RECEIVED
Mar 29 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Grace Gilchrist Knie, Circuit Court Judge

JAY WALTER TATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001358

APPENDIX

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

INDEX i

TRIAL TRANSCRIPT DATED JANUARY 17-18, 1995 1

ARREST WARRANT, INDICTMENT, SENTENCE SHEET – MURDER 312

ARREST WARRANT, INDICTMENT, SENTENCE SHEET – ABWIK 317

ORDER OF DISMISSAL 322

REMITTITUR 323

APPLICATION FOR POST-CONVICTION RELIEF DATED NOVEMBER 8, 1995 324

RETURN 332

AMENDED APPLICATION FOR POST-CONVICTION RELIEF DATED DECEMBER 5, 1996 337

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOVEMBER 13, 1997 340

ORDER OF DISMISSAL 367

SUPREME COURT OPINION NO. 25308 373

APPLICATION FOR POST-CONVICTION RELIEF DATED AUGUST 5, 2008 379

RETURN AND MOTION TO DISMISS 391

CONDITIONAL ORDER OF DISMISSAL 399

APPLICANT'S OBJECTION TO CONDITIONAL ORDER OF DISMISSAL 406

EXHIBIT #1 (APPLICANT'S REQUEST FOR DISCOVERY MATERIAL) 409

EXHIBIT #2 (ORDER TO TRANSFER TO COURT OF APPEALS) 411

EXHIBIT #3 (*PRO SE* BRIEF DATED MARCH 10, 2008) 412

EXHIBIT #4 (TRANSCRIPT OF PCR EVIDENTIARY HEARING DATED SEPTEMBER 19, 2006) 417

FINAL ORDER 426

APPLICATION FOR POST-CONVICTION RELIEF DATED JULY 9, 2020.....432

RETURN AND MOTION TO DISMISS.....453

CONDITIONAL ORDER OF DISMISSAL 464

APPLICANT OPPOSITION TO SUMMARY ORDER OF DISMISSAL 475

MEMORANDUM MOTION UPON THE COURT TO STAY A FINAL COURT ORDER PURSUANT TO THE APPLICANT PCR EVIDENTIARY HEARING.....482

FINAL ORDER OF DISMISSAL 487

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHEROKEE)

STATE)
)
V.) TRANSCRIPT OF RECORD
)
JAY WALTER TATE, JR.,) 94-GS-11-928, 94-GS-42-11-929
)
DEFENDANT.)

JANUARY 17-18, 1995
GAFFNEY, SOUTH CAROLINA

B E F O R E:

THE HONORABLE SIDNEY T. FLOYD, JUDGE, AND A JURY

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

HOLMAN GOSSETT, SOLICITOR
TRENT PRUETT, ASSISTANT SOLICITOR
ATTORNEYS FOR THE STATE

RICHARD WARDER, ESQUIRE
ATTORNEY FOR THE DEFENDANT

FILED IN THE OFFICE
CLERK OF COURT
2002 MAY 31 A 8:21
CHEROKEE COUNTY, SC

CAROLYN K. MITCHELL
CIRCUIT COURT REPORTER

FORM 2004 PENGAD/NNDY 1-800-631-6989

INDEX

WITNESS	PAGE
JOE MURRAY (SW)	
Direct examination by Sol. Gossett	57
Cross-examination by Mr. Warder	81
Redirect examination by Sol. Gossett	92
KENNY MILLWOOD (SW)	
Direct examination by Sol. Pruett	93
Cross-examination by Mr. Warder	99
DR. WILLIAM WHEELER (SW)	
Direct examination by Sol. Pruett	103
Cross-examination by Mr. Warder	109
JAMES MIKE WILKINS (SW)	
Direct examination by Sol. Gossett	111
Cross-examination by Mr. Warder	127
DR. JOEL SEXTON (SW)	
Direct examination by Sol. Gossett	134
SANDRA LITTLEJOHN (SW)	
Direct examination by Sol. Gossett	147
Cross-examination by Mr. Warder	155
BRENDA HARRISON (SW)	
Direct examination by Sol. Gossett	158
Cross-examination by Mr. Warder	163

I N D E X

WITNESS	PAGE
MELISSA SHEEHAN (SW)	
Direct examination by Sol. Pruett	164
Cross-examination by Mr. Warder	166
MAURICE MARTIN (SW)	
Direct examination by Sol. Pruett	168
Cross-examination by Mr. Warder	171
SUE SHIBLEY (SW)	
Direct examination by Sol. Pruett	174
DARRYL DUNCAN (SW)	
Direct examination by Sol. Gossett	176
Cross-examination by Mr. Warder	186
JULIUS P. MANNING (SW)	
Direct examination by Sol. Pruett	187
Cross-examination by Mr. Warder	196
LINDA GASKIN (DW)	
Direct examination by Mr. Warder	202
JOHN JEFFERIES (DW)	
Direct examination by Mr. Warder	204
JAY TATE (DW)	
Direct examination by Mr. Warder	206
Cross-examination by Sol. Pruett	227

FORM 2094 PENGADNDY 1-800-631-6989

I N D E X

Opening remarks to venire by the Court -- Page 3
Jury qualification -- Page 14
Jury selection -- Page 28
In camera conference with Juror Pennington -- Page 38
Selection of additional alternate -- Page 41
Motions -- Pages 42, 48, 173, 197, 243, 300
In camera conference with Juror Littlejohn -- Page 46
Jury sworn -- Page 52
Opening statement by Sol. Gossett -- Page 53
Opening statement by Mr. Warder -- Page 55
Closing argument by Mr. Warder -- Page 247
Closing argument by Sol. Gossett -- Page 257
Jury charge -- Page 270
Verdict -- Page 299
Sentence -- Page 306
Voir Dire -- Pages 307, 308

E X H I B I T S

NO.	DESCRIPTION	I.D.	EV.
S-1	Photograph		48
S-2	Photograph		48

FORM 2094 PENGADINDY 1-800-631-6989

JANUARY 17, 1995

(Whereupon the roll of jurors was called by the Clerk.)

THE COURT: I was introduced as I came in as being from -- well, I don't believe he told you. I'm Sidney Floyd from Conway, which is the Fifteenth Judicial Circuit, Horry and Georgetown Counties down there. And I have a little trouble hearing sometimes, like I couldn't hear her too well. So you'll understand that that's because of I'm so far from home and way up here in the mountains. We aren't used to being so high up here like y'all are.

But welcome to the Court of General Sessions, you jurors. Now, if I would tell the jurors in Horry County that you must serve during this particular week of General Sessions, they'd have absolutely no idea of what I was talking about. But y'all are lots more sophisticated up here in Gaffney and Cherokee County than what we are down in Horry County; so you already know.

But I'd have to tell the people in Horry County that this is high criminal court. We won't be concerned with people suing other people. We aren't interested in damages. We are only interested in whether or not a person that's been charged is guilty of a particular

offense with which he's been charged.

Do we have anyone that's never served before? Do we have anyone -- all of y'all have served before as jurors?

Oh, you have not served. Well, look-a-there, Ms. Clerk, we have a lot that hadn't served.

Well, I have an idea that some of you, particularly those of you who just raised your hand, that you received your notification that you had been selected as a juror for this particular week with some hesitation and reluctancy and apprehension, and maybe some of you with downright fear.

Well, let me try to relieve you as far as any fear is concerned. We'll make you as comfortable as we possibly can during this particular week. We'll keep you informed just as much as we can as to what's going on. And you'll be specifically instructed when you are selected as a juror during this week.

Generally the hours of court will be from ten o'clock in the morning until five o'clock in the afternoon. If you're actually involved in the trial of a case, I might ask that you come before that, at nine or 9:30; and we might have to stay a few minutes after five. But I'll assure you we will not stay very much after five o'clock during this particular week. I will not keep you

FORM 2094 PENDADINDY 1-800-631-6989

here unless I feel it's absolutely necessary for the orderly disposition of cases.

So I look forward to working with you during this particular week of criminal court, high criminal court, here in Cherokee County.

(Whereupon the venire was qualified by the Court.)

THE COURT: All right, Ms. Clerk, I find that they're qualified.

Now, ladies and gentlemen, I realize that you would rather be somewhere else than here in Gaffney during this particular week. There's something about us that we feel like, well, we shouldn't judge our fellow man. In the true sense of the word, you will not be judging your fellow man during this particular week. You will be judging the State of South Carolina, for all crimes are against the State of South Carolina.

For instance, if you are walking down Main -- do you have a Main Street?

THE CLERK: We call it Main Street, but it's Limestone Street.

THE COURT: Limestone. Okay. If you were walking down Limestone Street on Friday afternoon at four o'clock and someone runs up back of you, hits you over the head, grabs your pocketbook with all your money in it and runs,

the crime is not against you. The crime is against the State of South Carolina.

So, therefore, the State of South Carolina has an interest in every crime that is committed. And you must make sure that the State of South Carolina satisfies their obligation. For you will hear during this particular week -- and this might be a good time for me to tell you about it right now.

There are certain phrases that you will hear over and over during this particular week. One of them is the presumption of innocence. And that's not just a pretty phrase that's thrown out occasionally by people, this presumption of innocence. It's a substantial right that every citizen has.

And if you cannot accept that proposition, that is that every person, as of this moment, is innocent, every person, if you cannot accept that proposition, you must not serve. For our criminal jurisprudence is based upon the proposition that every person is presumed to be innocent. The United States is the only state in the world that has that presumption. But it's a very valuable one, as far as our country is concerned.

And so you must accept that proposition of law that every person is presumed to be innocent, just as soon as he is charged with any violation, no matter how

FORM 2004 PENGAD/NDY 1-800-631-6989

heinous the crime might be or how small or insignificant the crime might be.

And in order to overcome this presumption -- the State of South Carolina must do that. And they can only do it by a certain degree of proof. And this brings on the next phrase that you'll be hearing, that is, proof beyond a reasonable doubt. That's how the presumption of innocence is overcome. When the State satisfies you beyond a reasonable doubt of the guilt of the accused, then this presumption dissolves.

So the State of South Carolina must do that. They have that burden, to dissolve this presumption of innocence; and they do it by that degree of proof, proof beyond a reasonable doubt. That is a doubt for which you can give a reason. For, you see, each one of you are reasonable men and women. So, therefore, you must be convinced of the guilt of the accused.

Now, of course, reasonable doubt is just what it says; it's a doubt for which you can give a reason for. That doesn't mean the State of South Carolina must satisfy you beyond all doubt, or a crazy doubt, or a foolish doubt, for you could have that about anything. You could have that as to whether or not it'll ever rain again in Cherokee County. It might be a good idea, but -- no, we'll have lots more rain. And you could have a

FORM 2004 FENGARIMDY 1 800-631-6989

doubt, really, as to whether or not the ocean is salty at Myrtle Beach. But the State doesn't have to prove beyond all doubt, but they must satisfy you beyond a reasonable doubt.

So your responsibility this week is to make sure that the State carries that burden. To protect every person that's charged with the presumption of innocence, the State must satisfy you beyond a reasonable doubt of the guilt of the accused.

Now, I know that you would rather be someplace else. But I trust that some of you that will be serving this week will find -- well, I hope that you will discover some of the problems that we have in criminal court. And we do have problems: the logistics of getting everyone here at one time. We have a lot of problems of court. I hope that at the end of the week that you'll be able to appreciate those problems a little more, perhaps.

And then I hope you have a little better idea of just what justice is, for you are going to be part of justice here in Cherokee County this week; and I look forward to working with you during this particular week. And I trust that those of you that will be serving during this week that, despite the occasional inconvenience -- and I know it's an inconvenience for you to serve during

FORM 2094 PENGAD/INKDY 1-800-631-6989

this week, but despite that inconvenience that you'll find your service interesting and informative and gratifying and, I hope, satisfying. I hope you'll be able to look back with some degree of satisfaction of your service this week.

Now, I've introduced myself to you and you have introduced yourself to the Court. It seems only proper that you should be made aware of the other people, the other officers of the court, for you're an officer of the court just as I am during this week. But it seems only proper that you should be made aware of the other officers of the court that will be working with you during this particular week.

I have told you what your responsibilities are this particular week, and that is to make sure that a person that has been charged, that the State satisfies you of their guilt. If not, then you must, of course, find them not guilty. So that's your responsibility. And I'm going to give you a little thumbnail sketch of the other officers of the court that will be working with you this week as we strive towards that evasive term called justice.

First of all is your very fine Clerk of Court, Ms. Katie Baines. She's the lady that you all know and has served so faithfully many years here in Cherokee

FORM 2094 PENGADNDY 1-800-631 6989

County. Now, her responsibility is to make sure that everything that has been filed in a particular case is always in the court and before the Court.

Now, she has some other obligations that she has as your Clerk of Court. She's responsible for the Family Courts that are going on this week, and also for the public records of Cherokee County. She's responsible for the deeds and mortgages and federal tax liens and the mechanic liens and judgments. All these things, she's responsible for. So you'll understand if she's not always in the courtroom. But if she's not always in the courtroom, she will have some member of her very fine staff that will be in the courtroom, complying with her responsibility as your Clerk of Court.

The next person that I'd like for you to be made aware of is your Sheriff, Mr. Bill Blanton. And he was here just a minute ago. Oh, there he is. Okay. Of course, you know Sheriff Blanton.

Now, his responsibility is the security of the courtroom. Well, obviously, as your sheriff, he is the chief law enforcement officer throughout your county. So he's responsible not just for this room here but also all of Cherokee County. So you'll understand if he's not always in the courtroom. And if he's not, he'll always have some member of his very fine staff that will always

FORM 2094 PENGAD/NDY 1-800-631-6989

be in the courtroom, complying with his responsibility as far as the security is concerned.

Now, the next person I'd like for you to be made aware of is -- well, let's see. If this was a drama unfolding during this particular week, the chief actor, the star performer, the head honcho, is your Solicitor, Mr. Holman Gossett. And he's the gentleman that's -- if you will, stand up, Mr. Gossett. He's out in the courtroom there.

His responsibility is to represent the State of South Carolina in every case that is made in the Seventh Judicial Circuit, which comprises not only of your county here of Cherokee but also Spartanburg County. So you'll understand if he's not always in the courtroom that he'll be about some of his other duties that he has as your Solicitor of the Seventh Circuit. But he'll always have some members of his very fine staff, as he has this morning and yesterday, will always be in the courtroom if he's not here, complying with his responsibility as far as representing the State of South Carolina.

Now, our Supreme Court, United States Supreme Court as well as our South Carolina Supreme Court, has said that every person is entitled to representation. If you cannot afford an attorney, then one would be appointed for you.

And here in Cherokee County you have the Public Defender's Office. And it's headed up by Mr. Donald Letteer. Mr. Letteer is the gentleman that's over to my right and is now standing. He'll be representing the members of the -- indigents, rather, during this particular week. And he has other members of his particular staff that will be also representing the indigent defendants. And you'll get to know them as they are representing them during this particular term of court.

Now, the next person that I'd like for you to be made aware of has the most awesome responsibility of all; and that's the court reporter. That's Ms. Hammond. She's the lady -- you can't see her. She has her back to you here. But she's right down here.

And her responsibility as court reporter is to take down everything that is done or said this week in this courtroom. And if there's ever a question as to what takes place during this week, they will not come to me, nor will they go to you, nor to your Sheriff or your Solicitor, no matter how competent they might be, or your Clerk of Court. They will not -- they will only go to the record made by Ms. Carolyn Hammond. And you can see the responsibility that she has. But she does such a good job and it's always a delight to work with

FORM 2004 PENGAD/NDY 1-800-631-6989

Ms. Hammond.

Now, the next group of people that I'm going to introduce to you are here for your comfort and for mine. And if you have any problems during this particular week, if you'll just let one of these bailiffs know, then they will bring it to our attention; and we'll make your stay here just as comfortable as we possibly can and solve any problems that we can.

Of course, feel free to contact me or any other officers of the court that I've introduced to you. But if we aren't readily accessible to you at the particular time, if you'll let the bailiffs know, then they'll call our attention to that; and we'll try to solve whatever problems you have during this week, for we want to make you as comfortable as we possibly can.

First of all is Mr. J. D. Wallace. Mr. Wallace is the gentleman over to my left. And he's standing up there. And he'll be all over the courtroom, really, during this particular week of court.

Then we have Juanita Allison. And where -- is Ms. Allison in the courtroom? She's back in the back?

Ms. Allison is in the back, back there. You'll probably see her around.

And then Alma Parris. Where is Ms. Parris? Oh, there you are. Didn't even see you. Y'all look back

FORM 2054 PENGAD/INDY 1-800-631-6989

there at the back door. That's Ms. Parris back there. And she'll be generally in that area of the courtroom.

And then we have Mr. Francis Wilkin. Where is he? Is he back in the back, out in the hallway back there? All right.

So these are the people that will be working with you as we all strive towards justice during this week. So we all look forward to that.

Now, having said that, Mr. Solicitor, do we have any business this morning?

SOL. GOSSETT: Yes, sir. The State is prepared to go to trial. May we approach the bench?

THE COURT: Yes, sir.

(Whereupon a bench conference was held, off the record, within the presence of the venire but out of hearing of the venire.)

THE COURT: All right. Ladies and gentlemen of the jury venire, we're about to commence the case of the State v. Jay Tate.

Mr. Tate, if you will, please stand and face the jury.

(Whereupon the defendant complied.)

THE COURT: Mr. Tate is the gentleman that's now standing.

And where do you live, Mr. Tate? What is your

FORM 2094 PENGAD/INDY 1-800-631-6989

address?

THE DEFENDANT: [redacted] James Street.

THE COURT: Here in Gaffney?

THE DEFENDANT: In Gaffney.

THE COURT: All right, sir. Very good. You may have a seat. Thank you.

Do we have any members of the jury panel related by blood or marriage, close personal friends, enemies of, or have any business relationship with Mr. Jay Tate, the gentleman that was just standing?

All right, sir. Your name?

JUROR: Logan. Todd Logan.

THE COURT: Mr. Logan? Are you related to Mr. Tate, or what's your relationship with him?

JUROR: I grew up with him, basically.

THE COURT: Oh, you and he are friends?

JUROR: Yes.

THE COURT: Would you call yourself close personal friends or more like an acquaintance? You just knew each other?

JUROR: Yes, sir.

THE COURT: All right, sir. Now, the fact that you knew -- had some relationship with Mr. Tate, could you give him a fair and impartial trial?

JUROR: Yes, sir.

FORM 2094 PENGAD/MNDY 1-800-631-6989

THE COURT: Are you aware of the charges and the things that are against him?

JUROR: Yes, sir.

THE COURT: Have you discussed it in any way with anyone?

JUROR: No, sir.

THE COURT: Have you made up your mind as to his innocence or guilt?

JUROR: No, sir.

THE COURT: Can you set aside whatever you might have said or discussed with anyone and decide this case only upon the evidence as presented?

JUROR: Yes, sir.

THE COURT: All right, sir. I find that you are qualified, Mr. Logan, for this case.

Anyone else?

(Whereupon no one stood or replied.)

THE COURT: All right. Now, these are possible witnesses in the case. These may or may not testify. And the same questions go for these particular people. That is, if you are related by blood or marriage, close personal friends or enemies of, or have any business relationship with, please let it be known by standing.

Darryl Duncan -- and as your name is called, if you're in the courtroom, please stand. Darryl Duncan; he

FORM 2094 PENGAD/INDY 1-800-631-6989

is with the Sheriff's Department. He is not in the courtroom.

Where does he live? What area of the county?

OFFICER: He lives just east of Interstate 85.

THE COURT: All right. It's not within the city limits, then.

OFFICER: No, sir; out of the city limits.

THE COURT: All right, sir.

(Whereupon no one stood or replied.)

THE COURT: Brenda Harrison. Lives in Gaffney.

Is she in the courtroom? Brenda Harrison?

SOL. GOSSETT: No, sir.

(Whereupon no one stood or replied.)

THE COURT: Joel Hill, also a deputy with the Cherokee Sheriff's Department. Sheriff, where does he live?

OFFICER: He lives outside the city limits.

THE COURT: In which direction?

OFFICER: He lives west, about two miles outside the city limits.

THE COURT: All right. Do you know the community?

OFFICER: Drakeville (phonetic).

THE COURT: All right. He lives at Drakeville?

OFFICER: Yes, sir.

THE COURT: All right, sir. Very good. Joel Hill.

FORM 2094 PRIGADYNDY 1-800-631-6989

What about Julius -- yes, ma'am. Oh, excuse me.

JUROR: Joel is my cousin.

THE COURT: He is your cousin?

JUROR: I thought you said related to. I'm sorry.

THE COURT: Ma'am?

JUROR: I'm sorry. I stood up out of turn. I'm sorry.

THE COURT: I don't know; are you related to Joel Hill?

JUROR: Yes, sir. He's my cousin.

THE COURT: Okay. Are y'all kissing cousins, or are you further away or...

JUROR: No.

THE COURT: Maybe I shouldn't -- what are you? Like second or third cousin?

JUROR: First cousin.

THE COURT: First cousin. All right. Now, the fact that he may testify, would that keep you from giving a fair and impartial trial?

JUROR: No, sir.

THE COURT: He may or may not be a witness; I don't know if he is or not. Are you familiar with this particular case in any way?

JUROR: No, sir; not really.

THE COURT: Have you discussed it in any way with

FORM 2094 FENGAD/INDY 1-800-631-6989

Mr. Hill?

JUROR: No, sir.

THE COURT: Could you give a fair and impartial trial?

JUROR: I think so.

THE COURT: All right. And your name?

JUROR: Cheryl Harvey.

THE COURT: All right, Ms. Harvey. I find that you're qualified; but it's proper that be made known. Thank you very much.

All right. Julius P. Manning. He is also with the Sheriff's Department. And he lives in what area, what community?

OFFICER: Concord community.

THE COURT: He lives in Concord. Here in Gaffney County (sic).

(Whereupon no one stood or replied.)

THE COURT: What about Maurice Martin? He lives in Coggins Trailer Park here in Gaffney. Is he in the courtroom, Maurice Martin?

SOL. GOSSETT: No, sir.

THE COURT: All right.

(Whereupon no one stood or replied.)

THE COURT: Kenny Millwood. He lives in Gaffney. He's an EMS. He's with the Emergency Medical Service, I

FORM 2094 PENGAD/INDY 1-800-631-6989

think is what that stands for.

(Whereupon no one stood or replied.)

THE COURT: All right. What about Joe Murray? He lives in Gaffney on Eastview Street. Mr. Murray is the gentleman that's standing -- face the jury, Mr. Murray, please. All the way around.

(Whereupon Mr. Murray complied.)

THE COURT: That's a good man. All right. Mr. Murray is the gentleman that's now standing. And he lives here in Gaffney.

Anyone related by blood or marriage, close personal friends or enemies of, or have any business relationship with him?

(Whereupon no one stood or replied.)

THE COURT: Thank you, Mr. Murray. You may have a seat.

Dr. Joel Sexton. Mr. Sexton is a pathologist residing in Newberry, South Carolina.

Doesn't he live in Newberry?

SOL. GOSSETT: The Greenwood/Newberry area.

THE COURT: Yeah. All right.

Dr. Sexton. Anyone been a patient of his? You don't really think in terms of -- I kind of hate to ask that question. But he has private patients, as well. Or I think he does.

FORM 2994 PENGAD/INDY 1-800-631-6989

SOL. GOSSETT: Yes, sir.

(Whereupon no one stood or replied.)

THE COURT: Melissa Sheehan. What about Ms. Sheehan, Melissa? Is she in the courtroom?

SOL. GOSSETT: No, sir.

THE COURT: And she lives in Gaffney, here. She also lives in the trailer park, Coggins Trailer Park.

(Whereupon no one stood or replied.)

THE COURT: Susan Shibley, S-h-i-b-l-e-y. She's from Gaffney.

SOL. GOSSETT: That's Shibley, Your Honor. She's an attorney.

THE COURT: Shibley? Okay.

SOL. GOSSETT: Shibley, yes, sir. A local attorney.

THE COURT: Okay.

(Whereupon no one stood or replied.)

THE COURT: Scott Tallent, T-a-l-l-e-n-t. He's with the City Police Department, Gaffney City Police Department. I don't believe he's in the courtroom, either.

(Whereupon no one stood or replied.)

THE COURT: What about Dr. William Wheeler of Gaffney? He's with the Upstate Carolina Medical Center. Do we have any patients of Dr. Wheeler? Anyone? Please stand if you are a patient of Dr. Wheeler.

FORM 2094 PENGAD/INDY 1-800 631 6989

(Whereupon no one stood or replied.)

THE COURT: All right. What about James Michael Wilkins? He's from Pacolet.

Is that in this county or Spartanburg?

SOL. GOSSETT: It's just across the line.

THE COURT: In Spartanburg County?

SOL. GOSSETT: Yes, sir.

THE COURT: I thought it was.

(Whereupon no one stood or replied.)

THE COURT: All right. Any -- let me see the indictments.

SOL. GOSSETT: All right, sir. Your Honor, for the record, should I read those into the record?

THE COURT: You may.

SOL. GOSSETT: All right, sir. Your Honor, the State is prepared and is calling now Indictments No. 94-GS-11-928, the State v. Jay Walter Tate, Jr. He's indicted for murder. There's a true bill. And Indictment 94-GS-11-929, the State v. Jay Walter Tate, Jr. He's indicted for assault and battery with intent to kill and there's a true bill.

THE COURT: All right, sir. Good. Let me look at it and see if I need to ask any other questions.

(Whereupon the indictments were handed to the Court.)

FORM 2094 PENGAD/NDY 1-800-631-6989

(Pause.)

THE COURT: All right. Any further questions from the State?

SOL. GOSSETT: No, sir; not at this time.

THE COURT: Any from the defense?

MR. WARDER: No, Your Honor.

THE COURT: All right. Does anyone know of any reason why you could not give a fair and impartial trial both to the State of South Carolina and also to Jay Walter Tate, Jr.?

(Whereupon no one stood or replied.)

THE COURT: Are you aware of any prejudice that you might have for or against Mr. Jay Walter Tate, Jr. or for or against the State of South Carolina?

(Whereupon no one stood or replied.)

THE COURT: All right. Let's see, Ms. Clerk. Give us a jury. And I suppose I need to tell them how we draw a jury.

Let's tell y'all how we draw a jury. First of all, you got to get a big container. Show them that container there, Ms. Clerk.

(Whereupon the Clerk complied.)

THE COURT: See that container? Y'all look at that container. See it? Y'all see it? Look at it. You know what that is?

FORM 2994 PENGAD/INDY 1-800-631-6989

It's a bingo holder. Somebody in the General Assembly of the State of South Carolina introduced a bill and said that in order to get jurors in the state of South Carolina you had to have -- they didn't call it what it is. They described it, almost like when they were drawing up the bill they were looking at that right there. Because it describes it perfectly.

And so everybody had to go and get one of these containers. In Horry County we had to go over to Myrtle Beach and buy one from one of those places over there. You know how much it cost? $125. Just to hold some names.

But, anyway, you got to start with that. And then you've got to have a little capsule. Show them the capsule there, Ms. Clerk.

(Whereupon the Clerk complied.)

THE COURT: See that capsule? All right. Inside that capsule is a little slip of paper. Show them the little slip of paper.

(Whereupon the Clerk complied.)

THE COURT: See that little slip of paper? That slip of paper has one of your names on it. So you got to have a little slip of paper with your name on it, put it in that little capsule, close the capsule, put it in that big container, mix it all around. And then the Clerk --

FORM 2094 PENGAD/INDY 1-800-631-6989

the statutes provide that a person who is blind, or seeing handicapped, or either a young child must draw these names out. And we don't have anyone like that. I don't see anyone like that. Do we?

THE CLERK: No, sir.

THE COURT: All right. Is there any objection to the Clerk drawing the capsules out of the container, from the State?

SOL. GOSSETT: None from the State.

THE COURT: From the defense?

MR. WARDER: No, Your Honor.

THE COURT: All right, sir. Very good. So what we'll do is pull out one of those little capsules; they'll open it up, draw out the little slip of paper; and they'll call your name.

Now, when your name is called, you'll get up from wherever you're at and come around and come -- Mr. Bailiff, go on and show them where to stand.

THE BAILIFF: Right over here.

THE COURT: No, come and show them. Show them. Just come right there.

(Whereupon the bailiff complied.)

THE COURT: That's right. Come just the way that he is, where Mr. Wallace is. And you won't say a word. You'll just come up and face -- I don't know if that's

FORM 2004 PENGAD/NIDY 1-800-631-6989

the front of the courtroom or the back of the courtroom. But, anyway, just face from whence you came.

Again, you won't say a word. You'll just stand up and walk around. And you'll think, Well, for goodness' sake, everybody's looking at me.

And you are absolutely correct. Every eye in this courtroom will be on you from the moment your name is called and you stand up and start walking. Everybody's looking at you. And you're going to be a little self-conscious. And there's nothing wrong with that. Nothing wrong with being a little self-conscious.

For the consolation, if there is any, is that the person whose name is called immediately after you will be just as self-conscious as you are and just as embarrassed as what you may be.

So the first time or two that your name is called and you come up here, you'll be terribly self-conscious. But after that, after the second or third time, you can't hardly wait for your name to be called. The men will just strut up here.

But the first few times you will be. So I'm going to let you be nervous today and self-conscious today. But I might not let you be anymore, after today.

But, anyway, you'll come up and stand like Mr. Wallace and face in that direction. And then the

FORM 2094 PENGADNOY 1-800-631-6989

Clerk will ask this question and only this question: What says the State? And the State, by and through the Solicitor, will answer in one of two ways and only one of two ways. He will either say, Excuse the juror; or, he'll say, Present the juror. If he says excuse the juror, you will get up -- and, again, you won't say a word. But you'll walk right on out and take your seat back in the courtroom from whence you came.

If he says present the juror, you'll remain standing, without saying anything. Then the Clerk will ask this question: What says the defense? And the defendant, by and through his attorney, will answer in one of two ways and only one of two ways. He will either say, Excuse the juror, or, Swear the juror.

If he says excuse the juror, you won't say a word; you'll just walk right on back, take your seat right on back in the courtroom from whence you came. Now, if he says swear the juror, you will come around and take one of these seats over here and you will be a juror on this particular case.

Now, you notice that I said that both sides, both the State and the defense, has the right to excuse jurors. We call that challenges. We call that a challenge. But it only means that both sides have a certain number of people that they can excuse. And they

FORM 2004 PENGAD/ANDY 1-800-631-6989

can excuse them for any reason they see fit, save two.

Two things they cannot excuse a juryman for. One is the race. They cannot use that as a basis to strike a juror. Secondly is the gender. They cannot use the fact that you are a female or a male in order to excuse a juror. Those two things they cannot do, neither the State nor the defense. They cannot use either of those as a basis for striking or excusing a juror.

Now, other than that, they can excuse you for any reason they see fit. They can excuse you for the way you combed your hair back there. Or the fact that you didn't comb your hair. Or the fact that you don't have any hair. Any reason, other than those two, they can excuse you. So please don't take any personal affront. That's not intended.

It's just that both sides have the right to strike or challenge. And they will do that. And please don't take any personal affront, for none is intended a'tall.

All right, Ms. Clerk. Having said that, give us a jury.

THE CLERK: Ladies and gentlemen, as I call your name, please come forward. Number 102, Sara Gardner.

What says the State?

SOL. GOSSETT: Present Ms. Gardner.

FORM 2094 PENDAD/NDY 1-800-431-8...

THE CLERK: What says defense?
MR. WARDER: Please excuse Ms. Gardner from the trial of this matter.
THE CLERK: You're excused in this case, please.
Number 70, Kenneth Pope.
What says the State?
SOL. GOSSETT: Present Mr. Pope.
THE CLERK: What says defense?
MR. WARDER: Swear Mr. Pope.
THE CLERK: Have a seat in the jury box, please.
Number 66, Susan Fowler.
What says the State?
SOL. GOSSETT: We'll excuse Ms. Fowler.
THE CLERK: You're excused from this case, please.
Number 44, Dephanie Littlejohn.
What says the State?
SOL. GOSSETT: Present Ms. Littlejohn.
THE CLERK: What says defense?
MR. WARDER: Swear Ms. Littlejohn.
THE CLERK: Have a seat in the jury box, please.
Number 64, Jerry Pennington.
What says the State?
SOL. GOSSETT: Present Mr. Pennington.
THE CLERK: What says defense?
MR. WARDER: Swear Mr. Pennington.

FORM 2034 FENGADINDY 1-800-631-6989

THE CLERK: Have a seat in the jury box, please.
Number 6, Evelyn Barner.
What says the State?
SOL. GOSSETT: Present Ms. Barner.
THE CLERK: What says defense?
MR. WARDER: Swear Ms. Barner.
THE CLERK: Have a seat in the jury box, please.
Number 53, Sally Messer.
What says the State?
SOL. GOSSETT: Present Ms. Messer.
THE CLERK: What says defense?
MR. WARDER: Swear Ms. Messer.
THE CLERK: Have a seat in the jury box, please.
Number 12, Catherine Caughman.
What says the State?
SOL. GOSSETT: Present Ms. Caughman.
THE CLERK: What says defense?
MR. WARDER: Please excuse Ms. Caughman from the trial of this matter.
THE CLERK: You're excused from this case, please.
Number 61, Ruby Parker.
What says the State?
SOL. GOSSETT: Present Ms. Parker.
THE CLERK: What says defense?
MR. WARDER: Please excuse Ms. Parker from the trial

FORM 2094 PENGAD/INDY 1-800-631-6989

of this matter.

THE CLERK: You're excused from this case, please.

Number 42, Thomas Leach.

What says the State?

SOL. GOSSETT: Present Mr. Leach.

THE CLERK: What says defense?

MR. WARDER: Please swear Mr. Leach.

THE CLERK: Have a seat in the jury box, please.

Number 87, Louise Smith.

What says the State?

SOL. GOSSETT: Present Ms. Smith.

THE CLERK: What says defense?

MR. WARDER: Please swear Ms. Smith.

THE CLERK: Have a seat in the jury box, please.

Number 41, Krystal Lanier.

What says the State?

SOL. GOSSETT: Present Ms. Lanier.

THE CLERK: What says defense?

MR. WARDER: Swear Ms. Lanier, please.

THE COURT: Have a seat in the jury box, please.

Number 11, Gloria Camp.

What says the State?

SOL. GOSSETT: Present the juror.

THE CLERK: What says defense?

MR. WARDER: Swear Ms. Camp, please.

FORM 2004 PENLAD/NOV 1 800 631 6989

THE CLERK: Have a seat in the jury box, please.

Number 3, Mickey Allison.

What says the State?

SOL. GOSSETT: We'll excuse Mr. Allison.

THE CLERK: You're excused in this case, please.

Number 97, Robert Wade.

What says the State?

SOL. GOSSETT: Present Mr. Wade.

THE CLERK: What says defense?

MR. WARDER: Please swear Mr. Wade.

THE CLERK: Have a seat in the jury box, please.

Number 46, Gloria Love.

What says the State?

SOL. GOSSETT: Present Ms. Love.

THE CLERK: What says defense?

MR. WARDER: Swear Ms. Love, please.

THE CLERK: Have a seat in the jury box, please.

THE COURT: Mr. Pope, will you act as foreman of this jury, please, sir. Just come down and take that seat right in front of you there. And we're probably going to have an alternate; should we not? One alternate?

Isn't that twelve?

SOL. GOSSETT: I believe we're lacking one.

THE COURT: Oh, we do?

FORM 2094 PENGAD/INDY 1-800-631-6989

THE CLERK: Yes, sir.

THE COURT: Oh, all right. All right, then. We'd better get another one, then; hadn't we?

The people on the back row just shift over one seat, if you will. That will make it easier for the ones coming in.

All right. Well, I couldn't tell.

SOL. GOSSETT: They have an extra seat up on the back. That's why.

THE COURT: Yeah. You're right. I'm not used to that. Y'all throw me off when you do differently than what we have in Horry County.

That's fine. Go ahead, Ms. Clerk.

THE CLERK: Number 86, Kelli Sarratt.

What says the State?

SOL. GOSSETT: Present Ms. Sarratt.

THE CLERK: What says defense?

MR. WARDER: Please excuse Ms. Sarratt from the trial of this matter.

THE CLERK: You're excused from this case, please.

Number 31, Roxanna Haynes.

What says the State?

SOL. GOSSETT: Present Ms. Haynes.

THE CLERK: What says defense?

MR. WARDER: Please excuse Ms. Haynes from the trial

FORM 2004 PE NOADINDY : 800-631-6989

of this matter.

THE CLERK: You're excused from this case, please.

Number 25, Terry Hammett.

What says the State?

SOL. GOSSETT: Present Mr. Hammett.

THE CLERK: What says defense?

MR. WARDER: Please excuse Mr. Hammett from the trial of this matter.

THE CLERK: You're excused from this case, please.

Number 105, Sheila Lemmonds.

What says the State?

SOL. GOSSETT: Present Ms. Lemmonds.

THE CLERK: What says defense?

MR. WARDER: Please excuse Ms. Lemmonds from the trial of this matter.

THE CLERK: You're excused from this case, please.

Number 16, Belton Cunningham.

What says the State?

SOL. GOSSETT: We'll excuse Mr. Cunningham.

THE CLERK: You're excused from this case, please.

Number 40, Ronald Kirby.

What says the State?

SOL. GOSSETT: Present Mr. Kirby.

THE CLERK: What says defense?

MR. WARDER: Swear Mr. Kirby.

FORM 2004 PENGADNDY 1-800-631-6989

THE CLERK: Have a seat in the jury box, please.

THE COURT: That's twelve now. Right? Okay. Let's have one alternate. I think one should be sufficient; do you not?

SOL. GOSSETT: Yes, sir.

MR. WARDER: Yes, sir.

THE COURT: All right. Two and one.

THE CLERK: Number 9, Barbara Brown.

What says the State?

SOL. GOSSETT: Present Ms. Brown.

THE CLERK: What says defense?

MR. WARDER: Please excuse Ms. Brown from the trial of this matter.

THE CLERK: You're excused from this case, please.

Number 90, Lisa Spencer.

What says the State?

SOL. GOSSETT: Present Ms. Spencer.

THE CLERK: What says defense?

MR. WARDER: Swear Ms. Spencer.

THE CLERK: Have a seat in the jury box, please.

THE COURT: Mr. Foreman and ladies and gentlemen, give me your attention for just a moment, please. There's only two sacred seats over there. One is yours, Mr. Foreman; and the other is yours. If you will, Mr. Foreman, always take that particular seat; and,

FORM 2004 PENGAD/INDY 1-800-631-6989

Ms. Alternate, if you will always take that particular one. And the rest of you may sit anywhere you'd like. Just remember the other people coming in, so you'll want to fill in from this side back so people won't have to climb over you in order to get to a vacant seat.

Now, I'll be sending you to your room, for whatever reason, Mr. Foreman, during the trial of the case. While you are back in your jury room, do not discuss this case.

You don't know anything about it now, and that's the way it should be. And you should only have the information you receive by witnesses under oath or by exhibits that have been properly introduced. Anything else is improper.

So while I send -- when I send you back to your jury room, don't discuss this case. Do not discuss it in any way. Talk about anything you'd like back there except this case.

Now, Mr. Foreman, take -- and, too, when I ask you to come back from your jury room, that will be a request. So I would suggest to you, Mr. Foreman, that before leaving your jury room you would count heads in there and make sure that all thirteen of you are ready to come out. If one or more of you are not ready to come out, for whatever reason, just send word you'll come when

FORM 2094 PENGADWINDY 1-800-631-6989

you get good and ready; okay? For it will be a request.

All right, Mr. Foreman, take your jury to your jury room. And there should be -- y'all have some coffee back there or something?

THE CLERK: Yes, sir.

THE COURT: Okay. They'll have some coffee or something back there for you, Mr. Foreman. I don't know how long this will be. I'm thinking about fifteen or twenty minutes and I'll call you back out, and we'll get started then.

(The following took place outside the presence of the jury:)

THE COURT: Anything on the composition of the jury? Any motions as far as the composition of the jury? Suppose y'all step up here and I'll tell you what I'm talking about.

MR. WARDER: Your Honor, we have no motions under Batson or---

THE COURT: All right. That's what I wanted to know.

MR. WARDER: ---other related cases on that line.

THE COURT: Okay. Good.

Ladies and gentlemen of the jury venire, I've been informed by the parties that this case will take the balance of today and will go into tomorrow. So I'm---

FORM 2004 PENGADWINDY 1-800-631-6999

THE BAILIFF: Judge.

THE COURT: Yes?

(Whereupon a bench conference was held between the Court and the bailiff, off the record, within the presence of the venire but out of hearing of the venire.)

THE COURT: All right, gentlemen. Jurors, y'all just be at ease. Let me see the lawyers back in chambers. Ms. Clerk, you come back here, too, please. Bring your list, your jury list.

(Whereupon the Court, attorneys for the State, attorney for the defendant, and the Clerk retired to chambers.)

(The following took place in camera, within the presence of the Court, Sol. Gossett, Sol. Pruett, Mr. Warder, and Clerk Baines:)

THE COURT: Do you need your client in here?

MR. WARDER: I'm going to waive that. I think it really would be too uncomfortable.

THE COURT: Right. Let's bring Mr. Huntington in, if you will. Wasn't that his name?

SOL. GOSSETT: Pennington.

THE COURT: Pennington. Oh, okay. Pennington.

(Whereupon Juror Pennington was brought into chambers.)

FORM 2094 PENGAD/INDY 1-800-631-6989

THE COURT: Mr. Pennington, just have a seat. I just want to ask you about a question here. You had mentioned to the bailiff that you were on probation?

JUROR: Yeah, I was seventeen years old and I got in some trouble and I was on probation for five years.

THE COURT: For five years?

JUROR: Yeah.

THE COURT: All right. Now, what were you sentenced to? What was your -- what were you convicted of or pled guilty to?

JUROR: It was against the law. I think it was eighteen months.

THE COURT: All right. That sounds probably right in order for you to get that. But do you know what the particular offense was?

JUROR: It was breaking and entering.

THE COURT: Breaking and entering. Okay. Let me suggest something to you, that -- not necessarily today, but sometime, go by the probation office and see if you can't get a pardon for that.

I don't think it's that difficult to get a pardon. And once you do, you don't have to worry about this kind of thing here.

But I'm going to excuse the juror. I think, statutorily, I have to.

FORM 2084 PENGAD/NDY 1-800-631-6989

I'm going to excuse you as far as this term of court is concerned. So, if you will, just go by the probation office and find out what's necessary. I don't think it's too much trouble, or will be, for you. And I appreciate you coming up. And I appreciate you being candid with us and telling the bailiff. But the statute provides that you cannot serve. Okay?

Very good. Thank you very much, sir.

JUROR: Thank you.

THE COURT: All right, sir. Thank you.

(Whereupon Juror Pennington exited chambers.)

THE COURT: Now, this is what we'll do, gentlemen. We'll put the alternate on as a juror and then we'll select another alternate.

SOL. GOSSETT: Is the jury still out there?

THE COURT: Yeah. I didn't excuse them.

SOL. GOSSETT: Okay.

THE COURT: Is that okay?

SOL. GOSSETT: Yes, sir.

MR. WARDER: And, Your Honor, I guess I should say that we have no objection or exceptions to the procedure of excusing that juror.

THE COURT: All right. Let's go out and get our alternate and I'll excuse them.

(The following took place in open court:)

FORM 2094 PENGAD/INDY 1-800-631-6989

THE COURT: All right. We will need one additional alternate, I believe, gentlemen. Two and one.

Ms. Clerk.

THE CLERK: Number 7, Nancy Blanton, if you will come forward, please.

What says the State?

SOL. GOSSETT: Present Ms. Blanton.

THE CLERK: What says defense?

MR. WARDER: Excuse Ms. Blanton from the trial of this matter.

THE CLERK: You're excused from the trial of this case, please.

Number 45, Todd Logan.

What says the State?

SOL. GOSSETT: We'll excuse Mr. Logan.

THE CLERK: You're excused from the trial of this case, please.

Number 104, Judy Cash.

What says the State?

SOL. GOSSETT: Present Ms. Cash.

THE CLERK: What says defense?

MR. WARDER: Excuse Ms. Cash from the trial of this matter.

THE CLERK: You're excused from the trial of this case, please.

FORM 2094 PENGADINDY 1-800-631-6989

Number 60, Nancy Parker.

What says the State?

SOL. GOSSETT: Present Ms. Parker.

THE CLERK: What says defense?

MR. WARDER: Swear Ms. Parker.

THE CLERK: Have a seat in the jury box, please.

THE COURT: All right. If you will, take Ms. Parker -- now, Ms. Parker, you will be the alternate in this particular case. So when you come back, you'll sit in the little extra chair over there. All right?

All right, Mr. Wallace, if you will escort Ms. Parker to the jury room and introduce her as the new alternate.

(Whereupon the alternate juror exited the courtroom. The following took place outside the presence of all members of the jury panel:)

THE COURT: Anything else as far as the composition?

MR. WARDER: No, Your Honor, not from the defendant.

THE COURT: All right.

(Whereupon the venire was excused for the day.)

THE COURT: All right. Do we have anything before we get started gentlemen?

MR. WARDER: Your Honor, if it please the Court, I would object to the case being tried with this panel, Your Honor, based upon Your Honor's opening remarks.

FORM 2094 PENGAD/INDY 1-800-631-6989

Your Honor, at the beginning of the week of jury service here today, gave the jury some opening remarks as to the week of trial. In that you defined reasonable doubt, Your Honor; and I think that you defined it in part that they could have a foolish doubt about anything.

THE COURT: Uh-huh. Yeah.

MR. WARDER: And I object to that definition. I think that it goes beyond and certainly changes what the Supreme Court has approved as the definition of reasonable doubt, differs substantially from one that would make a reasonable person hesitate to act.

I think that that coming from the Court at the very beginning of the week of jury service, at the very beginning of this case, would taint the jury's idea of what a reasonable doubt would be and that even if an instruction were given at the end of the case, after they heard all the evidence, that would contain what I consider, respectfully, to be the more correct definition of hesitate to act, that that would carry over and would so taint them that I could not get a fair trial.

So on that basis, I would move that this jury panel be dismissed and the case be continued to another term.

THE COURT: All right, sir, Mr. Warder. I

FORM 2094 PENGAD/INDY 1-800-631-6989

respectfully deny your motion. I think that that is well within the purview or well within the -- describing what reasonable doubt is not. So I respectfully deny your motion. But let the record so show that.

Anything further?

MR. WARDER: Nothing from the defendant at this time, Your Honor.

THE COURT: All right. Anything from the State?

SOL. GOSSETT: No, sir.

THE COURT: All right. Let's take about fifteen minutes and we'll come back and get started then.

Gentlemen, I want your opening remarks to be very short, very concise. And I think anything over three, four, five minutes is long. So make it short. I'll give you all the time you need at the end for your eloquence at the end of the case rather than this. We're going to develop this case by the witnesses, not from the opening remarks.

SOL. GOSSETT: Your Honor, we have talked about sequestering witnesses. We're sequestering our witnesses and probably would like to have our first witness and the chief officer on the case.

THE COURT: Okay. I didn't know that y'all wanted them sequestered. Was there a motion to sequester?

MR. WARDER: No, sir. There was no motion to

FORM 2094 PENGADMNDY 1-800-631-6989

sequester. But I certainly don't object to them sequestering their witnesses.

THE COURT: Why would you want to sequester them?

SOL. GOSSETT: Well, we were going to do that. We thought it would apply to both, if you see fit to do that.

THE COURT: Well, I see no reason to sequester the witnesses---

SOL. GOSSETT: All right.

THE COURT: ---unless some good cause is shown. But I don't know of any so far.

SOL. GOSSETT: All right. We'll have our witnesses come in, then.

THE COURT: Okay. No problem with that a'tall. Let's take fifteen minutes -- you all come up for just a minute, if you will. And then we'll take fifteen minutes' recess and then come back and get started.

(Whereupon Bailiff Wallace entered the courtroom.)

(Whereupon the Court, Sol. Gossett, Sol. Pruett, Mr. Warder, and Clerk Baines retired to chambers.)

(The following took place in camera, within the presence of the Court, Sol. Gossett, Sol. Pruett, Mr. Warder, and Clerk Baines:)

FORM 2094 PENGAD/NINDY 1-800-631-6989

THE COURT: All right. Bring Juror Littlejohn in, please.

(Whereupon Juror Littlejohn entered chambers.)

THE COURT: All right. Ms. Littlejohn, isn't it, I believe?

JUROR: Yes.

THE COURT: And you're on the jury panel there.

JUROR: Yes.

THE COURT: And I understand you had mentioned to the bailiff, or one of the bailiffs, that you knew the defendant.

JUROR: Yes.

THE COURT: And you also knew something about the case.

JUROR: I heard about the case, yes. What he had done and all. And I knew Jay, had went to school together and stuff.

THE COURT: Do you know him real well?

JUROR: Yes.

THE COURT: Yes. I'm just curious. Why didn't you tell me when I asked about it?

JUROR: I wasn't sure what you were saying. I get confused easy.

THE COURT: Oh, that's easy to do.

JUROR: Yes. And knowing him, I couldn't...

FORM 2094 PENGADINDY 1-800-631-6989

THE COURT: Well, after hearing what -- knowing this fellow, you would not feel comfortable serving?

JUROR: As a juror.

THE COURT: And do not feel that would be fair to him or to you.

JUROR: Huh-uh.

THE COURT: All right. All right, Ms. Littlejohn, I'm going to -- I'll excuse you, then, as far as service in this case. And you'll have to be back tomorrow at 2:30. Okay?

JUROR: Okay.

THE COURT: All right. Then, next time, if the judge asks the question and there's any question, you stand up and tell them what you know. Okay?

JUROR: Okay.

THE COURT: Okay. Very good. Thank you, Ms. Littlejohn. You're excused. Thank you.

(Whereupon Juror Littlejohn exited chambers.)

THE COURT: Okay. I don't know if y'all have any objections or not. But, anyway, I excused her because I felt like it was best.

MR. WARDER: I certainly hate to lose a juror that was of the minority race because my defendant is; and I think that takes away some of our -- but I think the juror clearly said that it would give her trouble.

FORM 2094 PENDADINDY 1-800-831-6958

THE COURT: But, anyway, I have ruled on it. And I didn't ask either of y'all to agree with me or not agree with me. But she did not feel comfortable and said she knew all about the case and talked about it and discussed it. So, anyway, I find that she is not qualified to serve. Because I believe one or both of y'all would have struck her if you'd known.

Okay. Very good.

(Whereupon the Court took a brief recess.)

(Photograph received into evidence and marked as State's Exhibit No. 1.)

(Photograph received into evidence and marked as State's Exhibit No. 2.)

(The following took place in open court, outside the presence of the jury:)

THE COURT: All right. Are we ready to go forward? State ready?

SOL. GOSSETT: Yes, sir.

THE COURT: Defense ready?

MR. WARDER: Yes, Your Honor.

Your Honor, I would move for a continuance and to draw a new jury panel. Your Honor, since we were last on the record, there's been another juror that's been excused. We have now at this time excused two of our jurors---

FORM 2084 PENGAD/INDY 1-800-631-6989

THE COURT: Right.

MR. WARDER: ---since the time. The effect of the last juror was to move -- we have now moved two alternates into the jury panel.

THE COURT: Yes, sir.

MR. WARDER: I had used a total of my seven strikes of my original ten in seating the panel. The last alternate was selected at a time I had exhausted all of my challenges to that alternate. I had used both of my strikes.

I now end up with a jury composed of jurors that I certainly would not have chosen had I known the information that the jurors had failed to disclose prior to our selecting them.

Your Honor, one juror was dismissed for cause because of the fact there had been a -- that juror had been convicted of a crime that carried a maximum penalty exceeding one year and was statutorily disqualified.

The second juror was disqualified because that juror had read about the case, had knew about the case, and told Your Honor she would be uncomfortable serving on it based upon her knowledge of my client and the fact she had known him.

I now think that I've been substantially prejudiced by having a jury panel composed of jurors

FORM 2084 PEHQAD/NNDY 1-800 631-6989

that, had I been allowed to use my peremptory challenges and had they disclosed that information, I wouldn't have chosen. So I move that this panel be dismissed and---

THE COURT: That you wouldn't have chosen? You would have struck them, you mean?

