case like that where that was, you know, an, an
13 issue In retrospect, could we have asked the question,
14 perhaps I think the question was asked does anybody have
15 any relationship to law enforcement or know anybody in law
16 enforcement There were some responses to those questions
17 I did not get the sense from that, the, the fact that Troy
18 Fisher being Tony Fisher's son and a witness and
19 testifying, was gonna be an issue that would not give us an
20 impartial jury

21 Q Did you think there was anything to object to in
22 regards to the make-up of the jury?

23 Mr Graves testified that they were all white except
24 for one

25 A That's true In looking at the jury lists in terms of

Kathleen Hodges - Cross-examination
by Ms White

1 the folks that were actually called as randomly selected
2 from, from the jury pool, there was only one
3 African-American that was actually called as a potential
4 juror from the, you know, once you're doing the random
5 selection, and, so -- I mean and that, that was something
6 we had absolutely no control over

7 MS WHITE One moment, please, Your Honor

8 (Pause)

9 MS WHITE That's all I have at this time

10 THE COURT Any redirect limited to what she went
11 into?

12 MR NEAL Very briefly, Your Honor

13 REDIRECT EXAMINATION

14 BY MR NEAL

15 Q Before trial, how long did you have this case?

16 A I assumed Mr Brough's case load at the end of October
17 of 2005

18 Q So---

19 A So---

20 Q ---about three or four months?

21 A Three or four months

22 Q when did you learn that Troy Fisher was related to
23 Director Fisher?

24 A I honestly don't remember

25 Q But you were surprised to find out that fact?

Kathleen Hodges - Redirect examination
by Mr Neal

1 A I was

2 Q And you've, in reviewing the file, you saw the name
3 Troy Fisher over and over?

4 A Sure

5 Q But you didn't know that until it was told to you?

6 A Correct I'm not from Spartanburg

7 Q Okay where are you from?

8 A Originally or currently?

9 Q Currently

10 A Anderson

11 Q And you've testified that you, you worked for the
12 Public Defender's Office for quite a while?

13 A Since February of 2000 -- well, the end of January of
14 2005

15 Q Where did you work before that?

16 A The Anderson solicitor's office

17 Q So, you've handled numerous criminal trials?

18 A I've been a criminal attorney either for the
19 prosecution, the Attorney General's Office, or the public
20 defender all 16 years

21 Q So, was it your testimony that you've never, before
22 today, have had a trial where a witness was related to a
23 public figure like this?

24 A I can't remember one

25 Q Okay So, the judge did say Troy Fisher's name during

Kathleen Hodges - Redirect examination
by Mr Neal

1 your dire?

2 A Yes, sir

3 Q But you -- and you're telling us when you learned it
4 you were surprised?

5 MS WHITE Your Honor, I think we've asked and
6 answered that question several times

7 THE COURT All right I'll let her answer it one
8 more time and we'll move on

9 WITNESS I was surprised

10 MR NEAL No further questions, Your Honor

11 THE COURT Thank you

12 MS WHITE Nothing further from the State

13 THE COURT Thank you, ma'am You may step down

14 WITNESS Thank you, sir

15 THE COURT Does the applicant have any other
16 witnesses?

17 MR NEAL No, Your Honor That's our case

18 THE COURT Does the State intend to call any other
19 witnesses?

20 MS WHITE No, Your Honor

21 THE COURT I will take a look at it

22 Mr Neal, do you mind if I ask your client a question
23 about the procedures?

24 MR NEAL Absolutely not

25 THE COURT Mr Graves, I need for you to stand up I

1 need to remind you that you remain under oath

2 Now, Mr Graves, in the event -- what I'm gonna do is
3 I'm gonna take a look at everything and consider the
4 testimony In the event that I am, I believe that you have
5 met your burden of proof today, I -- and I ask this of
6 everybody that comes in front of me

7 You do understand that I cannot -- this would not be a
8 vindication of your innocence of the charges against you,
9 and that all I could do is basically send it back to
10 basically go to start over again?

11 Do you understand that?

12 THE APPLICANT Yes, sir

13 THE COURT And, sir, you understand that if you are
14 successful at meeting your burden of proof, then you could
15 be subjected to receiving a full sentence on this charge if
16 you are convicted or pled guilty?