MR. WARDER: Yes, sir.

THE COURT: Well, they are struck now. So I've done what you didn't have to use your strikes for.

MR. WARDER: No, sir. I would have -- in fact, I would have struck the alternate, the juror that we now have on, had I known that information and that name come up at the same time, it would have come up at a time I would have had strikes left from my original peremptory challenges.

THE COURT: All right, sir. All right, Mr. Warder, I respectfully deny your motion. I don't know that we can have any more safeguards than what we did. I agree that the jurors did not -- they were not honest with us. And we discovered that. And the only thing I know is to replace them. And we just had some alternates, and that's all we've got. The rest of the jury panel is gone for the day. So we'll go forward.

So I'll respectfully deny your motion for a continuance.

SOL. GOSSETT: Just to bring to your attention one

FORM 2094 PENGADWINDY 1-800-631-6999

administrative matter, record keeping, bookkeeping. I have shown defense attorney, Mr. Warder, two pictures. And he has no objection, to my understanding, to those being used. And so we've had them marked State's exhibits.

THE COURT: Okay.

MR. WARDER: Yes, sir. The Solicitor has told me that that would eliminate a drawing and save us some time.

THE COURT: Yeah.

MR. WARDER: And I see no reason---

THE COURT: Okay. Very good.

MR. WARDER: ---to object.

THE COURT: So they are now in evidence? What is it, Exhibit No. 1 and 2?

SOL. GOSSETT: Yes, sir.

THE COURT: All right. Anything further?

SOL. GOSSETT: No, sir.

MR. WARDER: No, sir.

THE COURT: All right. Again, gentlemen, make your opening remarks very short and very concise. And I'll give you all the time you need at the end.

(The following took place within the presence of the jury:)

THE COURT: All right. Mr. Foreman, ladies and

FORM 2004 FEHGAD/NNDY 1-800-631 8999

gentlemen, give me your attention for just a moment, if you will.

The first part of any trial, or the first phase of any trial, is the opening remarks by the attorneys. Now, the opening remarks by the attorneys has no value to you as far as proof, for proof must come from witnesses under oath or by exhibits that have been properly introduced. But the opening remarks by the attorneys is a very intricate part of the trial. It sets the stage, it tells you what kind of lawsuit is involved.

Immediately after that we go into the next phase of any trial, and that is by the witnesses under oath. And that's how you must decide this case.

I told the attorneys, and I'm reminding them again, that their opening remarks must be very short and very concise; and they will be. But, again, it's an intricate part, so listen very closely as the attorneys make their opening remarks to you.

Ms. Clerk, you might swear the jury.

(Whereupon the jury was duly sworn at 12:01 p.m.)

THE COURT: Yes, sir, Mr. Solicitor.

SOL. GOSSETT: Your Honor.

(Whereupon Sol. Gossett made his opening statement to the jury, as follows:)

FORM 2094 PENDAD/NDY 1-800-631-6989

SOL. GOSSETT: Ladies and gentlemen, I'm Holman Gossett. I'm your Solicitor for Spartanburg and Cherokee Counties. I'm here today in my capacity seeking justice and, in doing so, bringing cases to you for trial that have been to the Grand Jury.

As the judge has indicated to you, this defendant is charged with murder and assault and battery with intent to kill. The Grand Jury has given true bills; and we're bringing this matter to you, bringing evidence to you, for you to decide the guilt or innocence of this defendant.

Briefly, the allegations indicated in the indictment say that Jay Tate, the defendant, on June first of last year, 1994, murdered his wife, Brenda Tate, by stabbing her. He also committed the crime of assault and battery with intent to kill upon this individual here, his stepson, by stabbing him. The testimony and evidence will show that these two crimes happened basically at the same time and place.

The evidence and testimony will also show that Brenda Tate and Jay Tate were married, that they had been living together as husband and wife. They began to have marital trouble. This marital trouble became serious to the point where, towards the end of May, Mrs. Tate took steps to process a separation from Jay Tate.

FORM 2094 PERIGADINDY 1-800-631-6989

And the testimony will also show that on June 1, 1994, on that day he came to Coggins Trailer Park, where they had resided together. There are several witnesses who lived there who will testify, also. And that on that day he, with malice aforethought, murdered Brenda Tate and committed the crime of assault and battery with intent to kill upon Joe Murray, this individual over here.

I'm not going to relate any more of the facts to you because I want you to hear those from the actual witnesses. Suffice it to say that this case is different in some ways because we have -- unlike where we don't have eyewitnesses, we have at least two eyewitnesses, Joe Murray, who is a surviving victim, and another individual, James Mike Wilkins, who were present at the crime scene.

As I stated to you at the beginning, my job is to seek justice. Your job is to do justice. And to do that, you have to listen carefully to all the evidence that's going to be presented to you in the courtroom today from this stand.

I ask you to do that, to carry out your oath and do nothing less than that, because you're upholding the laws of the State of South Carolina and Cherokee County. I ask you to determine what really happened on

FORM 2094 PENGAD/INDY 1-800-631-6989

the last day of May of last year and June the first of last year and to come back with a verdict that speaks the truth.

Thank you.

THE COURT: Yes, sir, Mr. Warder.

MR. WARDER: May it please the Court. Solicitor.

(Whereupon Mr. Warder made his opening statement to the jury, as follows:)

MR. WARDER: Mr. Foreman, ladies and gentlemen of the jury, we are here today to begin the trial of Jay Tate. We are going to try the events that occurred on or about June 1.

Now, this is the day and this is a case that involves the day that my client's wife was killed. We think that the evidence will show that he was deeply in love, that no one is sorrier than my client that his wife died.

Her death was a terrible accident, the evidence will show, that resulted out of a fight with his stepson. The testimony and evidence will show that Jay Tate and his stepson did not get along; that on the day that it happened, there had been a fight, a squabble over a knife; that as a result of that fight his stepson was injured and his wife was killed.

We think that the evidence will show that,

FORM 2094 PENGAD/INDY 1-800-631-6989

while it was a terrible tragedy, it was not a crime, it was not an act that my client would have done.

We ask you to listen carefully to the testimony, for your job as a jury will be to listen to all the testimony and decide what are the facts and then to take those facts and match them with the law that His Honor will give you at the end of the case.

During this trial you will hear the facts from the State first. We ask you to listen carefully to them. You will then hear the testimony of the defendant as to what happened that day.

From these facts presented by the State and the defendant, you will find the true facts, the real facts. You will match them with the law that His Honor will give you at the very end of the case.

We ask you to keep an open mind until you have heard everything so that you can do your duty and you can give a verdict that imparts justice. In this case, we submit that that verdict will be not guilty.

Thank you very much.

THE COURT: You may call your first witness, Mr. Solicitor.

SOL. GOSSETT: The State calls Joe Murray.

THE COURT: Come around, Mr. Murray, please, and be sworn.

FORM 2094 PENGAD/INDY 1-800-631-6989

JOE MURRAY, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOL. GOSSETT:

Q State your name for the Court, please.

A Joel Murray, Jr.

Q Okay.

THE COURT: You're going to have to speak up a little louder. Your voice doesn't carry.

Q Say you're Joe Murray, Jr.?

A Yes, sir.

Q Okay. I know you are soft-spoken and I guess you're a little nervous. Again, try to speak loud enough so this last man back here hears everything. Because they need to hear what you say. Okay?

A (Nodded head.)

Q Joe, where do you reside?

A [redacted] James Street.

COURT REPORTER: I can't hear you.

THE COURT: You're going to have to just speak up, now.

Q Talk like you want me to hear everything you say, okay?

A I resided at a trailer right behind [redacted] James Street.

FORM 2094 PENGAD/NDY 1-800-631-6989

Q Okay. Is that where you're living now?
A No, sir.
Q Okay. Where are you living now?
A 156 Eastview Drive.
Q Okay. Back in June of 1994, where were you living?
A I was living right behind [redacted] James Street, in a trailer right behind.
Q Okay. And who lived in the one at [redacted] James Street?
A My mother and Jay Tate.
Q Okay. And is that in Coggins Trailer Park?
A Yes, sir.
Q Okay. Here in Cherokee County.
A Yes, sir.
Q Okay. And had you lived in that trailer at some point, with your mother and Jay Tate?
A Yes, sir. I was -- lived in that trailer close to -- right till about two weeks up until everything happened.
Q Okay. Now, did you know the victim in this case, Brenda Tate?
A Yes, sir; that was my mother.
Q Okay. And do you know the defendant in this case, Jay Tate?
A Yes, sir; that's my stepfather.
Q Okay. And who is your natural father?

FORM 2094 PENGAD/INDY 1-800-631-6989

A My natural father is Joe Murray, Sr.
Q How long had it been since your father, Joe Murray, and your mother had been divorced?
A It was around -- well over nine, ten years.
Q Okay. And did you know -- how long have you known this defendant, Jay Tate?
A I've known him around -- around seven.
Q Seven years or so?
A Yes, sir.
Q Okay. When did Jay Tate and your mother, Brenda, get married? In approximately what year?
A I'm not sure the exact year.
Q About how long had they been married?
A They'd been married for around five or six years.
Q Okay. Where did Jay Tate and your mother, Brenda, last live together?
A [redacted] James Street.
Q Okay. That's the Coggins Trailer Park.
A Yes, sir.
Q Okay. And when did they start living there together?
A She had been living there, me and her, for a while. And Jay Tate started living there around two or three months, you know. And then after that I moved out in the trailer behind my mom, you know, 'cause my sister was

FORM 2084 PENGAD/NDY 1-800-631-6989

getting her a house.
Q Okay. You mentioned your sister. Had she lived in the trailer behind your mother?
A Yes, sir.
Q And then your sister moved out to another place.
A Yes, sir.
Q Over on Holmes Street, or somewhere.
A Yes, sir.
Q When your sister moved out, are you saying that's when you moved into the trailer behind your mother where your sister had been?
A Yes, sir.
Q Okay. And Jay Tate and your mother, did they continue to live together up until the day that your mother was killed?
A My mother was -- around the last -- the few -- three days right before everything happened, she was staying with my sister because, you know, they weren't getting along. And she -- while he wasn't there, she was slowly moving some of the important things out of the house. 'Cause she was wanting him to leave.
Q Okay. So she hadn't stayed at this [redacted] James Street in Coggins Trailer Park for three days prior to her dying.
A Yes, sir.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q She would stay with her daughter, your sister, at Holmes Street, somewhere else.
A Yes, sir.
Q Okay. Do you know if your mother had talked to an attorney about a separation?
MR. WARDER: Objection, Your Honor. I think he needs to lay some foundation.
THE COURT: No, he can answer that question. He can't go any further than that, though.
A Yes, sir; she had told me that she had---
MR. WARDER: Objection to hearsay.
THE COURT: All right. I sustain that objection.
SOL. GOSSETT: All right, sir.
Q The night before your mother was killed and you were stabbed, had Jay Tate and your mother seen each other at the trailer park?
A Yes, sir.
Q Okay. What took place that night before or day before?
A They were having a fight, you know. It all come down to my house.
Q Okay.
A I didn't know much of what was going on.
Q Okay. You say they were having a fight. Do you mean they were physically hitting each other or

FORM 2004 FEINBAUM/HUY 1 800 931 0999

just---
A No, they were arguing.
Q ---arguing. Not physically at that point; right?
A (Nodded head.)
Q So that's the night before.
A (Nodded head.)
Q And they came down to your trailer, which is behind your mother's.
A Yes, sir.
Q Okay. And do you know if anyone was called in to intercede in the matter?
A Yes, sir; the police showed up. They all come down to my house.
Q Okay. And did the argument continue or did the police restore calm and safety for the moment?
A Just for the moment. They argued, you know, still after -- they still had their problems later. You know.
Q Did the police come back out there again that same night?
A Yes, sir; I believe they did.
Q Okay. And thereafter, when the police came, could you tell us whether or not Jay Tate stayed in the trailer park or he left?
A He left that night.
Q Okay. And what about your mother?

FORM 2094 PENGAD/NDY 1-800-631-6989

A My mother, she was staying at my sister's house.
Q Okay. All right. And so during this period, now, you're -- you said that you had moved out to the trailer behind your mother's.
A Yes, sir.
Q Was anyone else living with you in that trailer behind your mother's?
A Yes, sir; Michael Wilkins.
Q Michael Wilkins?
A (Nodded head.)
Q He was your roommate.
A (Nodded head.)
Q All right. Well, let me direct your attention to the next day, the afternoon of June 1 of 1994, the day that your mother was killed. Where were you that afternoon?
A That afternoon? My mother had asked I and James Wilkins to change the locks for her and she'd take us swimming.
Q Okay. Now, change the locks on what?
A On her trailer.
Q The trailer that she had lived with Jay Tate in, at [redacted] James Street?
A Yes, sir.
Q Okay. She asked you to change the outside door

FORM 2094 PENGAD/NDY 1-800-631-6989

lock?
A Yes, sir.
Q Okay. And had she bought some locks?
A Yes, sir.
Q And did you and Mr. Wilkins change those locks?
A Yes, sir.
Q Okay. Do you know about what time you changed the locks?
A We changed the locks, had it done -- we had it done around -- very close to four o'clock.
Q Okay. And so they were completed sometime late afternoon.
A Yes, sir.
Q Okay. And after you completed changing the locks, who was in the immediate area there in front of your house and in between your mother's and your house? Who was present?
A Who was present? My mother was down at my house waiting for us to change the locks.
Q Okay. After the locks were changed, then what happened?
A Then I and James went down there, told my mom we was done. You know, we all load up in the truck. Me and James are on the back of the truck. And my mom was sitting there, getting ready to drive off.

FORM 2094 PENGADNDY 1-800-631-6989

Q Okay. So where is the truck sitting right there, right that moment?
A The truck is sitting right in front of my trailer, which is behind my mother's trailer.
Q Okay. And I believe your mother's trailer is sort of up on a hill and then yours is next; it goes down steeply.
A Yes, sir.
Q Okay. Now, your mother was where in the truck?
A She was in the driver's seat.
Q Okay. She was in the driver's seat. And where were you?
A I was on the bed of the truck.
Q So you were in the back, the bed of the truck; not in the cab.
A (Nodded head.)
Q Okay. Where was Mike Wilkins?
A Mike Wilkins was also in the back of the truck.
Q Okay. Had your stepfather, Joe Tate, been there up until this point in the day?
A No, sir.
Q Okay. And did your mother ever start the truck up?
A Yes, sir. We were ready to leave.
Q Okay. And where were y'all going, now?
A We were going swimming.

FORM 2094 PENGADINDY 1-800-631-6989

Q Okay. That was your incentive to change the locks.
A Yes, sir.
Q She was going to take you swimming.
A (Nodded head.)
Q Okay. What happened right before she pulled off?
A Right before she pulled off, Jay Tate come walking around from the front of my mom's trailer.
Q And where did he come to?
A He walked right down, close to ten feet away from the truck. And asked my mother---
Q Now, where -- are you still where you said you were, and Wilkins, and your mother?
A Yes, sir.
Q So y'all are in the truck, ready to go.
A (Nodded head.)
Q He walks up to the truck. And does he and your mother say anything?
A He asked her if she will take him somewhere. And she tells him no. And he asks her if he can talk to her. And she says no. And then he asked her if she can let him in the house. And then she handed me the keys and I got out of the truck and I headed up to the trailer.
Q Okay. Did -- when he said could he get in the house, did he say why he wanted to get in the house?
A Oh, yes. He said he wanted to get his stuff.

FORM 2094 PENDAMNDY 1-800-631-6989

Q Okay. He wanted to get his stuff out of the house.
A (Nodded head.)
Q All right. So your mother said no to talk to him, no to take him somewhere; but then when he said, Can I get my stuff out of the house, what did she do?
A She gave me the keys to let him in.
Q Okay. And when she gave you the keys, where was she?
A She was sitting in the front of the truck, in the driver's seat.
Q Sir?
A In the driver's seat of the truck.
Q All right. When she gave you the keys, did you get out of the truck?
A Yes, sir.
Q And where did you go?
A I went right up to my mother's trailer.
Q Okay. Up the hill, around the front of---
A Up the hill, around to the front of the trailer.
Q Okay. Now, the front of her trailer, does it face the front of your trailer?
A No, sir.
Q Okay. So her back door, or the back of her trailer would face the front of your trailer.
A Yes, sir.

FORM 7094 PENGAD/NDY 1-800-631-6989

Q Okay. Sort of like side by side, like this, going down the hill.
A (Nodded head.)
Q Okay. Did you go up around to the front door of her trailer?
A Yes, sir.
Q And did anybody go with you up there?
A Jay Tate.
Q Jay Tate, the defendant.
A (Nodded head.)
Q Okay. And did you -- did you get up to the door and put the lock in the door, or the key in the lock?
A No, sir.
Q What happened that -- were you going to do that?
A Yes, sir. But I hadn't even got up the steps yet. I was still trying to find the key, you know, 'cause it's a new key.
Q All right. While you were there, trying to find the key, before you put it in the door, is Jay Tate right here?
A Yes, sir.
Q What happens? Does he say anything or tell you anything or ask you anything?
A He asked me if I changed the locks.
Q Okay. And what did you say?

FORM 2004 PENGADMNDY 1-800-631-6989

A I said yes.
Q And what was his reaction to you saying yes, I changed the locks?
A He walked up to me and kind of punched me, like that. And I felt a sharp pain.
Q Okay. So he punched you where?
A He punched me right -- it was, I believe the first time was down around here (indicating).
Q Okay. And did you think you had been only punched at that time?
A Yes, sir.
Q Did you later determine otherwise?
A Yes, sir.
Q What did you determine later?
A Well, after he had punched me that time, you know, he hit me again in the side.
Q Uh-huh.
A And then I fell on the ground and he hit me twice more. And, you know, I was just laying there and he was walking fast around the trailer.
Q Uh-huh.
A And I was -- you know, my legs were starting to get real hot.
Q Uh-huh.
A And when -- I kind of standed up, you know; and I

FORM 2094 PENGAD/HOY 1-800-631-6989

could feel the blood all down my legs.
Q So he had actually stabbed you.
A (Nodded head.)
Q How many times did he stab you?
A He stabbed me four times.
Q Other than what you've told the jury about what conversation happened at the truck and up at the door, had you and Joe Tate said anything or reacted to each other in any way before he stabbed you?
A No, sir.
Q Had you pulled a knife out on him?
A No, sir. I was ready---
Q Had you---
A ---to swim. All I had was shorts on and a little shirt.
Q Did you have any weapons on you at all?
A No, sir.
Q Okay. Had you hit him?
A No, sir.
Q Had you done anything to make him mad or act like he did and stab you?
A No, sir.
Q All right. After he stabbed you, how were you feeling then?
A I'm kind of numb. You know, my whole body is numb.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q All right. Where does he go when you're there feeling numb?
A He walks around -- well, he walks at a sort of a fast pace around the trailer, down towards mine.
Q Okay. Back down towards the truck?
A Uh-huh.
Q Is that where you had left your mother?
A (Nodded head.)
Q Okay. And where did you go?
A I, I got up and I come around behind him.
Q Okay. Were you going slow or fast or---
A I was going about the pace he was.
Q Okay. And when you came around the trailer, let me ask you this: Did you see your mother anywhere?
A Yes, sir.
Q Where was she?
A She was standing half-way in between my trailer and hers.
Q Okay. And what did Jay Tate do?
A He walked directly right up to her.
Q Okay. Right up to your mother.
A Uh-huh.
Q And did they come together?
A Yes, sir.
Q And what happened?

FORM 2094 PENGADNDY 1-800-631-6989

A She just kind of started slouching down.
Q All right. Did he pull away from her?
A Yes, sir.
Q All right. Did she -- slouching down means... (demonstrating).
A Yes, sir.
Q Okay. And what did you do next?
A Well, I come up behind him. You know, I was gonna try to do something to him.
Q Uh-huh.
A And I turned around -- he turned around and I saw that knife; and I started going away from him, across the street.
Q All right. You saw a knife in his hand.
A Yes, sir.
Q All right. And can you tell us to any degree what that knife looked like?
A It looked like a wooden steak knife.
Q Okay. How long or short was it?
A I can't remember the exact length or anything; I was going up...
Q Okay. And when he turned around with that knife, where did you go?
A I went exactly away from him, as much as I could. And I walked over to a neighbor's house. And I just

FORM 2094 PENGAD/INDY 1-800-631-6989

looked back and he's -- when I turned back, he started to walk back up towards my mother's trailer. I go over to a neighbor's house and I asked them to call the ambulance.

Q Okay. You're sitting here calmly telling this now. Were you calm, like you are now, then? Or were you -- did you have your voice raised a little bit?

A I was probably speaking a little quieter than normal 'cause I was having trouble talking.

Q Okay. Were you feeling pain then?

A Yes, sir.

Q Okay. All right. As he -- you saw your mother slump and he turned around at you with a knife, then you ran off to the -- or went off to the neighbor's house to call---

MR. WARDER: Objection. The Solicitor is now leading.

THE COURT: I think you are, Mr. Solicitor. Let him do the testifying, rather than you.

Q All right. After you indicated what you had done, where did you end up after you saw the knife turned on you?

A After I saw the knife, I ended up at the neighbor's house.

Q All right. And did you ask the neighbor anything?

A Yes, sir.

FORM 2004 PENGAD/ITDY 1-800-631-6989

Q What did you ask?
A I asked for them to call an ambulance.
Q All right. How tall are you?
A About five-seven, five-nine.
Q Okay. And how much do you weigh or how much did you weigh on June 1 of last year?
A Around 140 pounds.
Q And how old---
A Or around 155.
Q ---are you?
A I'm eighteen right now -- well, I'm nineteen. Excuse me.
Q Do you know about how tall Jay Tate is?
A He's around six foot, six foot one.
Q And about how much he weighs?
A Around 250 pounds.
Q And do you know how old he is?
A Thirty-three.
Q All right. After you said you saw Jay Tate going up back towards the trailer, up the hill, did you see him any more after that?
A No, sir.
Q Okay. After he left, what did you do?
A I walked back across the street. And I saw my mom laying on the ground. I, I just wasn't feeling good at

FORM 2094 PENGADMNDY 1-800-631-6989

all; I had to sit down. So I leaned up against the tree and started trying to hold, you know, where I was cut, stop the bleeding.

Q All right. Did you say or do anything to your mother; or what did she do?

A She was lying on the ground.

Q Did she say anything more to you?

A No.

Q All right. And as you were there against the tree, did you see Mr. Mike Wilkins?

A I didn't see him at the time. You know, around a matter of thirty seconds he come up the hill, back towards me, and asked if I was all right. He said he went to call the ambulance.

Q All right. After a while did the police actually come?

A Yes, sir.

Q And did an ambulance come?

A Yes, sir.

Q And what did they do with you?

A What they -- with me?

Q Uh-huh.

A They held some bandages on me and then laid me down on a stretcher and took me to the hospital.

Q Okay. At some point did you relate what you've told

FORM 2094 PENGAD/NOY 1-800 631-6989

the jury, the basics of that, to the police at some point?

A Yes, sir.

Q All right. Let me show you what has been marked into evidence as State Exhibits No. 1 and 2. Can you identify State's Exhibit No. 1?

A Yes, sir.

Q What is that?

A That is a picture of my mother's home and mine.

Q Okay. And showing you State's Exhibit No. 2, what is that?

A Is just a closer view of my mother's home and mine.

Q Okay. Would you step down with me in front of the jury now, since these are sort of small.

(Whereupon the witness stepped down from the stand.)

Q Okay. Showing you State's Exhibit No. 1. What is this object right here?

A That is my mother's home.

Q Okay. So we're really looking at what part of her trailer?

A That is the side.

Q Okay. The end of it, the side of it.

A (Nodded head.)

Q Okay. Now, what is this right here?

FORM 2084 PENGADWINDY 1-800-631-6989

A That is the front of my home.
Q Okay. And is there a front door in that picture?
A Yes, sir. It's right there.
Q Okay. Right here.
A Yes, sir.
Q All right. So we see your mother's trailer and then your trailer.
A Yes, sir.
Q Okay. What is this object here?
A That is one of our neighbors' trailer behind us.
Q Okay. Now, where is the trailer that you went to or helped to call -- asked to call 911? Is that in the picture?
A No, sir.
Q Where would it be located?
A It would be right across from my trailer.
Q Right across---
A Right.
Q What is this object here?
A That's the road.
Q Okay.
A Dirt road.
Q So would the other trailer be where?
A On the -- over here on the dirt road.
Q Over on this side. Out of the picture.

FORM 2004 PENDADINDY 1-800-631-6989

A (Nodded head.)
Q Is that correct?
A Yes, sir.
Q Okay. Now, in this picture can you point out where the truck would have been or was on June 1?
A The truck was parked right in front of that front door, right there.
Q Is there an object there now?
A Yes, sir.
Q Is it a dark-colored car?
A Yes, sir. It's parked where I would have parked.
Q Okay. Not where the blue car is.
A No, the car right there in front of the door.
Q Okay. What is this object right here?
A That's the tree I leaned up against.
Q Okay. So the truck was here in front of the door. And the tree is over in front of another car.
A (Nodded head.)
Q Right?
A (Nodded head.)
Q Neither one of those vehicles were there at the time. Is that correct?
A Yes, sir.
Q Okay. So the truck was right here where this dark car is now.

FORM 2094 PENGADMDY 1-800-631-6989

A (Nodded head.)
Q Is that right?
A Yes, sir.
Q Okay. All right. Would you tell us -- show us on this picture -- you said when your mother gave you the keys, where did you -- did you go from where this truck was and to where?
A Right -- I walked straight right through here to the front door.
Q To the front door, which would have been out of the picture here.
A Yes, sir.
Q All right. And when you came back around and saw your mother and Jay Tate together, where were they?
A They were standing right about right here.
Q Right about here.
A Yes, sir.
Q Where the light part of the picture is and -- it looks like it's not grass, but brightness there, dirt. Is that correct?
A Yes, sir.
Q Okay. And then you ended up where?
A You mean after I---
Q After you got 911 and came back and checked on your mother.

FORM 2994 PENDAFORM 1 800-631-6989

A I was right, right here, came across the street.
Q Okay. You're in the same yard.
A Yes, sir.
Q And close to your mother.
A Yes, sir.
Q Showing you State's Exhibit No. 2, what is that?
A That's a close-up of the same picture.
Q Okay. This object here is what?
A My mother's house.
Q Okay. And is this -- what is this part of it here?
A This is the front.
Q Okay. That shows a portion of the front wall. Is that right?
A Yes.
Q It's just another angle?
A Yes, sir.
Q And then what's this object down here?
A That's my trailer.
Q Okay. I believe that's all. You can have a seat again, please.

(Whereupon the witness returned to the stand.)

Q If you will, Joe, answer any questions that the defense has for you.
A Okay.

CROSS-EXAMINATION

FORM 2094 PENGAD/NYDY 1-800-631-6989

BY MR. WARDER:

Q Mr. Murray, sir, did you and Jay Tate get along?

A We did at the beginning.

Q I believe you were in Hawaii when your mother and Jay started living together. Is that right?

A No.

Q You had already came back from Hawaii then?

A Excuse me?

Q You had already came back---

A Yes, sir.

Q ---before they started living together?

A Yes, sir.

Q And when you say that you and Jay got along initially, how long did you get along before your periods of disagreement started?

A The disagreement only started around three weeks before everything happened.

Q And that was about one week before you moved out? Is that your testimony?

A It was -- there was about two weeks before I moved out.

Q Okay. How long had you been moved out of the trailer when this happened?

A I had been moved out for close to two weeks.

Q Okay. And about two weeks prior to that you and Jay

FORM 2094 PENBADMDY 1 800-831-0909

stopped getting along?
A Yeah, you know, it's just slowly on. I always kept to myself and tried to stay away from the house.
Q Okay. Well, did you always try to stay away or did you used to try and spend a lot of time there with Jay?
A I really didn't spend much time with him 'cause I'm out with my friends or whatever.
Q Did your mother and Jay argue a lot about you?
A Yeah, they argued about me.
Q Were you a source of friction and trouble between Jay and your mother?
A Not so far. Just him, you know, messing with my stuff. I'd tell my mom about it and she'd fuss at him about it. And that's about as far as it'd go.
Q Well, when -- did anything physical happen between you and Jay?
A No, sir. Well, there was only -- there was one problem I had, that my mom told me to unhook the phone line, you know, when she was staying at my sister's. She told me to unhook the phone line 'cause he was running up the bill and he hadn't been paying it.
Q I see. Told you to unhook the phone. What did you do, call the phone company and have them come out and disconnect it?
A No, I can -- I'm good at all kinds of wiring so I

FORM 2094 PENGAD/INDY 1-800-631-6989

just unhooked it.
Q Did you cut it or did you pull it out of the wall, or what did you do?
A I just cut it.
Q Was Jay on the phone when you did that?
A I have no idea.
Q So you had went up and cut the phone line. How close was that to when this happened?
A This was pretty close. Around a week.
Q Okay. Well, I thought your mom had only been moved out three days.
A She had.
Q Okay. Did you cut the phone when your mother was still in the trailer?
A No, she wasn't -- she wasn't in the trailer at the time, you know. She, she was just kind of back and forth in between her and my sister's until that three days. And that three days she just started staying over there. And he would call all kinds of long-distance numbers and she'd have to pay---
Q All right. Now, slow down just a little bit. Your mom was back and forth between your sister; and then she moved out three days before this happened.
A (Nodded head.)
Q Okay. And it was during that three days that you

FORM 2054 PENTADANDY 1-800-631-6989

were afraid she was -- he was gonna run the phone up?
A No, he had been running it up, you know. She didn't -- she didn't think he was gonna leave.
Q So---
A And she was still paying the bill.
Q So Jay hadn't left when -- and you say you were afraid he wouldn't leave?
A Excuse me?
Q You were afraid he wouldn't leave?
A I didn't say that. I said my mother was afraid of that.
Q Well, when your mother moved out to live with your sister, the phone still worked; didn't it?
A Yes, sir.
Q Okay. And that was just three days before this happened.
A Yes, sir.
Q Okay. And in that three-day period, when did you decide -- when did you cut the phone line?
A It was before the three days. It was close to, like, a week or two before, before that one week where she started, you know, being over at my sister's house.
Q Was the phone working when this happened?
A I don't know.
Q Well -- did there ever come a problem with you

FORM 2094 PENGAD/INDY 1-800-631-6989

carrying guns and knives, things like that?
A I had a gun, like, a couple -- about two months before he started staying there. And I got rid of it.
Q That was your .357?
A No, that was a pellet gun.
Q You didn't carry a .357?
A A .357 pellet gun sometimes.
Q Are you telling us you carried a .357 pellet gun?
A Uh-huh.
Q What's a .357 pellet gun?
A A .357 pellet gun's a CO2 pistol that looks like a .357.
Q You didn't have a real .357 that took .357 cartridges and...
A No.
Q You didn't carry that in the middle of your back?
A I didn't actually carry it. I just -- sometimes I'd go hunting and I'd have it. I didn't have it at the time this all happened.
Q Where do you get a .357 pellet gun that looks exactly like a .357 revolver?
A Walmart's.
Q And that's what you did.
A I've had it for years.
Q How about knives? Did you usually carry a knife?

FORM 2094 PENGADNDY 1-800-631-6989

A I usually had a little pocket knife on me.
Q Have it on this day?
A No. I was going swimming. Stuff would fall out of my pockets. Well, the shorts I had on didn't have pockets.
Q Did you have swimming trunks on?
A No, they were shorts; right? But, you know, they had pockets but there are holes in them so you can't put anything in them.
Q Now, on the day this happened, you and Jay Tate walked to the front door of the trailer. Is that right?
A Uh-huh.
Q Jay was completely friendly?
A He didn't say anything at all till he said -- till he said, Did you change the locks?
Q Did you say anything?
A Yes.
Q Okay. What were you saying to Jay as you went up there?
A Nothing. He was around three or four feet ahead of me.
Q And when you got up to the door, your testimony is he said, Who changed the locks?
A He didn't -- no, he said, Did you change the locks?
Q Okay. How did he know the locks were changed?

FORM 2094 PENGAD/INDY 1-800-631-6989

Could you tell that just by looking at the door?
A Probably not.
Q You told us that your mother had just handed you the key.
A Uh-huh.
Q Is that right?
A Uh-huh.
Q A brand-new lock, would have been a brand-new, shiny key?
A It looked like any other key.
Q It wouldn't have been a new key, particularly.
A Yeah, it would have been a new key.
Q You told us that you were fumbling for the key. And, of course, my question is, why couldn't you pick up a brand new key out of the keys?
A The -- all keys look alike, you know. There are brown keys and stuff. But silver keys and silver keys look the same.
Q What color were these keys? Brass keys?
A The key, I believe, was silver.
Q And what was the key on, that you couldn't find it for all these other keys?
A A key ring full of keys.
Q How many keys were on it?
A Around -- probably about ten, twelve.

FORM 2004 PENNADINDY 1 800 631 6989

Q What all did your mother carry keys to that there would have been ten or twelve keys on a ring for?
A She worked at a rest area during the weekend. She had several rest area keys that went to different doors and different locks. And she had house keys. She had -- I believe she had one of my sister's house keys; I'm not sure. She had a key to my house.
Q And this new key that you'd just got didn't stand out on that ring.
A No.
Q Okay. Was there any kind of fight? Was Jay in any way injured?
A No.
Q Did you ever hit or grab or punch Jay?
A Well, you know, when I said he reached out and kind of punched me? I put my arm like that (demonstrating). And then he, he did it again, you know.
Q Okay. Did you ever hit or punch him, of course, was my question.
A I believe my arm never made contact with him.
Q Okay. Did you try and hit or punch him?
A No.
Q Now, did you encourage your mother to leave Jay?
A No.
Q Would you have -- and Jay argued a lot? Wouldn't

FORM 2094 PENGAD/NDY 1-800-631-6989

you make fun of his race?
A No. I also have another black relative. And me and him get along just fine.
Q You didn't tell your mother to leave Jay because he was black and you didn't think she should be with him?
A I said none of the sort.
Q And you would deny that you used racial epithets and called him names that day?
A I never -- I never say the word that you call black people. I rarely ever say that.
Q Well, did you say it to Jay that very day, that very day that that happened?
A (Shook head.)
Q This steak knife, was it a steak knife that was in the house?
A The -- I saw a glimpse. I have no idea.
Q Well, how long did you live there?
A I lived there for around six, seven months.
Q Was it a steak knife you saw from living in the house six or seven months and eating at that table in that dining room?
A Well, actually, I don't eat at the table in the dining room. I just go eat by myself.
Q Well, when you go and eat, do you use a knife?
A Rarely.

FORM 2991 RENOADMIDY 1-800-631-6989

Q So you don't know whether it was one of the knives that was in the drawer in the house for six or seven months or not.
A That's right.
Q And I take it from the way you're testifying you really couldn't recognize the knives that had been there six or seven months anyway.
A A few of them. You know, just the cheap ones.
Q This trailer that was behind your mother's trailer, did -- was it her trailer? Did she pay the rent or did she own it?
A On the trailer behind my mother's?
Q The one you lived in.
A No.
Q Okay. Did you rent it from some landlord?
A Well, actually, I hadn't even paid the first thing in rent. My sister moved out, they kept the deposit. And I was just starting a job, waiting to get paid for my first week. And that's about as far as it got.
Q Let's see. So, really, what we're talking about is your sister moved out and you moved in and you didn't tell the landlord or anything.
A I believe my sister discussed it with the landlord and he said it would be all right.
Q You don't know. You wouldn't discuss it.

FORM 2094 PENGADMNDY 1-800-631-6989

A No.
Q And this roommate that come up, that was there. Was that somebody that had lived there with the landlord, or was that just a friend of yours you moved in?
A It was a friend of mine I moved in to help me pay the rent.
Q Yeah, but there was no rent to pay. No rent was ever paid; was there?
A No, but there would have been.
Q And could you have lived there as short as a day or two?
A Excuse me?
Q Could you have only been there a day or two?
A Who, me?
Q (Nodded head.)
A I was there for about a week and a half to two weeks.
Q Did you have any guns over at that particular trailer? A .357?
A No, sir.
Q Okay. Thank you.
THE COURT: Any other questions?
SOL. GOSSETT: Just very briefly, Your Honor.
THE COURT: All right.
REDIRECT EXAMINATION

FORM 2094 PENGAD/MIDY 1 800-631-8989

BY SOL. GOSSETT:

Q What's your sister's name?

A Sandra Littlejohn.

Q I'm sorry?

A Sandra Littlejohn.

Q And who is she married to?

A Adrian Littlejohn.

Q Okay. And you said that you had another relative that was a black person.

A Yes, sir.

Q Who is that?

A Adrian Littlejohn.

Q So that's your sister's husband.

A Yes, sir.

Q All right. Lastly, from your front door, where the truck was, where you and your mother and Mr. Wilkins were before Mr. Tate walked up, could you have seen the front door to your mother's trailer?

A Can you repeat the question, please?

Q From your front door, where the truck was, could you have seen the front door of your mother's trailer?

A No, sir.

MR. WARDER: Objection. Beyond the scope of direct -- I mean, cross-examination.

THE COURT: Well, I'll allow it. I'll allow the

FORM 2094 PEMGAD/INDY 1-800-631-6989

question, but let's move on. Let's not be repetitive and let's stay within the realm of cross-examination.

SOL. GOSSETT: All right, sir.

Q So you could not see that front door from your mother's -- where you were.

A No, sir.

Q Okay. That's all.

THE COURT: All right. You may step down.

Solicitor, do you have a real short witness?

SOL. GOSSETT: Yes, sir. We need to put one witness up, if we could.

THE COURT: All right.

SOL. PRUETT: The State calls Kenny Millwood.

THE COURT: Come around, please, Mr. Millwood.

KENNY MILLWOOD, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOL. PRUETT:

Q State your name and occupation, please.

A I'm Kenneth Millwood. I'm a paramedic with the Upstate Carolina EMS.

Q How long have you been working there?

A About fourteen years.

Q And, generally speaking, what do your duties include as a paramedic?

FORM 2094 PENGAD/INDY 1-800-631-6989

A I'm EMS supervisor, shift supervisor.
Q Do you respond to dispatches or calls throughout Cherokee County?
A Yes, sir.
Q All right. And on June 1 of last year did you respond to a dispatch to Coggins Trailer Park?
A Yes, sir. We was dispatched at 5:15 to what we call the EMS Signal 14, which is a stabbing.
Q All right.
A And since they dispatched a ambulance at that scene, I back them up. I go if it's a bad call.
Q Okay. So when you say a bad call, do you mean a serious call?
A Yeah, a gunshot, stabbing, cardiac arrest, something like that.
Q All right. And did you, in fact, go to Coggins Trailer Park?
A Yes, sir; we did. We responded.
Q When you arrived at the scene, Mr. Millwood, what if anything did you observe?
A I'm testifying off of a State copy. It's a DHEC...
Q Is this your EMS run report?
A Yes, sir. Yes, sir; we responded and we arrived on the scene at 5:17.
Q P.M.?

FORM 2094 PENGAD/INDY 1-800-631-6989

A Yes, sir.
Q All right.
A In the afternoon.
Q And you observed what?
A When we first got there, we seen two police officers running. They had got there at the same time we did. And I asked J. P. Manning, I said, Is everything clear? And he says---

MR. WARDER: Objection to what J. P. Manning said.

THE COURT: Just say what you did---

A Okay. What I saw was a police officer running up the hill away from the scene. And they was a white female laying face down approximately ten yards to my left. We didn't pull up in the yard. It was a dirt road. We just stayed on the road with the ambulance.

And they were a white female laying face down about ten yards over in the yard. And then they was a white male, which is this guy right here -- I don't know his---
Q You're referring to Mr. Joe Murray?
A Yes, sir. I don't -- I don't remember his name.
Q All right. Where was he situated at?
A He was laying with the back of his head and his shoulders elevated up against a tree, approximately another thirty yards over to my left, on the other side of the female.

FORM 2994 FENGADMDY 1.800.631.6989

Q All right. And what was the course of action followed by the EMS, any paramedics that were at the scene?

A Okay. When we arrived, I -- since she was the closest one to the road, we immediately got to her first. We turned her over. She was -- she was obviously dead. She -- her pupils were dilated, she didn't have no respiration, no heart rate, no pulse, nothing. She had one stab wound that appeared to be under her left breast, a small amount of blood. She was pale.

Q All right.

A And at the same time the young fellow right here appeared -- he was hollering for somebody to help him. So we went over there. Since we couldn't help her, myself and Leon Durrant, which is another paramedic, responded over there to him.

And he had a -- he kept saying he was stabbed. And he had four stab wounds. He had one in the chest, in the lower chest. I think it was a -- it was on the left side also. It was more in this area here. And he had two stab wounds in the back and one in the flank, in the left flank. And he was---

Q So one in the front, one in the side, and two in the back.

A Two in the back; yes, sir.

FORM 2094 PEN:GAD/INDY 1-800-631-6989

So she had a light shirt on, a bra, and a pair of pull-up pants on. That's all she had on. No weapons on her.

Then we proceeded over to this man right here. And he had a pair of what appeared to be cut-off blue jeans. And we -- there was nothing on him or nothing in his pockets or nothing because we took them off in the back of the truck. We cut them off.

Q And what became of Mr. Joe Murray? Was he treated at the scene and then---

A Well, he was treated at the scene 'cause he had a lung that had been deflated. One of the puncture wounds had went into his left lung. And that's the reason he was having such a shortness of breath.

We put a large-bore IV catheter in his lung and inflated his lung and started two IVs to replace the fluid, the blood that he had lost, 'cause he was bleeding a lot, externally and internally. And put him on some IV fluid, put him on a back board, and put him in the back of the truck and started transporting him.

Q Okay. And as to Ms. Tate, Brenda Tate, what---

A We -- J. P. -- Mr. Manning came back up, the police officer. By that time I think the sheriff or -- I don't remember if the sheriff had got there. But a bunch of other people had started getting there. And one of them asked me, said---

FORM 2094 PENGAD/INDY 1-800-631-6989

MR. WARDER: Objection to what somebody asked him, Your Honor.

THE WITNESS: Okay.

SOL. PRUETT: I'm almost finished, Your Honor.

Q If you would, was she transported immediately from the scene---

A No, sir; she was---

Q ---or was she left there?

A We called -- I just told one of the police officers to call the coroner because there wasn't nothing we could do for her.

Q She was already dead.

A She was dead.

Q Thank you.

SOL. PRUETT: That's all I have.

CROSS-EXAMINATION

BY MR. WARDER:

Q So, as I understand it, Mr. Murray, Joe Murray, was about ten yards to your left, as you said?

A She was about ten yards to the left, off the side of the road; and he was about another twenty, twenty-five yards on over in the yard.

Q There was about thirty-five, forty yards between them?

A No, it was only about twenty yards in between them.

FORM 2094 PENGADWNOY 1-800-631-6989

Twenty, twenty-five yards in between them.
Q Twenty to twenty-five between the two of them.
A Between the two bodies; yes, sir.
Q Okay. And you don't know, of course, where Joe Murray had been prior to you getting there; do you?
A I don't have no idea. That's just where we found them.
Q And you don't know whether he had a weapon prior to your getting there or not.
A No, sir; I sure don't.
Q All you can tell us about is the scene as you observed it when you arrived at that time.
A That's exactly right. The only thing I can tell you that, you know, we just assessed the scene and we didn't find anything that could harm us.
Q Okay. And that's about 5:17.
A That was at 5:17. That was the time I arrived; yes, sir.
Q Thank you very much.
THE COURT: Anything else from Mr. Millwood?
SOL. PRUETT: No, sir. We'd ask he be excused, also.
THE COURT: All right. Mr. Millwood, as far as this case is concerned, you're excused. Thank you.
I believe you have the doctor that's to be back

FORM 2094 PENGAD/INDY 1-800 631 6989

at two. Is that right?

SOL. PRUETT: Yes, sir. We could start back at 2:15 if need be. I know it's one o'clock now.

THE COURT: All right.

All right. Mr. Foreman, ladies and gentlemen, it's almost one o'clock and everybody stops to eat in Horry County at one; so we ought to do the same here. I'm going to ask that you be back in your jury room at about two o'clock, Mr. Foreman. I think it will be about 2:15 or 2:10 before we call you out. But, if you will, try to reassemble yourselves in your jury room around two o'clock. Certainly be there by ten after two.

All right. Very good. Now, while you're at lunch, Mr. Foreman, don't discuss this case, do not allow anyone to discuss it with you. And even back in your jury room don't discuss this case. Wait until you've heard all the testimony before you start making any type of mental determination.

Mr. Bailiff, I'm going to send them to their room and you can tell them how to come in and out.

The bailiff will show you the way in and out of the courthouse. If you will go directly to your jury room. Thank you, Mr. Foreman. You're excused until then.

(The following took place outside the presence

FORM 2084 PENGAD/INDY 1-800-631-6989

of the jury:)

THE COURT: All right. Court will be in recess until two o'clock.

(Whereupon court was recessed for lunch.)

(The following took place outside the presence of the jury:)

THE COURT: All right. You may invite the jury to come out, or come in. They come out of their room into ours, right? That's what we'll have them doing.

(The following took place within the presence of the jury:)

THE COURT: Good afternoon, Mr. Foreman, ladies and gentlemen. I hope y'all had a nice meal.

Does the State and defense waive the polling of the jury?

SOL. GOSSETT: The State waives.

MR. WARDER: Yes, Your Honor, we do.

THE COURT: All right. Mr. Solicitor, you may call your next witness.

SOL. PRUETT: Your Honor, the State calls Dr. William Wheeler.

THE COURT: Come around, Dr. Wheeler, please, to be sworn.

DR. WILLIAM WHEELER, being first duly sworn, testified as follows:

FORM 2094 FENGALDINDY 1-800-631-6989

DIRECT EXAMINATION

BY SOL. PRUETT:

Q Would you state your name and your occupation, please.

A William Earl Wheeler. I'm a general surgeon.

Q I believe you practice medicine here in Cherokee County.

A Yes, sir.

Q If you would, give the jury the benefit of your background and education, Doctor.

A Okay. I received my medical degree from the University of Mississippi, did a residency in general surgery there and at Marshall University. I was professor of general surgery at Marshall University for eight and a half years. I'm board certified in general surgery and critical care and pharmasurgery.

Q Okay.

A And I've been in practice in Gaffney for about three and a half years.

Q All right. And you're licensed to practice in---

A I'm licensed to practice in the state of South Carolina.

Q All right.

SOL. PRUETT: Your Honor, at this time we'd qualify him as an expert in the area of general surgery.

FORM 2094 PENGAD/INDY 1-800-631-6989

THE COURT: Any question about his expertise in the field of general surgery?

MR. WARDER: No, Your Honor. There will be no questions as to his expertise.

THE COURT: All right, sir. The Court finds that Dr. Wheeler is an expert in the field of surgery and may testify accordingly.

Q Doctor, on or about June 1 of last year, did you have cause to treat one Joe Murray?

A Yes, sir.

Q Okay. If you would, describe for the members of the jury what injuries or ailments he had that needed your attention.

A Okay. He was brought to the emergency room where he was initially seen by the emergency room physician who then called me to come in to see him. He had four stab incisions at that time. He had two in the back on, I believe, the right back; one in the right chest; and one in the left flank, above the iliac crest. At that time he was very tender and we felt that he needed to go to the operating room.

He was taken to the operating room where we put in a chest tube on the right side. That was placed not because we had seen anything on his x-rays but because when you have a puncture to a lung where it might be

FORM 2094 REPORTMORE 1-800-631-6989

damaged and you're going to put somebody to sleep, when the anesthesiologist -- that's the doctor who puts him to sleep -- blows the air in, it may cause an injury to expand and cause a problem in the middle of surgery, which you don't want to have.

We placed a chest tube to drain anything and prevent that. And we got some blood out, which meant that the lung had been damaged at that time.

We explored his abdomen. He had -- the stab wound on his left side had penetrated into his abdomen and had gone into his pancreas and lacerated part of his pancreas. And it was causing bleeding from his pancreas.

Q Upon your initial examination of Mr. Murray, what was the next step, then, in his course of treatment, Doctor?

A Well, we had to operate on him and repair the pancreas.

Q Now, was this as a result of the wound to his left side?

A Yes, sir; the left side.

Q All right. What about the injury or the stab wound to his chest or abdomen area? How serious was that?

A That was -- you would not consider that an -- extremely serious from what had happened. A wound like that, if it's not treated, can cause somebody to die.

FORM 2094 PENGAD/INDY 1-800-631-6989

You can bleed to death in your lung if you are bleeding a tremendous amount. I don't think this injury -- that was that serious of an injury to him, but you don't ever know that until you treat some people.

There are people that sometimes you will put a tube in, watch them for a couple of hours, and then they have to have a surgery where you cut their chest open to fix it. And sometimes even that doesn't...

Q What about the injuries to his back? You had mentioned two stab wounds to his back. And how, I guess, serious or life-threatening were those injuries?

A These two apparently were not very serious in that we did not find any puncture that went into the abdomen or the chest from that, although some of his lung injury may have been from the back injury. There are a lot of thick muscles on the back, so it's more difficult to get a knife into a vital organ from the back.

Q Now, I'm going to ask you, as you go along, were the injuries as you observed consistent with a stabbing caused by a knife?

A They appeared to be a stab injury; yes, sir.

Q All right. Now, if surgery -- perhaps we could generalize some. How serious were the injuries that he sustained as a result of the stabbings?

A Damage to the pancreas is always considered a very

FORM 2094 PENGAD/NDY 1-800-631-6989

serious injury. People can have prolonged problems with it. They can die from it. He did have a blood vessel that was on top of it that was actively bleeding when we went in, that we had to tie off so that it would not bleed on there.

Q And insofar as how deep---

A That -- well---

Q ---in there, the blade penetrated the body. Do you have indications of that?

A The pancreas is laying just above the spine. And part of the pancreas lays next to the aorta, which is the big blood vessel going down to the rest of your body.

Q So, in terms of maybe inches or centimeters, how far had the blade---

A It was---

Q How far had---

A ---probably a good six inches.

Q All right.

A Five or six inches in.

Q And, following his surgery, what was his post-operative care and how long was he hospitalized?

A Can I refer to some---

Q Yes, you can.

(Whereupon the witness looked through documents.)

FORM 2094 PENGAD/INDY 1-800-631-6989

Q You're referring to what, Doctor?
A I'm referring to a discharge summary. He was brought to the hospital, I believe, on the first day of June. He initially went home on the ninth day of June. He required admission later for some complications from the surgery.
Q Okay.
A And he required a second surgery.
Q Your opinion as an expert in the area of general surgery, had these injuries and the stab wounds that were inflicted on Mr. Murray been left untreated, would he have died or could he have died?
MR. WARDER: Objection to that hypothetical question, if they had been left untreated, Your Honor.
THE COURT: Well, I -- the doctor -- I'll overrule your objection. I think he can testify. I don't know if he knows, but he can answer if he does.
A He probably -- the odds are that from the chest injury he probably would not have died. From the abdominal injury he would have had a very high likelihood, although it's not 100 percent.
SOL. PRUETT: I think that's all Your Honor. If I could ask the Solicitor.
THE COURT: All right, sir.
(Pause.)

FORM 2054 FENGALMINDY 1 800 431 6989

SOL. PRUETT: That's all we have, Your Honor.

THE COURT: Yes, sir, Mr. Warder.

CROSS-EXAMINATION

BY MR. WARDER:

Q Doctor, as to the last question that if the wounds were untreated. One can die from nearly any untreated wound; it can get infected and you die from it.

A Yes, sir.

Q Now, turning your attention away from the wounds themselves to the instrument that caused them. Would an instrument that made a wound such as you observed on Mr. Murray, would that instrument itself have been bloody or very bloody?

A It may or may not have been.

Q Okay.

A I mean, the gentleman was clothed. And going in and coming out, sometimes you can make a cut and it will be several seconds before something will bleed.

Q Yes, sir. And, of course, the point of my question is that this instrument would have went through clothes; it would have wiped some of the blood off of it.

A Yes, sir.

Q And the skin and tissues itself presses down on it and wipes some of it off.

A Yes, sir.

FORM 2094 PENDAD/INDY 1-800-631-6989

Q So, generally, you would expect to find on that instrument just traces of blood.
A There would be some blood; yes, sir.
Q But it wouldn't be dripping-type blood that would leave a trail through the ground, the woods, or anything like that; would it?
A Depending upon the location, it may or may not. I would not think that this probably would do that.
Q You wouldn't think that the instrument itself would carry anywhere near that kind of blood.
A Probably not. No, sir.
Q Okay. Thank you very much, Doctor.
A You're welcome.
THE COURT: Anything else from Dr. Wheeler?
SOL. PRUETT: No, sir. We'd ask that he be excused, also.
THE COURT: All right, Doctor. Thank you so much for coming. As far as this case is concerned, you're excused. Thank you. It doesn't mean you have to leave, Doctor. We'd be delighted for you to stay. But your attendance will no longer be required.
You may call your next witness, Mr. Solicitor.
SOL. GOSSETT: Can we check and see if our other doctor is here? We're waiting on him.
THE COURT: Yes, sir.

FORM 2094 PEIGAD/INDY 1-800-831-6989

SOL. GOSSETT: If he isn't, we'll call somebody else.

THE COURT: Okay.

(Pause.)

SOL. GOSSETT: He's not here. We'll go forward with our next witness. The State would call James Mike Wilkins.

THE COURT: Wilkins?

SOL. GOSSETT: Yes, sir.

THE COURT: Come around, Mr. Wilkins, and be sworn.

JAMES MIKE WILKINS, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOL. GOSSETT:

Q Would you state your name for the Court, please.

A James Michael Wilkins.

Q Pull that to you a little bit and speak up good so this gentleman way back here can hear us. Okay?

A All right. James Michael Wilkins.

Q Okay. And what do you go by?

A Mike.

Q Okay. Is it all right if I call you Mike, then?

A Yes.

Q Okay. Where do you live, Mike?

A 248 Green Street, Pacolet, South Carolina.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q Okay. Is that where you were living back on June 1 of 1994?
A No.
Q Where were you living on June 1 of '94?
A Coggins Trailer Park, James---
Q Coggins -- I'm sorry.
A Coggins Trailer Park, James Street.
Q James Street. Coggins Trailer Park.
A Yes.
Q That's here in Cherokee County.
A Yes.
Q Okay. And was there anyone residing or living with you at that Coggins Trailer Park?
A I was roommates with Joe Murray.
Q Joe Murray? Is this Joe Murray right here?
A Yes.
Q Okay. Did you know the deceased in this case, the victim, Brenda Tate?
A I had met her.
Q Okay. And how did you know her?
A She was Joe's mama and she came to the trailer.
Q Okay. Did you know where she had lived?
A Yes.
Q Where?
A In front of us. She had the trailer in front of

FORM 2094 PENGAD/INDY 1 800.431 9969

ours.
Q Okay. Her trailer would have been up the hill from yours.
A Yes.
Q Okay. So you had met her.
A Yes.
Q Okay. Do you know the defendant in this case, Jay Tate?
A I've seen him.
Q Okay. And where had you seen him?
A I -- at Brenda's trailer.
Q Okay. Did you understand the relationship between Brenda and Joe?
A I knew about it, you know, understanding. And I didn't know all about it because it wasn't my business.
Q Well, did you know they were married or not?
A I'd heard.
Q Okay. Do you recall the day that Brenda Tate and Joe Murray were stabbed?
A Yes.
Q How long had you been living with Joe Murray before this stabbing occurred?
A One or two weeks.
Q Okay. Do you recall the day before the stabbing?
A Yes.

FORM 2094 PENGADWNDY 1-800-631-6989

Q That would have been May 31 of '94?
A Yes, sir.
Q Okay. Were you at the trailer park during that day or night?
A Yes, sir.
Q The day before?
A Yes, sir.
Q Okay. And what happened that night before, if you recall, if anything, between Brenda and Jay Tate?
A An argument and then the police were called.
Q They argued and the police were called?
A Yes.
Q Okay. Did the police respond, come out there?
A Yes.
Q Okay. Did you see Brenda Tate?
A Yes.
Q Where did you see her that night before?
A At Joe and my trailer.
Q Okay. She came to your trailer?
A Yes.
Q Okay. Did you see Jay Tate that night?
A Yes.
Q Where did you see him?
A At the trailer.
Q Your trailer and Joe's?

FORM 2004 PERO/AFFINITY 1-800-631-6989

A Yes, sir.
Q Did he come there before or after or with Brenda?
A After.
Q After Brenda?
A Yes.
Q All right. Were they there, at some point, at the same time?
A I believe.
Q Okay. When they were there at your trailer at the same time, what happened?
A They argued and the police were called.
Q Okay. Do you recall the words or what Jay said, if anything, to Brenda?
A Just that he was gonna kill everyone and, you know, everybody that was there.
Q Okay. So who was there?
A Joe and myself and his mother.
Q Okay. And he said that to her on May 31 of '94?
A Yes.
Q Okay. And was that the day before he actually stabbed her?
A Yes, sir.
Q Okay. All right. Were the police called back out there?
A Yes, sir.

FORM 2094 PENGADINDY 1-800-631-6989

Q And did they get things calmed down or not?
A It seemed to. There for that night, it did.
Q Okay. And did he leave your trailer?
A He never did come in it. He was in the yard.
Q Okay. All right. Did he leave?
A Yes.
Q Did she stay or did she leave your trailer?
A She left, herself.
Q She left your trailer, too?
A Yes.
Q Okay. All right. Now, the next day is June 1, 1994. Were you at your trailer or in that yard that afternoon, June 1?
A Yes.
Q Okay. What were you doing that afternoon?
A Fixing to go swimming.
Q Okay. What had you been doing or who were you with before you were going swimming?
A Joe and I had changed the locks on his mom's trailer.
Q Okay. After the locks were changed, what were your plans?
A To go swimming.
Q Okay. And how were you going to get to the swimming place?

A Brenda was going to take Joe and I.
Q All right. Now, Brenda is Brenda Tate?
A Yes.
Q The mother.
A Right.
Q Did you or Joe have a vehicle to go swimming with?
A No.
Q Okay. So she was going to take you.
A Yes.
Q Okay. And you say the locks did get changed at the trailer of Brenda's?
A Yes.
Q Okay. Was that in the afternoon, late afternoon?
A It was in the afternoon.
Q Okay. And then you had made plans to go swimming.
A Yes.
Q Where had your plans gotten to? Did you actually go swimming?
A No.
Q Okay.
A We were in the back of the truck, ready to go.
Q All right. Say that again?
A We were in the back of the truck, ready to go.
Q Okay. Who was in the back of the truck?
A Joe and me.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q Okay. Now, back of the truck -- in the back seat of the truck?
A Now, in the back -- tail...
Q In the bed of the truck?
A In the bed.
Q Okay. And whose truck were you in?
A Brenda's.
Q And where was she?
A She was in the driver's seat.
Q Okay. And where was the truck located?
A In Joe and I's driveway.
Q Okay. Right in front of your front door?
A Yes.
Q Okay. So you hadn't pulled off yet.
A No.
Q Okay. Before y'all left, did something happen? Did somebody come up? Or what happened?
A Jay Tate came up and asked Brenda if he could talk to her and she said no. And then he asked if she would take him to his mother's house. She told him no. And then he asked to get in the trailer to get his clothes.
Q And what did she say to that?
A She asked Joe if he'd let him in.
Q Asked...
A Joe Murray.

FORM 2094 PENGAD/NDY 1-800-631-6989

Q Joe Murray, her son, to let him in?
A Yes.
Q Okay. And that's when she was still in the truck?
A Yes.
Q And where were you when this conversation was going on?
A Still in the back.
Q Okay. And when he asked if he could get his stuff out of the trailer, what took place?
A Joe got out of the back of the truck and went around the side of the trailer with him.
Q Okay. He went to what trailer?
A Brenda's trailer.
Q Okay. So did he have to walk uphill?
A Yes.
Q Around to the front of the trailer?
A Yes.
Q Okay. And did Joe do that?
A Yes.
Q And when Joe walked uphill and around Brenda's trailer, where was Jay Tate? What did he do?
A He was following with him.
Q He what?
A He was following with Joe.
Q Okay. So who's left at the truck?

FORM 2094 PENGAD/INDY 1-800 631-6989

A Brenda and I.
Q Okay. From where you and Brenda were, in the truck, did Jay Tate and Joe Murray ever get out of your sight?
A Yes, when they went around the side of Brenda's trailer.
Q Okay. To the front side of the trailer.
A Yes.
Q Okay. While you and Brenda were at the truck and while Jay and Joe were around the other side of the trailer, what did you hear or see?
A A scream and both of them running.
Q Okay. Who screamed?
A I believe it was Joe.
Q Okay. You heard Joe screaming and then what did you see?
A Both of them running around the side of the trailer.
Q Okay. Who did you see come out from around the trailer first?
A I -- Joe.
Q Joe Murray.
A Yes.
Q Okay. And which way was he headed?
A Just coming down the road.
Q Coming down the road?
A Yes. He was, you know, just running down the road.

FORM 2094 PERIGAD/RHDY 1-800-631-6989

Q Coming downhill toward...
A Yes. Coming towards the truck.
Q Okay.
A Towards Brenda and I.
Q Coming toward the truck where y'all were, coming downhill.
A Yes.
Q Okay. And then where did you see Jay?
A He was coming down the hill, also.
Q Okay. And were they both running?
A Yes.
Q Okay. And what did you and Brenda do when you heard the scream and then saw them running?
A We were out of the truck and headed towards her trailer.
Q Okay. How many -- how far had she gotten away from the truck?
A About fifteen, twenty feet.
Q Okay. And did you see Jay Tate do anything to Joe Murray?
A He -- in the back, he stabbed him one time, down here at the small.
Q Down where?
A Near the small, on the back side.
Q Down in the small of the back.

FORM 2094 PENGAD/NDY 1-800-631-6989

A Yes.
Q You saw him as he -- before -- as he came around the trailer, you saw him stab him---
A Yes.
Q ---in the back. Okay. And what did you see Joe do then?
A Run to the neighbor's yard.
Q Okay. Is the neighbor's yard across the street---
A Yes, it's---
Q ---from your---
A ---across the street, on the other side of the trailer park.
Q So Joe veers off to go to the neighbor's.
A Yes.
Q What does Jay Tate do?
A Stabs Brenda.
Q Okay. How far away was Joe from Brenda when he stabbed -- I mean, how far away was Jay from Brenda when he stabbed Joe?
A About thirty-five, forty feet.
Q Okay. So after he stabbed Joe, where did he go?
A Straight towards Brenda.
Q Okay. Thirty, forty feet to Brenda.
A Yes.
Q All right. When he got up to Brenda, what's the

first thing he did?
A Stabbed her.
Q Did he say anything to her?
A Not that I heard.
Q Okay. All right. What did you see them doing?
A He stabbed her and she fell.
Q Okay. And then, when he stabbed her and she fell, what happened? Where were you?
A He swung and I ran and went---
Q How far was---
A ---and called 911.
Q I'm sorry. How far away from Brenda were you when he stabbed Brenda?
A About four feet.
Q Okay. So when he stabbed her, what did he do to you?
A He swung and I ran.
Q Okay. When he swung, did you see anything in his hand?
A It was a knife.
Q Okay. Can you describe the knife in any way?
A It was about that long (indicating). And it just -- you know, it looked like some type of knife in a kitchen.
Q Okay. All right. When he swung at you, how close did he get to you?

FORM 2094 PENGAD/NDY 1-800-631-6989

A Not very.
Q Okay. How many feet was he away from you?
A About like that (indicating).
Q Okay. Did you do anything in response to him?
A Just ran.
Q Okay. If you had not moved from him, what would have happened?
A I'd have been stabbed.
Q Okay. All right. After he swung at you and you got out of the way, where did you see him go?
A Towards the interstate.
Q Towards the interstate?
A Yes.
Q Okay. Is that back up the hill in the direction and past her trailer?
A Yes.
Q Okay. When he did that, what was your next move?
A Call 911.
Q Where did you go to call 911?
A To a -- down the street to a trailer three or four trailers down.
Q Did you go to the same trailer that Joe went to?
A I believe I went and knocked on that door but no one came, and then went to another one.
Q You went to another one.

FORM 2924 PERIDIADMOY 1-800-631-6989

A Yes.
Q All right. And did you call 911?
A Yes.
Q Okay. And after you called 911, what did you do?
A Walked back up to where it happened.
Q Okay. And when you went back up, where was Brenda Tate?
A In the same place that she was stabbed. And she was laying face down.
Q All right. After she asked Joe Murray to let Jay Tate in the trailer, did you hear her say anything else?
A No.
Q Those were her last words?
A That's all that I heard.
Q Okay. And while she was laying there, where did you see Joe Murray?
A He was laying against the tree in front of our trailer.
Q Okay. And where was Tate?
A I don't know.
Q Gone?
A (Nodded head.)
Q Okay. Before Joe Murray and Brenda Tate were stabbed, did anyone there of the three of you say anything to Jay Tate to provoke him or make him mad?

FORM 2094 PENGAD/INDY 1-800-631-6989

A Nothing that I heard.
Q Okay. Did anyone hit or strike him or act as if they were going to hit or strike him?
A No.
Q Okay. Other than Jay Tate, did anyone have a weapon or pretend to have a weapon?
A No.
Q Okay. You had been with Joe all that afternoon; right?
A Yes.
Q Had you seen any weapon on him?
A None.
Q What did he have on while y'all -- when you were getting ready to go swimming?
A A pair of shorts and a silk shirt.
Q Okay. All right. After you saw Joe Murray there, what did you do? Did you go over with him or...
A Yes.
Q Did you go over to Brenda?
A I went to Brenda and then I went to Joe.
Q Okay. All right. Sometime after that did you wait until the police came---
A Yes.
Q ---and the ambulance came?
A (Nodded head.)

FORM 2014 PEHOADWAY 1 (800) 631-6989

Q Did you tell the police basically what -- briefly what you have told the jury?
A Yes.
Q Answer any questions they have for you.
CROSS-EXAMINATION
BY MR. WARDER:
Q Is it Wilkins?
A Yes.
Q Mr. Wilkins, you remember the events pretty clearly that day?
A Yes.
Q And as you testified, the first person to come -- that you seen around the trailer was Joe.
A Yes.
Q And he was being chased. Is that right?
A Yes. That's my statement.
Q And the man that was chasing him had a knife.
A Yes.
Q He didn't follow the man around -- he didn't follow Jay around, about four feet behind him?
A Not that I noticed. Joe was in the lead when I seen.
Q Well, you surely would have noticed if he'd---
A Yes.
Q ---been following him, rather than running from him;

FORM 2094 PENGADMNDY 1-800-631-6989

wouldn't you?
A If Jay would have come around the trailer first, I would have noticed.
Q Yes, sir. And Jay wasn't already down there at his mother and Joe trying to get down there to stop him from getting to his mother, was he?
A Not that I seen.
Q You would have seen that if it happened; wouldn't you?
A Yes.
Q And this knife you saw looked like a kitchen knife; not a steak knife or something like that, but a kitchen knife. Is that right?
A Steak knife and kitchen knife is about the same, isn't it?
Q Well, how long did you say it was?
A About like that (indicating).
Q That's what---
A That's about---
Q ---you cut a---
A ---what I saw.
Q ---steak with? Pardon me?
A That's about what I saw.
Q About a foot, foot and a half long?
A I don't know how long it was.

FORM 2094 FENQADMDY 1-800-631-6989

Q Well, is that what you cut steak with? Is that what you call a steak knife?
A If it's all I have sharp, yes, sir.
Q If it's what?
A If it's all I have sharp, yes, sir.
Q So a steak knife refers to a sharp knife, not a particular kind of knife. Is that your testimony?
A That's not what I said.
Q Pardon?
A That's not what I said.
Q Well, I don't mean to put words in your mouth. But your answer was to me, I thought, if it's sharp.
A Yes.
Q And so your idea of a steak knife is anything that's sharp?
A Well, you misunderstood me. If it's sharp and there's not a steak knife around, I'll use it. Yes, it's a steak knife.
Q Okay. If it's sharp, it's a steak knife.
A It's a kitchen knife.
Q Now, the Solicitor asked you if you tried to do anything when Jay swung at you. And you said you ran. Is that right?
A Yes.
Q You didn't try and kick him or anything like that;

FORM 2094 PENGAD/NDY 1-800-631-6989

did you?
A Yes.
Q You did?
A Yes.
Q Did you kick him?
A Not that I know of, no.
Q Did you try and hit him?
A No.
Q You just tried to kick him.
A Yes.
Q And then you ran after you tried to kick him?
A Yes.
Q Now, you and Joe are pretty good friends; aren't you?
A We were. We---
Q Well---
A ---still are.
Q ---you were going swimming that day together.
A Yes.
Q Moved in together?
A Yes.
Q Where were you living at, that you had to leave to move in with Joe?
A I didn't have to leave.
Q Well, where were you living before you lived with

FORM 2004 PENDAD/INDY 1-800-631-6989

him?
A I was living with my dad on 116 Brown Street.
Q Well, did you have to leave the home of your dad to live with him?
A No, I didn't.
Q Were you living both places?
A No, I weren't.
Q Well, did you move your stuff to that residence you shared with Joe at the trailer park?
A My clothes, yes.
Q All your clothes?
A Yes.
Q And how long did you say you had been living there?
A About a week or two.
Q About a week or two.
A Yes.
Q Did you sign a lease with the landlord?
A No.
Q Talk to the landlord?
A Yes.
Q Who is the landlord?
A I can't recall his name, but he lives right up above it.
Q You hadn't just moved into the trailer that Joe's sister had moved out; had you?

FORM 2094 PENGADWNDY 1-800-631-6989

A Yes.
Q Okay. And you hadn't paid anybody any rent.
A It wasn't due yet.
Q Had you made any arrangements to pay any rent?
A Yes, I had.
Q How much rent were you going to pay?
A Half.
Q Well, how much was that?
A It was ninety-five a week. You take that and add it times a month and you got what -- you know---
Q You were paying $95 a week?
A Yes.
Q Was that your half or was that all together?
A No, ninety-five all together.
Q Okay. Were you working then?
A Yes, at Stouffer's.
Q And you were going to start paying that rent; it just hadn't become necessary to do it yet.
A Yes.
Q Well, did you stay there after this happened?
A No, I didn't.
Q Did you ever pay anybody any rent?
A No, I didn't.
Q So you moved in, lived a couple of weeks, the rest of Joe's sister's rent term, and then you moved out.

FORM 2004 PENGAD/INDY 1-800-631-6989

A No, sir. The doors was locked the same night that all that happened and I had to leave.
Q Well, if you were in a separate trailer -- did you have a key to it?
A No, I didn't. We hadn't had one made yet.
Q So you were living in a place that you didn't even have a key to.
A Yes.
Q And the door got locked that night, so you couldn't get back in.
A It was locked by the police, yes, sir; and I was told not to re-enter it.
Q You never went and talked to the landlord about getting a key---
A Yes, I did.
Q ---or getting back in; did you?
A I went and talked to him and asked him would it be all right. And he said to call them, that they was the ones that locked it, not him.
Q When did you get your stuff out of there?
A It was a couple days after.
Q Did you move back in with your daddy?
A No, I didn't.
Q Did Joe ever go down there to where his mother was or did he run on over to the neighbor's and stay there?

FORM 2094 PENGAD/INDY 1-800-631-6989

A He come back across the road to where it had happened, to where his mother was.
Q Where did he go when he come back across the road?
A I was gone, sir. I can't answer that question.
Q Okay.
(Pause.)
Q Thank you.
SOL. GOSSETT: That's all we have of this witness, Your Honor.
THE COURT: You may step down, Mr. Wilkins.
SOL. GOSSETT: May I ask he be excused so he can go to work?
THE COURT: Yes, sir. As far as this case is concerned, you're excused. Thank you for coming.
You may call your next witness.
SOL. GOSSETT: The State would call Dr. Joel Sexton.
DR. JOEL SEXTON, being first duly sworn, testified as follows:
DIRECT EXAMINATION
BY SOL. GOSSETT:
Q Would you state your name for the Court, please.
A Dr. Joel Steven Sexton.
Q All right, sir. And where are you employed, Dr. Sexton?
A In Newberry at the Newberry County Memorial

FORM 2084 PENGADNOY 1-800-631-6989

Hospital.

Q All right. And how long have you been employed there?

A Since 1983.

Q And what is your profession, Doctor?

A I'm a physician. And my specialties are in pathology, which includes clinical pathology, surgical pathology, and forensic pathology.

Q All right, sir. And if you would, give us the benefit of your educational background and training.

A I graduated from the Medical University in Charleston, South Carolina, in 1968 and studied in their department of pathology until '72 when I took my national board certification in the three areas that I just mentioned and became nationally certified.

After finishing med school I had taken my licensing exam and had been licensed to practice medicine in this state. I then taught at the Medical University until 1983 when I moved to Newberry. My responsibilities there were to teach the medical students, the physicians that had graduated who were taking pathology training, as well as some of the pharmacy and nursing students.

I also was the Charleston County medical examiner, which is the medical equivalent of a coroner, and in that capacity investigated approximately 450 to 500 deaths

FORM 2004 PENGAD/INDY 1-800-631-6989

each year in Charleston County and determined which ones required further investigation, including an autopsy. And we autopsied about 125 deaths in Charleston County. And I was in charge of the section of forensic pathology that examined deaths that were sent in from across the state by the forty-six county coroners, as a consult to the Medical University.

Q All right, sir. You are licensed to practice medicine in South Carolina.

A That's correct.

Q And your duties and responsibilities include working as a pathologist?

A Yes, that's correct.

Q All right, sir. And do you have any special certifications in regard to pathology?

A As I mentioned, anatomical, clinical, and forensic pathology.

Q Okay. Would you explain to the jury what forensic pathology basically is, for the purposes of this case?

A First of all, pathology, as I mentioned, is a physician -- a pathologist is a physician who, in the hospital setting supervises the laboratory where various tests are run on various body fluids and helps your physician to understand those results, to know whether you're getting better or worse from a disease and whether

FORM 2094 PENGADNDY 1-800-631-6989

you have a particular illness or disease. A pathologist also does examination of tissue removed at surgery to determine if you have a type of cancer or some other benign process.

A pathologist does the autopsies on people dying in the hospital to determine why they didn't live a little longer, or perhaps in less pain, and to understand more about that particular illness or disease.

A pathologist who trains in forensic pathology also is trained in how to recognize what various injuries are due to, with what gunshot wounds and stab wounds and blunt trauma injuries look like on the body, and to try to reconstruct what happens at a scene of death as well as understanding toxicology, which is the effects of drugs or chemicals on the body.

So that a forensic pathologist examines people dying sudden or violent deaths, to help understand more about what happened to the person as well as what happened on or about the time of death.

Q All right, sir. You indicated that you are board certified as a forensic pathologist. To your knowledge, do you know how many doctors in South Carolina are board certified as forensic pathologists?

A Out of the 150 or so pathologists, there are about five that are.

FORM 2094 PENGAD/NNDY 1-800-631-6989

Q So you're one of five in the state.
A That's correct.
Q Okay. Have you testified in courts of this state as an expert in the field of forensic pathology?
THE COURT: Is there any question about his expertise, Mr. Warder?
MR. WARDER: No, Your Honor.
THE COURT: All right. The Court finds that he is an expert in the field of forensic pathology and may testify accordingly.
SOL. GOSSETT: All right, sir.
Q Doctor, going on to this particular case. On June 2, 1994, did you perform an autopsy on the subject Brenda Tate?
A Yes, I did.
Q And from that did you produce a report?
A I did.
Q And, if you will, when you originally saw the body, was it in the condition that it had been found and brought directly to you?
A Yes, it was.
Q All right, sir. Could you tell us how the body of Brenda Tate was clothed that day?
A Yes. She was wearing a pair of white stirrup-type pants, a blouse that was multi-colored: maroon, orange,

FORM 2994 PENGAD/NDY 1-800-631-6989

green, and had designs on it, and three-quarter length sleeves. She was wearing underclothing and a pair of black flat shoes.

Q All right, sir. Would you explain to us how you began the autopsy, looking externally, at your findings there?

A What we do is ask that the body be brought just as it was found. And we first photograph the external surface of the body, looking for anything that may be an injury or any evidence that may be on the surface. Then we undress the body, again looking for injuries or any sort of evidence. Then we do a complete internal examination: collecting body fluids for toxicological analysis as well as determining what internal injuries may have occurred, if there are any.

In this case the individual had only one injury to -- or one place of damage on the clothing, which was a hole here in the left chest just below the left breast. This corresponded to a stab wound in the left breast that was close to the midline and in the shape of a single-edged blade. Meaning that if you take a blade and you break it and look at the broken edge, it's a thin triangle. And the same type of wound was there on the left chest, with a blunt edge corresponding to the blunt part of the knife blade, and a sharp triangular edge

FORM 2094 PENGAD/INDY 1-800-631-6989

corresponding to the sharp edge.

The blade went in approximately four inches, striking the heart and the lung, producing holes in both and causing internal bleeding.

There were also two other very shallow stab marks, or some other type of injury from some sharp object, on the abdomen that did not penetrate the skin -- so they simply caused scrapes on the surface of the abdomen -- that were in the midline. These did not have holes in the overlying blouse, which could indicate a knife went just barely into the clothing and scraped that area; or it may have been some other object that caused those scrapes.

That was the only injury she had, as far as a serious injury, was the stab wound in the left chest. There were no injuries to her hands or arms. And there was, as mentioned, extensive internal bleeding from the stab wound in the chest.

Q All right, sir. Did you get the height and weight of the individual?

A We measure the length of the body, which corresponds generally pretty well with the person's height. And her length was five feet and one-half of an inch. And we estimated her weight at 165 pounds.

Q Okay. Other than the stab wound that you indicated

FORM 2094 PENGADINDY 1-800-631-6989

under the left breast area, no -- did you see any blood anywhere else?

A No, that was the only source of blood.

Q Okay. I show you this and direct your attention on Page 3 -- I believe it's a five-page report. This line right here. Is there a typo in your---

A No.

Q Okay.

A As I mentioned, there are three wounds. One is clearly a stab wound. Two others look like superficial stab wounds that did not go through the skin---

Q All right.

A ---but could be caused by some other sharp object, other than a knife---

Q Okay.

A ---since they're not as -- they're not deeper than they are long, which is a definition of a true stab wound.

Q Okay, sir. Very good.

A There was no blood associated with those other wounds. They were very shallow.

Q Okay. Could you show, on me, the jury about where that wound would have been?

(Whereupon the witness stepped down from the stand.)

FORM 2094 PENGAD/INDY 1-800-631-6989

A The wound that was the fatal wound was here on the left chest, just below the left breast. It went in, upward, and to the left and toward the ribs. The other two shallow wounds were here on the abdomen, one just above the other.

Q All right.

A In the upper abdominal region.

Q All right, sir. So when -- you said the instrument went in, it went up and to the left, and therefore hit what other...

A The heart and the left lung.

Q Okay. And how deep did you indicate that the instrument went?

A Approximately four inches, recognizing the organs inside do move to some degree. The heart is inside of a sac, the pericardial sac, that restricts its movement to some extent. It did go all the way through the heart and both sides of the sac before it hit the lung. So we have to estimate the depth. But the depth was approximately four inches.

Q Okay. Do you mind -- I know you've done this before -- just drawing what appeared to be the wound on the surface?

A Would you like me to draw a person and then draw the wound?

FORM 2994 PERGADAILY 1 800 631 6989

Q Either way you feel comfortable.

(Whereupon the witness complied.)

A The wound was just below the left breast. The blunt edge was toward the midline. The knife traveled upward, to the rear, and to the left.

Q All right, sir. And it went in approximately four inches. Is that about four inches, showing the depth?

A Right. Roughly. I'm showing it at an angle, so it's difficult to say on this. But, again, when we measured it, the depth that I probed was four inches.

Q All right.

A But the chest is slightly compressible. And there was no hilt mark. So, actually, this could have been made by a knife that was longer than four inches, since there was no evidence that the hilt of the knife came in contact with the skin; or it could be made by a knife a little less than four inches if it was with enough force and the clothing protected the skin from the hilt mark so that the chest were accurately compressed.

We give artificial resuscitation by compressing the chest so as to squeeze the heart against the spine. So obviously the chest is compressible. So we give a depth of four inches which corresponds to blades that may be a little shorter than that, about a half inch, or certainly longer.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q All right, sir. So it went -- and taking it from the furthest back. It went into the lung, the heart, and then the sac around the heart -- it had gone through that.

A That's correct.

Q More close to the surface, in regards to the fifth rib and the cartilage there, did you see an entry wound through the cartilage?

A It actually went through the cartilage that holds your ribs to your sternum or your chest plate and made a hole through that as well, as well as the soft tissue of the skin.

As I mentioned, it makes a bigger blunt edge here and a sharper edge at the other end. We measure all of these. The blunt edge was a little less than a tenth of an inch, which corresponds to a number of different types of knives; and the depth, as I mentioned, was four inches.

Q All right, sir. I'll let you sit back down. Thank you.

(Whereupon the witness returned to the stand.)

Q Doctor, given the description of the entry wound and the route it took, given your expertise and what you found, can you give any indication to the jury as to how much pressure or force it would have taken to have gone

FORM 2094 FELDGADINDY 1-800-631-6989

that deep and gone through the cartilage and the lungs and the heart?

A This is obviously a function of the sharpness of the blade, particularly the sharpness of the point. A good, sharp-pointed knife with a reasonably sharp blade, at a fairly moderate amount of force can be made to make this deep a wound. Whereas a blade that's dull, it would be difficult to do it without a great deal of force. But a good sharp blade could do this fairly easily with the force that you might roughly push somebody away.

Q All right. And did you determine if it were a very sharp or dull blade?

A No way to say from the wound itself. The edges were clean, suggestive of it being sharp. But depending on the force, if you put enough force behind a fairly dull blade, all blades are -- of a certain sharpness, maybe not enough to cut you like a razor, but with enough force they will cut through the skin.

Q All right, sir. Given the injury, the stab wound that you saw and that you described to the jury, what would have happened when Ms. Tate received this wound?

A The wound, as I mentioned, went through the heart. And in so doing it allowed the blood that would normally be pumped out of the heart into the vessels to leave and go into the cavity around the heart and the chest and

FORM 2004 PENGADNNDY 1-800-631-6989

caused internal bleeding to the amount of two quarts or two liters, they refer to it in medicine, which is equivalent to four pints of blood. And it only takes about three pints, rapid loss of three pints, for a person to black out and die.

So this would have allowed a fairly rapid death because of the size of the holes. And it was from internal bleeding.

Q All right, sir. So your opinion as to her death was that she bled to death.

A That's correct.

Q With the blood staying internally.

A My opinion, within a reasonable medical certainty, as to the cause of death, was internal bleeding from the stab wound.

Q All right, sir. I believe that's all, Doctor. Answer any questions he may have for you.

MR. WARDER: Your Honor, if it would please the Court, I would have no questions for this witness.

THE COURT: All right, sir.

Doctor, thank you so much for coming. And as far as this case is concerned, you are excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: We'd be glad to have you stay if you'd like, but your attendance will not be required.

FORM 2094 PENGAD/INDY 1-800-631-6989

THE WITNESS: Thank you.
SOL. GOSSETT: We'd call Sandra Littlejohn.
THE COURT: Sandra Littlejohn. Where is Ms. Littlejohn?
(Pause.)
THE COURT: Come around, please, Ms. Littlejohn.
SANDRA LITTLEJOHN, being first duly sworn, testified as follows:
DIRECT EXAMINATION
BY SOL. GOSSETT:
Q Would you state your name for the Court, please.
A Sandra Diane Littlejohn.
Q Okay. Can I call you Sandra?
A That's fine.
Q Is that what you go by?
A That's fine.
Q Okay. Where do you live, Sandra?
A I currently live on [redacted] Robb School Road.
Q Robb School Road?
A Robb School Road.
Q Is that out in Cherokee County, out across 85?
A Yeah.
Q Okay. And is that where you were living back in May of 1994?
A No, I was living in Coggins Trailer Park.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q Okay. And do you know where your mother was living back in May of 1994?
A Yeah, she was living in front of me in Coggins Trailer Park.
Q Okay. If there's a hill there, was she up the hill or down the hill from you?
A She was up the hill.
Q Okay. Just the very next one?
A The very next one.
Q Okay. How long had you been living in that trailer in Coggins Trailer Park?
A About, about a year or two.
Q Okay. And when did you leave that trailer at Coggins Trailer Park?
A At the end of May. We were -- I was in the process of moving.
Q Okay. And where did you move to?
A [redacted] Holmes Street.
Q Holmes Street?
A Holmes Street.
Q Is that here in the City of Gaffney?
A Yes, it is.
Q Okay. So you moved from Coggins over to Holmes Street.
A That's correct.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q And were you living at Holmes Street in the last week of May?
A Yes, I was.
Q Okay. And were you living there on June 1?
A Yes, I was.
Q Okay. So you had moved to Holmes about how many days before your mother was killed?
A Oh, we were still in the process of moving. We were still moving a lot of my stuff.
Q Okay. But you were actually---
A We were actually---
Q ---spending the night at Holmes---
A We were actually spending the night at Holmes Street.
Q Okay. In the process of moving means you still had some stuff---
A I still had some stuff in the trailer that my brother was going to be taking over after I moved out.
Q Okay. And who was paying the lease there at -- where you were, where you had been, at---
A At Holmes Street?
Q No, at Coggins.
A At Coggins? I was paying it -- paying at the -- the rent.
Q Okay. Did you know the deceased, Brenda Tate?

FORM 2094 PENGAD/NDY 1-800-631-6989

A Yes, I did. She was my mother.
Q Okay. And do you know the defendant in this case, Jay Tate?
A Yes, he's my stepfather.
Q Okay. Who is your father?
A Joe Stanley Murray, Sr.
Q Okay. At the time of your mother's death, how long had it been since your father, Joe Murray, Sr., and your mother had divorced?
A About ten years.
Q Okay. How long had you known Jay Tate?
A About ten years.
Q Okay. And do you know when Jay Tate and your mother got married?
A Yeah. It was about four years ago.
Q Okay. About---
A About '90.
Q 1990?
A About 1990.
Q Okay. Where did Jay Tate and your mother last live together?
A In Coggins Trailer Park.
Q Okay.
A Right up above where I was living.
Q All right. And would that address have been [redacted]

FORM 2094 PENGAD/NJDY 1-800-631-6989

James Street?
A That's correct.
Q That's where they lived.
A Right. That's correct.
Q Okay. And how long had your mother been living at the trailer park?
A About ten years.
Q Okay. And how long had Jay been living there with her?
A Since March.
Q Okay. He started living there with her in March of '94?
A That's correct.
Q Okay. Did your mother and Jay Tate continue to live together as man and wife up until the date that your mother was killed?
A No, they didn't.
Q Okay. What was their situation that you knew about?
A They were in the process of a separation.
Q Okay. Had they been arguing the days before---
A Yes.
Q ---her death?
A Continuously.
Q Okay. And where was she spending the night for the four nights before her death?

FORM 2094 PENQUADANDY 1-800-831-6989

A She was staying the night at my house.
Q Okay.
A She spent the night with me.
Q Okay. Had she moved her things out?
A She had moved a lot of her furniture and some of her clothes and a lot of her valuables, paperwork.
Q The night before her death, where did she spend the night?
A She -- she was -- she started out -- she went to sleep -- when I went to bed, she was sleeping on the couch. And then when I woke up that morning she was gone.
Q Okay.
A And I didn't -- then she came back that next morning to get me to go to Sears to buy a lock so she could change her locks on her doors.
Q At her trailer?
A At her trailer. Because she was planning on serving the paper, eviction---
MR. WARDER: Objection to what she was planning to do, Your Honor.
THE COURT: Well, is that what you were planning to do?
THE WITNESS: Go get locks?
THE COURT: Yeah.

FORM 2094 PENGAD/INDY 1-800-631-6989

THE WITNESS: Yes, sir.

THE COURT: She can testify as to what she was planning. Go ahead.

Q What did you and your mother do?

A We went to go and get the locks.

Q Okay. And---

A We started out to get locks. And that was it.

Q Did you go to Sears in Spartanburg or anywhere?

A In Spartanburg.

Q Okay. And did you accompany your mother there and back?

A I did accompany my mother there and back.

Q Okay. And do you know whether or not your mother had been to see an attorney in regards to her situation with Mr. Tate?

A I remember her mentioning it, that---

MR. WARDER: Objection, Your Honor.

A ---she was.

THE COURT: Well, I'm not going to let her go into that.

SOL. GOSSETT: All right.

Q Did you see your mother on June 1?

A I did. We went to go get locks that morning.

Q All right. You did it that day.

A We did it that day.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q Okay.
A And she...
Q Did you see her after you brought her back to her place?
A After she brought me back to my house, she came -- she was helping me move my stuff since I work so much. She was helping me move my stuff. And she had brought a load of things to my house.
Q Okay. So at your house on Holmes Street.
A My house on Holmes Street, from Coggins.
Q All right. What time was that?
A I'm going to guess around two.
Q Two o'clock on June 1---
A Around---
Q ---1994.
A Yeah. That's just a guess. I'm not sure. Because I was half -- when she came in with a load of stuff, I was half asleep. I was on the couch.
Q Was that the last time you saw your mother alive?
A That is the last time I saw my mom alive.
(Pause.)
Q How many nights did your mother spend with you prior to her death on June 1?
A About four.
Q Four nights.

FORM 2094 PENGAD/INDY 1-800-631-6989

A Uh-huh.
Q All right. Thank you. Answer any questions they may have.
CROSS-EXAMINATION
BY MR. WARDER:
Q Where was your brother living at the time?
A He was living at the trailer behind my mother. In the house that I was moving out of, he was already moving into.
Q Okay. What was the rent there?
A Ninety a week.
Q Ninety?
A $90. Every two weeks. Some -- it was ninety -- 180 every two weeks, so that would make it $90 every week.
Q One hundred eighty every two weeks.
A Right. See, I paid it every two weeks; and he was going to pay it by the week, my brother.
Q Okay. And he was going to pay $90 a week.
A Right.
Q Was he living there alone or did he have somebody living with him?
A He had someone living with him.
Q Okay. And you had your stuff located in that home.
A I had still some of my stuff in that home.
Q Okay. And part of your stuff you had moved to your

FORM 2094 PENGAD/INDY 1-800-631-6989

new home.
A Right.
Q Your brother had some of his stuff, you said, moved into that home?
A Uh-huh.
Q And where was the rest of his stuff? Where was he moving from?
A He was moving from where my mother was living, on [redacted] James Street.
Q So he was moving stuff out of the trailer that your mother and Jay occupied.
A Right. He had moved most of his stuff already. But he had just a few more items.
Q Okay. So you were moving your stuff out of the trailer behind to your new house. Your brother was moving his stuff out of the trailer where your mother and your stepfather resided into your trailer.
A Right.
Q And the fellow that was living with him, did he move anything in?
A I don't really know. I don't think he had -- I don't -- I don't really know.
Q Okay.
A As far as I was concerned, that was Joe. He was moving his stuff. And I didn't pay attention.

FORM 2094 PEHOA/INDY 1-800-831-4969

Q Okay. And did I understand it that your mother had moved most everything of hers already out of the trailer she had occupied with your stepfather?
A She was -- she had moved some of her clothes, her dining room table, the carpet underneath, and some more furniture items that meant a lot to her, and some of her valuables.
Q So mostly what was left there would have been Jay's stuff.
A A lot of it was.
Q Okay.
A The only thing she hadn't moved---
Q And then you were changing the locks to lock up Jay's stuff. Is that right?
A That's right.
Q Thank you.
THE COURT: Anything else of Mrs. Littlejohn?
SOL. GOSSETT: No, sir; that's all.
THE COURT: You may step down. Thank you.
THE WITNESS: May I be excused?
THE COURT: Yes, ma'am; you may be excused.
SOL. GOSSETT: The State would call Brenda Harrison.
BRENDA HARRISON, being first duly sworn, testified as follows:
DIRECT EXAMINATION

FORM 2094 PENGAD/INDY 1-800-631-6989

BY SOL. GOSSETT:

Q Would you state your name for the Court, please.

A Brenda Joyce Harrison.

Q Okay. Can I call you Brenda?

A Uh-huh.

Q Okay. Where do you live, Brenda?

A [redacted] James Street.

Q Okay. Is that in Coggins Trailer Park?

A Yes, sir.

Q Okay. Is that were you were living in June of 1994?

A Yes, sir.

Q Did you know the victim in this case, Brenda Tate?

A Yes, sir; I did.

Q How was it that you knew her?

A We had been friends for about ten years. Neighbors.

Q Okay. Do you know the defendant in this case, Jay Tate?

A Yes, I do.

Q And how is it that you know him?

A He was my neighbor.

Q Okay. Did you know him to be married to Brenda?

A Brenda, uh-huh.

Q Do you know how long he had lived in the trailer park with Brenda?

A Three or four months.

FORM 2024 PENGAD/INDY 1 800 631 6989

Q Okay. Do you recall back on June 1 of 1994, the day that Brenda Tate died?
A Yes, I do.
Q Okay. Do you recall the day before? That would have been May 31, 1994.
A Yes, I do.
Q What, if anything, unusual happened on May 31?
A Jay came down to my house and was setting on my daughter's toy box.
Q In what room?
A In the living room.
Q Okay. Did the police come down there sometime that day?
A No, I don't think it was that day. I think it was the day before, on the 30th.
Q Okay. So this was on the 31st. And he came to your house.
A Yes, sir.
Q Okay. Had Jay and Brenda been in an argument that day?
A Yes, sir.
Q Okay. And was he at your house before or after the argument?
A After.
Q Okay. And your trailer is how far away from

FORM 2094 PENGAD/INDY 1-800-631-6989

Brenda's?
A Two trailers behind it.
Q Okay. If hers is on the top of the hill, yours would be...
A The second one.
Q Okay.
A Well, the third one counting hers. But would be the second one behind hers.
Q Showing you State's Exhibit No. 1, can you see your trailer there?
A Yes, sir.
Q Which one is it?
A This one right here, the third one.
Q The third one down the hill?
A Right.
Q Okay. And hers being the uppermost.
A Right.
Q Okay. So after they argued, at some point Jay came to your house on May 31.
A Yes, sir.
Q And he was in your house?
A Yes, sir.
Q All right. And what happened -- how was he acting or how did he appear to be when he came to your house?
A He just sat on the toy box. He was -- he had been

FORM 2094 PENGADNDY 1-800-631-6989

talking. He was wanting to use the phone.
Q Wanting to use the phone. All right. Did you hear him say anything in regards to Brenda or anybody?
A Yes.
Q What did he say?
A He said that he would kill them all; he would kill Sandra, Brenda, and Joe, and anyone else who gets in my way.
Q Okay. He said that in your trailer.
A Yes, sir.
Q Was anybody in your trailer besides you and Jay when he said that?
A Yes, sir.
Q Who else?
A Maurice Martin and Melissa Sheehan.
Q All right. And did the police come at some point that day?
A I was -- I believe that was the 30th. I'm not...
Q Okay. And at some point, did Maurice Martin and Jay leave?
A That was the 30th -- well, no. That was that day. Yeah, the 30th was when it was her son-in-law.
Q Okay. Did you see Brenda or Jay the next day, on June 1?
A Yes, sir. They were up at the top of the hill, like

FORM 2094 PENGAD/INDY 1-800-631-6989

in her yard.
Q In her yard, Jay and---
A Well, Jay was in the yard. Brenda was in the road.
Q Okay. And was this in the afternoon or morning?
A Morning.
Q Okay. So that morning you saw Jay and Brenda out in the yard.
A Yes, sir.
Q And what were they doing?
A She looked like she was going to walk to the airport road, what we call the airport road, out through the woods.
Q Uh-huh.
A And he was just standing there.
Q Okay. Had they -- had you seen them do anything before she left?
A No, she was just walking around up there.
Q Okay. What mood -- or how did she act? What mood was she in or he in?
A She just, maybe, acted like she -- you know, maybe, they -- she was just trying to walk away from him or something.
Q Okay. And did you see Brenda Tate any more after what time and what you just described there?
A Yes, sir. She came to my trailer that morning.

FORM 2094 PENGAD/INDY 1-800-631-6989

After that.

Q After that.

A Uh-huh.

Q Okay. And what condition was she in then?

A She said her back was hurting.

Q Okay. All right. Is that the last time you saw her?

A Yes, sir.

Q Okay. I believe that's all.

CROSS-EXAMINATION

BY MR. WARDER:

Q Did you have occasion to talk with Jay about his troubles with Brenda on more than just that one occasion when you referred to him down there?

A Sure. He'd come to the house a lot, talk to us.

Q His wife was having some health problems?

A Yes, sir.

Q He was very concerned about her?

A He never did really say anything about it.

Q Did he tell you he loved her?

A Yeah.

Q As for Joe, do you know Joe?

A Yes, sir; I do.

Q Did Joe usually carry a weapon of some kind?

A Yeah.

FORM 2094 PEN3AD/INDY 1-800-631-6989

Q What kind of weapon did Joe usually carry?
A Joe had collected knives or he had knives at one time.
Q Did he usually carry one with him?
A I never seen him with a knife on him. I seen them hanging on his bedroom wall; yes, sir.
Q Did Joe used to demonstrate violence towards his mother, hit her and things like that?
A I never seen it; no, sir.
Q Did Joe tell you about it?
A No.
Q Thank you.

SOL. GOSSETT: I believe that's all, Your Honor.

THE COURT: Ms. Harrison, thank you so much for coming. As far as this case is concerned, you're excused. Thank you.

You may call your next witness, Solicitor.

SOL. PRUETT: Melissa Sheehan.

MELISSA SHEEHAN, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOL. PRUETT:

Q Would you state your name, please.
A Melissa Sheehan.
Q Ms. Sheehan, do you reside at Coggins Trailer Park?

FORM 2004 PENGAD/INDY 1 800 631 6989

A Yes, sir.
Q Okay. And does your sister also reside there?
A Yes, sir.
Q And what is her name?
A Brenda Harrison.
Q All right. And who does she reside with?
A With...
Q Who does Brenda Harrison reside with?
A With -- where she lives?
Q Yes.
A Coggins Trailer Park.
Q Does someone live with her?
A Her boyfriend.
Q What's his name?
A Maurice Martin.
Q Okay. Back on May 31 of last year, the day before Brenda Tate was killed, do you recall that day?
A Yes, sir.
Q And on that day did you see Jay Tate?
A Yes, sir.
Q All right. And where did you see him at?
A Up at Brenda's, his wife's.
Q Okay. At Brenda Tate's?
A Uh-huh.
Q And what was he doing there?

FORM 2094 PENGAD/INDY 1-800-631-6989

A I just seen him standing out in the yard.
Q Okay. On that same day did you have occasion to see him at Brenda Harrison's house?
A I seen him at my sister's house.
Q Okay. And did you hear any comments that he made on that date?
A He stated something about killing some people.
Q Okay. Who did he talk about killing?
A Joe, Sandra, and Brenda, and anyone else that got in his way.
Q All right. And how was Jay's behavior when he said that? Was he calm, his usual self? Or was he out of his mind?
A Calm.
Q Very calm.
A (Nodded head.)
Q That's all I have. Thank you.
CROSS-EXAMINATION
BY MR. WARDER:
Q Were you up there when Jay come up there to use the telephone?
A To Brenda Harrison's?
Q Uh-huh.
A Yes, sir.
Q Jay was -- who was he calling?

FORM 2094 PENGADDINDY 1-800-631-6989

A Brenda's doctor.
Q Why was he calling Brenda's doctor?
A To find out her health.
Q Was he concerned?
A He seemed concerned.
Q Now, how about Joe Morrison? Do you know him?
A Sir? Who?
Q Do you know Joe?
A Yeah. Joe Murray.
Q Does -- do you know him to carry a knife?
A I've seen a knife on him, yeah.
Q Okay. And do you know a fellow named Danny Jeffries?
A No, sir.
Q You haven't told Mr. Jeffries that you'd come in here and try and say things to hurt Jay; have you?
A No, sir.
Q You deny that.
A Sir?
Q You deny that. That you told Mr. Jeffries you were going to come in here and say things to hurt Jay.
A I'd say I didn't say that.
Q Thank you very much.
THE COURT: All right, Ms. Sheehan. Thank you so much. As far as this case is concerned, you're excused.

FORM 2094 PENGAD/INDY 1-800-631-6989

Thank you.

You may call your next witness.

SOL. PRUETT: The State calls Maurice Martin.

MAURICE MARTIN, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOL. PRUETT:

Q Would you state your name, please.

A Maurice Martin, Jr.

Q Okay. Mr. Martin, you reside where?

A [redacted] James Street.

Q Is that in Coggins Trailer Park?

A Coggins Trailer Park.

Q All right. And did you know Brenda Tate?

A Yes, sir.

Q And do you know Jay Tate?

A Yes, sir.

Q Okay. And who do you reside with? Who do you live with?

A Brenda Harrison.

Q Okay. I believe your home and Ms. Harrison's home was about two trailers down from Jay Tate's old residence?

A Two trailers.

Q All right. Now, do you recall the day of May 31 of

FORM 2094 PENGAD/INDY 1-800-631-6989

last year? This would be the day before Brenda Tate was killed.

A Yes, sir.

Q On that date did you see Jay Tate?

A Yes, sir.

Q And how was it you saw Mr. Tate?

A He come to my residence. I saw him walking up the street and then he come to my house.

Q For what purpose did he come to your house?

A He wanted to use the telephone.

Q All right. Now, while he was there at your house, did he make any statements that you heard that concerned the matters before the court today?

A Yes, sir.

Q And what, if anything, did he say?

A He told me that -- first he asked me was Brenda messing with anybody. I said, I don't know. You know. And so he said -- I say, Tate, just go home, you know, to your mama or your daddy, you know; don't get yourself in no trouble. He say okay. So -- then he say he was gonna kill her.

Q Was going to kill who?

A Brenda Tate.

Q All right.

A And...

FORM 2094 PENGADWDY 1-800-631-6989

Q Did he make any more threats concerning anybody else, other than Brenda Tate?
A He said Joe Murray and Sandra, he was gonna kill all of 'em.
Q Now, Sandra -- who is Sandra?
A Uh...
Q She's in the courtroom today?
A Yes, setting right there.
Q Is that Brenda's daughter?
A Brenda's daughter.
Q Did you try to talk him out of that when he said it?
A I tried to talk to him. I said, Man, just let it go, man; just go home. You got somewhere else to go. You can go stay with your mama or your daddy. And, you know...
Q What was his response to that?
A He just say he was gonna kill 'em. That was it.
Q When he said he was going to kill Brenda and Joe and Sandra, was he angry, was he upset? Or was he calm like you and I are now?
A Nah, he, he didn't act like hisself, you know. He just kinda acted kinda like he had something on his mind.
Q Was that the last time you saw Jay before this incident happened?
A Yes, sir.

FORM 2094 PENDAD/INDY 1-800 631 6989

Q That's all I have. Thank you.
CROSS-EXAMINATION
BY MR. WARDER:
Q When Mr. Tate came there and wanted to talk to you about this, did you go and contact Brenda and tell her of this impending danger that he had talked about?
A No, sir.
Q Did you warn any of the people of this impending danger that you supposedly heard?
A I didn't.
Q You just didn't do nothing.
A No, sir.
Q Did he say it with any feeling or emotion, like it was something he was really going to do?
A Yes.
Q What kind of emotion did he have? Did it upset him? Did he cry? What did he do?
A He wasn't crying. It was just like he was upset about something.
Q Thank you.
THE COURT: Thank you, Mr. Martin.
Oh, excuse me. Were you through?
MR. WARDER: Yes, sir.
THE COURT: All right. As far as this case is concerned, you're excused. Thank you so much for coming.

FORM 2094 PENGAD/INDY 1-800-631-6989

You may call your next witness, Solicitor.

SOL. GOSSETT: Your Honor, we've been going awhile. Could we take a brief recess and then we'll be -- I think we can finish up today.

THE COURT: All right. Let's see. Mr. Foreman, ladies and gentlemen, this might be a good time for us to take our afternoon siesta. So go to your jury room for about fifteen minutes. Forget this case. Talk about anything you'd like except this case. And I'll call you out in about fifteen minutes and we'll move right along.