17 THE APPLICANT Yes, sir Yes, sir

18 THE COURT All right And on the armed robbery, I
19 believe -- how much does the armed robbery carry?

20 THE APPLICANT Thirty

21 THE COURT Thirty years?

22 THE APPLICANT Yes, sir

23 THE COURT So, sir, you understand that you could
24 receive a sentence of 30 years?

25 THE APPLICANT Yes, sir

1 THE COURT The reason -- I believe that the reason I
2 was informed of that by the attorney general is that my
3 questioning of you would potentially, potentially not
4 complete as to the risk that you face in the event you are
5 successful at meeting your burden of proof today My
6 understanding is that if I find that you have met your
7 burden of proof and send the matter back, then you actually
8 could be charged and tried on all of those matters

9 Do you understand that?

10 THE APPLICANT Yes, sir

11 THE COURT And, so, my question to you simply as to a
12 potential sentence of 30 years is actually you would face
13 substantial -- you have a potential of facing substantially
14 more criminal exposure due to the fact that if it went back
15 down and the State decided to prosecute you on all of those
16 charges

17 You understand that?

18 THE APPLICANT Yes, sir

19 THE COURT And you still wish for me to review the
20 matter?

21 THE APPLICANT Yes, sir

22 THE COURT Sir, that's perfectly fine I only ask
23 those questions because I like for, to be, have some
24 comfort that people understand my limited role, that I am
25 not going to be able to say that you're not guilty of any

1 of those charges

2 okay?

3 THE APPLICANT Yes, sir

4 THE COURT Thank you, sir Good to see you Thank
5 you very much

6 MR NEAL Thank you, Your Honor

7 MS WHITE Thank you, Your Honor

8

9 ^END OF REQUESTED TRANSCRIPT OF RECORD^

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C E R T I F I C A T E

I, Pamela E Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 26th day of May, 2010, as reported by Linda Moffitt and transcribed by myself

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

October 26th, 2010



PAMELA E GREEN, Court Reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Lamar A Graves, #313160,)
)
 Applicant,)
)
 v)
)
 State of South Carolina,)
)
 Respondent)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2009-CP-42-3439

ORDER OF DISMISSAL

FILED
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 SPARTANBURG COUNTY
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 M HOPE BLACKLEY

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This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 18, 2009. The Respondent made its Return and Motion to Dismiss on or about February 22, 2010. Counsel for Applicant filed a Supplemental Memorandum in support of the post-conviction relief application. An evidentiary hearing into the matter was convened on May 26, 2010, at the Spartanburg County Courthouse. Jonathan A. Neal, Esquire, represented the Applicant. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Kathleen Hodges, Esquire, also testified. This Court also had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court, appellate records and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the January 2005 term of Spartanburg County Grand Jury for armed robbery (05-GS-42-

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0076) He was represented by Kathleen Hodges, Esquire On January 4, 2006, the Applicant proceeded to trial where a jury found him guilty of the charge He was sentenced by the Honorable J Derham Cole to confinement for a period of eighteen (18) years

The Applicant filed a timely notice of appeal The South Carolina Court of Appeals dismissed Applicant's appeal by written Order filed October 10, 2008 State v Graves, Op No 2008-UP-562 (2008) The Remittitur was filed October 28, 2008

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

- 1 Ineffective Assistance of Counsel

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SUMMARY OF TESTIMONY

Applicant testified that one of the witnesses who testified against Applicant at trial was Troy Fisher, son of the Director of Public Safety for the City of Spartanburg, Tony Fisher Applicant testified that Counsel should have requested the jurors be asked regarding any possible relationship with Tony Fisher during the voir dire Applicant testified that he believes the Solicitor vouched for State's witnesses on pages 383, 385, and 389 of the trial transcript In particular, Applicant testified that Troy Fisher's level of education had never been testified to, so it was improper for the Solicitor to mention his education Applicant also testified that he requested Counsel make a motion to change venue, but she failed to make that motion Applicant testified that he does not believe that his jury was impartial, as there was only one African American called as a juror Applicant stated that Counsel should have objected to the jury make-up Applicant also testified that he believes there are pages missing from the transcript during the jury qualification period

Applicant testified that there were issues regarding his identification and Counsel moved to

suppress the testimony regarding identifications Applicant testified that a pre-trial hearing was held regarding the identifications Applicant testified that Demario Mack was not certain that he could identify Lamar, so Counsel objected to his testimony regarding identification Applicant testified that he believes he would not have been found guilty had Troy Fisher's identification testimony been suppressed