(The following took place outside the presence of the jury:)

THE COURT: All right. Court will be in recess for fifteen minutes. Ms. Clerk, come and get me in fifteen minutes.

(Whereupon the Court took a brief recess.)

(The following took place outside the presence of the jury:)

THE COURT: All right. Are we ready to go forward?

Mr. Solicitor, why don't you bring your witnesses in here, rather than us having to run down the hall there to get one after another?

SOL. GOSSETT: All right, sir.

THE COURT: We've had to wait to get them here and there's no reason why they can't be sitting in here. Of

FORM 2094 PENGAD/NDY 1-800-631-6989

course, they might not want to be sitting in here. But maybe some other people don't want to be sitting in here, either; but we are here.

All right. Very good.

MR. WARDER: Your Honor, I think maybe I would like to do my objection in the form of a motion in limine. And it's my understanding that the Solicitor is going to offer an attorney that the deceased went to, for the purpose of showing that she had started a divorce. I object to that testimony on the grounds of relevancy. I think it has no relevancy to any issue.

I, second of all, think that while it isn't hearsay if she doesn't say she told me so, it implies hearsay. And it has no probative value. I think its prejudice outweighs any probative value and it shouldn't be admitted.

So I would make that objection and the motion in limine so I don't have to object in front of the jury.

THE COURT: Very good, Mr. Warder. I'll respectfully deny your motion. I think that it is relevant. I would allow that portion of it. I will not allow the other portion that we were discussing back in chambers, however.

All right. Very good. Invite the jury to come in.

FORM 2094 PENGAD/INDY 1-800-631-6989

(The following took place within the presence of the jury:)

THE COURT: All right. Let's see. Mr. Solicitor, you may call your next witness.

SOL. PRUETT: Your Honor, the State calls Sue Shibley.

THE COURT: Come around, Ms. Shibley.

SUE SHIBLEY, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOL. PRUETT:

Q Would you state your name, please.

A Susan E. Shibley.

Q Ms. Shibley, what is your occupation and profession?

A I'm an attorney here in Gaffney.

Q And have you specialized or practice in one particular area primarily?

A I have. A large percentage of my practice is in Family Court in the domestic law area.

Q Did you know Brenda Tate?

A I do.

Q And when did you first meet Ms. Tate?

A Ms. Tate came to me on April 28 and---

Q Of what year?

A '94. ---and asked me to represent her---

FORM 2004 PENGAD/BRDY 1 800 631 6989

THE COURT: As a result of her conversation, you might tell what you did. But I'm not going to let you repeat what she told you, Ms. Shibley.

Q Did she retain you for any purposes?

A She did.

Q For what purpose were you retained?

A I was retained for two purposes, one of which was to prepare a domestic complaint---

Q Okay.

A ---filing for a legal separation.

Q All right. And pursuant to that purpose for which you were retained, did you in fact prepare a complaint to be filed in the Family Court for separation?

A I did.

Q And when did you prepare that?

A That was prepared as of May 31.

Q Of the same -- 1994.

A Right. She came on April 28 and it was done by May 31.

Q All right. And was she to come back in and sign the complaint?

A She was to come in on June 1 so that the complaint could be filed and served. She was last in my office on May 31.

Q Okay. And did she ever come in and sign the

FORM 2094 PENGAD/INDY 1-800-631-6989

complaint on June 1?
A No, she did not appear on June 1.
Q That's all I would have. Thank you.
MR. WARDER: Your Honor, if it please the Court, I have no questions.
THE COURT: All right. Thank you, Ms. Shibley. As far as this case is concerned, you are excused. Thank you so much for coming.
All right. You might call your next witness.
SOL. GOSSETT: The State would call Darryl Duncan.
DARRYL DUNCAN, being first duly sworn, testified as follows:
DIRECT EXAMINATION
BY SOL. GOSSETT:
Q Would you state your name for the Court, please.
A Darryl Scott Duncan.
Q All right. Officer Duncan, where are you employed?
A Cherokee County Sheriff's Department.
Q And how long have you been employed at the Cherokee County Sheriff's Office?
A Approximately two years.
Q All right. Did you work for law enforcement before those two years?
A Yes, sir. I worked for Spartanburg County approximately a year and a half to two years.

FORM 2094 PRINTADINDY 1 800 631 6989

Q All right. And was that -- that was at the Sheriff's Office there?
A Yes, sir.
Q So you've been in law enforcement for four years?
A About four years.
Q What is your position with the Cherokee County Sheriff's Office?
A I'm a patrol officer.
Q All right. And your duties basically are what?
A I have an assigned area in which I ride and patrol and also answer calls that 911 dispatches out.
Q All right, sir. Were you working on June 1 of 1994?
A Yes, I was.
Q What shift were you on?
A I had come in on the second shift, which is from four to twelve.
Q Four to twelve.
A Right.
Q 4 p.m. to 12 midnight.
A Yes, sir.
Q And on June 1 of '94 did you receive a dispatch in reference to the matter we're here in court about?
A Yes, sir.
Q All right. About what time did you receive the dispatch?

FORM 2094 PENGAD/NYDY 1-800-631-6989

A I don't know the approximate time. I need a -- I've got it written down on a report.
Q Okay.
(Whereupon Sol. Gossett handed document to the witness.)
A It was approximately 1711 by military time. That would be around 5:11.
Q 5:11. Eleven minutes after five.
A Yes, sir.
Q Okay. And where were you dispatched to?
A I was dispatched to [redacted] James Street, which is in Coggins Trailer Park.
Q Okay. And after receiving that dispatch, what did you do?
A Officer Manning was the one that actually received the call, and I was the back-up officer. And so I responded to [redacted] James Street.
Q All right. So you responded and Officer Manning responded in his car.
A Yes, sir.
Q And you responded in your car.
A Yes, sir.
Q Okay. When did you arrive there?
A At 1711 (sic), which is seventeen minutes after five.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q So it took you about six minutes to get there.
A Yes, sir.
Q Okay. And did you and Lieutenant Manning arrive about the same time?
A We arrived at basically the same time.
Q Okay. Had you been to this location before?
A Yes, sir.
Q Okay. Do you remember -- this was on June 1.
A It was afternoon -- it was on the -- would be...
Q When had you previously been to that location?
A The day before this.
Q That would have been May 31.
A Yes, sir.
Q Okay. And who responded with you to that call?
A Actually, Officer Manning and Officer Fowlkes got the original call. It was a domestic dispute, is what it given out as. And I just responded as a back-up officer.
Q Okay. And that was at the Tate residence.
A Yes, sir.
Q Okay. The same place you responded to this time.
A Yes, sir.
Q Okay. Talking about the May 31, the day before, when you arrived, who was there, if anyone, that you talked to?
A I primarily talked with Jay Tate.

FORM 2094 PENGAD/NDY 1-800-631-6989

Q The defendant up here?
A Yes, sir. The other -- the complainant, who would have been Brenda Tate at the time, I assume---
Q Yes.
A ---was down behind her trailer. And I stayed up and talked to Jay Tate the whole time.
Q Okay. So he was there at one trailer; she was down at the other.
A Yes, sir. The other two officers went down there and talked with them.
Q Okay. At that time, on May 31, was there any reason to take anybody in or anything?
A No, sir. Just by talking with Jay, there was -- I think she -- the complainant, which would have been Brenda, was accusing him of some threats that had been made. And Jay had told me that he really hadn't made any threats.

And we talked and I explained to him about the C.D.V. law, the criminal domestic violence law. And a little bit after that he decided he would leave the area just so there wouldn't be no problem later on and we wouldn't have to come back out there for any problems.
Q So there weren't any physical injuries that y'all determined---
A That I observed, no. I didn't speak with the

FORM 2094 PENGAD/INDY 1-800-631-6989

complainant, so I can't really---
Q All right. And there was just -- the threatening incident; and y'all talked about it and calmed it down.
A Yes, sir.
Q Okay. After talking, you've indicated then that he left.
A Yes, sir.
Q Do you know who he left with or who took him away?
A I believe Maurice Martin had drove him off.
Q Okay. All right. Did he live there at the trailer park?
A He -- yeah, he stayed like three trailers down from this residence.
Q Okay. Now, going on over to the next day, June 1. You had received this dispatch at 5:11 and responded there at 5:17. When you arrived, what did you observe?
A When I arrived I saw two subjects laying on the ground and another subject kneeling beside one of the subjects.
Q Where was -- did you see Brenda Tate?
A Yes. I saw Brenda Tate. She was laying closest to the road, kind of -- you've got two trailers. Theirs is here. And there's a kind of a grade to the next trailer.
Q Uh-huh.
A She was laying in between the trailers, nearest to

FORM 2094 PENGADINDY 1-800-631-6989

the little main road that drives up.
Q All right.
A There's a tree about approximately five feet across from her. And another subject was laying there. And that was Joe Murray. He was laying there, with a subject kneeling beside him, which -- I'll find it in a minute.
(Pause.)
A Which was a Mike Wilkins, kneeling beside him.
Q All right, sir. In regards to Mr. Murray, was he alive?
A Yes, sir.
Q Did you notice anything about him?
A I went up and talked to him and basically asked him who stabbed him. And he had pointed out that the subject had -- which was Jay Tate, had stabbed him. And we proceeded from there. The witnesses stated the direction in which he had ran. And we proceeded to go around the trailer, which is 519, to check and see if the subject was still on the scene.
Q Okay.
A And as we went -- as I went around the trailer, and also Officer Manning, there was a set of keys laying kind of cater-cornered on the side of the trailer. As I rounded the trailer, I also picked those keys up.
Q All right.

FORM 2004 PENGAD/INDY 1-800-631-6989

A We got in front of the trailer and looked to see if maybe Jay Tate, which they had accused of doing the stabbing, was inside. So we -- I tried a key -- and the door was locked. I tried a key and the door opened and we went inside to more or less secure the scene. That was our basic...

Q All right. You looked for the defendant. Was he on the scene?

A No, sir; we never found him.

Q Was he in the trailer?

A No, sir.

Q He wasn't anywhere for y'all to find.

A No, sir.

Q All right. Now, these keys that you found -- I'm showing you State's Exhibit No. 1. It's been identified as the Tate trailer. Where did you find those keys in regard to...

A They was over here on the side of the trailer, kind of cater-cornered towards the front.

Q Okay.

A I think, if I'm correct, it was on a Aigner key chain.

Q All right. And you used those to get in the trailer and find that Joe Tate -- that Jay Tate was nowhere around.

FORM 2054 PENGAD/INDY 1-800-631-6989

A Yes, sir. Our main concern was basically to secure the scene, make sure any -- the suspect, the accused suspect, wasn't in the area so we could get EMS up there and also to make sure none of the evidence that we would find, if we did, was secure and wasn't tampered with.
Q All right. You haven't mentioned it, but did you go over and check on her before you went---
A I saw her laying there. I went straight to Joe Murray.
Q All right.
A Because he was -- they was the one that was looking up at me when I drove up.
Q Okay. All right. Now, you made the crime scene secure, meaning that no other harm was supposed to come to anybody.
A Yes.
Q And then what did you do in regards to EMS?
A EMS was waiting on us to clear the scene, as they normally do. It's a routine thing for us to go in, clear the scene, make sure when they come up no harm will be done to anyone else. And as we cleared the trailer as soon as we cleared the trailer, we called for EMS to come straight up, which was waiting down at the end of the road.
Q Okay. They weren't going to come until you told

FORM 2084 PEIGADINDY 1-800-631-6989

them they could.
A No, sir. It's just a routine thing that we do. That way no evidence can be tampered with and the suspect is either detained or, you know, if he's gone. That way the EMS personnel or anyone else come up won't be hurt.
Q All right. You indicated you had spoken to Joe Murray and the guy kneeling by him, Mr. Wilkins. When you first arrived, were there any other people around the area besides Ms. Tate?
A I didn't see anyone else around at that time.
Q Later, when EMS came, did other people sort of come out?
A Yes, sir. Everybody started getting curious, wanting to know why the ambulance come up there and police cars were there.
Q Okay. All right. Now, during your search that you described, did you see any weapons to the outside area of the trailer or the residence around there?
A At that time we didn't find anything. We checked all around the victims, Ms. Murray -- Mr. Murray and Ms. Tate. And we also checked in front of the trailer. And once inside we were more or less looking for any blunt or sharp objects that was in the trailer as we was also trying to secure the scene and check for any subject there.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q All right. After you did that, what steps did you take in regard to Sheriff Blanton or any other officer?
A The EMS arrived and talked with Officer Manning, just more or less a brief conversation. And then at that time I heard Officer Manning come over the radio calling for C-1, which is the coroner. And also he called for I-20, which is Joel Hill, and the Sheriff which is -- he's 100, which is also -- he does detective work also.
Q Okay. So y'all -- the Sheriff was called, the coroner was called, Captain Joel Hill of detectives was called, as usual, to the crime scene?
A Yes, sir.
Q All right. And you remained there to assist?
A Yes, sir.
Q All right. That's all. Would you answer any questions they may have for you.
CROSS-EXAMINATION
BY MR. WARDER:
Q Had you had occasion to respond to calls from Jay Tate to that location on prior occasions?
A I had responded one other time. I think this -- I can't give you an approximate -- I mean, a date; but it was about probably a month, month and a half earlier.
Q Was that in response to a call by Jay Tate?
A I don't know who the complainant was at that time.

FORM 2094 PENGADNDY 1 800-631-6999

I assume it was.
Q Okay. Thank you very much.
THE COURT: All right. Anything further?
SOL. GOSSETT: No, sir.
THE COURT: Mr. Duncan, as far as this case is concerned, you're excused. Thank you for coming. You may step down.
You may call your next witness.
SOL. PRUETT: The State calls Lieutenant Julius P. Manning.
THE COURT: Mr. Manning, come around, please.
JULIUS P. MANNING, being first duly sworn, testified as follows:
DIRECT EXAMINATION
BY SOL. PRUETT:
Q State your name, please.
A Julius P. Manning.
Q And you're employed by the Cherokee County Sheriff's Office?
A Yes, sir; I am.
Q What is your rank or position with the Sheriff's Office?
A I'm a lieutenant at the present time with the Cherokee County Sheriff's Department.
Q Okay. What are your duties or responsibilities as a

FORM 2094 PENGAD/INDY 1-800-631-6989

lieutenant?
A To patrol the area and answer calls put out by dispatch.
Q And as a lieutenant, are you the supervisor of the shift you work on?
A Yes, sir; I am.
Q And were you working on June 1 of last year, Lieutenant?
A Yes, sir; I was.
Q And on that day did you receive a dispatch in reference to the matters before the court involving the defendant, Jay Tate?
A Yes, sir.
Q All right. And approximately what time did you receive that dispatch?
A Approximately five o'clock.
Q All right. And do you recall what the code was, or the nature of the dispatch was, when you first received it?
A It was a Code 4, which refers to a stabbing, a wound, or a cut.
Q After you received the dispatch, did you in fact respond to the scene?
A Yes, sir; I did.
Q All right. And when you arrived there, what if

FORM 2094 PENDAMIDY 1 800-631-6990

anything did you observe?
A Officer Duncan and myself arrived at [redacted] James Street, which is in Coggins Trailer Park. I observed a subject resting prone-like against a tree. And I noticed a white female laying on the ground cater-cornered to the trailer.
Q Okay. Let me ask you this: Had you ever been to that location before June 1, 1994?
A Yes, sir; I had.
Q How many times?
A I can remember once before.
Q Okay. When was that?
A It was the day before, May 31.
Q Okay. And when you responded the day before, what was that in reference to?
A 1082, which is usually a domestic problem between family members or people cohabiting together.
Q Okay. And who was the family member or members who were having a dispute on that evening?
A Jay Tate and supposed to be his wife.
Q Brenda Tate?
A Brenda. Yes, sir.
Q All right. Were any arrests made that night?
A No, sir.
Q Why not?

FORM 2094 PENGAD/INDY 1-800-631-6989

A There was no need for an arrest. We saw no physical harm. I talked to Jay and I talked to Brenda also. At that time there was no reason -- Jay agreed to leave.
Q Okay.
A I advised him that it would be the best thing until things cooled off a little.
Q All right. Now, back to June 1 when you went out to the scene on that date. You said you observed Brenda Tate and Joe Murray. Was Ms. Tate still alive, or could you tell at that point in time?
MR. WARDER: Objection. That calls for an opinion outside of his expertise.
SOL. PRUETT: I'll withdraw the question.
Q Was Brenda Tate conscious?
A No, sir; she was not conscious.
Q What about Joe Murray? Was he conscious?
A Yes, sir; he was.
Q And was he able to give a brief description as to what happened to him?
A Negative. I didn't talk to Joe Tate (sic).
Q All right.
A I didn't talk to Joe Murray. Officer Duncan talked to him.
Q What about Mr. Mike Wilkins? Did you speak with him?

FORM 2004 PERADOMMY 1-800-631-6989

A No, sir; I did not.
Q All right. Was EMS at the scene at that point in time?
A They were standing by.
Q Why were they just standing by?
A They were dispatched the same time as we were. And they were standing by the scene waiting for us to clear the scene and secure the area so no harm would be brought to the EMS personnel.
Q I believe Officer Duncan just testified. Did you and he, in fact, clear the area?
A Yes, sir; we did.
Q Was Jay Tate found in the area?
A No, sir; he was not.
Q As you were clearing the area, were you or did you look for weapons as well?
A Yes, sir; we did.
Q And did you see any weapons in the area?
A On the scene, not at all, sir.
Q And we're talking about the immediate area of Joe Murray and Brenda Tate and the immediate area around the mobile homes.
A Saw no weapons at all.
Q All right. Now, after the area was cleared and EMS came and began to render treatment to Joe Murray, were

FORM 2094 PENGAD/NIDY 1-800-631-6989

there any persons when you first arrived at the scene, standing around? When you first arrived.
A I think Officer Duncan was talking to some subject over by Mr. Murray.
Q Other than him, was any person at the scene when you and Officer Duncan first arrived?
A One or two onlookers; but they was standing across the street at another trailer.
Q All right. Now, after you went to the scene and EMS was treating Mr. Murray, did you ask for any additional assistance from any other officers?
A Yes, sir. I called in 100, who is the Sheriff. I called in 101, who was the head detective. And I called in C-1, which is the coroner.
Q All right. And a result of that dispatch, did those persons in fact come to the scene?
A Yes, sir.
Q And were any other officers or teams called to the scene after the Sheriff arrived?
A Yes, sir.
Q Okay. Who was that?
A The search team was called in.
Q And what was the purpose of their coming to the scene?
A We were trying to pick up a trail or maybe a scent

of the suspect at that time.
Q All right. So at that point in time Jay Tate was still not in custody.
A No, sir; he was not.
Q You said the search team arrived. Are there tracking dogs that are a part of that team or accompany that team?
A Yes, sir.
Q And were they used in the search for Mr. Tate?
A Yes, sir; they were.
Q And was Mr. Tate apprehended on that day, June 1, 1994?
A No, sir; he was not.
Q Are you aware as to whether or not any warrants were issued for his arrest on that day, June 1?
MR. WARDER: Objection to relevancy.
THE COURT: What is the relevance of it?
SOL. PRUETT: To show flight, Your Honor.
THE COURT: Well, you can ask him if he arrested him. But let's move on.
SOL. PRUETT: All right.
Q Do you know when he was arrested? Jay Tate?
A Not the exact date, sir. I think it was about three or four days later.
Q Were you the officer who made the arrest?

FORM 2094 PENGADWNDY 1-800-631-6989

A I was called to identify the suspect.
Q All right. What---
A He was stopped on Thompson Street around Spears Alley.
Q Was he inside the city of Gaffney?
A Limestone Street; I'm sorry. Around Thompson Park, around Spears Alley.
Q Thompson Park, city of Gaffney.
A Yes, sir.
Q And that would have been how many days later, you say?
A I believe it was three or four days later.
Q I believe you were the officer -- let me ask you this: I'll show you this. Can you identify that?
A Yes, sir. It's an incident report. A booking sheet.
Q Okay. And who was the booking officer?
A I was, sir.
Q Okay. Is that your signature on the bottom of that document?
A Yes, sir; it is.

(Whereupon Sol. Pruett showed document to Mr. Warder.)

MR. WARDER: Your Honor, I have a couple of objections to the---

FORM 2934 PLUGAMERICA 1 800 821 6999

THE COURT: What is it?

SOL. PRUETT: It's a booking report---

THE COURT: I sustain the objection -- you're offering it in evidence?

SOL. PRUETT: Maybe I could lay a further foundation on its relevance to the case.

THE COURT: Well, I sustain the objection if you are offering it as an exhibit.

Q What date is on that? What date was he arrested?

THE COURT: Now, he can just refresh his memory. I'm not going to let him read from it.

A He was booked in on June 4, sir.

Q All right. And, as part of the booking process, do you inquire of persons being booked if they are either injured or hurt?

A (No response.)

Q Do you ask the person being booked---

A Yes, sir.

Q ---if they are either hurt or injured?

A Yes, sir.

Q And was Jay Tate -- in your booking of him, did you observe any injuries he had?

A No, sir. None at all.

Q Cuts, scrapes of any nature?

A No, sir.

FORM 2094 PENGAD/NDY 1-800-631-6989

Q Had there been, would you have noted that on your booking report?
A Yes, sir.
Q Did you note any injuries he might have had to himself?
A None whatsoever, sir.
Q What about allergies, ailments, anything?
A He said he had asthma. I asked him did he have asthma. He responded yes.
Q And did you serve those warrants on Jay Tate?
A Yes, sir.
Q Okay. That's all I have. Thank you.
CROSS-EXAMINATION
BY MR. WARDER:
Q Did you actually participate in the search that went on that day, out through the woods and all of that?
A No, sir; I did not go through the woods.
Q Okay. You didn't get out and examine the ground or anything like that, or look for trails or tracks or footprints or that kind of thing.
A Not in the woods; no, sir.
Q All right. Did you see any blood anywhere except right at the scene? Did you see any blood?
A I saw some blood; yes, sir.
Q On the ground?

FORM 2994 PEJ/READY/1 (800) 631-6989

A Yes, sir.
Q Where at?
A It was over by Mr. Murray.
Q Where he was stabbed.
A Yes, sir.
Q Okay. Thank you.

THE COURT: Anything else?

SOL. PRUETT: No, sir.

THE COURT: All right, sir. You might step down. Thank you so much. As far as this case is concerned, you're excused.

SOL. GOSSETT: Your Honor, that would be the State's case.

THE COURT: All right. Mr. Foreman, ladies and gentlemen, go to your jury room for just a very few minutes. Don't discuss this case. You mustn't start making any type of mental determination until you've heard all of the testimony.

But go to your jury room, I'm thinking, for about ten minutes; and I'll call you back.

(The following took place outside the presence of the jury:)

THE COURT: Any motions or anything at this time?

MR. WARDER: Yes, sir. For the record I would make a motion for a directed verdict, simply that taking the

FORM 2094 FENGADINDY 1-800-631-6989

evidence most favorably to the State no reasonable juror could conclude the guilt of my client beyond a reasonable doubt. On both counts, Your Honor.

THE COURT: All right. On both the -- you move for a directed verdict on the indictment for murder based upon the insufficiency of evidence.

MR. WARDER: Yes, sir.

THE COURT: As well as directed verdict for the indictment for assault and battery with intent to kill on the same basis.

MR. WARDER: Yes, sir.

THE COURT: All right, sir. I respectfully deny your motions. I think there is sufficient evidence to go forward.

It's now 4:15. I wonder if we couldn't get one or two more witnesses in this afternoon, Mr. Warder. What do you need? About four or five minutes?

MR. WARDER: Yes, sir.

THE COURT: All right. Let's take about five minutes, then. And we'll come back and see what we can do.

(Whereupon the Court took a brief recess.)

(The following took place outside the presence of the jury:)

THE COURT: All right. Let's see. Mr. Tate, I'm

FORM 2094 PENGAD/NDY 1-800-631-6989

going to -- now is the time, if you have any witnesses -- that's all right. You may sit down. Whatever's convenient for you.

Mr. Tate, I know you've discussed this with your attorney. But I want to make sure, myself. Now would be the time that you would put up any witnesses that you have. The State has completed their case.

Now, you may put up -- you may testify yourself, or not testify. If you choose to testify, then you subject yourself, just as any other witness would, as far as cross-examination is concerned. And if you have any record, if you have a record of moral turpitude, then, of course, that could be brought out.

If you choose not to testify, then I would instruct the jury they could not consider that in any way, as far as your innocence or guilt. As a matter of fact, I would instruct them not to even discuss it in their jury room in their deliberation if you choose not to testify.

So I'm going to ask -- as a matter of fact, y'all have discussed this; have you not, Mr. Tate?

THE DEFENDANT: Yes, sir.

MR. WARDER: Yes, we have, Your Honor.

THE COURT: All right, sir. And have you -- do you wish to testify or not? No, first of all, let me see.

FORM 2094 PENGAD/INDY 1-800-631-6989

What is his record? If he has any.

SOL. PRUETT: Your Honor, he has one prior conviction for assault and battery with intent to kill, 1981; and subsequently, in 1986, also one count of assault and battery with intent to kill; crimes of moral turpitude. He has other convictions, but not---

THE COURT: You have two assault and battery with intent to kill that they will be able to ask you about if you testify. And if you choose not to testify, then, of course, they could not bring that out. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you need to talk to your attorney about that some more?

(Whereupon the defendant conferred briefly with his attorney.)

MR. WARDER: Your Honor, he tells me that the 1981 conviction was reduced to assault and battery of a high and aggravated nature.

SOL. PRUETT: That's right.

THE COURT: Is it?

SOL. PRUETT: Yes, sir. I apologize, Your Honor.

THE COURT: All right. Then there's only one, then, that they could use.

SOL. PRUETT: Yes, sir; that's correct.

MR. WARDER: The 1986 assault and battery with

FORM 2094 PENDAMINDY 1 800 631-6989

intent to kill.

THE COURT: Assault and battery with intent to kill.

SOL. PRUETT: That's correct.

THE COURT: So that's the only one that they could use, would be that one. Would you like to discuss it further with your attorney; or have you made up your mind as to what you'd like to do, Mr. Tate?

THE DEFENDANT: Yes, sir; I want to testify.

THE COURT: You would like to testify.

THE DEFENDANT: Yes, sir.

THE COURT: Very good. Are you read to go forward, you and Mr. Warder?

MR. WARDER: Yes, Your Honor, we are. We do have one other short witness that would precede my client to the stand.

THE COURT: Very good. That's fine.

All right. Invite the jury to come in, then.

(The following took place within the presence of the jury:)

THE COURT: All right, Mr. Warder. You might call your next witness.

MR. WARDER: We call Linda Gaskin.

THE COURT: Come around, please, and be sworn.

LINDA GASKIN, being first duly sworn, testified as follows:

FORM 2054 PENGADINDY 1-800-631-6989

DIRECT EXAMINATION

BY MR. WARDER:

Q You are Linda Gaskin?

A Yes, sir.

Q And, Ms. Gaskin, where do you live at?

A Douglas's Trailer Park right now.

Q And how long have you lived over there?

A I just moved to Douglas's. I used to live at 462 Garden Lake Road.

Q And how long have you lived in the Gaffney area?

A About thirteen years.

Q Okay. Are you employed, ma'am?

A Yes, sir.

Q Where do you work at?

A Right now I work at T & S Mills in Gaffney.

Q All right. And how long have you known Jay Tate?

A I honestly can't tell you. I don't remember how long I've known him.

Q Can you give us approximate years, months?

A About -- what? Six months?

Q And were you with him on the night that he was arrested?

A Yes, sir; I was.

Q Okay. And prior to that, how long had you been with him?

FORM 2094 PENGADNDY 1-800-631-6989

A Well, when this happened I worked at Hoechst Celanese. And I got off at twelve o'clock. It -- technically it was Friday morning. I picked him up Friday morning when I got off work. At twelve o'clock.
Q Okay. And at the time he was arrested, where were you taking him?
A To the county police station, the jailhouse.
Q Okay. And what was the purpose of you taking him to the jail?
A So he could turn hisself in.
Q And he had told you about the events that had happened prior to that.
A Yes.
Q And did he tell you it was an accident?
SOL. PRUETT: Objection---
A Yes, sir.
SOL. PRUETT: ---Your Honor. We're getting into hearsay here.
MR. WARDER: It goes under res gestae, Your Honor.
THE COURT: I think it's hearsay. I sustain the objection.
Q Would you answer any questions that the Solicitor might have, please?
A Yes.
SOL. GOSSETT: No questions.

FORM 2094 PENGAD/INDY 1-800-631-6989

THE COURT: You say no questions or some questions?
SOL. GOSSETT: None.
THE COURT: All right, Ms. Gaskin. Thank you. As far as this case is concerned, you're excused. Thank you for coming.
You may call your next witness.
MR. WARDER: We call John Jefferies.
JOHN JEFFERIES, being first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. WARDER:
Q You are John Jefferies?
A Yes, sir.
Q Mr. Jefferies, where do you live at, sir?
A 606 Heddy Hill.
Q And how long have you lived here in the Gaffney area?
A In Gaffney? All my life.
Q Do you know Brenda Harrison?
A Brenda?
Q Yes, sir.
A I've seen her. I don't know her that well, but I've seen her.
Q Okay. And did you have occasion to hear her discuss her testimony here today?

FORM 2054 PENGADMINDY 1-800-631-6989

A Yes, I did.
Q Okay. And what did she tell you she was going to do here?
A Well, she wasn't talking directly to me. She was talking to some more people. She said that she wished if they found him that they would kill him. Them the words she said. And she said if she could do anything to cause him to make time, she was gonna do that, too. So, now---
SOL. PRUETT: Objection, Your Honor, at this point. I mean, it's confirming testimony. But we need to keep it to any prior statement and not the motives or bias of the witness.
MR. WARDER: I asked the witness if she told Mr. Jefferies, if she knew him---
THE COURT: Now, who is it? Is it someone who has already testified?
MR. WARDER: Yes, sir.
THE COURT: All right. Go ahead.
A And, like I say, that was all that was said. And, I mean, I said something, too. I said, You don't know the motive why that man did what he did. She say, I don't care; that was my friend.
Q Okay.
A And that was it.
Q So that was it.

FORM 2094 PENGADMNDY 1-800-631-6989

A That was our conversation.
Q Thank you.
THE COURT: Anything?
SOL. PRUETT: No, sir.
THE COURT: All right, Mr. Jefferies, thank you. You may step down. As far as this case is concerned, you're excused.
MR. WARDER: Your Honor, if it please the Court, I would call my client to the stand.
THE COURT: Mr. Tate, come around, please, and be sworn.

JAY TATE, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. WARDER:
Q Mr. Tate, how old are you, sir?
A I'm thirty-two years old.
Q And you were arrested on this charge when?
A June 4.
Q 1994?
A Right.
Q Okay. At the time you were arrested, were you employed, sir?
A Yes, sir.
Q And where did you work at?

A Odell Jeters Concrete.
Q Okay. And what type of work did you do for the concrete company?
A I was a concrete finisher, laborer.
Q Okay. Where do you work at? What area?
A What area?
Q Geographically, what area do you work in?
A I worked all over Spartanburg, Greenville.
Q And that was a company that poured and finished concrete cement?
A Yes, sir.
Q Okay. And at that time who were you living with?
A I was living with Brenda Tate.
Q Okay. And Brenda was your wife?
A Right.
Q And where were you living with her at?
A [redacted] James Street.
Q Okay. And tell us what type of residence [redacted] James Street was.
A It was a trailer park. Me and Brenda, we lived there. And...
Q Who else lived there?
A Joe Murray, Jr.
Q Okay. And he lived with you and Brenda?
A Right.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q How long had he lived with you and Brenda?
A Well, when I first started living there, he lived there. Then he moved out with some friends. And he stayed there for about a week and a half, with some friends across town in another trailer park. And then he moved back in 'cause he said they wasn't help paying the share of the bills.
Q The last time he moved back in, how long had he been there?
A Ever since.
Q How many -- in months, can you give us some idea how long it was the last time since he moved out -- since he moved out for the week, he was there?
A About six weeks.
Q Okay. And there's been some testimony in the courtroom that he lived in the trailer below, where his sister had lived. Was he living in that trailer?
A He had moved in that trailer about two or three days before this incident.
Q Okay. So before June 1 he had only been two or three days in the other trailer.
A That's right. Two or three days.
Q And where was his clothing and stuff located at?
A Most of his clothing was still at the trailer, 519 James Street.

FORM 2094 FENGADINDY 1 800 631 6989

Q Okay. Now, had Brenda been spending all of her nights, lately, at [redacted] James Street?

A She didn't spend the night Monday night.

Q Okay.

A 'Cause Sunday was May 29 and that was my son's birthday. I had picked him up that Saturday. He spent the night with us and I gave him his birthday gift on the 29th. And Brenda stayed there the 29th.

But on that Monday, it was Memorial Day. And I woke up and I realized she wasn't there. I went down to Joe's trailer, asked where was Brenda. He said he didn't know. I say, I'm very concerned about Brenda. I say, I think you need to tell me; I say, Where does Sandra live at, 'cause I didn't know where they lived at, at the time.

He say they lived at some swimming hole down by Draytonville. So I had my daddy's car. I took off. I rode around, see could I find her. And then I finally spotted her. I tried to stop her, you know, see, you know, was she all right, 'cause she had been acting real, you know, funny like.

Q And---

A And my wife had been sick about a month. At first, when she started acting this way, she -- she had missed a menstrual cycle. And then she just started bleeding heavy at once. And she was just acting -- just funny.

FORM 2094 PENGAD/NDY 1-800-631-6989

And on May the -- May the 31st I was down at Brenda Harrison's. I used the telephone 'cause our telephone had been destroyed because Joe Murray, Jr. had jerked the wires out of the back of the -- where the phone at, you know, the wires run into the house.

And I went down there. I called Susan Bland's office. And I was -- talked to the reception (sic), telling her how -- you know, I intended to talk to the doctor, but I talked to the reception. And I was really concerned about my wife's health. And she was acting very, very strange. And I ain't never seen nothing like this but once before.

Q Jay, I want you to tell us, first of all, about your relationship with your wife. Was it a good marriage?

A It was a good marriage till she got sick.

Q Okay. Were you two close?

A We was close.

Q Did you do things together?

A We did things together. Went out to eat. You know, we just rode around together.

Q Did you spend most of your time that you weren't working at home with your wife or did you spend it away?

A I spend (sic) it at home.

Q Okay. And you said until she got sick. Had her sickness -- had it changed her behavior some?

FORM 2094 PEINOADMIDY 1-800-631-6989

A It changed her behavior 85 percent.
Q Can you tell the jury how it changed or what you noticed that it changed, about her behavior?
A She was talking about, I hate all mens (sic); I don't want nobody around me. I say, What's the matter? She say -- she just couldn't explain it. And then, about two weeks after that, she started bleeding heavy. She had missed a menstrual cycle. She started bleeding heavy. And she just didn't want me around. And that was it.
Q Okay. Can you tell us a little bit about your relationship with your stepson?
A It was off and on, like, I'd try to be his friend. But, you know, I didn't accept the things that he did 'cause he drink. You know, I'm drug free. And he would drink beer.

And one night me and his friends had talked and I told 'em, I said, Y'all shouldn't be riding around tonight. I say, I've seen the law out tonight. It was him and two more guys and a girl. And the time they left the trailer, the girl got stopped for DUI. And I told 'em, I said, I told y'all don't be riding around.
Q Okay. Did you have physical, did you have verbal fights? Or did you not have fights? Or what...
A We -- if we say something to each other, you know,

FORM 2094 PENGAD/INDY 1-800-631-6989

basically, he was -- he will cuss me and I'd say, Man, you shouldn't do that.

Q Okay. When you say he would cuss you, was that an isolated type thing or something that happened on a frequent basis?

A It happened, you know, every once in a while. Like, he say -- you know, like one incident, I had to really, you know, talk to him because his mother was trying to talk to him about something and he pushed his mother. And I say, Hey, you don't do that; I don't do that.

And, you know, after that point right there, me and him really stopped speaking.

Q Okay. How did you feel about living in a home with your stepson?

A I really didn't -- I didn't mind. I really didn't mind. But I kindly -- since then, he's -- really didn't care that much about me since I was his stepfather.

Q Okay. Were there any racial problems between him and you?

A Well, it was -- he called me a nigger a couple times, you know. But I didn't pay it no attention, you know, 'cause he had been drinking.

Q Okay. Was he different when he was drinking than when he wasn't drinking?

A He was a whole lot different.

FORM 2964 PENGAD/INDY 1-800-631-6989

Q Okay. How often would he drink? Or was that a problem?
A He would drink about -- he would drink when he could get it. Beer. I never did see him assume (sic) no liquor or nothing, but just beer.
Q Okay. Would you notice a personality change when he'd drink?
A Yes.
Q Would that affect how you got along with him?
A Well, when he was drinking -- I try to stay away from the alcohol, 'cause, you know. And I just stayed away from him, period, when he was drinking 'cause I didn't never know what -- how he'd respond. 'Cause I had seen on occasion how he'd respond when he was drinking.

On one occasion I was there and I seen him with the -- walking around with the telephone, out in the yard. And he had been drinking. He had went across the street and got into some kind of argument. He called 911 and he was on the phone, talking to 911. And some -- him and some guy was, you know -- I guess they was having some kind of disagreement.

And was on the -- telling the lady at 911, Oh, he just hit me again. But when he come home later on that night, I said, Joe, you need to stop drinking; you shouldn't be doing that; you shouldn't be playing with

FORM 2054 FENDADMNDY 1-800-631-6989

911. I say, That's a very serious thing. And he didn't say nothing.

Q When you and your stepson didn't get along, did that affect the relationship with your wife?

A Yes, it did.

Q Okay. How did it affect that relationship?

A She kind of, you know, favored, you know, him more than she did me. And he -- you know, she would ask me questions, you know, like, I appreciate you don't bother nothing of Joe's, you know.

But anytime I ever borrowed anything to him, you know, I would always ask him, I say, Would it be all right if I play your stereo or anything? He would say, That's all right. I'd say, Your mom said, you know, you had told me to leave it alone. He say, No, I didn't say that; you know how my mom is.

You know, I never did, you know, really didn't know what was going on.

Q How were you and Brenda getting along in the days immediately preceding June 1?

A She was acting very strange. She say that she was gonna quit her job. I say, You can't quit your job. I say, You won't have nowhere to live. 'Cause, you know, I wasn't really making that much money on my job.

And she was just -- I never had seen no behavior

FORM 2094 PENGAD/NYC 1-800-631-6989

like that. That's why I tried to contact the doctor. She say she was gonna quit her job and work at the zoo. I say, You can't do that. Because, you know, she loved animals very much. I say, You can't do that.

And she just, just -- unusual behavior. Very unusual.

Q What were your feelings toward your wife?

A I loved my wife. I loved her very much. And I called the doctor and try to see what was going on. 'Cause she had kindly done this previous, before. And I, I don't know if she was on medication. I think the doctor was gonna put her on some kind of medication to balance her---

SOL. GOSSETT: Your Honor---

A ---out or something.

SOL. GOSSETT: ---I'm sorry. We have to object here.

THE COURT: I sustain---

SOL. GOSSETT: He's going into hearsay.

THE COURT: ---the objection.

Q You don't know if she was on medication; do you? Yourself.

A Well, I know she was on blood pressure medication and some kind of else medication. And I also know at the time of this incident the doctor had gave her birth

FORM 2094 PENGAD/NDY 1-800-631-6989

control pills.

Q Now, on the day there's been testimony about, the day preceding the first, on the 31st, what happened on the 31st?

A Nothing happened on the 31st.

Q Okay.

A Except -- except that's the day I called the doctor.

Q Okay.

A I went down to Brenda Harrison, called the doctor. That was on the 31st. And that was that morning, though. That was that morning. And late afternoon, on the 31st, Joe Murray, Sr. came up there. And he was out there threatening me.

Q Okay. Now, who was that?

A Sandra Littlejohn's and Joe Murray's daddy, biological daddy.

Q Okay. Joe Murray, Sr. was up there on the 31st.

A Yes.

Q There's been some testimony by officers that they were out there on the 31st. Were the officers out there on the 31st?

A No, they wasn't out there on the 31st. They was out there May 30.

Q Okay. They were out there the 30th.

A Right. Memorial Day.

FORM 2094 FENDADMDY 1-800-531-6989

Q Okay. And what happened on the 30th that brought the officers out there?

A It was a -- I was in there eating. And I noticed Brenda Tate and -- she opened the door and about five polices (sic) came in there. I was sitting at the kitchen table. I say, What seems to be the problem? And didn't nobody say nothing.

Brenda went back there and got the clothes. You know, she was gonna do laundry. She threw all my clothes out and got the clothes. And she left.

And then, when the police -- as soon as the police left, she hollered out the back door, Call the police. I say, What's the matter, Brenda? And then she say -- then she told Joe, Tell them he threatened us. And he called the police. The police came back out there again on the 30th.

And on the 31st I was down there -- that's when Joe Murray, Sr. was down there threatening me. And, and that afternoon I had to go to one of my after-care meetings. So Brenda Harrison took me to my after-care meeting.

Q Okay.

A That was on the 31st.

Q Okay. And what happened, then, on June 1?

A June 1. Okay.

Q Where did you spend the night on the 31st?

FORM 2094 PENGADMNDY 1-800-631-6989

A At the trailer.
Q Okay. The house you and Brenda occupied.
A Right.
Q Did you spend it alone or did Brenda spend it with you?
A I spend (sic) it alone.
Q Okay. What happened on June 1? Did you go to work?
A Yeah. Okay. Brenda came in. It must have been about six o'clock that morning. I was up, prepared to go to work. She came in. And I said, What's up? And she didn't say nothing. So I got in the car, you know, and went to work.
Q You left about -- what time was it you went to work?
A It must have been about 6:30.
Q Okay. And where did you have to go to work, Jay?
A I had to go to work that day at Fountain Inn.
Q Did you have to drive your car to Fountain Inn?
A I drove the truck.
Q Okay. And what time did you get off work at Fountain Inn?
A We must have left there -- it must have been about 4:30 and we got to Gaffney a little bit after five.
Q Okay. When you got to Gaffney, where did you go?
A He -- my bossman let me out on the frontage road. I

FORM 2094 PENGADMIDY 1 800 631-6989

walked home.
Q Okay. Now, you got to work -- what truck did you drive? Was it your truck?
A It's a company truck. So the bossman let me out at the frontage road.
Q Okay.
A And then I walked home. And then I put the key in the door and I see the key wouldn't fit. So I walked down to the trailer and I said---
Q You say you walked to the trailer. What trailer did you walk to?
A I was at my trailer. I walked down there and I talked to Brenda. I say, Would you come and let me in?
Q Now, that was the trailer that---
A Joe Murray, Jr.'s trailer. Yeah.
Q And that was the one your daughter had until she moved out a day or two---
A Right.
Q Okay. What happened when you walked down to the trailer?
A I asked her would she let me in. 'Cause, you know, I say, I'm tired; I'm tired of worrying about you. I say, I'm ready to get my clothes and go.
Q Okay.
A And she told -- she was gonna do it. And then Joe

FORM 2094 PENGAD/INDY 1-800-631-6989

say he'll do it. So Joe jumped out the back of the truck. I was walking in front of him. He had some keys. And he got in front of the trailer, you know, walking, you know, like up -- like towards the trailer, you know, like, when he come -- I had stopped 'cause he had to open the door.

He say, Why don't you get the fuck away from here? I say, I'm fixing to leave. Then he was opening the door. He opened the door. And then he was backing off. And I say, Joe, why you always starting trouble between me and your mother? He pushed me and kicked me.

And then when I pushed him back, he fell on the ground. And then it was -- it was a knife there. He grabbed the knife. And I, I fell on the ground with him. We struggled with the knife.

And then he broke loose. You know, like, kind of wrestling. He broke loose and rolled over and he took straight across -- like straight across the road. He took straight across the road. And I jumped up. I did not chase Joe Murray, Jr.

I walked, like, beside the trailer; and I was seeing whether he was coming. I had seen Brenda coming; but when I looked around, Brenda had ran up on me and the knife had went inside her.

Q Okay. You were holding the knife when it went in

FORM 2094 PENGAD/NDY 1-800-631-6989

Brenda.

A Yes, sir.

Q Okay. Did you see Brenda before she ran into the knife and became impaled upon it?

A No, sir.

Q And did you try and stab her or cut her---

A No, sir; I did not try to stab my wife. I loved my wife.

Q How did Joe get cut or stabbed?

A Me and him was on the ground. He had the knife in his hand first. And we was wrestling on the ground. And then he tore away. It happened real quick. It was fast (snapping fingers), just like that. He just -- and then when he tore away, he jumped up and just ran across -- straight across the road.

And then the guy named Michael Wilkins, he was down behind the truck. He was behind the truck. And then he seen Joe. He walked up there. 'Cause when Brenda fell down, she fell down on the ground, she was in a upright position. I was trying to communicate with her. She wasn't saying anything. I just thought it was unusual behavior again.

Q Okay. Now, did you know she had been stabbed?

A No, sir. I just felt something, you know, plunge against me. And I seen her when she fell back. I tried

FORM 2094 PENGAD/INDY 1-800-631-6989

to talk to her, communicate with her. I just thought it was unusual behavior.

Q What did you do then?

A I walked up to the trailer, I went inside the trailer, and I came out. And I left.

Q Where was Brenda when you left?

A She was sitting in a upright position.

Q Okay. Where was Joe?

A He was -- he had walked down the street, down to -- at that point he had moved down the street, while I was trying to talk to her. And I was trying to, you know, keep a eye on him. And then they -- he had went and got some kind of cordless telephone and was talking on it.

At that point I knowed they was getting help. And that's -- you know, I left.

Q Okay. How come you left?

A 'Cause I was scared.

Q What were you scared of?

A I was scared of Joe Murray.

Q Why were you afraid of him?

A 'Cause he had guns and what he had just -- he had tried to do to me.

Q When you say what he tried to do, what do you mean?

A He tried to cut me.

Q Okay.

FORM 2094 PENGAD/NDY 1-800 631-6989

A He tried to -- he, he went for the knife and I jumped down there. And me and him just struggled.
Q Jay, tell us about that knife. Was it a knife -- was it a clean knife that looked like it had been placed there? Was it a knife that laid out there? Where did that knife come from?
A I don't know where the knife -- it looked like it -- you know, it was just there. You know. You know, like it might have been put there that day.
Q Okay.
A That night before. I don't know.
Q Had you ever saw that knife there before?
A Yes, I had seen it in the kitchen.
Q Okay. Had you ever saw it outside where it was at that day?
A I had seen it outside on a couple of occasions. 'Cause when Joe worked on his moped, you know, like skinning the wires, or -- he had it out there on occasions doing that.
Q When was the first time you saw that knife that day?
A On the ground when Joe Murray, Jr. was going for the knife.
Q What did you think when he was going for the knife?
A He was gonna hurt me.
Q Okay. And at that time what did you do?

FORM 2084 PENDADVNOY 1-800-631-6989

A I jumped down on top of him. And me and him, we was struggling with the knife. 'Cause he had -- he had more position of the knife, but as things go along I kindly got the knife from him. And he just tore away. He screamed, then he ran across the street.

Q Did you know he had been stabbed?

A No, sir.

Q Now, when you left that day, how did you leave?

A I left on foot.

Q Where did you go?

A I went -- I went over to a friend's house. I called my dad. And I told Dad, I say, It's been a accident up here, you know, at my -- where I live at. I say, I need somebody. He say, Who you need, son? I say, I need just to talk to somebody.

And me and him, you know, talked on the telephone. And then I caught a ride.

Q Okay. And when you caught a ride, what day was that?

A That was on Wednesday.

Q Okay. And what happened between Wednesday and the time you were arrested?

A I was -- I was staying over at a friend's house.

Q Okay.

A And I kept in contact with my dad. I told my dad

FORM 2094 PENTAD/INDY 1 800 631-9969

that I need a attorney 'cause people gonna be telling lies on me.

And I ain't never threatened no one. 'Cause I loved my wife.

Q Okay. There's been some testimony in the courtroom that you had told people that you were going to kill her, that you were going to kill Joe.

A I have never said that.

Q Is that true?

A No. No. No. No.

Q At the time you were arrested, where were you headed?

A I was -- I had Bonnie -- me and Bonnie was together. I had called my dad on the car phone, told my dad I was getting ready to turn myself in, if he had got me situated with a attorney. He said, which he did -- you know, he said yes.

So I was coming down Limestone Street. And it was a police officer at the top of the hill. I got out of the car. I walked over there to him. I identified myself. And he said, No, you're not Jay Walter Tate, Jr. I say, Yes, I am. And I identified myself again.

And he had a little thing on the side. And he hit it. And he called in. And then he waited a few seconds. And then he pulled his revolver, his gun, out on me. And

FORM 2094 PENGAD/INDY 1-800-631-6989

at that time, you know, I was brought in.
Q At that time you were arrested for---
A I was arrested.
Q Is there anything else you need this -- you want to tell this jury, to fairly decide your case?
A Yes, sir. This right here, what happened, was nothing but a accident. I loved my wife. And I never had threatened my wife. Ain't never hit my wife, ain't never cursed my wife.

And can't nobody say I done that. I loved my wife very much. And I -- you know, everything's, you know, just working out fine till, you know, she got sick. And she went through this little thing she was going through, or whatever it was. She just -- she -- I ain't never seen nothing like it in my life. Very unusual.
Q And with regard to Joe, did you intend to hurt Joe that day?
A No. I ain't never hit Joe or tried to hurt him. I ain't never tried to hurt Joe.
Q Did you do anything except engage in a struggle for that knife that day?
A That's all that happened.
Q Jay, you've been in trouble with the law once before.
A Yes.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q You have one conviction for assault and battery with intent to kill.
A Yes, sir. It was in 1986.
Q Thank you. Would you answer any questions the Solicitor might have.
CROSS-EXAMINATION
BY SOL. PRUETT:
Q Just a few questions, Mr. Tate. How long had you and Brenda been living together?
A About three months.
Q Is it fair to say March 10 you and her moved in together?
A Well, she -- March 10 she was already living there. And I was released from the A.T.U. program down in Columbia.
Q So you began living together on March 10.
A Right.
Q She had been living there for a long time. Is that fair to say? At Coggins Trailer Park?
A Well, she had lived on 150 -- not in the trailer park. She had lived on 150, in a house. She had been living there four or five years. And she just had moved in that trailer.
Q All right.
A She hadn't been living in the trailer for three

FORM 2094 PENGAD/INDY 1-800-631-6989

months.
Q Well, you began living together with her on March 10.
A Right.
Q And Joe -- was he there then or had he already moved out?
A No, he was there then.
Q Okay. Well, when did he move out? After you moved in.
A He moved out -- he moved out about three or four weeks later. With some friends.
Q Sometime later.
A Yes.
Q And how long was he gone before he showed back up again?
A No more than two or three weeks.
Q Two or three -- well, was it May when he showed back up?
A Yes, it was in May.
Q Okay. So he was not there during March or April.
A He was there. He was the -- he was there in March. He was there some of April. And he moved back May.
Q Okay. On the day in question, when Brenda was stabbed, you returned from work, it's your testimony, and you went up to the home and found the door locked. Is

FORM 2094 PENGAD/NJDY 1-800-631-6989

that correct?
A Yes, sir.
Q Now, where was the knife at that you're talking to the jury about?
A I didn't see the knife at that point. The only thing I did, I -- when I got off from work, I went to the door. I put my key in. I see that the lock was changed. I asked -- walked down there. I asked Brenda to come and let me in. And Joe say he would let me in.
Q Where was the knife at?
A It was right -- right beside the step, like.
Q Okay. And as you walked in that day, you did not notice it.
A I didn't pay it no attention, 'cause I was concerned about getting in.
Q And when you determined that the door was locked, you went down and talked to Brenda. And then you and Joe came back up to the house. Is that correct?
A Right.
Q Is it your testimony that the two of you -- are there not some steps in front of that house, or trailer?
A Okay. Like -- okay. I was walking in front of Joe. And when he came by, that's when he gave a few remarks.
Q Well, did you or did you not walk up to the door before that scuffle started?

FORM 2094 PENGAD/INDY 1-800-631-6989

A I was, like, like, right behind him. I was right---
Q The question is, did you go up the steps?
A No, I did not go up the steps; but I was right behind him. As a matter of fact, I was holding the door for him, the storm door. I was holding it for him.
Q Okay. Where were the steps at, at that mobile home?
A Right in front of the door.
Q And how many steps are there?
A Three.
Q All right. So you were situated where? Again, he was unlocking the door, opening the door up. Where were you situated at?
A I was right there, like, at the bottom step. You know. I wasn't on the bottom step, but I was on the ground. I could, you know, hold the door from there.
Q You were holding the storm door open and he was opening the door up?
A Yes.
Q And he, in fact, opened the door up. Is that correct?
A Yes. He opened the door up.
Q Your testimony is that -- then you went inside the trailer or not? Did you go inside the home, or didn't you?
A I went inside the trailer after the incident.

FORM 2041 PENGAD/NDY 1 800 631 6989

Q No, I'm talking about before---
A No, I did not---
Q ---the fight.
A No, I did not go into the trailer then. No.
Q How did the two of you end up on the ground outside the mobile home?
A When I asked Joe, I say, Why you always starting trouble? And when he came down off the steps, he pushed me and kicked me. And then it seemed like he just, you know, went down towards the ground.
Q How big are you, Mr. Tate? How tall are you?
A I'm six-five.
Q Six foot five.
A Right.
Q How much do you weigh?
A I weigh 210 pounds.
Q All right. So Joe's a good bit smaller than what you are. Is that correct?
A Yeah, in a sense.
Q Well, he's about five foot, what? Five-nine?
A Five -- yes.
Q You heard his testimony he weighs about 145 pounds? Is that correct?
A I don't know.
Q You wouldn't dispute that, would you?

FORM 2094 PENGAD/INDY 1-800-631-6989

A No, I wouldn't dispute it.
Q All right. So you're a good bit bigger than he is.
A Yes.
Q But it's your testimony that he started the fight with you.
A Yes, sir.
Q All right. After the fight started, the two of you are rolling around on the ground. And when did you first notice that Joe Murray had this knife in his hands?
A When Joe went down towards the ground -- when he went down towards the ground, I jumped down. 'Cause I seen that he was gonna get the knife. I grabbed it. And we struggled. It's right there in front of the trailer. You could clearly see it was a struggle right there on the ground in front of the trailer.
Q Okay.
A Anybody could see that there was a struggle 'cause it ain't nothing but clear dirt there.
Q That's my question. Anybody could see it, but you didn't see it when you went in the house the first time, or tried to.
A No, sir.
Q Okay.
A The only thing I know, I couldn't get into the house when I first went there.

FORM 2094 PENGAD/NDY 1-800-631-6989

Q Right. Anybody there could see it, but you didn't see it the first time you went and tried to get inside the house.
A No, I did not see the knife.
Q Now, when Joe supposedly grabbed this knife, the two of you were scuffling around on the ground. Did you have ahold of his wrist? Or how exactly did you prevent yourself from being stabbed by Joe Murray?
A I held his hand. And he went like that right there (demonstrating). I was trying to get the knife from him. Then I guess, he -- you know, the knife went inside of him. I didn't -- it happened so quick.
Q Well, I'm asking you exactly how it happened. You had both hands on him and he was using one hand?
A No, he had one hand, struggling, 'cause I was trying to do like this (demonstrating). And---
Q What was your other hand doing?
A Huh?
Q What was your other hand doing?
A Trying to balance myself on the ground. 'Cause I was kind of, like, on the roll-over position there.
Q All right. And Joe is on his back, or his side? I don't understand where he was situated at.
A We both were situated on the ground.
Q Well, were you on top of him?

FORM 2094 PENGAD/INDY 1-800-631-6989

A No, sir; I wasn't on top of him. We was rolling on the ground. On the ground, struggling.
Q You were both rolling around on the ground.
A Struggling. We struggling, you know, side to side. Like, struggling.
Q Well, which is it? I'm not trying to confuse you. I'm just trying to get a picture of what happened. You're saying you're both rolling around on the ground. At the same time you're saying you had one hand steadying yourself and one hand on the hand that held the knife of Joe Murray. Which is it?
A Okay. When I jumped down on the ground, I grabbed his hand. And then that's, that's when he tried to throw his weight against me and I kindly rolled over. And at that point we was struggling.

And everybody could see, that went in front of that trailer, that there was a struggle there.

Q All right. How long did that struggle last?
A No more than -- I'd say fifteen, five to fifteen -- five to fifteen seconds. It didn't last long.
Q How did you come up with the knife?
A He let -- he let it go. He screamed, he let go of the knife, and he took off across the street.
Q And you didn't stab him in the back; did you?
A No, sir.

FORM 2994 PENGAD/NDY 1-800-631-6989

Q All right. To your knowledge, you didn't stab him at all.
A That's right.
Q All right. Then you went around the side of the house, in between where the two mobile homes are. And it's your testimony that Brenda Tate ran up to where you were?
A Okay. When I was walking, I looked down and I seen where Joe was at. And then she -- she was coming up, you know, coming up that way. 'Cause I had seen her, you know, I had looked -- glanced that way. And then when I looked with Joe, she ran into the knife, you know. And I felt, you know, like something plunged into me.
Q Well, how did you have that knife in your hand such that she -- was it sticking out like this? Was it held out like this? How could she run into it?
A She must have ran up on me. Because it happened -- that happened so quick, you know, I didn't realize it.
Q How did you have the knife situated---
A I must have---
Q How were you holding it?
A I must---
Q How were you holding the knife?
A I must have been holding it like this (demonstrating), 'cause -- and then looking back. And

FORM 2054 PENGADMINDY 1-800-631-6989

then when it happened, it happened so quick. And I didn't realize what happened, you know, till she fell down on the ground. That's when I tried to communicate with her.

Q Your testimony is that after she fell on the ground, if I have it right, it's just one of those things she was doing.

A Unusual. Yes, sir.

Q Right. Just one of those things. You didn't try to check and see if she had been stabbed?

A No, sir.

Q This woman you loved and cared so much about, you were just going to leave her laying face down in the dirt.

A She wasn't face down in the dirt. She was in a upright position. I was trying to communicate with her.

Q Well, upright -- you mean she was sitting?

A She was down -- well, sitting on her buns, like.

Q Okay. Sitting down on her rear end.

A Yeah. And looking up at me. She never was down -- her -- she never was face down when I left her.

Q All right.

A And I had seen that they had -- Joe and Michael had got help. So I left.

Q What do you mean you had seen that they got help?

FORM 2104 PENGAD/HDY 1-800-631-6989

A They had a telephone in their hand.
Q A mobile, cellular telephone of some kind?
A It was a cordless telephone, it looked like.
Q All right. So with Brenda laying on the ground, you leave her there.
A Yes, sir.
Q Is that correct?
A Yes, sir.
Q And you go inside the mobile home.
A I went back up there and went inside the mobile home. And then I sat down for a minute. And then I left.
Q You testified you got your clothes. Is that what happened?
A Sir?
Q You testified that you got some of your personal effects and---
A I didn't get nothing.
Q Oh, you didn't get anything.
A No, sir.
Q All right. You just sat there for a few moments and left.
A That's right.
Q Did you shut the door behind you?
A Yes, sir.

FORM 2094 PENGAD/INDY 1-800-631-6989

Q Did you lock it?
A Yes, sir.
Q Where were the keys at?
A I don't know.
Q You didn't see them out in front of the trailer?
A No, sir.
Q Okay. You also testified that when you left you made some calls. And you said an accident had happened.
A Yes, sir.
Q Well, what accident were you talking about? When you left, I understand your testimony is that nobody was hurt. You didn't think Joe had been stabbed. You didn't think Brenda had been stabbed. What was the accident you were talking about?
A When Joe was coming back down the road, he had -- he had unbuttoned his shirt. And seemed like I seen blood, you know, running down off of him.
Q He was running up the road towards you?
A He was coming -- when Joe -- when this happened, Joe ran straight across to the road to some more trailers. It's a -- like, it's a trailer set across from us. And he went down -- you know, like, he went across the -- I was watching him when he went across the road, like.
And then when he was -- when I was walking down towards the, the other -- you know, like, walking down

FORM 2094 PENDAD/INDY 1-800-631-6989

the other way, that's when Brenda plunged into the knife. And then that's when I seen that Joe, you know, had opened up his shirt, looking at hisself.

Q Did you go to work the next day?

A No, sir.

Q And you didn't come back to the residence to get any of your personal things.

A No, sir.

Q Let me ask you one more question about your relationship with Brenda. You moved in with her on March 10, 1994.

A Yes, sir.

Q So you only actually lived together, what? two and a half months?

A Yes, sir. But we had lived before we got married. We lived together before we got married. We lived together in 1984. Was living together in 1984.

Q But we're talking about 1994.

A Okay.

Q You only lived together for two and a half months.

A Right.

SOL. PRUETT: One moment, Your Honor. I think I'm finished.

(Pause.)

SOL. PRUETT: No further questions, Your Honor.

FORM 2094 PENGAD/NDY 1-800-631-6989

THE COURT: Anything else, sir?

MR. WARDER: No redirect.

THE COURT: Beg your pardon?

MR. WARDER: No redirect, Your Honor.

THE COURT: All right, Mr. Tate. You may step down.

THE WITNESS: Yes, sir.

MR. WARDER: Your Honor, if it would please the Court, that would be the case for the defendant in this matter.

THE COURT: All right. Very good.

Anything in reply?

SOL. GOSSETT: No, sir.

THE COURT: All right. Mr. Foreman, ladies and gentlemen, it's five o'clock. And everybody is supposed to stop at five o'clock. So we're going to stop now.

I'm going to ask that you be back in the morning at 9:30. Can any of you not be here at 9:30? Can you be here at 9:30? Just as easy as you can at 9:30 as ten.

Anybody have any trouble being here at 9:30? I don't want to be the only one here, now, in the morning at 9:30. I want all y'all here in the morning at 9:30.

All right. And we'll finish the case at that time, Mr. Foreman. There will be no more testimony; I don't think there will be any more testimony on which you

FORM 2094 PENGAD/NJ/NY 1 800 631-6989

must decide the case. But it's not ready for your determination and will not be until you've heard the final summation by the attorneys and you receive the law from the Court. So we'll do that first thing in the morning and then it will be in your hands for your determination.

Tonight don't discuss this case. If you're sitting around your supper table, if you go out to dinner tonight, don't discuss this case with anyone. It's improper for you to.

For the State of South Carolina and this defendant have selected the twelve of you out of the whole jury venire to decide this matter. They didn't ask the twelve of you plus your husband or wife or boyfriend or girlfriend. They want you to decide it. And you must decide it only upon the insight that ultimately the twelve of you will have from all the testimony and the exhibits that have been introduced.

All right, Mr. Foreman. With that bit of admonition -- oh, another thing. I don't know if y'all have -- do y'all have a newspaper, a daily?

THE CLERK: Yes, sir.

THE COURT: I don't know if this particular case has received any notoriety or not. I don't know if it will be in the newspaper or on TV. But if you take a local

FORM 2094 PENGAD/INDY 1-800-631-6989

newspaper, do not read anything that has to do with criminal court in Gaffney. Then don't read it, Mr. Foreman. It's improper for you to. And same thing goes with the newspaper -- or the TV commentators and the TV personalities and the radio people.

Don't listen to anything on the radio and don't watch anything or listen to it on TV. For, again, you must decide this case, not you plus some jackleg newspaper man or TV person. They want you to decide it. And it's improper for you to have any other insight other than what the twelve of you will have.

With that bit of admonition, now, Mr. Foreman, I'm going to release you and your jury until in the morning at 9:30. Come directly to your jury room in the morning. We'll have some goodies for you in there. And I'll call you out just as soon after 9:30 as I possibly can and we'll finish up the case at that time.

All right. Very good. Have a nice evening.

(The following took place outside the presence of the jury:)

THE COURT: All right. In the morning at 9:30, all of you be back. Court will be in recess until 9:30 in the morning.

(Whereupon court was recessed for the evening.)

FORM 2994 PEIKADMNDY 1 800 631 6989

JANUARY 18, 1995

(The following took place outside the presence of the jury:)

THE COURT: All right. Let's see. We finished all the testimony. You did not make your final summation, did you?

MR. WARDER: No, sir.

THE COURT: Have not. Okay. All right. Anything that we need to put on the record before we call the jurors out? I think the jurors are all here; are they not?

MR. WARDER: Your Honor, for the record, I need to renew my motions for directed verdict.

THE COURT: Very good. All right, sir. Go ahead.

MR. WARDER: Your Honor, I would simply make the same motions that I made at the close. I think now that all the testimony is in that, on both the charges of assault and battery with intent to kill and murder, we would be entitled to a directed verdict.

I think, when taking all the testimony as a whole, there is insufficient evidence to submit it to the jury, Your Honor.

THE COURT: All right, sir. I respectfully deny your motion. I think there is sufficient evidence. So

FORM 2964 PENGAD/INDY 1-800-631-6989

your motion for directed verdict on the indictment for murder is denied, as well as for assault and battery with intent to kill.

And, Ms. Clerk, do you have the indictments?

THE CLERK: Yes, sir.

THE COURT: And the State waives the opening? Is that...

SOL. GOSSETT: Yes, sir.

THE COURT: Very good. Thank you.

SOL. GOSSETT: Your Honor, excuse me. I wasn't back there when you were indicating that you were going to charge several offenses, lesser offenses, accident?

THE COURT: Well, accident is not a defense. But I'm going to charge that, and simple assault and battery.

SOL. GOSSETT: Involuntary?

THE COURT: Yeah. Oh, yeah. I'm going to charge -- for murder -- well, let's see. It would be good for me to write it out, I guess.

Murder -- I find no indication of anything as far as involuntary -- as far as voluntary manslaughter. I will charge involuntary manslaughter; assault and battery with intent to kill; assault and battery of a high and aggravated nature; and simple assault and battery; and self-defense on the assault and battery charges.

FORM 2094 PENGAD/NDY 1-800-631-6989

SOL. GOSSETT: Your Honor, on your standard charge on murder, in the use of a deadly weapon, do you charge the inference of implied malice with the use of a weapon, deadly weapon?

THE COURT: Yeah, I think I probably have that in there. Yeah. I think I do.

All right. Your final summation will be what? fifteen, twenty minutes? Something in that order? About that?

SOL. GOSSETT: I've worked hard with what we've talked about. And I don't think I can get it under twenty. But I think it's right there.

THE COURT: Okay. All right. That's good. I'm not going to stop you, of course. But I do want you to know you have a captive audience. They can't get up and walk out. Billy Graham has trouble holding an audience over about fifteen minutes. But if you're a better orator, better speaker than Billy Graham, go right on.

But supposing I tap gently on the desk if you go over about twenty minutes, not to stop you but to let you know what the time is.

All right. Invite the jury to come out or come in.

(The following took place within the presence of the jury:)

FORM 2094 PENGAD/INDY 1-800-631-6969

THE COURT: Good morning, Mr. Foreman, ladies and gentlemen. Hope y'all had a nice evening. Did you have some goodies this morning?

Well, y'all are an integrated jury over there; all the men over in one area and all the women in the other.

Does the State and the defense waive the polling of the jury?

SOL. GOSSETT: State waives, Your Honor.

MR. WARDER: Yes, Your Honor, we do.

THE COURT: All right. Mr. Foreman, give me your attention for just a moment, if you will.

Now, all the testimony is over. There will be no more testimony on which you must decide this case. But it's not ready for your determination and will not be until you've heard the final summation by the attorneys and then received the law from the Court. So the next phase of any trial is the final summation by the attorneys.

Now, our rules provide -- and we'll follow the rules here today. But our rules provide that the party that has the burden of proof -- and that's the State, always has the burden of proof. But the party that has the burden of proof has the right to close. So you'll hear first from Mr. Warder on behalf of the defendant.

FORM 2091 PENGAD/NDY 1-800-631-6989

And after Mr. Warder you'll hear from Mr. Gossett, the Solicitor, on behalf of the State.

Mr. Warder, of course, represents Mr. Tate. And you'll hear from him first. And then you'll hear from Mr. Gossett, who represents the State. And after that you'll receive the law from the Court. And then it will be in your hands for your determination. So listen very attentively as the attorneys make their final summation to you.

Yes, sir, Mr. Warder.

THE CLERK: What says defense?

MR. WARDER: Thank you, Your Honor.

THE COURT: Yes, sir.

(Whereupon Mr. Warder made his closing argument to the jury, as follows:)

MR. WARDER: Mr. Foreman, ladies and gentlemen of the jury, I would certainly like to start by thanking you for being here. I know that you spent all of your first day of jury service yesterday in this courtroom listening to the testimony in this case and you're back here this morning.

We know you answered your subpoena, you had to be here. But we greatly appreciate you doing your civic duty and we greatly appreciate your participation in this case.

FORM 2094 PENGAD/INDY 1-800-631-6989

This, of course, is the only time independent citizens, fellow citizens, have heard and got a chance to decide the fairness of the charges brought against my client.

Now, in this case your job, the job of the jury, is to find the truth, the true facts. Now, in this courtroom in this case, like in many things, finding the truth is more complicated and more involved than simply listening to what somebody says. Because often times witnesses are mistaken. Sometimes they certainly have something to gain. And they tell things that aren't the truth.

So I ask you, in finding the truth, in finding the true facts in this case, to use your common sense. Use the things you've learned by living upon this earth. In other words, test things: whether they're logical, whether that seems like the way people would really fairly act in the circumstances they describe, and whether the behavior they describe and they say they did conforms with your knowledge of human behavior, the things you've learned by just living on this earth. That's how you arrive at the truth.

In this case there are two theories. There is testimony that's diverse. Both sides can't be true. Only one side can be true.

FORM 2294 PEHGARDIDY 1-800-431-0889

Now, the State's theory, the State's witnesses, were that this was some kind of plan, an attack that resulted in the death of one person and the injury of another. And in that furtherance they put up friends. There was, I think, three friends of the deceased that said, Well, yeah, we heard him plan. Said, He came down to my house and said, I'm going to kill them all.

And I guess that's why this is a murder case, because they're saying, Well, it happened; somebody got killed. But I ask you to look at the facts.

The facts were, the undisputed facts were, that on the first of June, 1994, my client went to work at Fountain Inn as a concrete finisher. He came home from working. When he got to his house, he couldn't get in the door.

He then went out to the front yard, or the area in the road between the trailers, and asked his wife, and that she agreed to go let him in or send her son. And as he went back and as he went to the door, a fight broke out. And that's by all the witnesses.

Does that sound like a planned attack? Does that sound like the people that told you about the plan were describing what really happened? Or does that sound like something they made up later?

We had one witness that come in that said, yes,

FORM 2094 PENGAD/INDY 1-800-631-6989

indeed, one of those people had said, I'm going to get him; I'm going to say things to hurt him. And does that sound like the truth, is that they said that to try and hurt him?

There's certainly no evidence that this was a planned attack. In fact, Jay Tate had no way of knowing the lock had been changed. He would have been in his trailer, gone to the home, but for the lock being changed.

And that knife left right by the door. Who had been around that trailer that day? Who had been working there? Who had had an opportunity to place the knife there? And who might know that Jay couldn't get in the trailer?

And the answer is, obviously, Joe Murray. Joe, the stepson, had been working on the door of that trailer. He said they finished up about four o'clock. A few minutes before Jay arrived. They had just got done changing the lock.

I submit to you that it's logical that knife was used in some part of the getting the new lock in the door, that he was shaving on the wood, used it as a screwdriver, and placed it somewhere.

Because by all accounts the fight broke out very quickly after my client got there.

FORM 2084 PENGADINDY 1-800-631-6989

What about Joe Murray's account that he couldn't find the new key? Have any of you ever seen a new key, compared to an old key ring, the key ring that's carried in your pocket? Do you think it's logical that a new key wouldn't stand out?

What else did Joe tell you? Joe told you that he was stabbed or cut in the altercation and that he chased, he chased Jay Tate. He says he was about four feet behind him as Jay Tate ran down towards his mother. And that was his testimony.

What did the other fellow, Wilkins, tell you? They didn't have it together there. 'Cause he told you that Joe came out running and Jay Tate chasing him.

Both versions of the State's case can't be true.

Is that logical?

My client is six foot, five. Joe Murray is -- what did they say? Five foot, nine? Do you think if a six foot, five fellow with giant strides was chasing a five foot, nine fellow he'd catch him?

Who would be more logical to place a weapon to use in that fight? A big guy, who wouldn't need the weapon, or a little guy, who would? What's your common sense tell you?

I submit to you, in this case, your common

FILED IN THE OFFICE OF THE CLERK OF COURT
2007 JAN 31 A 9:22
CLERK OF COURT
FULTON COUNTY, GA

FORM 2094 PENGADWAY 1-800-631-6989

sense tells you the things they're describing don't pass the test of reason nor the test of human conduct you learn by living on this earth. That's not the way people react.

Joe, who had the opportunity to place the knife there, had been there just minutes before, was the one, by physical stature, that needed it.

Is it at all surprising that a fellow five foot, nine, of Joe's size, gets cut when he wrestles with my client over a knife? Is it surprising that he lost that wrestling match and he got injured? Is that surprising at all? No.

This is a case that there was a terrible tragedy. And suddenly the tragedy is not that Joe got injured in the fight over the knife that he had placed there, that he got injured as a result of the attack on Jay. The tragedy in this case is that somebody my client cared about, a wife that even though he had had difficulties with got accidentally injured and died from those injuries.

I submit to you that even from looking at Joe on the stand you know that's just how it happened. You had a chance to observe his demeanor, what he said and how he acted. Was that unemotional testimony the testimony of a man who just witnessed the murder of his

FORM 2094 PENGAD/NDY 1-800-631-6989

mother? Is that how somebody would testify and act?

Was his conduct at the scene that of a man that had just witnessed the murder of his mother? He was laid up under a tree some twenty-five yards away.

What tempers emotion? What does your everyday experience and common sense tell you would make a man testify that way in the case involving the death of his mother? Guilt.

Joe was emotionally flat. Joe testified emotionally flat because he knew that the result of his mother was the plan where he had attacked Jay. He knew it was just as Jay said. And that's why. That's why he testified in that manner. That's why he acted in that manner. That's why he acted in that manner out at the scene.

Because this is a trial about a tragedy and an accident and terrible results and the woman my client loved dying as a result of it.

His Honor will charge you at the end of this case on all the law, the law that applies to the facts. And you will first decide the facts and then apply it to that law. I ask you to listen carefully to His Honor's complete charge on the law because it will give you all the law you will apply, depending on the version of the facts that you decide.

FORM 2094 PENGAD/INDY 1-800-631-6989

I submit to you, in this case, the version of the facts will show that this is a terrible accident. And His Honor will give you that law.

As part of the law His Honor will give you, he will tell you about a reasonable doubt and the presumption of innocence. He will tell you that Jay Tate, like everybody, is presumed to be innocent; and that presumption continues with him now, throughout this trial; and that, as a result of that presumption of innocence, the State must prove guilt beyond all reasonable doubt.

And he will define a reasonable doubt. And he will tell you about that. And that is simply the type of doubt that would make one hesitate to act.

Is there facts and demeanor and circumstances that would make you to hesitate to act in this case? I submit to you there are plenty.

And he will tell you about the two kinds of reasonable doubt: the kind of reasonable doubt that comes from the evidence and the lack of evidence.

And that simply means that the first kind of reasonable doubt, that one that arises from the evidence, means that when the testimony is in conflict, when it doesn't make sense, when there's things that don't have the ring of truth. Those are doubts that come from the

FORM 2094 PENGAD/INDY 1-800-631-6989

evidence itself. And that's the first type of reasonable doubt.

The second type he will tell you about is the kind that comes from the lack of evidence. And that simply means that if there's anything that a conscientious juror seeking the truth needs to fairly decide this case and it's not been brought here in the courtroom, if the question wasn't asked, if the thing wasn't here, if the witness didn't appear, and it's something you really need to fairly decide this case, it doesn't matter whose fault it is that it isn't here. If it isn't here and you need it, then that's a reasonable doubt from the lack of evidence.

I submit to you in this case there are both kinds of reasonable doubt. And I submit to you, in this case, that your oath to find a true and a just and a fair verdict will require that you find a verdict of not guilty.

Now, in all criminal cases, I guess, people think about winning and losing. And His Honor told you in opening remarks that this is a case where the State of South Carolina brings the charges and what you're doing is judging whether there's still reasonable doubt after the State of South Carolina has presented all its evidence.

FORM 2004 PENGAD/NDY 1-800-631-6989

But let me tell you about winning and losing in a criminal case. The State of South Carolina never loses a criminal case if a jury conscientiously applies the law and the principles of reasonable doubt and presumption of innocence. For whether the verdict is innocent or guilty, the State of South Carolina always wins.

Because the State of South Carolina is not the Solicitor's Office or the people that brought this case. The State of South Carolina is you and your fellow citizens. And the citizenry, the people of this state, always win when the constitution and the principles of presumption of innocence, the laws and the constitutional guarantees are carried forward. All of the citizens always win when juries apply and do the right thing according to the constitution.

In this case I submit a verdict that both the State and the citizens will win is a verdict of not guilty. It would also be the fair, the right verdict in this case for the defendant.

I urge you in this case to return the correct, the fair, and the just verdict of not guilty to all charges.

Thank you very much.

SOL. GOSSETT: May it please the Court.

THE COURT: Yes, sir, Mr. Solicitor.

FORM 2094 PENGAD/NDY 1-800-631 6989

(Whereupon Sol. Gossett made his closing argument to the jury, as follows:)

SOL. GOSSETT: Ladies and gentlemen, this is the last time you'll hear from me. I certainly appreciate your patience. I've watched you as the trial progressed and you've paid careful attention to all the testimony. So we know how important you're taking this matter and your job and your duty.

A few minutes after I sit down, the judge is going to charge you on the law in this case and then you're to deliberate the guilt of the defendant.

In talking to you a little bit about the law, you know by now that the State must prove its case to you beyond a reasonable doubt. And I tell you that a reasonable doubt is a doubt that would cause a reasonable person to hesitate in acting in their most important affairs.

It's not proof beyond the shadow of a doubt or a hundred percent certainty or beyond all possible doubts. Were the burden of proof that, then no defendant in any criminal case could ever be convicted because there's always some possibilities.

But what you have to deal with, ladies and gentlemen, is not possibilities but facts. What the facts show is a reasonable doubt.

FORM 2094 PEHGADMNDY 1-800-431-6963

Now, the defendant in this case is charged with the crimes of murder and assault and battery with intent to kill. And the judge is going to charge you those. He's going to charge you, also, the lesser included offense of involuntary manslaughter in regards to the murder and the lesser included offenses of assault and battery of a high and aggravated nature and simple assault. And he's also going to charge you with accident.

Let me tell you what murder is. A murder is committed when a person, with malice aforethought, kills another person. And malice is defined as wickedness or a depraved heart.

The term aforethought simply has to do with timing. That at the time the murder is committed, malice was there in the heart. Malice doesn't have to exist for some long time. It can even exist just instantaneously when the fatal blow is given.

There doesn't have to be premeditation proved for you to find somebody guilty of murder. But I submit to you in this case premeditation is there. He had said he was going to do it.

And I submit to you that malice can be shown in two different ways: implied malice or expressed malice. Implied malice can be inferred, malice can be inferred or

FORM 2094 PENGADNIDY 1-800-631-6989

implied when the use of a deadly weapon causes the fatal blow. And I submit to you that expressed malice is shown where a person states his intention to kill.

We have that here.

Assault and battery with intent to kill, like murder, requires that malice be present before the assault. And if someone, in this case Joe Murray, had died, then that would have been murder.

And in the murder of Brenda Tate, there was a deadly weapon and there was the expressed intent from the defendant's own mouth.

Judge Floyd, as I say, is going to charge you on the lesser offenses of these crimes. He's going to charge you on self-defense and tell you about accident. All I can tell you, I submit to you these do not apply in this case.

Look at the evidence. He's guilty of murder. He's guilty of assault and battery with intent to kill, which means he tried to kill.

Now, as a juror, you're the sole judges of the facts. The attorneys and Judge Floyd can't decide the facts and tell you what the facts are in this case. You are the fact finders. And as the fact finders, you have to determine the credibility or the believability, who are you going to believe that took the stand.

FORM 2094 PENGAD/INDY 1-800-631-6989

And I tell you that you have a right to believe all the testimony a witness says, part of what a witness says, or none of the testimony of a witness. You may believe the testimony of one witness as opposed to others or many; or you can believe many as opposed to one.

You may believe or disbelieve a witness because their testimony was consistent with other testimony or other evidence. Or you can disbelieve because that testimony is inconsistent with other testimony or other evidence.

You can believe or disbelieve a witness because of the way they acted, their demeanor on that stand. That's why that stand is so close to you. You have to judge the witnesses.

And you can believe a witness or disbelieve a witness based on how they obtain the knowledge that they're telling you about, whether they saw it with their own eyes, they heard it, how close they were, what occasion they have to know it.

You can disbelieve a witness when that person has a prior conviction for a crime of moral turpitude because that tells you something about their trustworthiness, their truthfulness. And in this case the only witness that took the stand that had a prior conviction of moral turpitude was the defendant, Jay

FORM 2094 PENGAD/NDY 1-800-631-6989

Tate, for his prior conviction of assault and battery with intent to kill. So you can disbelieve him because of his prior convictions because that tells you something about him and his truthfulness.

Having heard both sides of this case, you have to make a credibility call, a determination of what's believable. And in this case I submit to you, to find the defendant, Jay Tate, not guilty or guilty of some of these lesser offenses, you have to believe he's credible.

You have to believe that Joe Murray, who is five-nine and weighed 145 pounds, attacked Jay Tate, who is 210 pounds and six feet five inches tall. You have to believe that Joe Murray not only attacked Jay Tate but lured him to the front of that trailer and went one-on-one with him instead of attacking him where his cohort Mike Wilkins or his mother could have helped him.

You have to believe that that knife just happened to be there when the fight started. And that after it started Joe stabbed himself with the knife.

The defendant's own statement from that stand indicated he never had control of that knife, he never got it out of the hands of Joe Murray until after that attack was over and Joe Murray screamed and ran.

You have to believe that Jay Tate, holding the hand of Joe Murray, who held the knife, inflicted four

FORM 2094 PENGAD/NNOY 1-800-631-6989

stab wounds, one of which was six inches deep -- that's what Dr. Wheeler said -- six inches deep in this man, and that Jay Tate didn't even know he had stabbed him.

You have to believe there was a struggle on the ground there between these two men and a knife and nobody saw any evidence of a struggle out there in front of that trailer where the police looked, where they found the keys.

And you have to believe Jay Tate was in a fight, as he described to you on the stand, as this man told you -- they both were there. He was taken to the hospital seriously ill, could have died; and this man walked away without a scratch.

Incredible.

That's what you have to believe to find Jay Tate guilty of some lesser offense of this assault and battery with intent to kill charge, or not guilty by self-defense.

Now, with respect to the indictment involving the murder of Brenda Tate, there is the truly incredible, the totally unbelievable, testimony of Jay Tate. Remember what he said?

He testified that Joe Murray dropped the knife and ran screaming; that he picked the knife up; he walked around the trailer; he went down back toward the truck.

FORM 2094 PERIGADAILY 1-800-631-6989

And according to his testimony he was casually holding the knife out in plain view, where anybody could have seen it -- that's his own words -- and that Brenda Tate ran up and jumped on the knife and impaled herself on the knife.

Remember the doctor's testimony? What's even more incredible is that the blade of the knife just happened to go inward and upward, straight into and straight through, straight through the heart of Brenda Tate.

That's what he wants you to believe. That's what you have to believe if you're going to find him guilty of some lesser charge on the murder of Brenda Tate.

And after she fell to the ground, which he described in his testimony as some unusual womanly behavior, he just walked off.

I ask you, are these the actions of a person that's deeply in love with his wife and so very concerned about her health? He just walked off.

And if you believe his testimony, you have to believe that he left the scene not knowing that anybody was really hurt, or that he left thinking that he hadn't done anything. Yet he fled. He was gone for four days.

Every other time the police was called out

FORM 2094 PENDADINDY 1-800-631-6989

there, he was back; back and forth, back and forth. He was there when the police came. Not on this occasion. He fled. He wasn't seen for four days. He didn't go to work, didn't go back to the trailer, didn't wait for the police. He was gone.

Why was he gone? Why didn't he act the way he had been acting the other times? He knew he was guilty. He knew he had murdered Brenda. And he knew he had tried to murder Joe.

As incredible as Jay Tate's testimony is, that's what you have to believe, ladies and gentlemen, to find that he's guilty of some lesser charge of involuntary manslaughter or that it was an accident.

You have to believe the death of Brenda Tate was just an accident. But, ladies and gentlemen, by your common sense and the facts you hear, you know that's not what happened. You know by the testimony what happened.

You know that they got married in 1990. You know that he came and started living with her there in the trailer in 1994. And you know that shortly after he came they started having marital problems.

And the defense, they want you to believe that it was all Joe Murray's fault, that he was the source of all the problems. Yet Joe Murray, by the testimony of Jay Tate from that stand, Joe Murray wasn't there on

FORM 2094 PENGADINDY 1-800-631-6989

April the 28th of 1994; and that's the date that Sue Shibley, Brenda's lawyer, said she came to her first and started talking to her and started that action of separation from Jay Tate. He wasn't even there.

Brenda Tate and Jay Tate, after a few weeks of living together, couldn't make the marriage work. She consulted a lawyer. She was ready to file for separation. She and Jay, just prior to this murder, had been arguing for days. The deputies had been out there the day before. She had gone to her daughter's on Holmes Street to stay for four nights prior to the stabbing. She had moved some of her stuff out.

Jay Tate couldn't accept it when Brenda left the home.

The day before the defendant stabbed Brenda Tate and Joe Murray, we don't have one, we don't have two, we don't have three, we have four people come in and testify and tell you what they heard from the defendant's own mouth at their trailer that he was going to kill Brenda and Joe and Sandra and anybody else that got in his way.

In that regard, Jay Tate was a man of his word. He said it. He did it.

We have Mike Wilkins, we have Melissa Sheehan, we have Brenda Humphries, and we have Maurice Martin.

FORM 2084 PENGAD/INDY 1-800-631-6989

All said they heard the defendant say he was going to kill Brenda and Joe and Sandra and anybody else that gets in my way.

Remember Maurice Martin? He even tried to talk Jay out of it. Maurice had known him. He asked the defendant, You got any place else to stay? Well, there's my mama or daddy. Well, go there; don't do this; leave it alone. Don't get in trouble.

But instead of doing that, what did the defendant say? He stated he was going to kill. And on cross-examination Mr. Warder was asking him, Well, now, how did he say it; how did he say it? Maurice said he didn't say it in anger, he didn't say it in jest. Maurice said he said it like he was really going to do it.

Maurice tried to talk him out of it.

I submit to you, on that day, the day before the stabbing happened, he had made his mind up what he was going to do. And that's premeditation, ladies and gentlemen. We don't have to prove it, but that's premeditation.

Now, on the day Brenda was murdered, he showed up at Coggins trailer park, he was armed, he was ready to kill. I submit to you he brought that knife with him. He couldn't have gone in that trailer to get it because

FORM 2094 PENGAD/NDY 1-800-631-6989

the trailer was locked. There's no way he could have gotten it out. He brought it with him.

He brought it with him. And after he was finished doing what he had stated he was going to do and what he had made his mind up to do and why he came there to do it with that knife; he took the knife back away with him.

Remember what the police said? They looked in the trailer. He said he had gone in the trailer. They looked around the trailer, they looked all around it. They called the Sheriff out. They called the chief of detectives out. They called the bloodhounds out; they called the dogs out. Nobody found Jay Tate. Nobody found the knife.

He had made up his mind he was going to kill. He came there armed that night and he took it away with him.

The testimony in this case is uncontradicted that Jay Tate came down to the trailer park where Brenda was, where Joe was, and Mike; and they were preparing to go swimming. The defendant asked Brenda if she would talk to him; she said no. He asked her if she would give him a ride; she said no.

The defendant asked Brenda if he could get his things and she gave Joe Murray the keys to go let him in.

FORM 2094 PENGAD/INDY 1-800-631-6989

And together, Joe Murray and the defendant walked to the front of the trailer. And as Joe fumbled for the keys, he asked the last question he asked: Did you change the locks?

And when Joe said yes, the attack started. He attacked Joe Murray. There was no provocation there. None at all. The defendant began stabbing Joe Murray, who was defenseless. Stabbed him four times: in the chest, in the flank, and two times in the back.

Mike Wilkins said he saw him chase him around and he did catch up with him and he did stab him in front of Mike Wilkins.

And after he stabbed Joe Murray four times, he went to his wife and he stabbed her through the heart. He even swung at Mike Wilkins, who was standing there.

He had done exactly what he had said he would do. He had murdered Brenda Tate; he tried to murder Joe Murray; and he even swung at Mike Wilkins. Anybody that gets in his way.

The evidence, ladies and gentlemen, in a criminal prosecution, doesn't get any better than this. We have statements of witnesses; four of them stated they heard his intention the day before, his threat to kill. We have two eyewitnesses, one a surviving victim, both saying they saw the stabbings.

FORM 2094 PENGADNDY 1-800-631-6989

Brenda Tate was stabbed by Jay Tate. She did not run up and throw herself on the knife. He stabbed her directly in the heart.

He's indicted for murder. He's indicted for assault and battery with intent to kill. And I submit to you your common sense tells you that that's exactly what he's guilty of and that's what your verdict should be.

I submit to you, ladies and gentlemen, don't give the defendant anything less than he deserves. Don't give him anything more. But don't give him anything less.

Thank you.

FORM 2094 PENGAD/INDY 1-800-631-6989

CHARGE TO THE JURY BY THE HONORABLE SIDNEY T. FLOYD:

THE COURT: All right, Mr. Foreman and ladies and gentlemen. Give me your attention for just a moment and let me discuss with you very briefly what your responsibilities are in this particular case, as well as what mine is in this case we find ourselves in here in Gaffney on Wednesday morning.

Now, Mr. Foreman, I told you and the other members of the jury panel, or I think I did -- I generally do on the first day of court -- that every person is presumed to be innocent. And that's true.

Every person is presumed to be innocent. And in order to overcome this presumption, the State of South Carolina must remove this presumption of innocence. And they do that by a certain degree of proof. And that's proof beyond a reasonable doubt.

And that's exactly what it says is what it means. You must be satisfied beyond a reasonable doubt, for you are reasonable men and women. So the State must satisfy you beyond a reasonable doubt of the guilt of the accused. And this doubt, reasonable doubt, might arise from the evidence or the lack of evidence in a particular case.

It's not a crazy doubt, Mr. Foreman, or a

FORM 2094 FENGAD/INDY 1-800-631-6989

foolish doubt, for you could have that about anything. You could have a doubt as to whether or not we'll ever have any more sunshine in Cherokee County. I submit to you that that's a crazy doubt. The State doesn't have to prove beyond that type of doubt. The State must prove beyond a reasonable doubt.

Now, our Supreme Court has said that a reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

So, Mr. Foreman, you must be satisfied beyond a reasonable doubt of the guilt of the accused before you could find him guilty. That is a doubt for which you could give a reason.

Now, Mr. Foreman, if you wanted to really find out exactly what your responsibilities are, you could get out your South Carolina constitution. Now, I know you not going to get out your South Carolina constitution. I know that.

But you could open up your South Carolina constitution, read a few sections in Article V; then go to the statutes that the General Assembly has passed and read three or four of those. And you would find that the jury's responsibility is to determine what the truth is. You are a fact-finding group. You and only you can determine what the facts are in a particular case.

FORM 2094 PENGAD/INDY 1-800-631-6989

And since it falls upon your shoulders to determine the truth in a matter, Mr. Foreman, it naturally falls upon your shoulders to determine the credibility of witnesses.

Credibility -- I sort of like the word; don't you? Credibility. I like it. Sort of three or four syllables. I throw it out whenever I can. Credibility, you know. It sounds nice. But it means nothing more than believability. Who and what is to be believed?

And in determining that, Mr. Foreman, you may, and rightly so, take into consideration the interest that a witness may have, or the bias that a witness may have, or the interest that a witness may have. You may even take into consideration the very demeanor of a witness, Mr. Foreman; that is, how they acted and reacted to the various questions propounded to them by the various attorneys.

Anything in your good common sense that will lead you to the truth, Mr. Foreman, then that's what you must follow. For that's your object, that's your quest, is to determine the truth.

And it doesn't matter, Mr. Foreman, where the truth comes from. It does not matter if the truth comes from the witnesses of the State or the witnesses of the defendant or a combination. It doesn't matter to you

FORM 2094 PEIGAD/INDY 1-800-631-6989

where the truth comes from. You're only interested in the truth.

So you may believe one witness against many witnesses, or the converse of that: many witnesses against one. You may believe part of what a witness says, everything a witness says; or you may reject everything a witness says, as well, Mr. Foreman.

So anything that you find, Mr. Foreman, that's where -- or whatever route that will take you in your quest for the truth, that's what you must follow.

And if I should intimate to you, Mr. Foreman, in any way where I believe the truth to come from, you disregard it, for it's unintentional on my part. That's your province and yours alone. And I wouldn't intentionally invade your province.

For just as I cannot invade your province, Mr. Foreman, neither may you invade mine. For, you see, the same constitution and the same statutes that provide that you are the fact finders further provide that the trial judge, whoever the trial judge might be, but the trial judge must give you the law. So I must give you the law, Mr. Foreman.

Now, you may not like it. You may disagree with it. But under your oath you have no choice but to accept the law that I'm giving and will be giving to you

FORM 2094 PENGAD/INDY 1-800-631-6989

in the next few minutes and apply it to the truth as you find it to be, and you will arrive at a verdict.

The word verdict, I've been told by Latin scholars -- and I'm certainly not a Latin scholar, but I've been told by Latin scholars that the word verdict comes from two Latin words: vere dicto, which means I speak the truth.

And that's what the State of South Carolina wants you to do and that's what this defendant wants you to do, is to speak the truth as between them. And you'll do that, Mr. Foreman, once you determine what the truth is, applying the law that I'm giving and will be giving to you in the next few minutes.

Now, Mr. Foreman, this case is not so different from practically all cases that are tried in both civil and criminal court. There are three types of evidence in practically every case. And in this case there are three types of evidence that you, the jury, might use in seeking the truth, in your quest for the truth.

And in this case we have exhibits. And then another -- that's one type of evidence. Another type is direct evidence. And another is indirect or circumstantial evidence.

Now, by exhibits, they are whatever they are. They speak for themselves. No one can add to or take

FORM 2994 PENGAD/ANDY 1-800-631-6989

away from them. If there is a picture, it is there. You can't add or take away from it. It is whatever it is.

And by direct evidence means that someone comes in, takes the oath, sits down, and tells you what he knows of his own senses. He -- of his five senses. You know what your five senses are. That's what we mean by direct evidence. Someone comes in and says I know this is true because I either saw it or I smelled it or I tasted it or I heard it or I felt it.

You know what your five senses are. Well, that's what we mean by direct evidence. I know this because I either saw it, smelled it, heard it, felt it, or tasted it -- you know, the five senses. That's what we mean by direct evidence.

Now, by indirect or circumstantial evidence is meant that the proof of some other fact or facts under which, taken either singly or collectively, the existence of a particular fact in question may be inferred as a necessary consequence. And crimes may be proven by circumstantial evidence as well as by the direct testimony of eyewitnesses.

Circumstantial evidence is good, provided it meets the legal test. And to the extent, but only to the extent, but to the extent that the State relies upon circumstantial evidence, it must prove all the

FORM 2094 PENGAD/INDY 1-800-631-6989

circumstances relied upon beyond a reasonable doubt.

They must be wholly and in every particular perfectly consistent with one another; and they must point beyond a reasonable doubt to the guilt of the accused to the exclusion of every other reasonable hypothesis. That is, they must be absolutely inconsistent with any other reasonable hypothesis than that of the guilt of the accused.

In other words, Mr. Foreman, in your consideration of circumstantial evidence, you and your jury should seek some reasonable explanation thereof other than the guilt of the accused. And if such reasonable explanation can be found, then you could not convict on such evidence alone.

I charge you further that the fact that the circumstances relied upon are strongly suspicious and the defendant's guilt probable is not sufficient to sustain a conviction based solely upon circumstantial evidence because the proof offered by the State must exclude every reasonable hypothesis except that of guilt and must satisfy you, the jury, beyond a reasonable doubt.

Now, Mr. Foreman, you and your jury must decide two cases. Normally it would be tried by two separate juries. But because the facts are the same in the various -- at the particular time, or the occurrence took

FORM 2094 PENGAD NYC 1-800-631-6989

place at the same time and with our idea of economic economy, or the judicial economy, you will be trying two cases. And you must decide them each one separately.

You must try the case of the State v. Jay Walter Tate, Jr. on the one indictment for murder. I'm not going to read that indictment to you, Mr. Foreman, for you'll have it in your jury room for your perusal. But it says, basically -- well, it says generally this, Mr. Foreman: that on June 1 of 1994 in Cherokee County that the defendant did willfully and with malice kill Brenda Tate. And that is an indictment for murder. And I'll tell you what murder is in just a moment, Mr. Foreman. But this is one case that you must decide.

Now, you have also to decide another case. And it's also against the defendant, Jay Walter Tate, Jr. And that is for assault and battery with intent to kill. Again, I won't read it to you. But it says, basically, that on this day of June 1 of 1994 in Cherokee County and with malice that the defendant did commit an assault and battery upon a Joe Stanley Murray with the specific intent to kill the said victim.

So these are the two separate cases, Mr. Foreman, that you and your jury must decide.

Now, I'm going to give you some principles of law. And, again, it applies to the particular

FORM 2094 PENGAD/INDY 1-800-631-6989

indictments. And hopefully, Mr. Foreman, this will enlighten you somewhat in your seeking the truth in this matter. And then, after you determine what the truth is, then you would apply these principles of law.

Now, I stated to you in the first indictment, that is, Jay Walter Tate, Jr., the one for murder -- and I must tell you what murder is. Murder, Mr. Foreman, is the felonious -- and felonious means nothing more than unlawful -- but it's the felonious or unlawful killing of any person with malice aforethought, either expressed or implied.

Hence, in order to convict of murder, the State must not only prove the killing of the deceased by the defendant but that it was done by malice aforethought. And such proof must be beyond a reasonable doubt.

Malice, Mr. Foreman, is defined in the law of homicide as a term of art; that is, a technical term importing wickedness and excluding just cause or excuse. It is sometimes -- it is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty and fatally bent on mischief.

The word expressed or implied does not mean different kinds of malice, Mr. Foreman, but merely the manner in which the only kind known to the law may be

FORM 2004 PENGAD/ANDY 1-800-631-6989

shown to exist; that is, either by direct evidence or by indirect or by inference, Mr. Foreman.

Malice may be expressed as where previous threats of vengeance or lying in wait or other circumstances shows directly that an intent to kill was really entertained. Malice may also be implied as where, though no expressed intent to kill is proven by direct evidence, it is indirectly but necessarily implied from the facts and circumstances which have been proven.

Malice may be implied from the willful, deliberate, and intentional doing of an unlawful act without just cause or excuse. In other words, in its general term, malice means the doing of a wrongful act intentionally, without justification or excuse.

Of necessity, the law says that malice may be implied under certain circumstances. Even in the absence of direct evidence as to what was in the defendant's heart and mind, it is indirectly but necessarily inferred from facts and circumstances that have been proven. The law says if one intentionally kills another with a deadly weapon or during the commission of a crime or of a felony or under some other circumstances, the implication of malice may arise.

If facts are proven beyond a reasonable doubt to raise an inference of malice to your satisfaction,

FORM 2094 PENGADDANDY 1-800-631-6989

this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with all other evidence in this case; and you may give such weight as you determine it should receive. You must decide from all the evidence whether malice is to be inferred.

And it will be observed, Mr. Foreman, that it must be malice aforethought. And while the law does not require that malice shall exist for any particular length of time before the commission of the act, it must be aforethought. There must be a combination of a previous evil intent and the act producing the fatal result. But the State is not required to prove any motive for the killing.

Now, Mr. Foreman, under the theory that the lesser is included in the greater, you might consider involuntary manslaughter.

Now, as I indicated, an indictment for murder includes the lesser crimes of the unlawful homicide known as manslaughter. In other words, a defendant indicted for murder may be convicted of manslaughter if the evidence warrants it.

Manslaughter is the felonious or -- again, it's the felonious or unlawful killing of another without malice, expressed or implied. You will notice that the absence of malice is what distinguishes manslaughter from

FORM 2084 PENGADMNDY 1-800 631 6989

murder.

Now, manslaughter is divided into two classifications: voluntary and involuntary. Now, you will only consider yourself with involuntary manslaughter.

Now, involuntary manslaughter, Mr. Foreman, is the unlawful killing of a human being without malice and without the presence of an intent to kill. It is an unintentional taking of human life.

Any person charged with the crime of involuntary manslaughter may be convicted only upon showing of criminal negligence, which is the reckless disregard of the safety of others. And we have this in the statute, Mr. Foreman; and I'll read, just briefly, this statute to you.

With regards to the crime of involuntary manslaughter, criminal negligence is hereby defined as the reckless disregard of the safety of others. Any person charged with the crime of involuntary manslaughter shall be convicted only upon the showing of criminal negligence as defined by this section; that is, the reckless disregard of the safety of others.

Now, mere negligence, Mr. Foreman, is not enough to support a conviction of involuntary manslaughter. The State must prove heedlessness or

FORM 2094 PENGAD/INDY 1-800-631-6989

willfulness on the part of the defendant. This means the criminal negligence of the defendant must be found to have been an aggravated or culpable and gross. That is, there must have been a departure of what would be the conduct of an ordinary, reasonable, and prudent and careful man under the same circumstances as to indicate either a disregard of human life or an indifference as to the consequence of one's actions.

Therefore, to make out the charge of involuntary manslaughter and to justify a conviction of this offense, the burden is upon the State to prove beyond a reasonable doubt that the death resulted from the criminal negligence of the defendant; that is, it was a reckless disregard for the safety of others.

Now, Mr. Foreman, if you have a reasonable doubt as to whether or not the defendant was guilty of murder or manslaughter, it would be your duty to resolve the doubt in the defendant's favor and to find him guilty of the lesser offense.

I further charge you, Mr. Foreman, where the death of a human being is the result of an accident or a misadventure, in the true meaning of the term, no criminal responsibility attaches to the action of the defendant.

If it was shown that the killing was

FORM 2094 PENGAD/INDY 1-800-631-6989

unintentional, that it was done while the defendant was engaged in a lawful enterprise, and it was not the result of criminal negligence, the homicide will be excused on the score of an accident.

This does not mean that the defendant must prove that the homicide occurred by accident or misadventure. The burden still rests upon the State to prove beyond a reasonable doubt that the death resulted from the criminal negligence of the defendant; that is, concerning the involuntary manslaughter charge, as far as that goes.

Now, Mr. Foreman, the defendant -- I think that's the law as far as murder is concerned. And I'll come back and tell you the possible forms in just a minute, Mr. Foreman.

But the defendant is charged in a second case of which you must decide; that is, assault and battery with intent to kill. And, again, you'll have this indictment in your jury room for your perusal. Take as much time or as little time with it as you deem proper.

Now, assault, Mr. Foreman and ladies and gentlemen, is a willful attempt or threat to do violence to the person of another in a rude, angry, and resentful manner. When such violence is actually done, that is called a battery. And in that case the charge would be

FORM 2094 FENGAD/INDY 1-800-631-6989

assault and battery. But as it is sometimes expressed, an assault is an attempt to do bodily harm which falls short of touching the body or actually doing the battery.

Now, the defendant is charged with assault and battery with intent to kill. Now, Mr. Foreman, this contains all the elements of murder except the actual death of the person assaulted. So that, before the accused can be convicted of this charge, you, the jury, must be satisfied beyond a reasonable doubt from the evidence that the party assaulted, had he died as a result of the injury, the defendant would have been guilty of murder, which is, as I stated to you before, the unlawful or felonious killing of another with malice aforethought, either expressed or implied.

There must be not simply the intent to kill, for that may be present in the case of manslaughter. But the intent to kill must be accompanied with malice aforethought, which is the distinguishing element between murder and manslaughter.

In other words, there must be a combination of a previous evil intent and the infliction of an injury calculated and intended to produce death.