Applicant also testified Counsel was ineffective for failing to object to the Solicitor's closing argument on page 381 because Applicant believes that the Solicitor mentioning the baby in the house was a violation of the "Golden Rule" argument Applicant testified that some of the victims were present at a bond hearing, which he believes violates the South Carolina Code

Applicant testified that appellate counsel was ineffective because the issue of jury qualification was not raised in the appeal

Counsel testified that Troy Fisher was the first witness at the pre-trial hearing Counsel testified that she is not sure that she knew Troy Fisher was Tony Fisher's son until the trial testimony Counsel acknowledged that there were no questions regarding any relationships with Tony Fisher asked of the potential jurors, as questions were only asked regarding witnesses Counsel testified that two of the State's witnesses could not identify Applicant during pre-trial hearings Counsel testified that if Troy Fisher's identification of the Applicant could have been excluded, then that would have been helpful Counsel testified that she made a motion to suppress the identification of Applicant, because she had concerns about whether or not the witnesses had spoken to each other and perhaps been influenced prior to the photo line-up Counsel testified that Applicant had not been identified the night of the robbery, however, he was identified in the photo line-up Counsel also testified that Applicant's photo was in the same position in each line-up shown to witnesses

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Counsel testified that she questioned detectives regarding the identifications from the night of the robbery and from the photo line-up

Counsel testified that Applicant never requested that she file a motion for a change of venue. Counsel also testified that she did not think that motion would have been appropriate. Counsel testified that she had sufficient time to investigate and prepare for trial. Counsel testified that she was assigned the case approximately three to four months prior to trial. Counsel testified that she did not object to the Solicitor's closing arguments because attorneys have leeway in making inferences. Counsel testified that she is familiar with the concept of the "Golden Rule" argument and did not find anything objectionable in what the Solicitor said in closing arguments. Counsel also testified that she probably should have objected to the comments made during closing about Troy Fisher's education and appearing to testify even though he lived in Maryland.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S C Code Ann §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, [the] burden of proof is on the applicant to prove his allegations by a preponderance of the evidence. Frasier v State, 351 S C 385, 389, 570 S E 2d 172, 174 (2002) (citing Rule 71 1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove

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that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result " Strickland v Washington, 466 U S 668, 104 S Ct 2052, 2064, 80 L Ed 2d 674, 692 (1984), Butler v State, 286 S C 441, 334 S E 2d 813 (1985)

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel First, the Applicant must prove that counsel's performance was deficient Under this prong, attorney performance is measured by its "reasonableness under professional norms " Cherry, 300 S C at 117, 385 S E 2d at 625, *citing* Strickland Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different " Cherry, 300 S C at 117-18, 386 S E 2d at 625

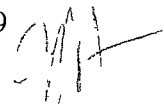
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This Court finds that as to allegations of ineffective assistance of counsel, Counsel's testimony was more credible than the Applicant's testimony. This Court is not convinced that any errors, even assuming the errors were outside of reasonable professional judgment, would lead to a reasonable probability of a different outcome in the trial. It is clear from the record that Counsel objected to and argued against any testimony regarding identification of the Applicant in pre-trial hearings and again during the trial.

Regarding Applicant's allegation that Counsel was ineffective for failing to know that Troy Fisher was the son of Tony Fisher, this Court finds that the Applicant has failed to meet his burden of proof. Even if it was error for Counsel to not know this information, the jury was made aware of the identity of the witness and this Court finds that it would be forced to speculate that the Applicant suffered prejudice as a result. Therefore, this Court finds that this claim should be denied and dismissed.

As to Applicant's allegation that Counsel was ineffective for failing to make a motion to change venue, this Court finds that Applicant failed to meet his burden of proof. Counsel's testimony that a motion to change venue was never discussed was credible, as was her opinion that based on the facts of the case, a motion to change venue would not have likely succeeded.