Now, Mr. Foreman, again, I told you what malice is as far as murder is concerned. But malice -- and it's the same, so I'll repeat it again because of this charge

FORM 2094 PENGADINDY 1-800-631-6989

of assault and battery with intent to kill.

Malice is a technical term importing wickedness and excluding just cause or excuse. It is something which springs from depravity, from a heart devoid of social duties and fatally bent on mischief. And, again, malice may be implied from the deliberate, intentional doing of a wrongful act without just cause or excuse. But, in any case, it is for you, the jury, to say, upon a consideration of all the evidence in the case, whether or not malice existed.

Now, Mr. Foreman, under the theory that the lesser is included in the greater, you might consider assault and battery of a high and aggravated nature, for that's a lesser included offense in assault and battery with intent to kill.

Now, assault and battery of a high and aggravated nature, Mr. Foreman, is the unlawful and intentional infliction of a violent injury to the person of another, accompanied by circumstances of aggravation.

For example, and only for example of some aggravating circumstances, Mr. Foreman, is the use of a deadly weapon, without malice but in a spirit of wantonness and with a reckless disregard of the safety of others; the infliction of serious bodily injury -- and serious bodily injury is defined as a grave, not trivial,

FORM 2094 PENGADINDY 1-800-631-6989

injury, such injury as gives rise to apprehension of danger to life, health, or limb; or the intent to commit a felony; or a great disparity between the ages or the physical conditions in the parties; or a difference in the sexes.

Had the victim died, the accused would be guilty of manslaughter as opposed to murder.

So, Mr. Foreman, again, under the theory that the lesser is included in the greater, you might consider simple assault and battery. And as the term implies, it is an unlawful and an intentional infliction of a violent injury on the person of another, unaccompanied by any circumstances of aggravation.

Now, where an assault and battery is the result of an accident of a misadventure, in the true meaning of the term, no criminal responsibility attaches to the actions of the defendant. If it is shown that the assault and battery was unintentional but it was done while the defendant was engaged in a lawful enterprise and it was not the result of a criminal intent, the assault and battery will be excused on the score of an accident or misadventure.

All right, Mr. Foreman and ladies and gentlemen, I think that's the law -- well, let me see. There's been, also, some evidence, Mr. Foreman, in this

FORM 2084 PENGAD/NNDY 1-800-631-6989

assault and battery with intent to kill, this indictment against the defendant, there's been some evidence, or possible evidence, depending upon self-defense.

Now, a person has a right to act in self-defense. Self-defense is a good defense when properly made out. Self-defense is based on necessity.

Now, Mr. Foreman, ladies and gentlemen, self-defense is a complete defense. If established, you must find that the defendant was not guilty of this particular indictment of assault and battery with intent to kill. For this is a complete defense. If established, you must find the defendant not guilty.

There are four elements required by law to establish self-defense in this case. One is the defendant must be without fault in bringing on the difficulty. One cannot, through his own fault, bring on a difficulty and then claim the defense of self defense.

Secondly, the defendant must have actually believed that he was in imminent danger of losing his life or sustained serious bodily injury, or he actually was in such imminent danger. Imminent means immediate, not past or the future, but present danger.

If his defense is based upon his belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same

FORM 2094 PENGAD/INDY 1-800-631-6989

belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the blow in order to save himself from serious bodily injury or losing his own life.

And then, fourth, Mr. Foreman and ladies and gentlemen: the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises, he has no duty to retreat before acting in self-defense.

These are the elements of self-defense. And if you have a reasonable doubt of the defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find him not guilty.

On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence, including the evidence of self-defense, then you would find him guilty.

All right, Mr. Foreman and ladies and gentlemen, I think that's the law as far as this case is concerned.

(Pause.)

FORM 2094 PENGAD/INDY 1-800-631-6989

Well, let's see. Did we not get the possible forms of the verdict for assault and battery with intent to kill? Oh, are they underneath there?

Yeah. They are. Very good. Thank you. Just didn't see it.

All right, Mr. Foreman, these are the possible forms of the verdict that you might arrive at as far as one of these cases, that is the case under which the defendant is charged with murder. These are the three possible forms of the verdict.

One is guilty of murder. Or, guilty of involuntary manslaughter. Or, not guilty. One of these, Mr. Foreman, will speak the truth as far as you are concerned and as far as this case is concerned. They're exclusive of each other, of course, so you will write one of those, Mr. Foreman, on the back of this indictment at the place where it has "Verdict."

You will either write, "guilty of murder," or "guilty of involuntary manslaughter," or "not guilty" and sign your name as foreman. One of these will speak the truth. And it depends strictly upon your view of the evidence, Mr. Foreman, applying the law that I've given to you. But those are the three forms of the verdict.

I'm going to allow you to take that into your jury room, Mr. Foreman, not to aid you in arriving at

FORM 2094 PENGAD/INDY 1-800-631-6989

your verdict but aid you in writing your verdict, for you will write one of those on the back of this indictment where it has "Verdict." All right, sir?

Very good. All right. Now, on the indictment for assault and battery with intent to kill, there can be only -- one, two, three, four. There's four possible forms of the verdict, Mr. Foreman, depending strictly upon your view of the evidence and applying the law that I've just given to you.

These are the possible forms of the verdict, depending strictly upon your view of the evidence: guilty of assault and battery with intent to kill. If that's the view of the evidence, Mr. Foreman, applying the law I've just given to you, you would so write that on the back of this particular indictment, assault and battery with intent to kill, you would so write that on the back here, "guilty of assault and battery with intent to kill" and sign your name as foreman.

Another possible form of the verdict, Mr. Foreman, again depending strictly upon your view of the evidence, applying the law that I've just given to you, is guilty of assault and battery of a high and aggravated nature. And if that's the view of the evidence, you would so write that, Mr. Foreman, and sign your name here as foreman.

FORM 2094 PENGAD/INDY 1-800-631-6989

Another possible form of verdict, again depending strictly upon your view of the evidence, applying the law that I've just given to you, is guilty of simple assault and battery. And if that's the view of the evidence, applying the law that I've given, you would so write that and put your name there.

Another possible form of the verdict is not guilty. And if that's the view of the evidence, applying the law that I've just given to you, Mr. Foreman, you would so write that, "not guilty," and sign your name.

So those are the possible forms of the verdict, Mr. Foreman, of assault and battery with intent to kill, or assault and battery of a high and aggravated nature, or simple assault and battery, or not guilty.

On murder, on the indictment for murder, Mr. Foreman, again depending strictly upon your view of the evidence, applying the law that I've just given to you, is guilty of murder, or guilty of involuntary manslaughter, or not guilty. One of those, Mr. Foreman, will speak the truth.

Now, I've told you, Mr. Foreman, when you've finished or when you have completed your deliberation and once you've arrived at your verdict, you would so write it on the back; and that's true. But, in the larger sense, Mr. Foreman, it's not just your verdict; it's also

FORM 2094 PENGAD/INDY 1-800-631-6989

the verdict of the other eleven. For, you see, this must be unanimous. It's not majority rule; it is not nine/three or ten/two. It must be unanimous and it must speak the truth.

Now, Mr. Foreman, I'm going to ask that you go to your jury room for just a very few minutes. And I might call you right back out. And the reason that I might call you right back out is in the event that I failed to charge something that I should have charged to you. And, if so, one or both or all three of these very fine attorneys will jump up, one or all three of them, before you get outside, and say, Judge you forgot something.

For you won't find better lawyers than these, Mr. Gossett and Mr. Pruett have very competently, very thoroughly, very enthusiastically represented the State of South Carolina. And, likewise, Mr. Richard Warder has very competently, very knowingly, very enthusiastically represented the defendant in this matter. So one or all three of those will jump up and say, Judge you forgot something.

And if so, I'll call you right back in. If I do not, then I will send into your jury room the exhibits that we have along with the indictments and the forms of the verdict. And once you receive that, Mr. Foreman,

FORM 2004 FEHGADNNDY 1 800-631 6989

then you start your deliberation. But do not start it until I send that in to your jury room. Okay?

Thank you. Take your jury to your jury room, Mr. Foreman. If you need anything in there, Mr. Foreman, just knock on the door; the bailiff will give it to you. I don't know what you have in there, but if you need paper or pencil or anything like that.

(Whereupon the jury retired to the jury room at 11:00 a.m. The following took place outside the presence of the jury:)

THE COURT: Any objection or addition from the State?

SOL. GOSSETT: Your Honor, I didn't hear -- I listened closely, but I didn't hear any charge on moral turpitude.

THE COURT: On moral turpitude. I didn't. About credibility?

SOL. GOSSETT: You did credibility; yes, sir. But not moral turpitude.

THE COURT: Moral turpitude. Now, in what sense are you referring to, Mr. Solicitor?

SOL. GOSSETT: Going to credibility of witnesses.

THE COURT: I did not say about him and the fact of him being convicted of a crime. Is that what you had in mind?

FORM 2094 PENGAD/INDY 1-800-631-6989

SOL. GOSSETT: Yes, sir. That's right.

THE COURT: I didn't do that. Should have. Should have done that. All right, sir. Anything further?

SOL. GOSSETT: Not from the State, Your Honor.

THE COURT: All right. Anything from the defense?

MR. WARDER: Yes, sir. I would object to your charge on reasonable doubt.

THE COURT: Okay.

MR. WARDER: And I would object in two regards. You told the jury that it would be a doubt for which they might be required to give a reason and that it could not be a crazy doubt, and then you gave the example of rain and---

THE COURT: That's right. And I still think that's good law. Now, the Supreme Court might disagree with me. And when they do, then I'll stop saying it. But until then I won't. But you keep making your objection, and rightly so.

MR. WARDER: Yes, sir.

THE COURT: All right, sir. Very good.

Bring the jury back out.

MR. WARDER: Since you're going to bring the jury back out, I didn't hear you caution them about the order you gave the verdicts making no difference; and I would ask that you do that.

FORM 2004 FENGARDINDY 1-800-831-6969

THE COURT: Sir?

MR. WARDER: I would ask that you charge the order in which you gave the verdicts had no significance.

THE COURT: Okay. I didn't go backwards one time on them?

MR. WARDER: I don't think so, Your Honor.

THE COURT: I didn't? I try to do that, but I don't always do it.

(The following took place within the presence of the jury:)

THE COURT: Mr. Foreman, I told you that one or all three of them would jump up if I forgot something; and I did forget to say something. And I want you to keep this in the context as though I had said it at the time.

You remember back, I was telling you about the credibility of witnesses? That you could take in consideration their prejudice or their biases or their interests or even the demeanor of the witness.

And, further, Mr. Foreman, the fact that some witness or the fact that someone might have been convicted of some prior crime, that cannot -- you cannot consider that except in the context of the credibility. You cannot use that in any way as far as the innocence or guilt of the defendant in this particular offense. That has nothing to do with the particular crimes of which he

FORM 2094 RENGA/MNDY 1-800-631-6989

has been charged with this time. But you may consider it as far as credibility is concerned, in your deliberation.

And, also, Mr. Foreman, it was brought out to me, and I should have told you that the fact that I called out or I have these different possibilities of verdicts in some line does not have any significance.

For instance, in the one for assault and battery with intent to kill, there's one, two, three, four possibilities. If there's four possibilities, you've got to have one on top and one on the bottom and you've got to have two in the middle.

And the same thing goes as far as murder, the indictment for murder. There's one, two, three possibilities, Mr. Foreman. I could have put any one of them on top and any one of them on the bottom. It has no significance, and please don't attach any significance as to which ones I might have on top or bottom. There's no significance a'tall to that. Those are just -- if there's three possibilities, you've got to have one on top, one on bottom, and one in the middle. And that's all.

All right, Mr. Foreman. Go to your jury room. And I'll send in to your jury room in just a moment the exhibits and the possible forms of the verdict; and you then might start your deliberations.

FORM 2094 PENGAD/INDY 1-800-631-6989

All right, sir. Very good. And once you've arrived at your verdict and have written your verdict on the back of the indictments, knock on the door; and we'll receive your verdict.

(The following took place outside the presence of the jury:)

THE COURT: Anything further from the State?

SOL. GOSSETT: No, sir.

THE COURT: From the defense?

MR. WARDER: No, Your Honor. We would have nothing additional.

THE COURT: All right. In just a minute I'll get you each a copy of the possible forms of the verdict that I'm going to send into the jury room for your files; the ones that I have here is not the way that I wanted it.

You might want to check the exhibits, though.

MR. WARDER: I believe there was just two photographs and -- that's all I can remember. Yes, sir. That's all the exhibits I remember.

SOL. GOSSETT: Yes, sir.

(Pause.)

THE COURT: Let's give each of those gentlemen a copy of this. And then I think we'll be ready.

Y'all look at the possible forms of the verdict. I'm just making a cursory glance at it and it

FORM 2094 PENGADINDY 1-800-631-6989

seems all right to me.

(Whereupon Sol. Gossett and Mr. Warder were handed documents.)

THE COURT: All right. Those are for your files.

MR. WARDER: Thank you, Your Honor.

THE COURT: All right. I appreciate the way you each tried the case. It was not an easy case from either side. And it was the best of the legal profession; and as your trial judge, I thank you very much. And we'll see, Mr. Solicitor, now how the jury views your case.

SOL. GOSSETT: Yes, sir.

THE COURT: All right, sir.

(Whereupon the exhibits, verdict forms, and indictments were handed to the jury and the jury began their deliberations at 11:15 a.m.)

(Whereupon the Court proceeded with other matters not related to the trial of this case.)

(The following took place outside the presence of the jury:)

THE COURT: All right. State ready?

SOL. GOSSETT: Yes, sir.

THE COURT: Defense ready?

MR. WARDER: Yes, Your Honor, we are.

THE COURT: All right. Let's everybody have a seat.

Now, I don't know what the verdict is in this

FORM 2094 PENGADNDY 1 800-631-6989

case. And, of course, neither do you. But if anyone that does not feel that they can accept the verdict, whatever the verdict might be, without some type of emotional outburst, I would suggest you get out of the courtroom right now.

I will not tolerate any type of emotional outburst from anyone in the courtroom. So if you'd like to leave, you'd better leave now.

All right. Invite the jury to come out.

(Whereupon the jury returned to the courtroom with their verdict at 12:20 p.m.)

THE COURT: Ms. Clerk, you might inquire of the jury.

THE CLERK: Mr. Foreman, have you reached a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: Please hand it to the bailiff.

(Whereupon the verdict was handed to the Court.)

THE COURT: You may publish the verdict.

THE CLERK: Your Honor, Indictment 94-GS-11-929, the State v. Jay Walter Tate, Jr., the verdict is guilty of assault and battery of a high and aggravated nature. Signed by Kenneth A. Pope, Foreman.

94-GS-11-928, the State v. Jay Walter Tate, Jr., indictment for murder, the verdict is guilty of

FORM 2004 PENGAD/INDY 1-800-631-6989

murder. Signed by Kenneth A. Pope, Foreman.

Mr. Foreman, ladies and gentlemen, if that is the verdict of you all, please indicate by raising your right hands.

(Whereupon all jurors raised their right hand.)

THE CLERK: Unanimous, Your Honor.

THE COURT: Would either of you like to see the form of the verdict?

MR. WARDER: No, Your Honor.

THE COURT: All right. Mr. Foreman, ladies and gentlemen, thank you so very much for your service in this particular case. And I'm going to excuse you now until 2:30 this afternoon. Come back at 2:30 this afternoon.

Thank you so much. Have a nice meal.

(The following took place outside the presence of the jury:)

THE COURT: Any motions or anything on behalf of the defendant?

MR. WARDER: Yes, Your Honor. I would move for a new trial in that the verdict of the jury was against the preponderance of the evidence.

THE COURT: All right. On each of these indictments?

MR. WARDER: Yes, sir.

FORM 2094 PENGADMNDY 1-800 631-6989

THE COURT: All right, sir. I respectfully deny your motion. I think there was sufficient evidence for the jury to reach each of the verdicts that they did have. So on the Indictment No. 928, the motion for a judgment notwithstanding the verdict and in the alternative for a new trial is respectfully denied; as well as in Indictment No. 929, the motion is denied.

All right. Any reason why sentence shouldn't be imposed?

MR. WARDER: No, sir; not at this time.

Your Honor, I observed the Court; and you listened to most all the testimony. You heard it unfold, as did the jury. I'm faced with a conviction of murder and that's a mandatory sentence.

THE COURT: Yes, sir.

MR. WARDER: And it's nondiscretionary. So I don't think it does a whole lot to say a whole lot at this time, Your Honor.

THE COURT: All right, sir. I did hear the evidence and I know about this situation. And I know that he does have a record of some sort, because he stated that was guilty of, I think, assault and battery of a high and aggravated nature or either assault and battery with intent to kill some seven or eight years ago.

MR. WARDER: Yes, sir.

FORM 2084 PENGAD/INDY 1-800-631-6989

THE COURT: Is there anything else, Mr. Solicitor?

SOL. GOSSETT: He did have that record; and then, I believe, in '81.

THE COURT: In '81, yeah; that's been a long time.

SOL. GOSSETT: He was on parole when this happened.

THE COURT: All right. Very good.

Mr. Tate, anything you'd like to say before sentence is imposed?

THE DEFENDANT: Yes, sir. What happened, you know, what I told, it was the truth and nothing but the truth. And people got together and conspired against me and testified against me. And the whole thing is just -- to me, it was a set-up. People conspired together against me.

'Cause I didn't know these people, you know, the witnesses, the ones that testified against me, I didn't know 'em that well. And since they was friends of my wife, Brenda Tate, they all was on her family's side. They got together and conspired.

And times and dates when police arrived was wrong. 'Cause the police came to my residence May the 30th, 1994. They came out there once. Then they came again. They just -- they just called the police 'cause they wanted to.

And I did not say I was gonna kill anyone. And

FORM 2094 PENGAD/INDY 1-800-631-6989

this whole thing -- I loved my wife. She was going through some kind of -- some kind of -- I don't know what it was. 'Cause she missed her period the first month when I was home and I thought she was pregnant and I thought it was a good sign and everything. Then she started acting unusual.

And then -- I didn't know that she was thinking about taking a -- you know, you know, leaving me or nothing like that. But, you know, she had talked about, you know, she had hated me -- you know, hate me and she don't want no men around her.

And I loved my wife. And what happened, you know, wasn't nothing but a accident. And people done got together and conspired and said it was something else rather than a accident.

If you love someone, you care about them -- in 1985 me and -- before me and Brenda Tate got married, Brenda was acting unusual like she was now. She tried to commit suicide. And that's why I was -- I was trying to keep a eye on her.

But I was -- I did love my wife. I did not try to harm or hurt her son. Her son tried to hurt me. I just had got off work that day, came there, tried to get in. The key wouldn't fit the lock. And I seen the truck. I walked down there, asked her would she let me

FORM 2094 PENGAD/INDY 1-800-631-6989

in. And Joe volunteered to come up there and let me in.

He gave me a few words, you know, at the front. I asked him, you know, I said, Did you change the locks? When he got ready, you know, to step down, I was holding the door for him; he pushed me. And then I -- when he pushed and kicked me, I, you know pushed him away. And then he went towards the knife. And me and him wrestled, you know, for this knife.

I didn't know he was hurt or nothing at that point. When I was walking down beside the trailer, Brenda Tate, she just walked into the knife.

It -- it's not no murder, 'cause I did not murder my wife. I loved my wife. And I tried contacting the doctors that day about her unusual behavior.

And they said that she had moved valuables out. That's because her daughter had just moved into another home and she was giving away the furniture that was in our home.

This was very unusual behavior, you know. But it wasn't nothing I could say. I loved my wife. And she was also getting counseling about, you know, about the problem about -- she was having problems -- you know, she was having female problems she was getting help for through a -- a local psychiatrist in Gaffney.

I loved my wife. I did not murder her.

FORM 2094 PENNAD/INDY 1-800-631-6989

THE COURT: All right, sir, Mr. Tate. Thank you for that. You've told the jury that---

THE DEFENDANT: Yes, sir.

THE COURT: ---and they found that you were guilty of murder.

THE DEFENDANT: Yes, sir.

THE COURT: And it's my place to sentence you. And you understand that.

THE DEFENDANT: Yes, sir. I want to ask one more thing. Like times and dates, you know, like events that happened, that's very important, too; right?

THE COURT: Everything is important.

THE DEFENDANT: Okay. Times and dates. And police testified to wrong dates. Like they said they was out there on the 31st, which they wasn't. They was out there Memorial Day. That was on May the 30th. That was on -- that was on a Monday. 'Cause the 29th was my son's birthday. He had spent the night with me. And I took him home Sunday night. And then the 30th came.

THE COURT: Yes, sir.

THE DEFENDANT: So a lot of things -- all the facts are wrong.

THE COURT: Yeah.

THE DEFENDANT: Yes, sir. A lot of the facts are wrong in this case.

FORM 2094 PENGADNINDY 1-800-631-6989

THE COURT: All right, sir, Mr. Tate. Thank you, sir.

THE DEFENDANT: Yes, sir.

THE COURT: Now, the sentence of the Court on the murder, Mr. Tate, I don't have any choice in that; that's automatic. The sentence of the Court is that you are hereby confined to the South Carolina Board of Corrections for the balance of your life.

On the assault and battery of a high and aggravated nature, the sentence of the Court is that you are hereby confined to the South Carolina Board of Corrections for a period of nine years.

Luck to you.

END OF REQUESTED TRANSCRIPT OF RECORD

FORM 2094 PENGAD/INDY 1-800-631-6989

Date: 1-11-95 309

County: Cherokee

VOIR DIRE

Case No: 94-65-11-926, 929 Judge: Sidney J. Floyd

Pl./State: State State/Pl's. Atty: Holman Gossett
Trent Prewett

Defendant: Jay Walker Tate Jr. Defense Atty: Richard Warden

Court Reporter: Carolyn K. Hammond

Juror No.	Name	Sex	Race	Strikes *Court	Plaintiff	Defense	Accept
102	Sara A. Gardner	F	W			✓	
FOREMAN 70	Kenneth A. Pope	M	W				✓
66	Susan D. Fowler	F	W		✓		
EXCUSED 44	Stephanie A. Littlejohn	F	B	X			✓
EXCUSED 64	Jean W. Pennington	M	W	X			✓
6	Evelyn I. Barker	F	W				✓
53	Sally A. Wessels	F	W				✓
12	Catherine B. Cauthen	F	W			✓	
61	Ruby A. Parker	F	W			✓	
42	Thomas F. Veach	M	W				✓
87	Louise B. Smith	F	W				✓
41	Krystal L. Lanier	F	W				✓
11	Gloria N. Camp	F	B				✓
3	Vicky W. Allison Jr.	M	W		✓		
97	Robert S. Wade	M	W				✓
46	Gloria J. Love	F	W				✓
86	Kelli R. Sarratt	F	W			✓	
31	Lovonia L. Haynes	F	W			✓	

*For the court column, please indicate who made the motion to strike the jurors "for cause" with a "C" for Court, "P" for Plaintiff or "D" for Defense.

Date: 1-17-95

County: Cherokee

VOIR DIRE

Case No: 94-65-11-928 929 Judge: Sidney J. Floyd

D./State: State State/Pl's. Atty: Herman Jarrett
Trent Pursett

Defendant: Jay Walter Tate, Jr. Defense Atty: Richard Winder

Court Reporter: Carolyn K. Hammond

Juror No.	Name	Sex	Race	*Court	Strikes Plaintiff	Strikes Defense	Accept
25	Terry W. Hammett	M	W			✓	
105	Sheila W. Yarbrough	F	W			✓	
16	Belton L. Cunningham	M	B		✓		
40	Ronald S. Kirby, Jr.	M	W				✓
	Alternate:						
9	Barbara M Brown	F	W			✓	
excused for jury duty 90	Lisa A. Spencer	F	W				✓
	Alternate:						
7	Nancy J. Blanton	F	W			✓	
45	Todd E. Logan	M	B		✓		
104	Judy F. Cash	F	W			✓	
excused for jury duty 60	Nancy P. Parker	F	W				✓

For the court column, please indicate who made the motion to strike the jurors "for cause" with a "C" for Court, "P" for Plaintiff or "D" for Defense.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

CERTIFICATE

I, the undersigned Carolyn K. Mitchell, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the General Sessions Court for Cherokee County, South Carolina, on the 17th and 18th days of January, 1995.

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

May 8, 1995

Carolyn K Mitchell

CAROLYN K. MITCHELL
CIRCUIT COURT REPORTER

FORM 2094 PENGAD/INDY 1-800-631-6989

312

ARREST WARRANT

E-179022

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of Cherokee

THE STATE

against

Jay W. Tate
Address: [redacted] Trailer Park
Gaffney, SC 29340
Phone: _____ SSN [redacted]
Sex: M Race: B Height: 6'04" Weight: 180
DL State: SC DL#: [redacted]
DOB: [redacted] Agency ORI#: SC011000
Prosecuting Agency: SHERIFF'S OFFICE
Prosecuting Officer: Captain Joel Hill
Offense: MURDER
Offense Code: _____
Code/Ordinance Sec. 16-3-10

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to law.

_____ (L.S.)
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant Jay W. Tate on 06/04/94

James E. Talley
Signature of Constable/Law Enforcement Officer
Julius P. Manning

RETURN WARRANT TO:
Charles S. Greene, Chief Magistrate
Cherokee County Court House
Gaffney, SC 29340
803 487-2533

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
KATIE M. BAKER
CLERK OF COURT

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 518

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of Cherokee

Personally appeared before me the affiant Captain Joel Hill who being duly sworn deposes and says that defendant Jay W. Tate did within this county and state on June 1, 1994 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Cherokee) in the following particulars:

DESCRIPTION OF OFFENSE: MURDER

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE DEFENDANT, JAY W. TATE, DID WITH MALICE AFORETHOUGHT CAUSE THE DEATH OF BRENDA TATE ON JUNE 1, 1994 BY STABBING HER. THIS OFFENSE OCCURRED AT LOT [redacted] TRAILER PARK GAFFNEY, IN CHEROKEE COUNTY SOUTH CAROLINA.

WARRANT BASED ON INVESTIGATION BY THE CHEROKEE COUNTY SHERIFF'S OFFICE.

Sworn to and subscribed before me on 06/01/94

C. S. Greene (L.S.)
Signature of Issuing Judge

Signature of Affiant
Affiant's Address: 200 West Montgomery Street, Gaffney, SC 29340
Affiant's Telephone: 803 487-2565

ARREST WARRANT

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of Cherokee

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on June 1, 1994 defendant Jay W. Tate did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Cherokee) as set forth below:

DESCRIPTION OF OFFENSE: MURDER

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

C. S. Greene (L.S.)
Signature of Issuing Judge
Judge Code: 644

Judge's Address: Cherokee County Court House, Gaffney, SC 29340
Judge's Telephone: 803 487-2533

Issuing Court: [ ] Magistrate [ ] Municipal [X] Circuit

ORIGINAL

E-179022

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

WITNESSES

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

WITNESSES C 1-18-95

Joel Hill, SD

ARREST WARRANT NO. E179022

ACTION OF GRAND JURY

TRUE BILL

Ashley Wilburn
Foreman of Grand Jury

VERDICT

GUILTY OF MURDER

Kenneth A. Pope 1-18-95
Foreman of Petit Jury *Date:*

DOCKET NO. 94-GS-11-928

The State of South Carolina,

County of Cherokee

COURT OF GENERAL SESSIONS

_____ TERM _____

THE STATE

vs.

Jay Walter Tate, Jr.

Indictment for Murder

Holman C. Gossett, Jr.

FORM 5 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF Cherokee)

INDICTMENT FOR MURDER

At a Court of General Sessions, convened on _____,

the Grand Jurors of Cherokee County present upon their oath:

COUNT ONE — MURDER

That Jay Walter Tate, Jr.

did in Cherokee County on or about June 1, 1994,

feloniously, wilfully and with malice aforethought, kill one Brenda Tate

by means of stabbing her

and that the said victim died as a proximate result thereof.

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

Trent N. Rivette
SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

VS

Jay W. Tate

COUNT NO: _____

CASE NO: 94 GS-11 928

WARRANT NO: E 179022

CHARGE: Murder

The sentence of the Court is that Jay W. Tate, the defendant named in this indictment be confined to the State Board of Corrections/Cherokee County Detention for a term of your Natural Life ~~months/years~~ (and) (or) pay a fine of $ _____ : provided that upon the service of _____ months /years (and) (or) payment of $_____ plus (pay) (waive) cost and assessments as applicable *, the balance is suspended and the defendant is placed on probation for _____ months/years.

RESTITUTION: (YES) (NO)
HEARING HELD OR WAIVED ON : _____

PHYSICAL INJURY $ _____
(and) (or)
PROPERTY DAMAGE $ _____
TOTAL $ _____

PAYABLE TO CLERK FOR (VICTIM) _____

SPECIAL CONDITIONS OF PROBATION AND/OR SENTENCE: _____

DATE: 4-18-95
GAFFNEY, S.C. 29340

Presiding Judge

Kate W. Brown
CLERK OF COURT

*COST AND ASSESSMENTS : FINE $ _____
NON WAIVABLE $ _____
NOT WAIVED $ _____
TOTAL $ _____

Date of Birth [redacted] 62
Social Security [redacted]
Drivers License [redacted]
ATTORNEY FOR DEF: Richard Wheeler
ADDRESS 519 Jones Street
Gaffney, SC
SOLICITOR Holmes Garrett
COURT REPORTER C. Hammond

M/[redacted]
B/[redacted]

WHITE- Clerk CANARY - Detention PINK - Probation Dept.

SOUTHLAND PRINTERS, INC. FORM #002

ARREST WARRANT

E-179023

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Cherokee

THE STATE
against

Jay W. Tate
Address: [redacted] Coggins Trailer Park
Gaffney, SC 29341
Phone: _____ SSN: [redacted]
Sex: M Race: B Height: 6'04" Weight: 180
DL State: _____ DL#: _____
DOB: [redacted] Agency ORI#: SC011000
Prosecuting Agency: Sheriff's Office
Prosecuting Officer: Captain Joel Hill
Offense: ASSAULT AND BATTERY WITH INTENT TO KILL
Offense Code: _____
Code/Ordinance Sec. 16-3-620

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to law.

_____ (L.S.)
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant Jay W. Tate on 06/04/1994

CLERK OF COURT
KATIE R. RAINEY
JUN 8 1994

Julius P. Wood #1858
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
Charles S. Greene, Chief Magistrate
Cherokee County Court House
Gaffney, SC 29340
803 487-2533

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 618

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Cherokee

Personally appeared before me the affiant Captain Joel Hill who being duly sworn deposes and says that defendant Jay W. Tate did within this county and state on June 1, 1994 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Cherokee) in the following particulars:

DESCRIPTION OF OFFENSE: ASSAULT AND BATTERY WITH INTENT TO KILL

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE DEFENDANT, JAY W. TATE, DID WITH MALICE AFORETHOUGHT AND WITH THE INTENT TO KILL, COMMIT A BATTERY UPON JOE STANLEY MURRAY, JR. BY STABBING HIM SEVERAL TIMES WITH A KNIFE. THIS OFFENSE OCCURRED ON JUNE 01, 1994 AT [redacted] TRAILER PARK, LOCATED IN CHEROKEE COUNTY.

WARRANT BASED ON INVESTIGATION BY THE CHEROKEE COUNTY SHERIFF'S OFFICE.

Sworn to and subscribed before me on 06/02/94

_____ (L.S.)
Signature of Issuing Judge

Joel Hill
Signature of Affiant

Affiant's Address 200 West Montgomery Street
Gaffney, SC 29340

Affiant's Telephone 803 487-2585

ARREST WARRANT

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Cherokee

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on June 1, 1994 defendant Jay W. Tate did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Cherokee) as set forth below:

DESCRIPTION OF OFFENSE: ASSAULT AND BATTERY WITH INTENT TO KILL

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

_____ (L.S.)
Signature of Issuing Judge

Judge Code: 644

Judge's Address Cherokee County Court House
Gaffney, SC 29340

Judge's Telephone 803 487-2533

Issuing Court: [ ] Magistrate [ ] Municipal [X] Circuit

ORIGINAL

E-179023

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

_____ _____

_____ _____

_____ _____

WITNESSES

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

CODEFENDANTS

_____

_____

WITNESSES C 1/18/95

Joel Hill, SD

ARREST WARRANT NO. E179023

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

VERDICT

GUILTY OF ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE

Kenneth A. Pope 1-18-95

Foreman of Petit Jury Date:

DOCKET NO. 94-GS-11-929

The State of South Carolina,

County of Cherokee

COURT OF GENERAL SESSIONS

_____ TERM _____

THE STATE

vs.

Jay Walter Tate, Jr.

Indictment for Assault and Battery With Intent To Kill and Possession of Firearm or Knife During Commission of or Attempt to Commit Violent Crime

Holman C. Gossett, Jr.

FORM 8 (12/87)

INDICTMENT FOR ASSAULT AND BATTERY WITH INTENT TO KILL ~~AND POSSESSION OF FIREARM OR KNIFE DURING COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME~~

STATE OF SOUTH CAROLINA)
)
COUNTY OF Cherokee)

At a Court of General Sessions, convened on _____,

the Grand Jurors of Cherokee County present upon their oath:

COUNT ONE — ASSAULT AND BATTERY WITH INTENT TO KILL

That Jay Walter Tate, Jr.

did in Cherokee County on or about June 1, 1994, with malice aforethought commit an assault and battery upon one Joe Stanley Murray, Jr. _____ with intent to kill the said victim.

COUNT TWO — POSSESSION OF FIREARM OR KNIFE DURING COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME

That _____

did in _____ County on or about _____, possess or visibly display a firearm or visibly display a knife during the commission or attempted commission of a violent crime, to wit: _____,

in violation of Code Section 16-23-490, *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.

Trent W. Kneece

SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

COUNT NO: 321

CASE NO: 94 GS-11 929

VS

Jay W. Tate

WARRANT NO: E 129023

CHARGE: ~~Abdt K~~ ABHAN

The sentence of the Court is that Jay W. Tate, the defendant named in this indictment be confined to the State Board of Corrections/Cherokee County Detention for a term of 9 months/years (and) (or) pay a fine of $ _____ : provided that upon the service of _____ months /years (and) (or) payment of $_____ plus (pay) (waive) cost and assessments as applicable *, the balance is suspended and the defendant is placed on probation for _____ months/years.

RESTITUTION: (YES) (NO)
HEARING HELD OR WAIVED ON : _____

PHYSICAL INJURY $ _____
(and) (or)
PROPERTY DAMAGE $ _____
TOTAL $ _____

PAYABLE TO CLERK FOR (VICTIM) _____

SPECIAL CONDITIONS OF PROBATION AND/OR SENTENCE: _____

DATE: 4/8-95
GAFFNEY, S.C. 29340

Presiding Judge

*COST AND ASSESSMENTS : FINE $ _____
NON WAIVABLE $ _____
NOT WAIVED $ _____
TOTAL $ _____

CLERK OF COURT

Date of Birth [redacted]-62
Social Security [redacted]
Drivers License [redacted]
ATTORNEY FOR DEF: Richard Worley
ADDRESS 519 James Street
Gaffney, S.C.
SOLICITOR Holman Gossett
COURT REPORTER C. Hammond

M/F
B/W

WHITE- Clerk CANARY - Detention PINK - Probation Dept.

SOUTHLAND PRINTERS, INC. FORM #002

The Supreme Court of South Carolina

Sidney T. Floyd, Judge
Cherokee County
Nos. 94-GS-11-928 & 929

The State, Respondent,

v.

Jay Walter Tate, Jr, Appellant.

ORDER OF DISMISSAL

The above entitled case is pending on appeal in this Court. Due to the failure of appellant to timely serve Record on Appeal and provide proof of service to the Supreme Court in the above matter, as provided for in Rule 209 of the South Carolina Appellate Court Rules,

IT IS ORDERED that the above captioned appeal be and hereby is dismissed. Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Clerk of Court for Cherokee County after (15) days, exclusive of the date of filing this Order.

ERNEST A. FINNEY, JR., CHIEF JUSTICE

By _____
CLERK

Columbia, South Carolina

November 2, 1995

Copy to: Richard H. Warder, Esquire
The Honorable Norman Mark Rapoport
Daniel T. Stacey, Esquire
The Honorable Katie W. Baines
Mr. Jay Walter Tate, Jr.

The Supreme Court of South Carolina

Sidney T. Floyd, Judge
Cherokee County
Nos. 94-GS-11-928 & 929

The State, Respondent,

v.

Jay Walter Tate, Jr., Appellant.

REMITTITUR

No Petition for Reinstatement having been filed in the above matter since issuance of this Court's Order dated November 2, 1995,

IT IS ORDERED that the above appeal be and hereby is dismissed.

ERNEST A. FINNEY, JR., CHIEF JUSTICE

By Brenda J. Healy
Deputy CLERK

Columbia, South Carolina

November 20, 1995

Original to : The Honorable Katie W. Baines

Copy to: Richard H. Warder, Esquire (Appellant's Attorney)
The Honorable Norman Mark Rapoport (Respondent's Atty.)
Daniel T. Stacey, Esquire (AD's Chief Attorney)
Mr. Jay Walter Tate, Jr. (Appellant)

95-CP-11-382

STATE OF SOUTH CAROLINA

County of CHEROKEE.

In the Court of Common Pleas

JAY W. TATE, JR. 131829
Full name and prison number (if any) of Applicant,

vs.

STATE OF SOUTH CAROLINA,
Name of Respondent(s).

APPLICATION FOR POST-CONVICTION RELIEF

95. 382

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
DEC 4 8 44 AM '95
CLERK OF COURT

INSTRUCTIONS — 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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention McCormick Correctional Institution
   Route 2, Box 100 McCormick, South Carolina 29899

2. Name and location of Court which imposed sentence Cherokee County General Session Court
   Gaffney, South Carolina 29342

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) 94-GS-11-928; Murder
   (b) 94-GS-11-929; Assault and Battery of a high and aggravated nature
   (c)

4. The date upon which sentence was imposed and the terms of the sentence:
   (a) January 18, 1995; Life for Murder and Nine (9) years for Assault and Battery
   (b) of a high and aggravated nature
   (c)

A TRUE COPY
Kathy W. Bowen
CLERK OF COURT

5. Check whether a finding of guilty was made

(a) after a plea of guilty 324

(b) after a plea of not guilty Yes

(c) after a plea of nolo contendere

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. The Supreme Court of South Carolina

ii.

iii.

(b) the result in each such Court to which you appealed:

i.

ii.

iii.

(c) the date of each such result:

i. November 2, 1995

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Rule 209 of the South Carolina Appellate Court Rules (SCACR)

ii.

iii.

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) N/A

(b)

(c)

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See attachment sheet

(b)

(c)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) See attachment sheet

(b)

(c)

(CONCISED GROUND VIOLATIONS AND FACTS SUPPORTING UNLAWFUL IMPRISONMENT)

1. That the applicant was denied effective assistance of counsel under Article I, Section 3 and 14 of the South Carolina Constitution, as well as Statute Section 17-25-10 Code of Law of South Carolina. Behind the respondents conpire to have the applicant be tried upon a invalid indictment under No. 94-GS-11-928 of allege true bill, by the Cherokee County Grand Jury for Murder under Statute Section 16-3-10 Code of Law of South Carolina.

CONCISELY FACT: (1)- During January 18, 1995 the applicant appeared for trial on Murder under indictment No. 94-GS-11-928 that did not show a valid date or month or year whereupon any grand jury or foreman met to review and consider the charges of rendering a true bill under Section 16-3-10 Code of Law of South Carolina.

2. That the applicant was denied effective assistance of counsel under Article I, Section 3 and 14 of the South Carolina Constitution, as well as Statute Section 17-25-10 Code of Law of South Carolina. Behind the respondents conspiring to unconstitutional request that other lesser(s) charge be instructed and submitted upon the petit jury, for the Cherokee County General Session Court. The respondents knew or should have known lesser of offense(s) instruction would constitute enactment of double jeopardy against the applicant, for the same essential elements of crime for Murder under indictment No. 94-GS-11-928 in tainting the petit jury to render a fair and impartial verdict of innocent or guilty of Murder.

CONCISELY FACT: (2)- During January 18, 1995 the court reords of the applicant trial will show no proper waiver of presentment was ever entered ,by the applicant to allow the respondents to request such lesser instruction that foresee involuntary Manslaughter or accidently death along with a Murder instruction under indictment No. 94-GS-11-928 to be instructed. Since the Cherokee County Grand Jury only consider and determine the presented evidence(s) as allege to support a true bill for just Murder that the applicant should be prepare to meet doing his trial, not to instruct any lesser element of offense(s) under Statute Section 16-3-10 Code of Law of South Carolina.

3. That the applicant was denied effective assistance of counsel under Article I, Section 3 and 14 of the South Carolina Constitution, as well as Statute Section 17-25-10 Code of Law of South Carolina. Behind the respondents engaging to try the applicant under a invalid indictment No. 94-GS-11-929, for the offense Assault and Battery with intent to kill without fulfilling any date or month or year the document was ever review and considered by the grand jury or foreman. Also the respondents indictment was invalid for trial behind the State Prosecution did not have any evidence to support the indictment for the allege battery without any weapon.

CONCISELY FACT: (3)- During January 18, 1995 the applicant was allege indicted, but tried by the General Session Court for Cherokee County for Assault and Battery with intent to kill of one Joe S. Murray, with a weapon under an arrest warrant No. E-179023 without the respondents charging or presenting any types of weapon to support the battery and charge showing the applicant was the individual did such act or to allow any lesser to be present to the petit jury when there was not no weapon seized from the applicant possession.

4. That the applicant was denied effective assistance of counsel under Article I, Section 3 and 14 of the South Carolina Constitution, as well as Statute Section 17-25-10 Code of Law of South Carolina. Behind the respondents allowing lesser offense(s) during January 18, 1995 to be instructed knowing such instruction constitute double jeopardy of violation without an indictment(s) for each lesser(s) included offense(s).

CONCISELY FACT: (4)- During January 18, 1995 the applicant was sentence and rendered guilty by the petit jury, for the Cherokee County General Session Court on a unconstitutional charge of Assault and Battery of a high and aggravated nature to confinement impose of Nine (9) years imprisonment. The respondents knew or should have known such verdict and sentence were improper without first receiving a waiver of presentment under Section 17-23-130 Code of Law of South Carolina, as well as Article I, Section 11 of the South Carolina Constitution before the applicant could be sentence on the lesser charge foreseeing the same indictment No. 94-GS-11-929 of the allege original offense Assault and Battery with intent kill, or without any charge to support the actually alleged battery and verdict against the applicant.

5. That the Applicant was denied effective assistance of counsel under Article I, Section 3 and 14 of the South Carolina Constitution, as well as Statute Section 17-25-10 Code of Law of South Carolina. Behind the Respondents tainted the petit jury mind in perpetrating that the Cherokee County Grand Jury action of true bill indictments, under the offense and number Murder- 94-GS-11-928; Assault and Battery wwith intent to kill- 94-GS-11-929 was improper or unconstitutional rendered. On the presented elements and evidence to support both allege charge of Murder and Assault and Battery with intent to kill only without reviewing or considering any lesser offense(s).

CONCISELY FACT: (5)- As the court records can clearly show during January, 1995, the Applicant Jay W. Tate was deny a fair and impartial jury trial, by his attorney and the Respondents engaged to consent lesser offenses to be instructed upon the petit jury for the General Session Court, for Cherokee County. To bar the Applicant rights and quarantees to be tried under the standard or requirement that the Respondents must prove beyond a reasonable doubt its defense, under the original true bill indictment number 94-GS-11-928 Murder and 94-GS-11-929 Assault and Battery with intent to kill. Without the Presiding Judge implementing any of the lesser offense(s) to the petit jury for the Cherokee County General Session Court foreseeing these charges Voluntary Manslaughter, or Involuntary Manslaughter, or Assault and Battery of a high and aggravated nature, or Simple Assault and Battery, or Self-Defense to be render a decided verdict of guilty or innocent by the Petit jury for the General Session Court, for Cherokee County. Such lesser offense(s) charge or instruction overruled the Cherokee County Grand Jury allege true bill indictment(s) only for Murder docket number 94-GS-11-928; Assault and Battery with intent to kill docket number 94-GS-11-929 behind the essential elements and evidences that was presented by the Respondents to receipt a constitutionality indictment(s).

6. That the Applicant was denied effective assistance of counsel under Article I, Section 3 of the South Carolina as well as Section 17-25-10 Code of Law of South Carolina. Behind the Respondents deprived and refused the Applicant to a first Appeal under Rule 209 and Rule 203 (h) (2) of the South Carolina Appellate Court Rules.

CONCISELY FACT: (6)- During January 18, 1995, the Applicant was convicted and sentenced following a verdict of guilty by the Cherokee County General Session Court. On November 2, 1995, the Applicant receipted an order of dismissal from the South Carolina Supreme Court dismissing access to an appeal, pursuant to Rule 209 of the South Carolina Appellate Court Rules for failure of counsel to timely prepare or present an appeal.

RESPECTFULLY SUBMITTED,

S/ Jay Webster Tate Jr.
APPLICANT

11. Prior to this application have you filed with respect to this conviction 327

(a) any petition in a State Court under South Carolina Law? N/A

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? N/A

(d) any other petitions, motions or applications in this or any other Court?

N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii.

iii.

iv.

(b) the name and location of the Court in which each was filed:

i. N/A

ii.

iii.

iv.

(c) the disposition thereof:

i. N/A

ii.

iii.

iv.

(d) the date of each such disposition:

i. N/A

ii.

iii.

iv.

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

i. N/A

ii.

iii.

iv.

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

None

14. If you answered "yes" to (13) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

15. If any ground set forth in (9) 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:

(a) Because the attorney neglected to inform of such violations during trial or

(b) after the trial.

(c) _____

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

(a) your arraignment and plea? Yes

(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? N/A

17. If you answered "yes" to one or more parts of (16), list:

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

i. Richard H. Warder, Post Office Box 26133.
Greenville, South Carolina 29616

ii. _____

iii. _____

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

i. Plea & trial & sentences and appeal

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

WHEREFORE, it is prayed that this Honorable Court so grant and order that the applicant sentence and conviction be ruled unconstitutional.

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

No

STATE OF SOUTH CAROLINA

County of Cherokee.

VERIFICATION

329

I, Jay W. Tate J.R., 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.

Jay Walter Tate J.R.
APPLICANT

SWORN to and subscribed before me this 8

day of November, 19 95

Edward R. Mauldin (L.S.)
Notary Public

My Commission Expires: October 13, 2003

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, JAY W. TATE J.R., 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 therefor.

Jay Walter Tate J.R.
Applicant

SWORN or affirmed to and subscribed before me this

8 day of November, 19 95

Edward R. Mauldin
Notary Public

My Commission Expires October 13, 2003

STATE OF SOUTH CAROLINA

COUNTY OF McCORMICK.

(AFFIDAVIT OF SERVICE 330

I, JAY W. TATE , the applicant as a State prisoner confined at the McCormick Correctional Institution Route 2, Box 100 McCormick, South Carolina 29899. Appearing before the institution undersigned Notary Public with aforesaid of document Application for Post Conviction Relief and Affidavit of Service to be mailed upon the Clerk of Court Office Cherokee County CourtHouse Post Office Box 1226 Gaffney, South Carolina 29342. And a copy thereto upon Honorable Charles M. Condon, South Carolina Attorney General Office Post Office Box 11549 Columbia, South Carolina 29211.

Dated 11-8-95 .

RESPECTFULLY SUBMITTED,

S/ Jay Walter Tate JR
APPLICANT

Sworn and Subscribed to before me this

8 day of November 1995 .

Edward R. Martin (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES October 13, 2003

332

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	)	IN THE COURT OF COMMON PLEAS
Jay Walter Tate, 131879, Applicant, v. State of South Carolina, Respondent.	)	95-CP-11-382 RETURN

The Respondent, making its Return to the Application for Post-Conviction Relief filed December 4, 1995, would show this Court:

I.

The Applicant is presently confined in the McCormick Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Cherokee County. The Applicant was indicted at a term of the Court of General Sessions for Cherokee County for murder and assault and battery with intent to kill. He was represented by Richard Warder, Esquire, of the Cherokee County Bar. On January 17-18, 1995, the Applicant proceeded to a jury trial at the conclusion of which he was found guilty of murder and assault and battery of a high and aggravated nature. He was sentenced by the Honorable Sidney T. Floyd to confinement for a period of life for

333

murder and nine (9) years for assault and battery of a high and aggravated nature.

The Applicant filed a timely Notice of Intent to Appeal, however, due to the failure of the Applicant to serve a Record on Appeal and provide proof of service to the Supreme Court, the appeal was dismissed by Order of the Supreme Court dated November 2, 1995.

Attached herewith and incorporated herein by reference are the records of the Cherokee County Clerk of Court regarding the subject conviction, the Order of Dismissal of the Supreme Court of South Carolina and the trial transcript.

II.

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

1. Ineffective assistance of counsel;

2. Ineffective assistance of counsel for failure to file an appeal.

   [See the Applicant's facts in support of this allegation].

III.

In his first allegation, the Applicant alleges that he received ineffective assistance of counsel. The Respondent submits that the extensive trial record speaks for itself as to the competency of counsel. The Respondent contends that the attorney

334

for the Applicant was diligent in his representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

In Strickland v. Washington, supra, the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. 466 U.S. at 687. The Respondent submits that counsel's performance was not deficient nor was the Applicant prejudiced in any way by such performance.

Nevertheless, the allegation of ineffective assistance of counsel probably raises questions of fact which cannot be conclusively refuted by the record presently before this Court. Therefore, the Respondent requests that an evidentiary hearing be held in order to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

335

IV.

In his second allegation, the Applicant alleges that he was not advised of his right to appeal from his trial. In Matter of Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991), the Supreme Court of South Carolina held that at the conclusion of a trial if a client wishes [emphasis added] to appeal his case and is indigent or claims to be indigent, trial counsel, whether appointed or retained, must file and serve notice of appeal as required by Rule 203, SCACR. The operative phrase is the wish of the client. Respondent submits that the Applicant was advised of his right to appeal and knowingly, intelligently and voluntarily waived that right. Therefore, this allegation should be denied and dismissed.

V.

The Respondent therefore requests that this Court convene an evidentiary hearing to be held on the issues of whether the Applicant received effective assistance of trial counsel and whether the Applicant was denied his right to appeal his trial conviction.

V.

Each and every allegation contained within the Application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

336

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

CHARLES MOLONY CONDON
Attorney General

JOHN W. McINTOSH
Deputy Attorney General

TERESA NESBITT COSBY
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: _____

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3921

Columbia, South Carolina
March 5, 1996

320

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE [illegible], S.C.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE) Case No.: 95-CP-11-382

DEC 5 12 05 PM '96

36,782

Jay Tate, 213067,

Applicant,

vs.

State of South Carolina,

Respondent.

AMENDED APPLICATION FOR POST-CONVICTION RELIEF

COMES NOW the Applicant, by and through his attorney, and amends his original application for post-conviction relief as follows:

1. The original petition for post-conviction, attached hereto, is adopted and incorporated herein as if repeated verbatim.

2. A seventh ground supporting the Applicant's allegation that he is being held in custody unlawfully (paragraph 9 of the original petition) is added to the petition, to wit;

7. The Applicant's trial attorney failed to adequately investigate the facts and circumstances surrounding the two indictments against the Applicant; the Trial Attorney failed to adequately prepare for trial; the Trial Attorney failed to adopt a competent trial strategy; failed to adequately prepare Applicant for direct and cross-examination; the Trial Attorney did not marshal or maximize the evidence presented in open trial during his cross-examinations or direct examinations of witnesses or closing argument; that Trial Attorney failed to develop and present evidence and witnesses for the Defendant.

3. The facts supporting the above allegations (paragraph 10 of the original petition) are added to the petition, to wit;

The Trial Attorney did not interview witnesses favorable to the Applicant and whose names were provided by the Applicant, and develop their testimony; the Trial Attorney failed to marshal and develop facts favorable to the Applicant and presented in the State's case in chief in his cross-examinations of State's witnesses and his closing argument; that the Trial Attorney had no discernible defense strategy other than cross-examination without a basic strategy of Defense; that Trial Attorney failed to advocate Defendant's position accident/no criminal intent despite Applicants assertion of this position on the witness stand and support for this position by the State's witnesses.

4. By way of explanation and amendment, but not in any way limiting the assertions of grounds 1, 3 and 6 (paragraph 9 and 10) of the original petition, the following is added:

Grounds 1 and 3: The Trial Attorney failed to object to indictments 94-GS-11-928 and 929 as being invalid on their face. The invalidity stems from the fact that neither indictment contains the date the Grand Jury met and returned a True Bill on the indictments. The Trial Attorney also failed to complete the appeal in which this issue could have been addressed. Because this date was omitted, the Applicant asserts that the error was jurisdictional and the indictments were invalid, resulting in invalid convictions.

Ground 6: The Applicant instructed the Trial Attorney that he wished to appeal the verdict of both indictments. Although

Applicant did complete an affidavit of indigency at the Trial Attorney's instruction, the appeal was dismissed for failing to serve the record of appeal and failing to request reinstatement of the appeal; That the Trial Attorney failed to pursue the appeal or to insure the Office of Appellate Defense took the appeal; That the Trial Attorney failed to advise the Applicant that the appeal was not being pursued despite his instructions.

Respectfully Submitted,

Thomas E. Shealy
Criminal Defense Service
P.O. Box 308
Gaffney, SC 29342
(864) 488-3829

Attorney for Applicant

December 5, 1996

Gaffney, S.C.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE	)	
Jay Walter Tate,	)	
	)	
Applicant,	)	
	)	TRANSCRIPT OF RECORD
-vs-	)	95-CP-11-382
	)	
The State,	)	
	)	November 13, 1997
Respondent.	)	Gaffney, South Carolina

B E F O R E:

HONORABLE J. DERHAM COLE, JUDGE

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

KEITH R. KELLY, ESQUIRE
Attorney for the Applicant

CHRIS SAMELLAS, ESQUIRE
Attorney for the Respondent

Linda D. Moffitt
Circuit Court Reporter

INDEX

WITNESSES	PAGE
JAY WALTER TATE (AP)	
Direct examination by Mr. Kelly	5.
RICHARD H. WARDER (RW)	
Direct examination by Mr. Samellas	18
Cross-examination by Mr. Kelly	23
Redirect examination by Mr. Samellas	23

No exhibits entered into evidence.

LASER BOND FORM A © PENGAD • 1-800-631-6989

(Proceedings November 13, 1997)

MR. KELLY: May it please the Court, Your Honor, Mr. Warder and I just learned that Mr. Tate, Jay Walter Tate, was taken back to McCormick, apparently by mistake this morning and is not here.

THE COURT: Well, I think they took him to Spartanburg. If he is one of those, they took some to Spartanburg. I don't know who authorized it or who asked them to do that, but the Spartanburg County Jail came to Cherokee and picked up this morning's applicants and took them to Spartanburg. I've already talked with them. They're supposed to be on their way back.

MR. KELLY: Okay. He may be in Spartanburg then.

THE COURT: Well, he may be anywhere, but I hope he's on the way back.

MR. KELLY: All right, sir.

(Whereupon, a recess was taken.)

THE COURT: Mr. Kelly, you do represent Mr. Tate.

MR. KELLY: I do, Your Honor.

THE COURT: Mr. Kelly, are you ready on Mr. Tate's application?

MR. KELLY: We are, Your Honor.

THE COURT: All right. Call your first witness.

MR. SAMELLAS: Your Honor, I'm sorry. One minute. Could I address the Court?

THE COURT: Yes.

MR. SAMELLAS: With regards to the Anders brief, there was an Anders brief filed in this case, Your Honor, by Mr. Richard Warder. In that brief, the appendix was never filed with that brief, so it was never perfected for appeal. The Supreme Court dismissed the Anders brief that was filed by Mr. Tate.

We would concede that that appendix wasn't filed, and we would concede that that original Anders brief can be refiled and perfected with an appendix as it relates to his appeal, the original, not a new appeal.

THE APPLICANT: I would like to go forward with my PCR application if it's all right with you, Your Honor.

MR. SAMELLAS: That's fine, Your Honor. We are just conceding the fact that we wouldn't argue about a waiver of the state appeal in this case since the Anders brief was filed initially and there was no appendix with it. If an Anders brief is now filed and resubmitted with the proper appendix, we would allow that to go forward with any additional claims that he has in post-conviction relief.

THE COURT: Okay.

MR. KELLY: Well, now, I believe I understood now with any additional claims that he has.

THE COURT: For post-conviction relief.

MR. SAMELLAS: What we are saying is an Anders brief

LASER BOND FORMA @ PENGAD• 1-800-631-6989

that was filed, it was never perfected. We submit he can refile that Anders brief with the appendix, because a brief was done. The reason it wasn't perfected was because the appendix was never attached. We concede that. We are saying that he can refile that Anders brief along with the appendix to the Supreme Court. Then with regard, if he wants to have any other issues heard, we'll hear those with regard to anything else he might have.

THE COURT: Today.

MR. KELLY: PCR instead of---

THE COURT: I assume that one of the allegations in here is that his appeal was not perfected. They're going to allow that Anders brief to be filed along with the appendix. Now they're saying you don't need to address that issue here. They agree to that. We can go forward with any other allegation or ground he has.

MR. KELLY: We can go forward with the other five.

THE APPLICANT: Okay.

JAY WALTER TATE, having been first duly sworn, testified as follows:

MR. KELLY: May it please the Court.

THE COURT: Mr. Kelly.

MR. KELLY: Thank you, Your Honor.

DIRECT EXAMINATION BY MR. KELLY

Q Please state your name for the record, Mr. Tate.

CASEMAKER © FEDGATE

A Jay Walter Tate, Jr.

Q All right, sir. And you---

THE COURT: You don't have to lean into that microphone. It will pick it up.

Q You were represented by Mr. Richard Warder in the trial of your case.

A Yes, sir.

Q All right. When was the trial of that case? Was it January?

A January, I think, 16th, 17th of 1995.

Q 1995.

A Yes, sir.

Q All right. Now, you have filed a PCR with the Court asking for relief, is that right?

A Yes, sir.

Q Okay. And you have a copy of yours with you there.

A Yes, sir.

Q All right, sir. Let's start with number one, please, sir.

A Okay.

Q What are you -- you are alleging ineffective assistance of counsel.

A Yes, sir. I'm going to go ahead and read the allegation.

Q Number one.

LASER BOND FORM A ® PENGAD • 1-800-631-6989

A Okay. Number one.

THE COURT: You-all excuse me just a minute. I can't hear over here. I'm trying to take some testimony.

Q Go ahead, sir.

A Okay.

"Number one, that the applicant was denied effective assistance of counsel under Article One, Section Three and Fourteen of the South Carolina Constitution, as well as Statute 17-25-10, Code of Laws, South Carolina. Behind the respondents conspired to have the applicant be tried upon a invalid Indictment Number 94-GS-11-928 of allege true bill by the Cherokee County Grand Jury for murder under Statute Section 16-3-10, Code of Laws, South Carolina.

"Concisely fact number one, during January the 18th, 1995, the applicant appeared for trial on murder under Indictment Number 94-GS-11-928 that did not show a valid date or month or year, whereupon, any grand jury or foreman met to review and consider the charges or rendering a true bill under Section 16-3-10, Code of Laws of South Carolina."

Your Honor, do you see what I am talking about right here? They don't have a---

THE COURT: I've got a copy of the indictment.

THE WITNESS: Okay. They're supposed to have a year, a month, a date when the indictment was filed. Then you can go back to the back side where it don't have a date right

here neither when an indictment was filed. I believe that's a requirement with the strictness of the law. So that right here, the indictment as a whole is invalid. It's no good.

Q Okay. Mr. Tate, was any objection made to the indictment prior to the jury being sworn?

A No, sir.

Q And, number two, the second ground in your PCR.

THE WITNESS: Oh, before I forget, Your Honor, I would like to put this indictment right here, the copies of this indictment, into the record as evidence.

THE COURT: Well, the indictment is in the record. The original indictment is in the record.

THE WITNESS: As evidence?

THE COURT: Yes, sir.

THE WITNESS: Okay.

THE COURT: It's part of the record.

THE WITNESS: All right.

A "Ground two, that the applicant was denied effective assistance of counsel under Articles One, Section Three and Fourteen, of the South Carolina Constitution, as well as Statute 17-25-10, Code of Laws, South Carolina. Behind the respondents conspiring to unconstitutional request that other lesser charge be instructed and submitted---

THE COURT: You are going to have to slow down so that the court reporter can hear what you are saying.

LASER BOND FORM A © PENGAD • 1-800-631-6989

THE WITNESS: Okay. Do you want me to start over with allegation two?

THE COURT: Start with number two, and read slowly if you're going to read it.

THE WITNESS: Okay.

A "That the applicant was denied effective assistance of counsel under Article One, Section Three and Fourteen, of the South Carolina Constitution, as well as Statute Section 17-25-10, Code of Laws of South Carolina. Behind the respondents conspiring to unconstitutional request that other lesser charges be instructed and submitted upon the petit jury for the Cherokee County General Session Court. The respondents knew or should have known lesser offenses instruction would constitute enactment of double jeopardy against the applicant for the same essential element of crime for murder under Indictment Number 94-GS-11-928 in tainting the petit jury to render a fair and impartial verdict of innocent or guilty of murder.

"Concisely fact two, during January 18, 1995, the court records of the applicant trail will show no proper waiver of presentment was ever entered by the applicant to allow the respondents to request such lesser instruction that foresee involuntary manslaughter or accidental death along with a murder instruction under Indictment Number 94-GS-11-928 to be instructed. Since the Cherokee County Grand Jury only

considered and determined the present presented evidence as allege to support a true bill of just murder that the applicant should be prepared to meet doing his trial, not to instruct any lesser element of offenses under Statute Section 16-3-10, Code of Laws, South Carolina.

Q Mr. Tate, during the trial of your case or at the conclusion of your case were lesser included offenses charged to the jury?

A Yes, sir.

Q Okay. And you did not want that.

A No, sir.

Q You believe that that violates double jeopardy---

A Yes, sir.

Q ---because it was not presented to the grand jury for indictment.

A Yes, sir, and it also -- it also -- the record will show that I didn't allow this. The transcript of record, it will show that I didn't allow no lesser offenses to be instructed.

Q You didn't---

A I didn't ask for it.

Q You didn't ask for it.

A Right.

Q But it was done anyway.

A That's right.

LASER BOND FORM A © PENGAD • 1-800-631-6989

Q Over your objection.
A That's right.
Q Okay. And number three.
A Let me---
THE COURT: Wait a minute. Did they find you guilty of any lesser offenses?
THE WITNESS: Yes, sir.
THE COURT: They did?
THE WITNESS: Well, not on this allegation here.
Q Okay.
A Okay.
MR. SAMELLAS: Your Honor, just to clarify, he was charged with murder and---
THE COURT: Found guilty of murder. I know.
A Okay.
"Ground three, that the applicant was denied effective assistance of counsel under Article One, Section Three and Fourteen of the South Carolina Constitution, as well as Statute Section 17-25-10, Code of Laws of South Carolina. Behind the respondents engaging to try the applicant under a invalid Indictment Number 94-GS-11-929 for the offense of assault and battery with intent to kill without fulfilling any date or month or year, whereupon, the document was ever reviewed and considered by the grand jury or foreman. Also, the respondents indictment was invalid for trial behind the

state prosecution did not have any evidence to support the indictment for the alleged battery without any weapon.

"Concisely fact number three, during January the 18th, 1995, the applicant was allege indicted but tried by the General Session Court for Cherokee County for assault and battery with intent to kill of one Joe S. Murray with a weapon under an arrest warrant Number E-179023 without the respondents charging or presenting any types of weapons to support the battery and charge showing the applicant was the individual did such act or to allow any lesser to be presented to the petit jury where there was not no weapon seized from the applicant's possession."

Your Honor, I have a copy of the arrest warrant here. I would like to put that into the record as evidence.

THE COURT: It's in the record.

THE WITNESS: Okay.

Q Do you have a copy of an indictment?

A Yes, sir, and the indictment.

MR. KELLY: Is that in the record, Your Honor?

THE COURT: It's in the record.

MR. KELLY: Okay.

THE COURT: All the records regarding each charge, indictments and arrest warrants, will be made a part of the record.

MR. KELLY: Thank you, Your Honor.

LASER BOND FORM A © PENGAD • 1-800-631-6989

Q So your allegation is two-fold in this particular problem. It's, number one, like the first instance. There is no date, time or place on the indictment.

A When the indictment is filed, right, sir.

Q And was any objection made by your lawyer for that---

A No, sir.

Q ---prior to the jury being sworn?

A No, sir.

Q All right, sir. And, secondly, your objection is that you were found guilty even though no weapon was found.

A Presented, that's right.

Q No weapon was presented by the state.

A That's right.

Q All right, sir.

A Okay.

"Allegation number four, that the applicant was denied effective assistance of counsel under Article One, Section Three and Fourteen, of the South Carolina Constitution, as well as Statute Section 17-25-10, Code of Laws, South Carolina. Behind the respondents allowing lesser offenses during January the 18th, 1995, to be instructed knowing such instruction constitute double jeopardy or violation without an indictment for each lesser included offense.

"Concisely fact number four, during January the 18th, 19956, the applicant was sentenced and rendered guilty by

the petit jury for the Cherokee County General Sessions Court on a unconstitutional charge of assault and battery of a high and aggravated nature to confinement impose of nine years imprisonment. The respondents knew or should have known such verdict and sentence were improper without first receiving a waiver of presentment under Section 17-23-130, Code of Laws of South Carolina, as well as Article One, Section Eleven, of the South Carolina Constitution before the applicant could be sentenced on the lesser charge foreseeing the same Indictment Number 94-GS-11-929 of the alleged original offense of assault and battery with intent to kill or without any charge to support the actually alleged battery and verdict against the applicant."

Q All right, sir. And your allegation here is that it was double jeopardy, is that right?

A That's right, because they didn't have no indictment for this, I guess, lesser included offense.

Q Okay. But you were found guilty of assault and battery of a high and aggravated nature---

A Right.

Q ---against Joe S. Murray.

A Right.

Q Okay. You were not found guilty of assault and battery of a high and aggravated nature under the lesser included offense of the murder indictment, right?

LASER BOND FORM ® PENGAD • 1-800-631-6989

A No. This was an assault and battery with intent to kill indictment right here.
Q Right.
A And they didn't have no indictment. Do you know? You see what I'm saying? They didn't have no waiver.
Q Okay. So your allegation then is that no waiver was signed by you for presentment to the grand jury.
A Right.
Q And, therefore, it should have been presented to the grand jury or else the Court has no jurisdiction.
A That's right.
Q All right, sir. Number five.
A "Number five, that the applicant was denied effective assistance of counsel under Article One, Section Three and Fourteen, of the South Carolina Constitution as well as Statute Section 17-25-10, Code of Laws, South Carolina. Behind the respondents tainted the petit jury minds in perpetrating that the Cherokee County Grand Jury action of true bill indictments under the offense and number murder, 94-GS-11-928, assault and battery with intent to kill, 94-GS-11-929, was improper or unconstitutionally rendered. On the present presented elements and evidence to support both allege charge of murder and assault and battery with intent to kill only without reviewing or considering any lesser offenses.

"Concisely fact five, as the court records can clearly show during January 1995, the applicant, Jay W. Tate, was denied a fair and impartial jury trial by his attorney, and the respondents engaged to consent to lesser offenses to be instructed upon the petit jury for the General Sessions Court for Cherokee County. To bar the applicant rights and guarantees to be tried under the standard or requirement that the respondents must prove beyond a reasonable doubt its defense under the original true bill Indictment Number 94-GS-11-928, murder, and 94-GS-11-929, assault and battery with intent to kill. Without the presiding judge implementing any of the lesser offenses to the petit jury for the Cherokee County General Sessions Court foreseeing these charges, voluntary manslaughter or involuntary manslaughter or assault and battery of a high and aggravated nature or simple assault and battery or self-defense to be rendered a decided verdict of guilty or innocent by the petit jury for the General Session Court for Cherokee County. Such lesser offenses charge or instruction overruled the Cherokee County Grand Jury allege true bill indictments only for murder, Docket Number 94-GS-11-928, assault and battery with intent to kill, Docket Number 94-GS-11-929, behind the essential elements and evidence that was presented by the respondents to receipt a constitutionally indictment."

LASER BOND FORM A © PENGAD • 1-800-631-6989

Q All right, sir. And exactly what is your position on number six here, number five? I'm sorry.
A Number five?
Q Yes.
A That the evidence that was presented, I don't see how they got a constitutional, you know, indictment.
Q Okay. So the indictment was invalid, is that right?
A Well, no, well, they didn't have evidence, you know what I'm saying, to get a constitutionally indictment.
THE COURT: And there wasn't sufficient evidence to support the verdict, the decision of the jury?
THE WITNESS: Yes, sir.
Q And number six has already been conceded by the state.
A Number six already been conceded.
Q Right. By the state. Please answer any questions the state would have.
A Okay.
MR. SAMELLAS: We have no questions of the applicant.
THE COURT: All right. Thank you, Mr. Tate. Do you have any other allegations or grounds that you would like to assert for post-conviction relief?
THE WITNESS: No, sir.
THE COURT: You don't have any other grounds.
THE WITNESS: No, sir.
THE COURT: Okay. Thank you. You may step down.

LASER RECORD FORM A PENGAD 1-800-631-6989

MR. KELLY: That would be the applicant's case, Your Honor.

THE COURT: No other witnesses by the applicant. Any by the state?

MR. SAMELLAS: I'm sorry, Your Honor?

THE COURT: They are not going to offer any other evidence. Do you have any witnesses?

MR. SAMELLAS: Yes, Your Honor. We would call Richard Warder.

RICHARD H. WARDER, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SAMELLAS

Q Mr. Warder, would you please state your full name for the record?

A Richard H. Warder.

Q And how did you come about representing Mr. Tate?

A I'm not sure who first contacted us. I'm sure it was his family, and his family contacted us. I think we met with Mr. Tate over here in jail.

Q Do you recall the facts of this case?

A I'm not sure I recall them all, but I recall the general facts.

Q Can you just give us a general background of what happened in this case, please?

A Mr. Tate was charged with murder and assault and

LASER BOND FORM A © PENDAD • 1-800-631-6989

battery with intent to kill that resulted from an altercation wherein two people were stabbed with a knife.

Q One of those people must have died, is that correct?

A Yes, sir.

Q Okay. One of the things he talks about is these -- there wasn't sufficient evidence in the trial. He says there wasn't sufficient evidence to convict him on. Now, you made objections, didn't you, after the state presented its case as to the insufficiency of the evidence?

A Yes, sir.

Q You also after your case made objections as to the insufficiency of the evidence in this case, is that correct?

A Yes, sir.

Q And were both of those objections denied by the judge?

A Yes, sir.

Q Okay. Also, with regard to jury charges, do you remember what you had the jury charged with?

A I do not remember exactly what charges we submitted, no, sir.

Q Okay. The jury was charged with murder. I'm going to show you something.

MR. SAMELLAS: Bear with me one moment, Your Honor.

(Pause.)

Q I'm sorry. Turn to page 278. Start at line five. In looking at that, does that -- where you had started to

instruct the jury as to murder?
A Yes, sir.
Q Okay. And if you will turn to page 280 to look at line 14---
A Yes, sir.
Q ---and that's where -- if you'll just look at that, I'm sorry. It's line 14 where the judge instructed the jury on the charge, lesser included charge, of involuntary manslaughter.
A That's correct.
Q If you will please, turn to page 282. Look at line 20.
A Yes, sir.
Q Is that where the judge charged the jury with accident or misadventure?
A Yes, sir.
Q If you will, please turn to page 283 beginning at line 16. That's where the judge instructed the jury as to the charge of assault and battery with intent to kill.
A Yes, it is.
Q Now, would you please turn to page 285, line 16?
A Yes, sir.
Q And there the judge, excuse me, beginning at line 11 is where the judge charged the jury with the instruction of assault and battery of a high and aggravated nature, is that correct?

LASER BOND FORM A @ PENGAD • 1-800-631-6989

A That's correct.
Q If you will, look at page 287 at line four.
A Yes, sir.
Q Now, that's where the judge instructed the jury as to self-defense on the assault and battery charge, is that correct?
A Yes, sir.
Q I think he also, give me one moment, charged simple assault and battery. Yes. If you will look at page 286, beginning at line eight, the judge also charged the jury with simple assault and battery, is that correct?
A Yes, he did.
Q So the judge charged the jury with murder, involuntary manslaughter, assault and battery with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, self-defense on assault and battery and accident on this, is that correct?
A Yes, sir.
Q Okay. One of the things that Mr. Tate mentioned is there was no voluntary manslaughter charge. Why wouldn't there have been a voluntary manslaughter charge?
A There were no facts to support it.
Q So there was no facts to support that. Okay. Now, one of his other complaints was that, you know, he was convicted of these indictments and he didn't want these lesser

included offenses. Did you discuss these lesser included offenses with him?

A Sure, we did at the trial, yes, sir.

Q In fact, I believe that he contended that this was an accident, that she impaled herself.

A That's right.

Q Turned around and impaled herself on the knife.

A Accidental impalement was the defense.

Q And he was indicted for murder and for assault and battery with intent to kill.

A Yes, sir.

Q Convicted of murder---

A Yes, sir.

Q ---of his wife. And then he got a lesser included offense. The jury came back and found him guilty of assault and battery of a high and aggravated nature.

A Yes, sir.

Q So he didn't get what he was indicted for. He got something less.

A Yes. He was found guilty of a lesser included on that charge.

Q Okay.

MR. SAMELLAS: No further questions at this time, Your Honor.

MR. KELLY: May it please the Court.

LASER BOND FORM A © PENGAD • 1-800-631-6989

CROSS-EXAMINATION

BY MR. KELLY

Q Mr. Warder, the dates and times on the indictment, was there any objections made prior to the jury being sworn about the indictment being defective?

A No, sir, there was not.

Q Okay. And there was no presentment to the grand jury or anybody else of the charges of simple assault or a lesser included offense, is that right?

A No, sir. They were lesser included offenses, and I didn't believe that they had to be individually presented.

Q Right. Thank you.

MR. KELLY: That's all I have, Your Honor.

THE COURT: You may step down. Have you got another question you want to ask?

MR. SAMELLAS: Yes, sir.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. SAMELLAS

Q Mr. Warder, did you review the indictments?

A Yes, sir.

Q Did you feel that they were -- it was proper subject matter jurisdiction on the basis of those indictments?

A We reviewed the indictment for the allegations and certainly at the time I felt that it was a proper

indictment.

Q Thank you.

MR. SAMELLAS: No further questions.

THE COURT: Step down. Let me be certain of one thing. Now, I know the Assistant Attorney General inquired of the witness as to whether or not he had requested a manslaughter instruction or whether the applicant had objected to a manslaughter instruction. As I understand it, the applicant never has requested any lesser included offense be instructed. Is that right?

MR. KELLY: That's correct.

THE COURT: That's what he's objecting to, is that they were instructed. So he didn't want a manslaughter instruction.

MR. KELLY: That's right.

THE COURT: A voluntary manslaughter.

MR. KELLY: That's right.

THE COURT: Okay. Any other witnesses by the state?

MR. SAMELLAS: No, Your Honor.

THE COURT: Anything further?

MR. SAMELLAS: Yes, Your Honor, with regards to the indictments which you have in front of you for murder and assault and battery with intent to kill---

THE COURT: Yes, sir.

MR. SAMELLAS: ---the body of those indictments

LASER BOND FORM A © PENGAD • 1-800 631-6989

complies with the law, Your Honor, because it does have the date that the incidents occurred. Those indictments also were true billed by the state grand jury. The only thing on the indictments that is not there is the actual date that the state grand jury convened, but that does not, Your Honor, make the indictment insufficient, because the body of the indictment is properly completed in accordance with the South Carolina Code Section, Annotated Section, 17-19-20.

THE COURT: All right. Mr. Kelly.

MR. KELLY: Well, Your Honor, we submit that the objection should have been raised by counsel for the applicant at that point in time. It was not done. It's conceded that it was not done. We submit the indictments failed to go to the state grand jury---

THE COURT: Do you and Mr. Tate have any law indicating that to be the case?

MR. KELLY: No, Your Honor, I don't have. The applicant will submit The State vs. Griffin.

THE APPLICANT: What I'm saying, Your Honor, is the date should be on the indictment.

THE COURT: Don't give me -- I mean, I understand the argument. What I'm asking for is what the case is that you say stands for that proposition. Do you have one?

MR. KELLY: I do not.

THE COURT: What about Mr. Tate? Has he got one?

MR. KELLY: The State vs. Griffin, Your Honor.

THE COURT: State vs. Griffin?

MR. KELLY: Yes, sir.

THE COURT: Okay. Anything further? I'll take it under advisement and issue an order shortly.

END OF REQUESTED TRANSCRIPT OF RECORD

LASER BOND FORM A © PENGAD • 1-800-631-6989

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of Common Pleas for Cherokee County, South Carolina, on the 13th day of November 1997.

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

January 7, 1997

Linda D. Moffitt

Circuit Court Reporter

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

IN THE COURT OF COMMON PLEAS

No. 95-CP-11-382

Jay Walter Tate

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

36,782

This matter comes before the Court by way of an Application for Post-Conviction Relief dated December 4, 1995. The Applicant filed an Amended Application on December 5, 1996. Respondent made its Return on March 5, 1995. An evidentiary hearing into the matter was convened on November 13, 1997 at the Cherokee County Courthouse. Applicant was present at the hearing and was represented by Keith R. Kelly, Esquire. Respondent was represented by Chris Samellas of the Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Testifying on behalf of the State was Richard Warder, Esquire. The Court also had before it a copy of the transcript of the proceedings held against the Applicant, the records of the Cherokee County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the McCormick Correctional Institution.

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

1. Ineffective assistance of counsel;

2. Ineffective assistance of counsel for failure to file an appeal.
(see Application and Amended Application for facts supporting above allegations.)

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

Applicant's alleges that he was denied effective assistance of trial counsel. This Court finds that the attorney for the Applicant was diligent in his representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). The proper standard for attorney performance is that of reasonable effective assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). A convicted defendant's claim that counsel's assistance was so defective as to require reversal of the

conviction requires that the defendant show first, that counsel's performance was deficient and; second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington, supra. See also Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). This Court finds that the Applicant's attorney's performance was not deficient nor was the Applicant prejudiced in any way by his attorney's performance.

This Court finds that the evidence before it reveals that counsel met with the Applicant, thoroughly investigated his case, and thoroughly discussed with the Applicant the charges pending against him, the maximum possible sentence, and the options available to the Applicant. This Court finds that counsel had access to the Solicitor's file and was aware of the evidence the State had in its possession.

The Applicant alleges that he was denied effective assistance of counsel because the date the grand jury convened was not noted on the indictment, lesser-included charges were charged to the jury, the weapon was not shown to the jury, his sentence to the lesser-included charge constituted double jeopardy, there was insufficient evidence to support the verdict and his appeal was not perfected.

At the beginning of the hearing, the Respondent consented to allow the Applicant to refile his Anders brief along with the Appendix.

Counsel testified that the Applicant was originally indicted for murder and assault and battery with intent to kill that resulted from an alteration wherein two people were stabbed with a knife. Counsel further testified that he made motions for Counsel further testified that he made motions for a directed verdict based on the insufficiency of the evidence at the close of the State's case and the close of the Applicant's case and both motions were denied.

The transcript of the trial reflects that the jury was charged on murder, involuntary manslaughter, accident or misadventure, assault and battery with intent to kill, assault and battery of a high and aggravated nature, self-defense and simple assault and battery. Counsel testified that there were no facts to support a charge of voluntary manslaughter. Counsel explained that he discussed the lesser-included charges with the Applicant and that the Applicant maintained that one of the stabbings was an accident. Counsel further explained that the Applicant could be convicted of lesser-included charges without the charges being submitted to the grand jury.

This Court finds that the indictments comply with S.C. Code Ann. §17-19-20 in that the body of the indictments explains the date of the crimes and the nature of the offense charged in a manner that can be easily understood. In addition, the murder indictment provides the manner in which the death of the deceased was caused and further provides that

the Applicant did feloniously, wilfully and with malice aforethought kill and murder the deceased in compliance with S.C. Code Ann. § 17-19-30.

This Court further finds that counsel discussed the lesser-included charges with the Applicant and the Applicant's defense demanded that they be charged. This Court finds that the testimony was that the Applicant stabbed the victims and there is no requirement that the actual knife used be presented to the jury. Finally, this Court finds that counsel made motions for a directed verdict based on the grounds of the insufficiency of the evidence but they were denied by the trial court.

The Applicant's prior Post-Conviction Relief counsel filed an Amended Application on the Applicant's behalf; however, most of the allegations were not raised at the evidentiary hearing and are therefore waived.

This Court further finds that the Respondent has consented for the Applicant to refile his Anders brief and Appendix.

This Court finds that the Applicant has failed to prove that counsel's representation fell below a standard of reasonableness and that there is a reasonable probability that but for counsel's alleged unprofessional errors, the outcome of the trial would have been different. Stickland, supra. This Court finds that the Applicant's allegations concerning trial counsel lack credibility, are without merit, and are denied and dismissed. This Court finds them to be waived by

the Applicant as Applicant has failed to meet his burden of proof regarding any other allegations. All other allegations are hereby denied and dismissed.

Based on the foregoing, this Court finds that Applicant has not established any constitutional violations or deprivations before or during his trial. Therefore, this Application for Post-Conviction Relief must be denied and dismissed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief in this matter be dismissed with prejudice.

2. That the Applicant be remanded to the custody of Respondent.

3. That the Applicant be allowed to refile his Anders brief and Appendix.

AND, IT IS SO ORDERED this 31 day of July, 1998.

The Honorable Derham J. Cole
Presiding Judge
Seventh Judicial Circuit

SPARTANBURG, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jay Walter Tate, Jr., Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
J. Derham Cole, Post-Conviction Judge

Opinion No. 25308
Heard May 22, 2001 - Filed June 25, 2001

AFFIRMED

Chief Attorney Daniel T. Stacey, of the South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., all of Columbia, and Assistant Attorney General Kathleen J. Hodges, of Greenville, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of post-conviction relief (PCR) to petitioner on an issue related to his indictments. We affirm.

FACTS

Petitioner was indicted for murder and assault and battery with intent to kill (ABIK). On both indictments, the caption reads, in pertinent part, as follows:

> At a Court of General Sessions, convened on _____, the Grand Jurors of ___Cherokee___ County present upon their oath. . . .

Thus, the County information is filled in, but the date information for when the grand jury convened is not. Likewise, on the back of both indictments, the County information is supplied, but the Term information is blank. Under the section entitled "ACTION OF GRAND JURY," the indictments are both stamped "TRUE BILL" and signed by the Grand Jury Foreman.

> The body of the ABIK indictment reads:
>
> COUNT ONE — ASSAULT AND BATTERY WITH INTENT TO KILL
>
> That Jay Walter Tate Jr. did in Cherokee County on or about June 1, 1994, with malice aforethought commit an assault and battery upon one Joe Stanley Murray, Jr. with intent to kill the said victim.

The body of the murder indictment reads:

> COUNT ONE — MURDER

> That Jay Walter Tate Jr. did in Cherokee County on or about June 1, 1994, feloniously, wilfully and with malice aforethought kill one Brenda Tate by means of stabbing her and that the said victim died as a proximate result thereof.

Petitioner was tried for stabbing his wife, who died, and his stepson. The crimes were committed on June 1, 1994. The trial occurred on January 17 and 18, 1995. At the outset of the trial, the solicitor called the indictments by number[1] and indicated that each had been true billed. No objection was made to the indictments. A jury convicted petitioner of murder and assault and battery of a high and aggravated nature (ABHAN). The trial court sentenced him to life for murder and nine years concurrent for ABHAN. This Court dismissed his direct appeal for failure to file the Record on Appeal.

Petitioner filed for PCR. With the exception of the claim regarding his direct appeal, the PCR court denied petitioner relief. On petition for certiorari, this Court granted petitioner a belated appeal and affirmed his convictions based on the direct appeal issue raised. However, we also granted certiorari on the following issue:

> Are the indictments invalid because neither show the date on which the grand jury convened?

DISCUSSION

Petitioner argues that counsel was ineffective in failing to object to the indictments because the space for the date in the caption showing when the grand jury met is blank. Alternatively, petitioner contends that this omission deprived the trial court of subject matter jurisdiction because without the date on which the grand jury met, the indictments fail to establish that the grand jury timely acted on the charges.

---

[1]The murder indictment was Docket No. 94-GS-11-928 and the ABIK indictment was Docket No. 94-GS-11-929.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). This Court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. E.g., Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Petitioner's counsel should have raised an objection to these indictments because the date information was blank. Nonetheless, we find there is no prejudice from counsel's conduct since the omissions in the indictments do not invalidate them. In other words, the defect in the caption did not affect the trial court's subject matter jurisdiction over this case.

The regularity of the proceedings of a court of general jurisdiction will be assumed in the absence of evidence to the contrary. Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). This Court has stated that "the caption of an indictment should show the place and date at which the court was held and the indictment found." State v. Griffin, 277 S.C. 193, 196, 285 S.E.2d 631, 633 (1981). However, any "omissions may be corrected by other parts of the indictment." Id.

Furthermore, the caption of an indictment is no part of the finding of the grand jury. State v. Lark, 64 S.C. 350, 42 S.E. 175 (1902). Instead, "[i]t is the body of the indictment rather than its caption that is important. If the body specifically states the essential elements of the crime and is otherwise free from defect, defect in the caption will not cause it to be invalid." State v. Marshall and Brown-Sidorowicz, P.A., 577 P.2d 803, 811 (Kan. Ct. App. 1978); see also 42 C.J.S. *Indictments and Information* § 28 (1991) ("Defects in a caption will not invalidate an indictment which is otherwise good and sufficient.").

In Griffin, the murder indictment did not have the blanks filled in for the date and county of the grand jury's convention. On the back of the indictment, however, the county and date were specified, and the grand jury

foreman's signature appeared below the words "True Bill." Thus, we ruled that the trial court correctly refused to quash the indictment. Griffin, supra.

In the instant case, the back of the indictment does not specify the date the grand jury met. Nevertheless, we find the record amply supports the conclusion that there was no irregularity in the proceedings. First, we note the 94- prefix on the docket numbers indicates that the grand jury met in 1994. See footnote 1, supra. In addition, we find the grand jury necessarily convened after the crime had been committed. See Lark, supra (noting absurdity of argument that an indictment was found before crime was committed). Moreover, the record clearly reflects that the indictments had been true billed by the time the case was called to trial in January 1995. Given that the regularity of the proceedings of a court of general jurisdiction will be assumed absent evidence to the contrary, Pringle, supra, we hold that the record in this case establishes the grand jury met and acted in a timely fashion.

Furthermore, we note there is no challenge to the sufficiency of the body of the indictments, and our own review confirms that the indictments properly state the counts of murder and ABIK. Therefore, the defects in the captions do not vitiate these indictments. See State v. Marshall and Brown-Sidorowicz, P.A., supra (a defect in the caption will not cause indictment to be invalid if the body specifically states the essential elements of the crime).

Despite the lack of information regarding the date on which the grand jury met, the indictments were substantively sufficient to confer subject matter jurisdiction. Accordingly, petitioner cannot show any prejudice from counsel's failure to object to the indictments.[2]

---

[2]Although the parties in their briefs cite State v. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000), Anderson v. State, 338 S.C. 629, 527 S.E.2d 398 (Ct. App. 2000), and State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995), we find them inapposite to the issue at bar. These three cases all involved indictments which had not been stamped "True Bill." In Anderson and Grim, the matter was remanded to determine whether the indictments had, in fact, been

CONCLUSION

On petitioner's claim challenging the indictments, we affirm the PCR court's order denying relief.

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

---

true billed; in Bultron, the Court of Appeals held that the evidence from a hearing to quash the indictment showed that the indictment had been true billed. The failure on an indictment to reflect the action taken by the grand jury is completely distinguishable from the omission in the caption of the date on which the grand jury convened. We therefore reject petitioner's suggestion that this matter necessitates a remand.

Jay W. Tate, 131879
Evans CI/F3-B-240
610 Hwy 9 West
Bennettsville, SC 29512

August 5, 2008

MRS. Brandy W. McBee
Clerk of Court Cherokee Co.
P.O. Drawer 2289
Gaffney, SC 29342

0 0 8 CP-11681

2008 AUG -8 P 12:58
BRANDY W. MCBEE

RE: Filing of PCR Application.

Dear Mrs. McBee:

Enclosed please find the above referenced application to be filed in your office. If possible please inform me of the case number once it has been filed and clocked in.

I'll appreciate your assistance in this most important matter.

Sincerely,

S/ Jay W. Tate

CERTIFICATE OF SERVICE

I, Do hereby certify that I, Jay W. Tate, have filed a copy of the attached PCR application with the Cherokee County Clerk of Court, at P.O. Drawer 2289, Gaffney, SC 29342, by placing same in the hands of SCDC mail room officials, postage pre-paid first class and return address clearly marked..

August 5, 2008

S/ Jay Walter Tate Jr.
Jay W. Tate

cc:
File

FORM 5

STATE OF SOUTH CAROLINA)
)
County of Cherokee)

IN THE COURT OF COMMON PLEAS

0 0 8 CP-11 6 8 1

2008 AUG -8 P 12:

RANDY W. BEE

Jay Walter Tate # 131879)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

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 Evans CI/F3-B-240. 610 Hwy 9 West, Bennettsville, SC 29512

2. Name and location of Court which imposed sentence Cherokee County Courthouse

3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 94-GS-11-928 (Murder); 94-GS-11-929 ABTK

(b) N/A

(c) N/A

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 1-18-95 Life for Murder: 9 years for ABHAN

(b)

(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?

No

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(b) the result in each such Court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(c) the date of each such result:

i. N/A

ii. N/A

iii. N/A

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. N/A

iii. N/A

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) Counsel did not file an appeal.

(b) N/A

(c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Newly Discovered Evidence (See Attachment)

(b) Constitutional Violation [redacted]

(c) N/A

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) State allegation of facts that Applicant was indicted in 1995 (See attached)

(b) N/A

(c) N/A

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? YES

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? YES

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Petition for Writ of mandamus

ii. PCR [redacted]

iii. Habeas Corpus

iv.

(b) the name and location of the Court in which each was filed:

i. Cherokee County Court of Common Pleas. S.C. Supreme Court

ii. Cherokee County Court of Common PLeas; S.C. Supreme Court

iii. Cherokee County Court of Common Pleas: S.C. Court of Appeals

Jay Walter Tate
Attachment to PCR

Ground: Newly discovered evidence,& Constitutional violation.

Facts in support of Grounds for PCR:

On August 2, 2005, Applicant filed a Petition for Writ of Mandamus with the Cherokee County Clerk of Court. The State made its Return and Motion to dismiss dated April 26, 2006. On September 19, 2008, a hearing was held in the matter. Applicant was present and was represented by Rodney W. Richey, Esquire. The State was represented by S. Prentiss Counts, from the Attorney General's Office.

After the hearing before the Honorable Dovet A. Early, III, an Order of Dismissal was filed with the Clerk of Court on April 17, 2007. Subsequently, an appeal was taken and a copy of the record on appeal was provided to Applicant. In said record of the proceedings the State took the position that I had been"indicted for Murder and ABWIK in 1995." Tr. P. 3, lines 9-10. Given that Applicant had never been informed of the date or time off indictment.He sent for the a copy of the January Term, 1995[1], grand jury docket sheet. He received a certified true copy of the January 12, 1995, grand jury docket on or around August, 2007.(See attached exhibit 1)

Such sheet does not list Ashley Wilburn, as Foreman of Grand Jury, but list Laura S. Cash as the forelady. (Ashley Wilburn is listed as the Forman of Grand Jury in Applicant's indictment.) In the case at bar, no evidence has ever been presented to authenticate the alleged indictment upon which Applicant was convicted with. The fact state that the indictment was not signed by the grand jury forman that served during the January, 1995 term.There has never been an indication of which term Applicant was indicted until the State took their position in the record; nor there has been any record of whether the indictment was published.

Clearly, there was some irregularity in the grand jury proceedings, and it has never been established when the action by the grand jury was taken until the State took such position that Applicant was indicted in 1995. However, the evidence obtained by Applicant proves otherwise. Thus, the regularity of grand jury indictment procedures cannot be pressumed given that there exist evidence to the contrary. Unlike in the case of Pringle v. State, 339 S.E.2d 127 (1986) and State v. Bultron, 457 S.E.2d 616 (Ct. App. 1995) cert. den. No onehas ever testified as to the authenticity of the indictment or of the regularity of the grand jury proceedings of the Cherokee County grand jury. Thus, there has been insufficient evidence on the record to assume regularity of the grand jury proceedings.

Although our State Supreme Court has held in Gentry, 610 S.E.2d 494 (2005), that the indictment is a notice document. Applicant has a state created liberty interrest protected by the Fourteenth Amendment of the U.S Constitution in the provisions of art. I §§ 3, 11 and art. V, § 22 of S.C. Constitution, as well as the statutory provisions of S.C. Code Ann. § 17-19-10 et seq. Moreover, the State's position that Applicant was indicted in 1995 raises the question of Whether his constitutional right that a grand jury which is properly established and constituted under the law considered the criminal allegations against him? S.C. Const art. I, § 11, and art. V, § 22 ("... right to be tried for a crime charged against him only upon an indictment presented by a legal grand jury ...may thereafter justly take the position that he has been deprived of life, liberty,... without due process of law.") State v. Rector, 155 S.E.385, 392 (1930).

1. Applicant was tried and convicted on 1-18-1995.

*** See back side

Conviction may not be obtained by piling inferencee upon inferences. U.S. v. Vallo, 238 F.3d 1242(10th Cir. 2001). In Ross v. Mitchell, 99 S.Ct. 2992 (1979) the Court observed. "...it is our duty as well as the state's to see that through the procedures for bringing him to justice he shall enjoy the protections which the constitution guarantees...Egual protections of the law is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguard extends to all..." Id. at 3000.

The fact that there is no constitutional requirement that States institute prosecutions by means of an indictment returned by a grand jury, does not relieve these states that do employ them (grand juries) from complying with the requirements and commands of the Fourteenth Amendment in the operation of those juries.

The court has the right to determine whether an inmate is being deprived of a "state created right" or "liberty interest" granted him by a rule, statute, or regulation promulgated by the government. Meachum v. Fano, 96 S.Ct. 2532 (1976).

For the foregoing reasons. Applicant moves the Court to hold an evidentiary hearing in this matter. To determine whether his sentence should be vacated for constitutional violation based on the newly discovered evidence.

S/ Jay W. Tate

cc:
file

104

Grand Jury — January 12 TERM, 1925

NO.	NAMES	NO. DAYS	AMOUNT	MILES	AMOUNT	TOTAL	REMARKS
1	Hamm S. Cook			10			foreman
2	Joel D. Hollis			8			
3	Jack O Howe			3			
4	Rose L Rollins			6			
5	Jerry Perry E. Rose			12			
6	Selma Wells			2			
7	James A. Caskey	1		3		21 20	
8	Pearl C Black	-		-		- -	83 yrs 4
9	Carl H. Barber	1		12		24 80	
10	Vivian B Badger	-		-		- -	Deceased
11	Jimmy B Clay	1		15		26 00	At Hermitage
12	Mary E. Anderson	-		-		- -	Excused
13	Jeanette E. Fowler	-		-		- -	Excused
14	Robert Davis	1		10		24 00	
15	Thelma K. Irwin	-		-		- -	LL
16	Eva B. Gray	1		9		23 40	
17	Ernest Lockhart	-		-		- -	LL
18	Brenland Baker	1		2		20 80	
19	Douglas D. Porter	-		-		- -	LL
20	Jerry L. Mahaffey Jr	1		10		24 00	
21	Robert O. McCown	-		-		- -	Excused

A TRUE COPY
Attest W. Mabry
CLERK OF COURT
CHEROKEE COUNTY, S.C.

Exhibit - 82

A TRUE COPY
By Cindy W. McBee
CLERK OF COURT
CHEROKEE COUNTY, S.C.

January 12 TERM, 19 65 105

	NO DAYS	AMOUNT	MILES	AMOUNT	TOTAL	REMARKS
Wilson H. Barnett	1		10		24 00	
Larry B. Barker	-		-		- -	Non-Resident
Arthur W. Phillips	-		-		- -	Sole Cousins Mother
Gilman A. Rogers	1		1		20 40	Excused by Ct.
Sarah L. Sale	-		-		- -	Moved
Vera A. Brown			3			
Carl M. Spencer Mailing	1		10		24 00	
Catherine H. Spencer	-		-		- -	LR
Joan C. Spencer	-		-		- -	LR
Melissa P. Sale	-		-		- -	Moved
Willie Sale	-		-		- -	Sale's Heirs
Jesse L. Vermelee	1		10		24 00	
Ronald L. Wilson	-		-		- -	Moved
Charles C. Wilson Jr	1		12		24 00	
Bailiff						
James E. Ford Jr	1		2		20 80	
Dexter S. White	1		9		22 40	
Robin L. Wilkins	1		2		21 20	Bailiff
Spencer Williams	1		2		20 80	
Geo. Cash	-		-		- -	Dec'd P.O.
Doug E. Gross	1		1		20 40	
Kathy W. Carraway	1		2		20 80	
Robin L. Cauthen	-		-	-	- -	
Ricky T. Rumbell	1		1		20 40	Alternate (1)
Martha J. Eads	1		4		21 60	
Lynn S. Davis	-	-	-	-	- -	Moved
Sandra B. Field	1		12		25 80	
Robin A. Hagan	1		9		23 20	Alternate (2)
Cozy H. Young	-		-		- -	Recused
[illegible] Mayfield	-		-		- -	Alt. #2
Mrs. Catherine L. Landis	-		-		- -	Moved
Jeffrey Justice	-		-		- -	Staff
Henry J. Roy	-		-		-	Atty
Tommie J. Smith	1/1		10		- 24.00	Clerk
Darnell L. Sale	1		6		22 40	
DARNELL TURNER, SR.						

Exhibit 1
2-12

iv. _____

(c) the disposition thereof:

i. Dismissed/Denied

ii. Dismissed; affirmed by S.C. S.Ct.

iii. Denied: Appeal dismissed S.C.Court of Appeals

iv. _____

(d) the date of each such disposition:

i. April 6. 2007

ii. July 31. 1998 ; affirmed June 25. 2001 reh den August 8. 2001

iii. October 13. 2003: Appeal dismissed May 23. 2005

iv. _____

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

i. Order of Dismissal 05-CP-11-392

ii. Tate v. State. 549 S.E.2d 601 (SC 2001)

iii. Order of Dismissal with Prejudice 01-CP-11-604

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?

NO

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

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

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:

(a) Newly Discovered Evidence not know to Applicant

(b) _____

(c) _____

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

(a) your arraignment and plea? N/A

(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. Richard Warder Esquire. P.O. Box 26133. Greenville. SC 29616

R.Keith Kelly. P.O. Box 6443. Spartanburg. SC 29304

ii. Daniel T. Stacey. Robert Dudek. S.C. Office of Appellate Defense

_____

iii. Rodney Ritchey. P.O. Box 10916. Greenville. SC 29603

_____

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

i. Trial Sentencing

PCR

ii. Stacey at Pet. for Writ of Cert (PCR), Dudek Appeal (H/C)

_____

iii. Writ of mandamus

_____

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

Reverse and remand or vacate conviction.

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Cherokee)

I, Jav Walter Tate, 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.

Jay Walter Tate, Jr.
Jav Walter Tate

SWORN to and subscribed before me this 5 day of August, 2008.

(L.S.)
Notary Public

My Commission Expires: 08-06-2009

2008 AUG -8 P 12:58
BRANDY W. MCBEE

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

I, Jay Walter Tate, Jr., #131879, 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.

Jay Walter Tate, Jr.

Jay Walter Tate, *Applicant*

SWORN or affirmed to and subscribed before me this 5 day of August, 2008.

Notary Public

My Commission Expires: 08-06-2009

2008 AUG -8 P 12:58

BRANDY W. MCBEE

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE	)	SEVENTH JUDICIAL CIRCUIT
	)	
	)	**2008-CP-11-0681**
Jay Walter Tate, 131879,	)	
	)	
Applicant,	)	
	)	
v.	)	**RETURN AND MOTION TO DISMISS**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2009 MAY -4 P 12:56
BRANDY W. MCBEE

Respondent (the State), making its Return and Motion to Dismiss to the Application for Post-Conviction Relief (PCR) filed August 8, 2008, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Cherokee County. The Cherokee County Grand Jury indicted Applicant for murder (94-GS-11-928) and assault and battery with intent to kill (01-GS-11-929). Richard Warder, Esquire, represented the Applicant. On January 17-18, 1995, the Applicant went to trial on the charges. He was found guilty of murder and the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). The Applicant was sentenced by the Honorable Sidney T. Floyd to confinement for a period of his natural life for murder and 9 years for ABHAN.

Applicant filed a timely Notice of Intent to Appeal. However, due to the failure of Applicant to serve a Record on Appeal and provide proof of service to the South Carolina Supreme Court, the Supreme Court dismissed the appeal and issued a remittitur dated November 2, 1995.

Applicant subsequently filed a PCR application on December 4, 1995 (95-CP-11-382), in which he alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and
2. Ineffective assistance of counsel for failure to file an appeal.

Respondent made its Return on March 5, 1995. Applicant also filed an Amended Application on December 5, 1996. On November 13, 1997, an evidentiary hearing was convened at the Cherokee County Courthouse. Applicant was present at the hearing and was represented by Keith R. Kelly, Esquire. By written order dated July 31, 1998, the Honorable J. Derham Cole denied and dismissed the application with prejudice. However, Judge Cole allowed Applicant to refile his Anders brief and Appendix.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Supreme Court ultimately granted Applicant a belated appeal and affirmed his convictions based on the direct appeal issue raised. However, the Supreme Court also granted his Petition for Writ of Certiorari on the following issue: Are the indictments invalid because neither show the date on which the grand jury convened? By written Order filed June 25, 2001, the Supreme Court affirmed the denial of post-conviction relief by Judge Cole. Applicant's subsequent Petition for Rehearing was denied and the Remittitur was issued on August 8, 2001.

Applicant then filed a "Petition for Writ of Habeas Corpus" on November 2, 2001 (01-CP-11-604). Upon information and belief, Applicant proceeded *pro se*. By written order dated October 13, 2003, the Honorable J. Michael Baxley denied and dismissed the petition with prejudice.

A timely Notice of Appeal was filed, and an appeal was perfected by the South Carolina Office of Appellate Defense. Following the submission of an Anders brief and a *pro se* brief, both of which argued that the trial court lacked subject matter jurisdiction, the South Carolina Court of Appeals dismissed the appeal on May 23, 2005. The Remittitur was issued on June 8, 2005.

The Applicant subsequently filed a Writ of Mandamus on November 14, 2005. The Respondent made its Return and Motion to Dismiss on April 8, 2006. A hearing on the Respondent's motion was convened on September 19, 2006 at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Rodney Richey, Esquire. S. Prentiss Counts of the South Carolina Attorney General's Office represented the Respondent. The Honorable Doyet A. Early, III, dismissed the writ by order dated April 6, 2007. The Applicant appealed the dismissal and this appeal is still pending.

Incorporated herein by reference are the records of the Cherokee County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Applicant's direct appeal records, and the Applicant's prior PCR records.

II.

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

1. Newly Discovered Evidence; and
2. Constitutional Violations.

III.

The State moves to dismiss the Application with prejudice for the following reasons:

Successive Application

The State submits that the current Application for PCR must be summarily dismissed because it is successive to the Applicant's prior application for PCR. The Uniform Post Conviction Procedure Act (the Act) provides that:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (1985). Successive applications are disfavored and the burden is on the Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

The State submits that the Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for PCR; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, supra; Arnold v. State/Plath v. State, supra. Therefore, the State requests that this Court summarily dismiss the Application for PCR as successive.