Regarding the Applicant's allegation that Counsel was ineffective for failing to object to several statements made by the Solicitor during closing arguments, this Court finds that the Applicant has failed to meet his burden of proof. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S C 318, 468 S E 2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. Vouching occurs when a Solicitor attempts to



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STATE OF NORTH CAROLINA
JUL 28 2011

bolster the credibility of a witness by “placing the government’s prestige behind a witness by making explicit personal assurances of a witness’ veracity,” or by “implicitly vouches for a witness’ veracity by indicating information not presented to the jury supports the testimony” Gilchrist v State, 350 S C 221, 227, 565 S E 2d 281, 285 (2002), *quoting* State v Shuler, 344 S C 604, 630, 545 S E 2d 805, 818 (2001) However, to be entitled to a new trial for improper closing arguments, the test is whether “the Solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process” State v Hamilton, 344 S C 344, 362, 543 S E 2d 586, 596 (2001)

This Court finds that although the Solicitor’s comments in closing argument may be considered vouching and probably should not have been made, to conclude it was error to not object and such error was prejudicial to the outcome of the trial would require this Court to engage in speculation Therefore, this Court finds that this claim should be denied and dismissed

In regards to Applicant’s allegations of ineffective assistance of appellate counsel, this Court finds that Applicant has failed to meet his burden of proof Applicant failed to present any evidence or testimony to support his allegation, therefore, this claim is denied and dismissed

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant

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CLERK OF COURT,
SOUTHWESTERN DISTRICT OF MISSISSIPPI
2010 JUL 28 AM 10:33
M HOPE BLACKLEY

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71 1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243¹ for appropriate procedures for appeal.


IT IS THEREFORE ORDERED

- 1 That the Application for Post-Conviction Relief must be denied and dismissed with prejudice, and
- 2 The Applicant must be remanded to the custody of the Respondent

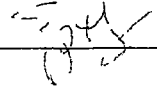
¹ Formerly Rule 227 SCACR. Rules 224 through 230, SCACR, were renumbered as Rules 240 through 246, SCACR by order of the South Carolina Supreme Court dated April 29, 2009.

THE CLERK OF COURT
 FAYETTEVILLE COUNTY
 2010 JUL 28 AM 10 33
 MICHELE BLANKLEY

AND IT IS SO ORDERED this 28th day of July, 2010



J Mark Hayes II
Presiding Circuit Court Judge


_____, South Carolina

FILED
CLERK OF COURT
SOUTH CAROLINA
2010 JUL 28 AM 10:33
MIDDE BLAUKLEY

WITNESSES

P. Cockrell

Spartanburg County Sheriff's Office

ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date *DS-12-05*

VERDICT

Foreperson of Petit Jury

Date

DOCKET NO

05-GS-42-1704

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

12/10/2005

TERM

THE STATE

VS

Lamar Graves

Indictment for

WEAPONS/POINTING AND/OR PRESENTING
FIREARMS AT PERSONS

SC Code 16-23-410

CDR Code 122

Class FEL F

2005 MAY 13 PM 3 18
Spartanburg County

DOCKET NO. **05-GS-42-0016**

WITNESSES

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JAN 31 2005

TERM

ARREST WARRANT NUMBER

Direct Indictment (H645801)

**THE STATE
VS**

Lamar Graves

ACTION OF GRAND JURY

True Bill

Representative of Grand Jury
date 1-27-05

VERDICT

Indictment for

ARMED ROBBERY

SC Code 16 11 330 (A)
CDR Code 139
Class FEL/A

[Signature]
Representative of Petit Jury
date

WITNESSES

Cockrell

Spartanburg Co Sheriff's Office

DOCKET NO
05-GS-42-0077

The State of South Carolina
County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JAN 3, 2005

TERM

ARREST WARRANT NUMBER

1645792

THE STATE
VS

ACTION OF GRAND JURY

True Bill

Lamar Graves

Foreperson of Grand Jury

Date *1-27-05*

VERDICT

Indictment for

BURGLARY, FIRST DEGREE
(Dwelling)

SC Code 16 11-0311
CDR Code 0079
Class FEL/EXM (V)

Foreperson of Petit Jury

Date

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions convened on JAN 27 2005, the Grand Jurors of Spartanburg County present upon their oath

BURGLARY, FIRST DEGREE

(DWELLING)

The Defendant, Lamar Graves, did in Spartanburg County, on or about January 21, 2004, wilfully and unlawfully enter the dwelling of Demareo Mack located at Spartanburg, South Carolina without consent and with the intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime either displays what appears to be a knife or pistol, revolver, rifle, shotgun or other firearm, and/or uses or threatens the use of a dangerous instrument and/or is armed with a deadly weapon or explosive, and/or the entering or remaining occurs in the nighttime, and/or causes physical injury to a person who is not a participant in the crime, and/or the defendant has (2) two or more prior convictions for Burglary and/or housebreaking in violation of Section 16-11-311, Code of Laws of South Carolina (1976, as amended)

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


ASSISTANT SOLICITOR