Statute of Limitations

Furthermore, the State submits that the current application for PCR should be summarily dismissed for failure to comply with the filing procedures of the Act. S.C. Code Ann. § 17-27-10 to -160 (1976 & Supp. 2000). The Act reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a) (Supp. 2000).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on January 18, 1995. The Applicant appealed and the Supreme Court dismissed the appeal and issued a remittitur dated November 2, 1995. This Application was filed on August 8, 2008, well after the one year statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the PCR Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law." Therefore, the State requests that this Court summarily dismiss the Application for PCR for failure to file within the time mandated by statute.

Newly Discovered Evidence

The Applicant alleges that there exists "newly discovered evidence" which entitles him to pursue this successive PCR Application. The Applicant alleges this "newly discovered evidence" stems from the lack of testimony related to his grand jury indictment. The State submits this allegation is wholly without merit.

The Applicant fails to make specific allegations of whether the evidence meets the requirements of after-discovered evidence. See State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983); State v. Pierce, 263 S.C. 27, 207 S.E.2d 414 (1974). In Hayden, the Supreme Court held that:

> A party requesting a new trial based on after-discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching.

The State submits the Applicant has failed to allege a cognizable claim of after-discovered evidence. Moreover, he has failed to allege the "new evidence" could not, by the exercise of due diligence, have been discovered before his prior PCR hearing.

In conclusion, the State submits this allegation should be summarily dismissed because the situation as set forth in the Application does not meet the requirements of after-discovered evidence. South, supra; Hayden, supra.

IV.

WHEREFORE, having made its Return and Motion to Dismiss, the State requests that the Applicant's current application for PCR be summarily denied and dismissed.

Respectfully Submitted,

HENRY DARGAN MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MICHELLE J. PARSONS
Assistant Attorney General

By: Michelle Parsons
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Columbia, South Carolina.
May 1, 2009.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Jay Walter Tate, Applicant, vs. State of South Carolina, Respondent.	2008-CP-11-0681 CERTIFICATE OF SERVICE BY MAIL

BRANDI W. MCBEE
2009 MAY 1 A 10: 56
CLERK OF COURT
CNTY. S.C.

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 Respondent's Return and Motion to Dismiss in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Jay Walter Tate, SCDC No. 131879
Evans Correctional Institution, F3-B-240
Highway 9 West
Bennettsville, SC 29512

Anne Mueller
Anne A. Mueller
Legal Assistant for the Respondent

DATED this 1st day of May, 2009.

HENRY MCMASTER
ATTORNEY GENERAL

June 5, 2009

FILED
2009 JUN -8 A 8:47
BRANDY W. MCBEE

The Honorable Brandy W. McBee
Cherokee County Clerk of Court
P.O. Drawer 2289
Gaffney, South Carolina 29342

RE: Jay Walter Tate v. State of South Carolina
2008-CP-11-0681

Dear Ms. McBee:

Enclosed for filing in the above matter is a Conditional Order of Dismissal signed by the Honorable J. Mark Hayes, II, and dated May 16, 2009. Please return a clocked copy of the order to me and I will make arrangements for personal service of the order on the inmate.

Please note that this Order does not end this post-conviction relief matter but only informs the applicant's counsel that the Court "intends to dismiss" the application. At a later date and if appropriate, Judge Hayes will sign a "Final Order of Dismissal" which will conclude the case.

Sincerely,

Michelle Parsons Kelley
Assistant Attorney General

MPK/aam
Enclosure

cc: Jay Walter Tate, SCDC No. 131879
Evans Correctional Institution, F3-B-240
Highway 9 West
Bennettsville, SC 29512

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE	)	SEVENTH JUDICIAL CIRCUIT
	)	
	)	**2008-CP-11-0681**
Jay Walter Tate, SCDC No. 131879,	)	
	)	
Applicant,	)	
	)	
v.	)	**CONDITIONAL ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2009 JUN -8 A 8:47
BRENDA W. MCGEE
CLERK
2009 MAY 29 AM 9:29
VOID
ERROR

This matter comes before this Court by way of an application for post-conviction relief filed August 8, 2008.

I. 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 Cherokee County. The Cherokee County Grand Jury indicted Applicant for murder (94-GS-11-928) and assault and battery with intent to kill (01-GS-11-929). Richard Warder, Esquire, represented the Applicant. On January 17-18, 1995, the Applicant went to trial on the charges. He was found guilty of murder and the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). The Applicant was sentenced by the Honorable Sidney T. Floyd to confinement for a period of his natural life for murder and 9 years for ABHAN.

Applicant filed a timely Notice of Intent to Appeal. However, due to the failure of Applicant to serve a Record on Appeal and provide proof of service to the South Carolina Supreme Court, the Supreme Court dismissed the appeal and issued a remittitur dated November 2, 1995.

Applicant subsequently filed a PCR application on December 4, 1995 (95-CP-11-382), in which he alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and
2. Ineffective assistance of counsel for failure to file an appeal.

Respondent made its Return on March 5, 1995. Applicant also filed an Amended Application on December 5, 1996. On November 13, 1997, an evidentiary hearing was convened at the Cherokee County Courthouse. Applicant was present at the hearing and was represented by Keith R. Kelly, Esquire. By written order dated July 31, 1998, the Honorable J. Derham Cole denied and dismissed the application with prejudice. However, Judge Cole allowed Applicant to refile his Anders brief and Appendix.

A timely Notice of Appeal was filed on Applicant's behalf. The South Caro[illegible] Supreme Court ultimately granted Applicant a belated appeal and affirmed his convictions [illegible] the direct appeal issue raised. However, the Supreme Court also granted his Petition [illegible] Writ of Certiorari on the following issue: Are the indictments invalid because neither show the date on which the grand jury convened? By written Order filed June 25, 2001, the Supreme Court affirmed Judge Cole's denial of post-conviction relief. Applicant's subsequent Petition for Rehearing was denied and the Remittitur was issued on August 8, 2001.

Applicant then filed a "Petition for Writ of Habeas Corpus" on November 2, 2001 (01-CP-11-604). Upon information and belief, Applicant proceeded *pro se*. By written order dated October 13, 2003, the Honorable J. Michael Baxley denied and dismissed the petition with prejudice.

A timely Notice of Appeal was filed, and an appeal was perfected by the South Carolina Office of Appellate Defense. Following the submission of an Anders brief and a *pro se* brief,

both of which argued that the trial court lacked subject matter jurisdiction, the South Carolina Court of Appeals dismissed the appeal on May 23, 2005. The Remittitur was issued on June 8, 2005.

The Applicant subsequently filed a Writ of Mandamus on November 14, 2005. The Respondent made its Return and Motion to Dismiss on April 8, 2006. A hearing on the Respondent's motion was convened on September 19, 2006 at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Rodney Richey, Esquire. S. Prentiss Counts of the South Carolina Attorney General's Office represented the Respondent. The Honorable Doyet A. Early, III, dismissed the writ by order dated April 6, 2007. The Applicant appealed the dismissal and this appeal is still pending.

Incorporated herein by reference are the records of the Cherokee County Clerk of Court regarding the subject convictions; the Applicant's records from the South Carolina Department of Corrections; the transcript of the proceedings against the Applicant; the Applicant's direct appeal records, and the Applicant's prior PCR records.

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

1. Newly Discovered Evidence; and
2. Constitutional Violations.

VOID
FILED
CLERK OF COURT
CHEROKEE COUNTY
2009 MAY 11 AM 9:29
MISTAKEN

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

> All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

This Court finds, further, that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower

VOID
ENTERED
2009 MAY 11 AM 9:29
CLERK OF COURTS

> court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on January 18, 1995. The Applicant appealed and the Supreme Court dismissed the appeal and issued a remittitur dated November 2, 1995. This Application was filed on August 8, 2008, well after the one year statutory filing period had expired.

Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

This Court also notes the Applicant raised a claim of after-discovered evidence on the basis that the grand jury indictment had not been authenticated. The Applicant fails to make specific allegations of whether the evidence meets the requirements of after-discovered evidence. See State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983); State v. Pierce, 263 S.C. 27, 207 S.E.2d 414 (1974). In Hayden, the Supreme Court held that:

> A party requesting a new trial based on after-discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching.

FILED
2009 MAY 19 AM 9:29
CLERK OF COURT
SPARTANBURG COUNTY

The Applicant has failed to allege a cognizable claim of after-discovered evidence. Moreover, he has failed to allege the "new evidence" could not, by the exercise of due diligence, have been discovered before his prior PCR hearing.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Cherokee County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Michelle Parsons, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 16th day of May, 2009.

The Honorable J. Mark Hayes, II
Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

VOID
CLERK OF COURT
SPARTANBURG COUNTY
2009 ERROR 29
MARC KITCHENS

RECEIVED
JUL 08 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE	)	SEVENTH JUDICIAL CIRCUIT
Jay W. Tate, #131879,	)	Case No. 2008-CP-11-0681
Applicant,	)	
vs.	)	APPLICANT'S OBJECTION TO
The State,	)	CONDITIONAL ORDER OF DISMISSAL
Respondentt	)	

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2009 JUL -8 A 11: 2
BRANDY MCBEE

COMES NOW Applicant, in his capacity as a pro se litigant and state the following reasons why his Application should not be dismissed, and show this Honorable Court as follow:

1. This matter comes before the Court by way of an Application for PCR Relief filed August 8, 2008, in which Applicant alleges that he is being held in custody unlawfully because there is newly discovered evidence not previously presented and for constitutional violation.

2. The State filed its Return dated May 1, 2009 in which it allegedthat the Application should be summarily denied and dismissed for the following reasons:

A. Successive Application; B. Statute of Limitations; C. The Application does not "meet the requirements of after-discovered evidence." Return at p.6.

3. The Court seeks to dismiss the application summarily because it is successive, for failure to comply with the filing procedures of 17-22-45(a) (1 year statute of limitations); The Applicant's failure "to allege a cognizable claim of after-discovered evidence."(Cond. Order ofDismissal p. 5).[1]

4. Applicant objects to summary dismissal based on the following facts and the supporting case law:

As a Matter of Law, the Applicant would move the Court to take judicial notice that he has filed a Request for Discovyry with the Cherokee County Clerk of Court and the S.C. Attorney General Office which has not been responded to. Given that the State has moved for summary judgment as a defense of Statute of Limitations citing McDonnell v. Consolidated School District of Aiken, 885 S.E.2d 638 (1994). The Applicant moves the Court to adhere to the well established law that a court should not grant summary judgment against a party who has not had an opportunity to pursue discovery or whose discovery requests have not been answered. Rule 56 allows summary judgment only"after adequate time for discovery." Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). Also see. Parrish v. Bd. of Commissioners, 533 F.2d 942, 951 (5th Cir. 1976)(trial Court did not allow relevant discovery and summary judgment was reversed.); Tupper v. Dorchester Co.,487 S.E.2d 187, 191 (SC 1997)(summary judgment is not appropriate where further inquiry into the facts of a case is desirable to clarify the application of the law.) See attached request for discovery exhibit 1.

Applicant further moves the Court to include in the record the following documents which have been filed and not made part of the record. Exhibit 2 Order of the Supreme Court on Writ of Mandamus(Case no. 05-CP-11-392); Exhibit 3 Pro se Brief of Appellant. Applicant has also included page 3b of his PCR application which does not seem to be part of the record submitted by the State.

1. Applicant was served with a copy of the Order for conditional dismissal on June 17, 2009.

A. The State seeks to have the Application dismissed because it is successive. The State relies on the language of S.C. Ann. § 17-27-90 to support such request for summary dismissal. However, Applicant points out to the Court that this statute forbids a successive application unless an applicant can point out to a "sufficient reason" why the new ground for relief he asserts were not raised, or were not raised properly. (emphasis added by Applicant)

In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous applications. Tilley v. State, 511 S.E2d 689 (1999). Additionally, successive PCR applications are permitted in rare procedural circumstances. See e.g. Tilley, supra, Case v. State, 289 S.E.2d 413; Carter v. State, 362 S.E.2d 20 (1987). In fact, "a second application is not absolutely barred." Land v. State, 262 S.E.2d 735 (1980); Washington v. State, 478 S.E.2d 833 (1996).

Applicant submits that there is "ample reason" or "sufficient reason" why his application should not be dismissed and he should be given an opportunity to "litigate again." Such reasons could not have been previously presented to the Court because they were not available to applicant until after the ruling of the S.C. Supreme Court in Evans v. State, 611 S.E.2d 510 (SC 2005). At which time the Applicant shought to obtain the documentation in regards to his indictment by the Cherokee Co. grand jury, by filing a Writ of Mandamus on August 2, 2005.

A hearing was convened on September 19, 2006, before the Honorable Doyet A. Early, III. Applicant was represented by Rodney W. Richey, esq. The State was represened by S. Prentiss Counts, Ass. Att. Gen. At the Hearing Ms. Counts asserted for the first time throughout Applicant's proceedings that Applicant "was indicted for murder and ABWIK in 1995."(Ex. 4p. 3, l. 9-10).

Applicant obtained a copy of the grand jury docket sheet for the January 1995 term and such does not show that Ashley Wilburn was the grand Jury forman for that term. Instead, Laura S. Cash was the designated forelady. (See exhibit 1 to PCR application.) Thus, there is an issue of material fact and evidence, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. S.C. Code § 17-27-20(a)(4). Moreover, § 17-27-70(b) provides:

> "the Court may order ... or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a a material issue of fact. "(emphasis added by Applicant).

Given the position taken by the state at the Mandamus hearing. It can no longer be stated that the regularity and legality of the grand jury of Cherokee Co. in the Court of general sessions because the record shows something to the contrary. Moreover, no legal presumption canbe indulged, because there is a showing to the contrary. State v. Jones, 45 S.E.2d 29 (1947). The Caption of an indictment should show the place and date at which the Court was held and the indictment found. State v. Griffin, 285 S.E.2d 631 (1981).

In the case at bar, unlike Griffin, the ommission cannot be corrected by the other parts in the indictment given the position taken by the state of S.C. in their opposition to [redacted] Writ of Mandamus, and the evidence obtained by the Applicant. Which proves otherwise. Therefore, for the reasons stated herein and the reasons stated in the PCR attachment, as well as the Case law cited. The Court shouldid not grand summary dismissaal and should order a hearing to be held in this matter. To ensure the guarantee of Equal Protections of the law, as guaranteed by the constitution, is not infringed upon, through the proc dures established by the State for bringing him to justice. See Ross v. Mitchell, 99 S.Ct. 2993 (1979).

In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non moving party. Mayer v. M.S. Bailey & Sons, 555 S.E.2d 406 (SC App. 2001)

B. The State alleges that Applicant has failedto comply with the Statute of limitations as required by 17-27-45(a). However, Respondent's assertion is misplaced because it is inapplicable to the allegations raised by applicant of newly discovered evidence. Instead the applicable law in the matter is listed under § 17-27-45(c)which states:

> "If the applicant contends that there is evidence of material fact not previously presented and heard that requires vacation of the conviction or sentence, the applicantion must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

Until the State took the position that Applicant had been indicted in 1995, these fact was unbeknown to the Applicant. However, once this fact became a matter of public record and Applicant pursued it. The Application was filed within the one year limitations as required in § 27-27-45(c). That is the state stated the fact which was recorded on September 19, 2006. The date of discovery whithin which he filed PCR application was the date when he received the impanelment sheet which showed that someone other than Ashley Wilburn,(who signed the indictment as the grand jury foreman)was the grand jury foreman during the term that the state alleged. Applicant received the impanelment sheet within the one year statute of limitations and made the required filing, from the date he received the impanelment sheet August 2007. This evidence could not by the exercise of due diligence be discovered because the state had never taken the po ition of when in particular the applicant was indicted. Thus, the Statute of limitations as alleged by Respondent is not applicable and instead 17-27-45(c) statute of limitations should be applied.

C. Contrary to the Respondent's allegations in their response. The newly discovered evidence does not stem "from lack of testimony related to his [applicant] grand jury indictment." Return p.6 . Instead, as previously pointed out, it stems from the states' position that Applicant was indicted in 1995, which newly discovered evidence revealed that such fact is not true. This evidence and the specific allegations made in the app ication. Require that a hearing be held as was done in the case of State v. Bultron, 457 S.E.2d 616 (1995) to determine whether the grand jury of Cherokee County has been reduced to a"mere play thing of the pr secutor." State v. Thompson, 409 S.E.2d 420 (SC 1991). Thus, allowing for the evidence of actual abuse of grand juryproceedings to be reviewed in obtaining an unlawful indictment.

For the foregoing reasons, Applicant movesto be granted a hearing in this most important matter.

Respectfully requested,

s/ Jay Walter Tate, Jr.

Jay W. Tate, # 131879
ECI/F3-B-240
610 Hwy 9 West
Bennettsville, SC 29512

cc:
file

EXHIBIT 1

State of South Carolina	)	IN THE COURT OF COMMON PLEAS
County of Cherokee	)	7th JUDICIAL CIRCUIT
Jay W. Tate, # 131879,	)	
Applicant,	)	CASE No. 08-CP-11-681
vs.	)	
State of South Carolina,	)	REQUEST FOR DISCOVERY (INTERROGATORIES
Respondent.	)	& REQUEST FOR PRODUCTION OF DOCUMENTS) (RESPONDENT AND NON-PARTY Clrk of Ct)

FILED IN OFFICE OF BRANDY W. MCKEEN 2009 JUL -8 A 8:49 CLERK OF COURT CHEROKEE COUNTY, SC

Pursuant to Rules 33 and 34 SCRCP, the applicant submits the following interrogatories and request for production of documents to Respondent and Cherokee County Clerk of Court (non-party). You are directed to answer each of the interrogatories in writing under oath, and produce each of the requested documents for inspection within 30 days of service.

1. What is the name of the Cherokee County Grand Jury Doscket Coordinator for the time period between June 1994 and January 1995?

2. Who was responsible for maintaining disposition of True Bills issued by the Cherokee County Grand Jury? (between June 1994 and January 1995)

3. State the procedure in effect between June 1994 and January 1995 to process and obtain a true bill indictment. If those procedures are set forth in any policy, directive, or other document, produce the document.

4. State the names, titles, and duties of all Cherokee County Clerk of Court, or other court staff members who have responsibility for docketing, assigning case (indictment numbers), recording the names of grand jurors for each specific term. If such duties or responsibilities are set forth in any job description, policies, directives, or other documents, produce the document.

5. State the name(s) of all witnesses that testified before the grand jury proceedings for indictment(s) No: 94-GS-11-928 & 929. Produce the Documents.

6. State any and all writen or recorded statements made by each of the witnesses and the sclicitor during the grand jury procedures held to obtain indictments No. 94-GS-11-928 & 929. If such statements are contained within specific transcript(s), records or other documents, produce the documents, or minutes of grand jury proceedings.

7. State during which specific term of the Cherokee County grand jury was the Applicant indicted. If such information is contained in any docket, record, document, or recorded writing. Produce the document.

8. Provide all other documents, items of evidence, or sworn or unsworn statements or affidavits, or testimony that relate to the indictment of Applicant by the Cherokee County grand jury.

December 3, 2008

Jay W. Tate, #131879
Evans CI/F3-B-240
610 Hwy 9 West
Bennettsville, SC 29512

EXHIBIT 1 pg. 2

Honorable Brandy W. McBee
Clerk of Court Cherokee Co.
P.O. Drawer 2289
Gaffney, SC 29342

December 3, 2008

RE: Request for Discovery Material And Certificate of Service.

Dear Ms. McBee:

Enclosed please find the above referenced material. A copy of said Discovery request has also been served on the S.C. Attorney General. Please provide the requested information within the time allowed and contact me if you have any questions regarding this matter.

Sincerely,

S/ Jay W. Tate

CERTIFICATE OF SERVICE

I, Jay W. Tate, do hereby certify that I have on this day mailed a copy of Request for Discovery to the below listed individuals and a copy of this letter and Certificate of Service by placing same in the hands of SCDC mail room officials first class postage prepaid and return address clearly marked:

Individuals Served:

Honorable Brandy W. McBee
Clerk of Court, Cherokee Co.
P.O. Drawer 2289
Gaffney, SC 29342

Henry McMaster
S.C. Attorney General
P.O. Box 11549
Columbia, SC 29549

December 3, 2008

S/ Jay Walter Tate, Jr.
Jay W. Tate, # 231479
Evans CI/F1-P-240
610 Hwy 9 West
Bennettsville, SC 29512

cc:
Brandy W. McBee, Clerk of Ct.
Henry McMaster, S.C. AG
file JT

EXHIBIT 2

The Supreme Court of South Carolina

Jay Walter Tate, Appellants,

v.

State of South Carolina, Respondent

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2007 JUL -8 A 11:49
BRANDY W. MCBEE

ORDER

Appellant's counsel served and filed the notice of appeal in this matter, and indicated that the appeal is from the denial of a post-conviction relief (PCR) application. Based on this, the South Carolina Court of Appeals transferred this case to this Court.

It now appears that this appeal involves the denial of a petition for a writ of mandamus and not a PCR application.[1] Accordingly, this matter is hereby transferred to the Court of Appeals.

C. J.

FOR THE COURT

Columbia, South Carolina

May 17, 2007

[1] While specifically declining to construe the petition for a writ of mandamus as a PCR application, the circuit court judge indicated that, if the action was construed as a PCR application, it would be barred as being untimely and as being successive. Since neither appellant's counsel nor appellant have provided an adequate explanation under Rule 227(c), SCACR, any potential argument that the circuit court judge should have construed this matter as a post-conviction relief action will not be considered in this appeal. The appeal shall proceed solely as an appeal from the denial of a petition for a writ of mandamus.

EXHIBIT 3

RECEIVED
APR 14 2008
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Cherokee County
Doyot A. Early, III Circuit Court Judge

Case No: 2005-CP-11-392

Jay Walter Tate, Jr., ... Appellant,

vs.

State of South Carolina, ... Respondent.

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2009 JUL -8 A 11:49
BRANDY W. MCBEE

PRO-SE BRIEF

Jay Walter Tate, Jr. #131879
Appellant, Pro-Se
SCDC/Evans C.I. F-3-240-B
610 Highway #9 West
Bennettsville, South Carolina 29512

ARGUMENT

"The primary purpose or function of this writ is to enforce an established right, and to enforce a corresponding imperative duty created or imposed by law. It is designed to promote justice, subject to certain well-defined qualifications. Its principle function is to command and execute, and not to inquire and adjudicate." Willimon v. City of Greenville, 243 SC 82, 86-87, 132 S.E.2d 169, 17-171 (1963). Accordingly, to obtain a writ of mandamus requiring the performance of an act, the appellant must show, 1) a duty of the opposing party to perform an act, 2) the ministerial nature, 3) the appellant's specific legal right for which discharge of the duty is necessary, and 4) a lack of any other legal remedy. Cooper v. State, 338 SC 202, 525 S.E.2d 886 (2000).

First, the Appellant would direct this court's attention to the filed Writ of Mandamus, specifically the named defendants. The Appellant is informed, and has strict proof of an illegal process that was utilized to indict him. The Appellant did request from the lower court to order that Ashley Wilburn (former Grand Jury Forewoman) and Trent Pruett (Former Solicitor) to provide numerous documents and testimony that would clearly establish the illegal process in conferring jurisdiction to the General Sessions Court. App. page 19 lines 14-18. The Appellant, at no time, alleges Subject Matter Jurisdiction, only to either grant or deny a Writ of Mandamus, or in the alternative, command the named Defendants to provide the necessary testimony or documentary evidence to establish what (date) and what method was utilized to confer jurisdiction to the General Sessions Court, and execute any irregularity that would be deemed as contrary to State Statute or Constitution. Unfortunately, the command and execute requirement was ignored. This Appellant does allege and assert that he is in possession of clear and convincing evidence that the grand jury was impaneled falsely, and the State utilized that presumption of correctness to make an unlawful taking of the Appellant's right's, without Due Process of Law.

A plain reading of Section 17-25-10 requires that a criminal defendant cannot be punished [sentenced] for an offence until after the State has duly and legally convicted the individual. That did not happen in this case. As stated above, the Appellant is now in possession of strict proof to the contrary, and given an opportunity, will provide such to a court.

Secondly, the Court of General Sessions and its officers have a plainly defined duty to conduct judicial proceedings in conformity with Constitutional and Statutory law. A criminal defendant has the right to a valid indictment returned by a legally constituted grand jury. See US Constitution Amendment V,

SC Constitution Article I, §11 and SC Code Ann. §14-7-320 and SC Code Ann. §17-19-10. Those and many other rights are owed to every criminal defendants in this State. See SC Constitution Article I, §3 and must be provided before a lawful conviction can take place.

More importantly, the Court of General Sessions and its officers are vested with exclusive authority to prosecute criminal violations of law in this State. Thus, the acts that the Appellant requested to be enforced, are clearly ministerial in nature, and would therefore be proper for this Court to issue a Writ of Mandamus.

Third, the Appellant has cited throughout this brief numerous Constitutional provisions, statutes, and case law, all demonstrating that he does have a clearly established right to force the Court of General Sessions to conduct its criminal prosecution in conformity with the requirements of due process. In addition, the Appellant reminds this Court that he is in possession of strict and undeniable proof that an irregularity did prejudice him, and that the Appellant did petition to lower court for a Writ of Mandamus, basically requesting that the Court order the Defendants to produce certain information, that would highlight the irregularity and the frequency of the illegal proceedings.

Fourth, the Appellant has exhausted all available remedies to address this issue, and no other available remedy exists to request that an Order be issued for this information. At no time did this Appellant ask or request this Court or any other court vacate his sentence, nor did he request that his criminal prosecution be upset for any reason. App. p. 20 lines 12-13.

The Respondents, acting on the behalf of Ashley Wilburn, and Trent Pruett, incorrectly determined that this was an application for Post-Conviction Relief, and stated that it was successive as determined by SC Code Ann. §17-27-90, and time barred by SC Code Ann. §17-27-45(a). (App. 19 lines 1-3. This Court can plainly see that the Appellant was requesting information and not relief. The Respondent incorrectly used the above-mentioned statutes to dismiss the Writ of Mandamus with does not apply to a Writ of Mandamus.

Accordingly, the Appellant has shown a clear duty of the opposing party to perform an act that is ministerial in nature. Also the Appellant has correctly identified a right to force discharge of that duty, and has no other adequate legal remedy to seek redress.

Under 28 U.S.C. §1361 (1988), district courts have jurisdiction to enforce Federal officials constitutional statutory duties that are clear and free from doubt. See Kahane

v. Carlson, 527 F.2d 492 (2nd Cir. 1975), Mandamus, however, is extraordinary writ that should not be granted if other relief available. See Exparte Fahey, 332 US 258 (1974).

In the present case the Appellant request grand jury forewoman, Ashley Wilburn produce the following information:

1. Please advise as of what date you resided as Cherokee County Grand Jury? App. P. 2 lines 18-20

2. What was your position on the Grand Jury? App. p2 line 21

3. Are you a registered voter in the State of South Carolina? App. p2 lines 22-23

4. How many grand jury members appeared with you during the term of court that you True Billed indictment 94-GS-11-28 and 94-GS-11-929? App. p2-3 lines 24-25

In the present case Appellant request the Solicitor Trent N. Pruet produce the following information and documents:

5. Produce copies of Legal Documents listing the (dates) that you appeared before the S.C. Grand Jury for Cherokee County to present a indictment against Petitioner in Indictment No.# 94-GS-11-929, #94-GS-11-928? App. p3 lines 12-16.

6. Did the grand jury foreman (date) the date of True Bill in your presence? App. p4 lines 22-25

The Respondent's did take the position on the record that the Appellant was indicted in 1995. App. 17 lines 8-10.

CONCLUSION

Therefore, the Appellant respectfully request that this case be remanded for further proceedings, and or in the alternative for a Writ of Mandamus be granted, and that the information the Appellant seeks be released.

This 10TH day of March, 2008.

Respectfully submitted,

Jay Walter Tate, Jr Pro-se

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Cherokee County
Doyot A. Early, III Circuit Court Judge

Jay Walter Tate, Jr., ... Appellant,

vs.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Jay Walter Tate, Jr., the Appellant, do hereby certify that I did on the 10 day of March, 2008, deposit a copy of the foregoing Pro-Se Brief with the Evans C.I. Mailroom Clerk to be forwith to the U.S. Mail System with sufficient postage, addressed as follows:

S. Prentiss Counts
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

S/ Jay Walter Tate Jr.
Jay Walter Tate, Jr. #131879
Appellant, Pro-Se
SCDC/Evans C.I. F-3-240-B
610 Highway #9 West
Bennettsville, South Carolina 29512

Sworn and subscribed to before me
on this 10 day of March, 2008.

Notary Public for South Carolina
My Commission Expires: 08-06-2009

EXHIBIT 4

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS NONJURY
COUNTY OF CHEROKEE)

JAY WALTER TATE,) TRANSCRIPT
APPLICANT,) OF
vs.) RECORD
STATE OF SOUTH CAROLINA,) 05-CP-11-392
RESPONDENT.)

September 19th, 2006
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE DOYET A. EARLY, III, JUDGE.

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

RODNEY W. RICHEY
ESQ.
Attorney for the Applicant

S. PRENTISS COUNTS
ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2009 JUL -8 A 11:49
BRANDY W. MCBEE

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

INDEX OF WITNESSES

(There were no exhibits marked or testimony taken during this hearing.)

PROCEEDINGS

THE COURT: Good morning, Mr. Tate.

How are you doing?

MR. TATE: I'm doing all right, sir.

THE COURT: All right. As I understand, we have a motion in this, in Mr. Tate's case.

MS. COUNTS: Yes, Your Honor, we're here on the State's motion to dismiss. Mr. Tate was indicted for murder and ABWIK in 1995. He went to trial and was found guilty of murder and, found guilty of both murder and ABWIK.

THE COURT: Look likes ABHAN in your return.

MS. COUNTS: ABHAN. I'm sorry. That was the lesser.

He went to trial or the trial judge was Sydney Floyd. Judge Floyd sentenced him to life and nine years under ABHAN. He tried to file an appeal, but it failed for, because he failed to provide proof of service to the Supreme Court and was dismissed in November of 1995. He filed his first PCR --

THE COURT: December 4, 1995.

MS. COUNTS: Thank you, Your Honor.

And it was dismissed. He's also filed a Writ of Habeas, which was denied. The applicant filed this application in August of 2005, which was titled Writ of Mandamus, which the State---

THE COURT: Well, didn't, didn't, when he had his PCR before Judge Cole, he denied and dismissed it, but he allowed him to refile his Anders brief and then he filed that with the Court of Appeals or Supreme Court. He was granted a belated appeal, and his convictions were affirmed on the direct appeal issue.

MS. COUNTS: Yes, Your Honor. Thank you.

His current application is a Writ of Mandamus, which the State construes as an application for post-conviction relief. In his application he challenges the Grand Jury.

THE COURT: Hold on a second.

Hadn't he been back?

Didn't he file a Writ of Habeas Corpus in November of '01?

MS. COUNTS: Yes, Your Honor.

THE COURT: And Judge Baxley dismissed that with prejudice, appeal was filed, and that was dismissed on May 23, '05, and now he filed a Writ of Mandamus alleging the Trial Court lacked subject matter jurisdiction due to the defects in the indictments.

Is that where we are?

MS. COUNTS: Yes, Your Honor.

Actually my first motion would be move to dismiss the, because it's a writ.

THE COURT: Okay.

MS. COUNTS: In -- but in the alternative, if it's, if it's construed PCR, we'd move to dismiss because, for the grounds it's successive and Statute of Limitations.

THE COURT: All right. Mr. Richey, tell me why I shouldn't dismiss this as being either successive, beyond the Statute of Limitations. I assume you're gonna say he can raise subject matter jurisdiction any time.

MR. RICHEY: Yeah. And Your Honor, kind of what Mr. Tate is, Tate is filing, Your Honor, is, is kind of as a Writ of Mandamus, and what he's seeking in this Writ, Your Honor, is information. My read of it, going over it with Mr. Tate---

THE COURT: What information does he want?

MR. RICHEY: He wants -- Your Honor, he lists some nine things that he wants. Not some -- excuse me. Some sixteen items of information he wants. Couple of those items being basically deposition testimony from the Grand Jury foreman, testimony from the previous solicitor---

THE COURT: Testimony, these are, these are -- this is testimony that's already been taken?

He just wants a copy of it?

MR. RICHEY: No, this testimony has not been taken.

THE COURT: Well, he wants to take depositions of them?

MR. RICHEY: Of the jury foreman. He wants testimony to her regarding the date that he was actually indicted.

The date doesn't appear on the front of the indictment. He wants to know what information that Trent Pruett, at the time who was the prosecutor, brought before the Grand Jury. He, he wants to know how many jurors appeared during the term of Court that the indictments were true billed. He asked for some discovery information, which, I have, I've discussed with Mr. Tate. A lot of the discovery information, the DNA test, should be something that his previous lawyers filed. But he's asking the Court to assist him in getting that.

It's a litany of information that, Your Honor, that he wants. I mean he's not asking the Court to give him any relief as to his case.

THE COURT: Well, what else he wants -- keep listing them.

Discovery, what else?

MR. RICHEY: Okay. But I'll go through, through them, Your Honor. He, he wants, what was the lady's position on the Grand Jury. The indictment shows she was the foreman.

THE COURT: Hold on. Slow down.

You want the testimony of the Grand Jury foreman, testimony of Solicitor Trent Pruett, the number of jurors, jurors on the Grand Jury that indicted him, discovery.

What else?

MR. RICHEY: Okay. He want, request for Trent Pruett,

copies of legal documents listing the date that he appeared before the Grand Jury, he being Trent Pruett, against the petitioner, against him. He wants the true bill certified copy of the indictment. He wants the arrest warrant. I think we've got all those.

Is that correct?

MR. TATE: Yes.

MR. RICHEY: So, Your Honor, we're withdrawing those. We have those.

He, he wants to produce the trial transcript, which we already have, Your Honor. He wants what date the, that he appeared in front of the Grand Jury. That's Trent Pruett. So, that would go to his deposition. Did the Grand Jury foreman sign the, the indictment.

THE COURT: Well, you got the indictment.

MR. RICHEY: We got the indictment, Your Honor, and there's a copy and I've shown it to him. But it's, in fact, signed. But since they don't have a date on it, we question the signature.

THE COURT: Okay.

MR. RICHEY: And he wants to know why the Grand Jury failed to convene to hear his case. He does, he does not---

THE COURT: So, you can find that out through the deposition of the Grand Jury foreman I assume?

MR. RICHEY: Yes, that's it.

THE COURT: All right. Mr. Richey, you have any case law, rules, or anything else, or do you know of anywhere this is ever been done?

MR. RICHEY: No. But, but I would, I would ask the Court, if the Court would actually, if the Court is inclined to dismiss this case, to not dismiss it with prejudice, to allow him to file in the Supreme Court if he wants to do that. I mean I don't, I don't have any case law that allows me to do it. But if it's a Writ, I would like to still hold, keep the door opened where he can file this with the Supreme Court.

THE COURT: Well, if I dismiss it with or without prejudice he can still do what he wants to in the Supreme Court. I just don't know of any legal grounds that would allow me to do it. I find it to be successive, beyond the Statute of Limitations, and I'm gonna dismiss it with prejudice.

MR. TATE: Your Honor?

Your Honor?

THE COURT: Yes, sir. Yes, sir. Hold on. Hold on. I'll be glad to hear from you.

MR. TATE: Okay. Okay. This is a Writ of Mandamus. The State of South Carolina don't know when the Grand Jury convened or when I was indicted. I want to see if this whole thing is a fraud. I'm trying to get documentary

evidence to show that I was indicted. That's, that's the information I want. I want documented evidence and I want Trent Pruett subpoenaed and I want the foreman subpoenaed to say that it was a Grand Jury.

THE COURT: I understand.

MR. TATE: Cause this whole thing could of been a fraud---

THE COURT: I understand what you want.

MR. TATE: ---when the Grand Jury convened on it.

THE COURT: I understand your position, sir. But I don't know of any law that allows me to grant your request. You certainly have the right to ask the Supreme Court who's above me.

Thank you.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE) SEVENTH JUDICIAL CIRCUIT
2009 NOV 30 A 11: 20
) 2008-CP-11-0681
Jay Walter Tate, #131879,) BY ANDY W. MCBEE
)
Applicant,)
v.) **FINAL ORDER**
)
State of South Carolina,)
)
Respondent.)

CLOSED
NOV 30 2009
MARC HUGHES
CLERK
ERROR
2009 DEC 9 AM 9:03

This matter comes before the Court pursuant to an application for post-conviction relief filed August 8, 2008.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated May 16, 2009, provisionally denying and dismissing this action. This Court gave Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached herewith are the Conditional Order of Dismissal and the Affidavit of Service, dated June 17, 2009, serving the Order on the Applicant.

The Applicant submitted a pro se document captioned "Applicant's Objection to Conditional Order of Dismissal" dated July 3, 2009. The Applicant asserted the following reason he is entitled to an evidentiary hearing:

1. His receipt of the True Bill Indictment constitutes "Newly Discovered Evidence" that could not have been discovered earlier by due diligence;

2. The "impanelment sheet" indicates Ashley Wilburn, who signed the indictment, was not the grand jury foreman.

An Applicant requesting a new trial based on after discovered evidence must show that the

evidence:

> (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had." Hayden, Id. This Court finds the Applicant failed to meet his burden to demonstrate after-discovered evidence.

Further, after Discovered Evidence in a PCR proceeding is subject to a statute of limitations provided by the Uniform Post Conviction Procedure Act of one year from the date the information was or could have been discovered by due diligence. S.C. Code Ann. §17-27-45(c) (2008). The indictments underlying the Applicant's case date back to 1994 and 1995. The alleged error could have been discovered with due diligence within a year of the issuance of the indictments. As a result, the Applicant's claim is also untimely.

VOID
CLOCKED IN
FILED
APR 9 9:08

This Court finds that Applicant's response is not sufficient to show why the Conditional Order of Dismissal served upon him should not become final. This Court finds that Applicant failed to present sufficient cause for filing a successive application and for filing more than twelve (12) years after the statute of limitations expired.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice.

2

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 227, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 20 day of November, 2009.

J. Mark Hayes, II
Administrative Judge
7th Judicial Circuit

Spartanburg, South Carolina.

VOID
CLOCKED IN

Exhibit 1

Jay Walter Tate, Jr. #131879
Evans C.I. F-3B-240
610 Highway #9 West
Bennettsville, South Carolina 29512

September 22, 2010

Honorable Brandy W. McBee
Clerk of Court, Cherokee County
P.O. Drawer 2289
Gaffney, South Carolina 29342

2010 SEP 22 A 11:15
BRANDY W. MCBEE
CLERK OF COURT
CHEROKEE COUNTY, S.C.

RE; Appointment of Counsel
Jay Walter Tate, Jr V. State of South Carolina
Case No. 2008-CP-11-0681

Dear Ms. McBee,

You informed me that my case had been dismiss. I never received a Final Order of Dismissal from your office or the Attorney General Office. I received a letter dated June 5, 2009 that was sent to you about the Conditional Order of Dismissal, which I am sending you a copy of.

If there is no Final Order of Dismissal please appoint Counsel. If there is a Final Order of Dismissal Please send it to me.

Thanking you in advance for your time, help and consideration in this important matter

Sincerely,

HENRY MCMASTER
ATTORNEY GENERAL

June 5, 2009

The Honorable Brandy W. McBee
Cherokee County Clerk of Court
P.O. Drawer 2289
Gaffney, South Carolina 29342

RE: **Jay Walter Tate v. State of South Carolina**
2008-CP-11-0681

Dear Ms. McBee:

Enclosed for filing in the above matter is a Conditional Order of Dismissal signed by the Honorable J. Mark Hayes, II, and dated May 16, 2009. Please return a clocked copy of the order to me and I will make arrangements for personal service of the order on the inmate.

Please note that this Order does not end this post-conviction relief matter but only informs the applicant's counsel that the Court "intends to dismiss" the application. At a later date and if appropriate, Judge Hayes will sign a "Final Order of Dismissal" which will conclude the case.

Sincerely,

Michelle Parsons Kelley for
Assistant Attorney General

MPK/aam
Enclosure

cc: Jay Walter Tate, SCDC No. 131879
Evans Correctional Institution, F3-B-240
Highway 9 West
Bennettsville, SC 29512

Exhibit 2

2010 AUG 26 A 10:18

BRANDY W. MCBEE

JAY WALTER TATE, JR., #131879
EVANS C.I. F3B-240
610 HWY 9, WEST
BENNETTSVILLE, S.C. 29512

AUGUST 25, 2010

HONORABLE BRANDY W. McBEE
CLERK OF COURT, CHEROKEE COUNTY
P.O. BOX DRAWER 2289
GAFFNEY, S.C. 29342

2010 AUG 26 P 1:32
BRANDY W. MCBEE

RE: APPOINTMENT OF COUNSEL
JAY WALTER TATE, JR. V. STATE OF SOUTH CAROLINA
CASE NO. 2008-CP-11-0681

DEAR MS. McBEE:

WILL YOU PLEASE APPOINT ME COUNSEL TO REPRESENT ME IN MY UP COMING PCR CASE IN THE CHEROKEE COUNTY COURTHOUSE.

THANKING YOU IN ADVANCE FOR YOUR TIME, HELP AND CONSIDERATION IN THIS MATTER. I REMAIN WITH HIGHEST REGARDS.

SINCERELY,

Jay Walter Tate Jr.

JAY WALTER TATE, #131879

CC: ON FILE

Case 2008-CP-11-681 has been dismissed, therefore a request for an Attorney is not necessary.

8/26/10

432

STATE OF SOUTH CAROLINA)
)
COUNTY OF Cherokee)
)
Jay Walter Tate, Jr #131879)
Plaintiff(s))
)
vs.)
)
State of South Carolina)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

_____-CP-_____-_____

20CP-110489

Submitted By: Jay Walter Tate, Jr SC Bar #: _____
Address: Lee Correctional Institution Telephone #: _____
990 Wisacky Highway Fax #: _____
Bishopville, South Carolina 29010 Other: _____
E-mail: _____

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. **This form is NOT required to be filed in E-Filed Cases.**

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete**

☐ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2020 JUL 15 PM 3:15
BRANDY W. MCBEE

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☒ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Incapacitated Adult Settlement (790)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)
- ☐ Permanent Restraining Order (680)
- ☐ Interpleader (690)

Submitting Party Signature: Jay Walter Tate, Jr **Date:** 7-9-20

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FORM 5

20CP-11 0489

STATE OF SOUTH CAROLINA)
)
County of CHEROKEE)
)
Jay W. Tate #131879)
Full name and prison number (if any) of Applicant)
)
v.)
)
State of South Carolina)
)
Attorney General)

IN THE COURT OF COMMON PLEAS

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2020 JUL 15 PM 3:47
BRANDY W. MCBEE

APPLICATION FOR

POST-CONVICTION RELIEF

After Discovery Evidence
S.C. Code of Law Ann
17-27-45(C)

INSTRUCTIONS - 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 Lee Corr, Inst 990 Wisacky Hwy Bishopville, S.C. 29010

2. Name and location of Court which imposed sentence General Sessions Cherokee County

3. Name(s) of co-defendant(s) (if any) NA

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 94-GS-11-928; Murder

(b) 94-GS-11-929; Assault and Battery of

(c) a high and aggravated Nature.

5. The date upon which sentence was imposed and the terms of the sentence:

(a) January 18, 1995; Life for Murder and Nine

(b) (9) years for assault and Battery of a

(c) high and aggravated nature.

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty YES

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. The Supreme Court of South Carolina

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. NO

ii. _____

iii. _____

(c) the date of each such result:

i. November 2, 1995

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Rule 209 of the South Carolina

ii. Appellate Court Rule (SCACR

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) NA

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) S.C. Code of Law Ann 17-27-45

(b) (C) After Discovery Evidence

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Memorandum of Law Support

(b) PCR Application.

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NA

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NA

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NA

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. NA

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. NA

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. NA

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. NA

ii. _____

iii. _____

iv. _____

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

i. NA

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?

NA

_____

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

(a) which grounds have been presented:

i. NA

ii. _____

iii. _____

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

i. NA

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:

(a) NO

(b)

(c)

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

(a) your arraignment and plea?

(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?

NO

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

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

i. Richard H. Warder
Post office Box 26133 Greenville SC.

ii. 29616

iii.

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

i. Trial

ii.

iii.

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

Vacate sentences

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

NO

STATE OF SOUTH CAROLINA)
)
County of Cherokee)

VERIFICATION

I, Jay W. Tater Jr, 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.

Jay W. Tater Jr

SWORN to and subscribed before me this 9th day of July, 2020.

Notary Public (L.S.)

My Commission Expires: 09/04/2029

Revised 3/2003

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

I, Jay W. Tate Jr. #131879, 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.

Jay Walter Tate Jr
Applicant

SWORN or affirmed to and subscribed before me this 7th day of July, 2020.

Notary Public

My Commission Expires: 09/04/2029

Revised 3/2003

[Exhibit A]

Cherokee County
Sheriff, Steve Mueller

August 30, 2019

Jay Walter Tate Jr. #131879 F-2-A-1139
Lee Correctional Institution
990 Wisacky Highway
Bishopville, S.C. 29010

Mr. Tate.

I have looked through your file for the search warrant you asked for. There is not one in there. However, they originate in the Magistrate's Office. You might want to send your request to that office. They are located in the same building we are so you can used the 312 E Frederick Street, Gaffney SC address.

Sincerely,

Donna Brackett

Donna Brackett
Records Clerk

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

Jay Walter Tate Jr.,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A: 20CP-11-0489

SUMMONS

To the Respondent Above-Named:

You are hereby summoned and required to answer the PCR Application herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this PCR Application upon the subscribed, at the address shown below, within sixty (60) days after service hereof, exclusively of the day of such service, and if you fail to answer the PCR Application judgment by default will be rendered against you for the relief demanded in the PCR Application.

S/ Jay Walter Tate Jr.
Jay Walter Tate Jr.
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010

S.C.

Date: July 9 2020

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2020 JUL 15 PM 3:49
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

Jay Walter Tate Jr.,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A: 20CP-11 0489

AFFIDAVIT OF SERVICE

I, Jay Walter Tate Jr., hereby served a true copy Post-Conviction Relief Application by placing a true copy in the United States Mail to the address listed below:

Clerk of Court, Cherokee County
P.O. Drawer 2289
Gaffney, S.C. 29342

S/ Jay Walter Tate Jr.
Jay Walter Tate Jr.
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010

Date: July 9 2020

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2020 JUL 15 PM 3:49
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA **COUNTY OF CHEROKEE**	**IN THE COURT OF COMMON PLEAS**
Jay Walter Tate Jr., Applicant, v. State of South Carolina, Respondent.	**CASE:** 20CP-11 0489

MEMORANDUM OF LAW IN SUPPORT OF POST-CONVICTION RELIEF APPLICATION

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2020 JUL 15 PM 3:47
CINDY W. MCBEE

To Respondent:

Now comes Applicant moves before Court of Common Pleas pursuant to S.C. Code of Law Ann 17-27-10, 17-27-80; Based on after-discovered evidence; S.C. Code of Law Ann 17-27-45(C):

STATEMENT OF THE CASE

On or about June 1, 1994, the Cherokee County Sheriff's Office received a 911 call of an alleged assault at 519 James Street in Cherokee County. Officer Duncan and Officer Manning were the first to arrive at the scene to find Joe Murray and Brenda Tate, both victims, injured.

Officer Duncan was informed by Murray that the assailant, Jay Tate, was no longer on the premises. The victim stated that the suspect was headed uphill (see T.T. pg. 74, line 19 – 22). Also on the scene was James Wilkins who stated that the suspect headed towards the Interstate (see T.T. pg. 124, line 9 – 13). Officer Duncan testified at trial that the witnesses stated the direction in which Mr. Tate had ran (see T.T. pg. 182, line 16 – 17). Duncan elected to secure the crime scene for evidence. During his search of the premises, he discovered a set of house keys laying on the ground at the side of the residence (see T.T. pg. 183, line 7 – 25). Instead of following police protocol for collecting and packing evidence, Duncan used the keys to enter the dwelling. He gave the following testimony:

"We got in front of the trailer and looked to see if maybe Jay Tate, who they had accused of doing the stabbing, was inside. So we...I tried a key...and the door was locked. I tried another key and the door opened, so we went inside to more or less secure the scene; that was our basic.

Article 1 section 10 of the South Carolina Constitution and the Fourth Amendment to the United States Constitution.

17-13-140: Issuance, execution and return of search warrants for property connected with the commission of crime, inventory of property seized.

ARGUMENT 1

The Applicant contends that on September **16,** 2019, Applicant made a discovery of after-discovered evidence collected by Officer Duncan. Evidence collected at the crime scene, a set of house keys. Whereby Officer Duncan took the keys and unlocked the door, opened the door, entered and searched Applicant's dwelling without a search warrant or inventory search, verifying proof of persons handling evidence seized at a crime scene. See **STATE V. SPANN 513 SE2d 98, 100 (S.C. 1999)** (Granting motion for new trial where new evidence was discovered eight (8) years after the original trial).

In order to prevail on motion for new trial based on after-discovered evidence, movant must show the evidence: (1) Is such that it would probably change the result if a new trial was granted; (2) Has been discovered since the trial; (3) Could not in the exercise of due diligence have been discovered prior to the trial; (4) Is material; and (5) Is not merely cumulative or impeaching. (1) Applicant contends Respondent did not have probable cause to enter house without search warrant at 519 James

in Solicitor's discovery; (3) Applicant contends that search warrant was never discovered before trial; (4) Applicant contends that he was never issued a search warrant before trial; (5) Applicant contends that there was no search warrant issued by the Cherokee County Sheriff's Office for 519 James Street from Officers Manning or Duncan.

Applicant stated that the Respondents did not contain a search warrant or had probable cause to enter home without a search warrant. See Exhibit A

"[A] Great burden is placed... on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the arche-type of the privacy protection secured by the Fourth Amendment." **ID at 317, 435 F.2d at 389 (Footnote Omitted)**

CONCLUSION

Wherefore, the above-described after-discovered above has never been presented nor heard by the Court. The Applicant respectfully requests a hearing to be held on this motion.

Respectfully Submitted,

S/ Jay Walter Tate Jr.

Jay Walter Tate Jr.

Date: July 9 2020

STATE OF SOUTH CAROLINA **COUNTY OF CHEROKEE**	**IN THE COURT OF COMMON PLEAS** **7TH JUDICIAL CIRCUIT**
Jay Walter Tate Jr. #131879, Applicant, v. State of South Carolina, Respondent.	**CASE NO: 2020CP-1104 89** **REQUEST OF INPANELMENT DOCUMENTS INCLUDING THE STATE PETITION, SUPPORTING MATERIALS, AND INPANELING JUDGE'S ORDER** **(RESPONDENT AND NON PARTY CLERK OF COURT)**

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, SC
2020 JUL 15 PM 3:53
BRANDY W. MCBEE

This Motion comes before the Court pursuant to Rule 5 to request the following documents: **Requesting Inpanelment documents, including the State's Petition, Supporting Materials, and the Inpaneling Judge's Order.** This may be released to a defendant made in a timely request to applicant in a PCR proceeding **Evans v. State, 363 S.C. 495, 505, 611 SE2d 510, 515.**

1. **State the name(s) of all witnesses that testified before the Grand Jury proceedings for Indictment Numbers 94-GS-11-928 and 94-GS-11-929.**
2. **Provide all other documents, tangible evidence, item of evidence, or sworn or unsworn statements or affidavits, or testimony that relate to the indictments of Applicant by Cherokee County Grand Jury.**
3. **The DATE of the Grand Jury Findings.**

Respectfully Submitted,

S/ Jay Walter Tate Jr.

Jay Walter Tate, Jr. #131879
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010

Date: July 9 2020

Jay Walter Tate, Jr. ..... Applicant

vs.

State of South Carolina .....Respondent

CERTIFICATE OF SERVICE

I, Jay Walter Tate Jr., the Applicant, do hereby certify that I did on the 9th day of July, 2020, deposit a copy of the foregoing **Request of Inpanelment Documents, Including the State Petition, Supporting Materials, and Inpaneling Judge's Order** with the Lee Correctional Institution Mailroom Clerk the be forwarded to the U.S. Mail System with sufficient postage addressed as follows:

Individuals Served:

Honorable Brandy W. McBee
Clerk of Court, Cherokee County
Post Office Drawer 2289
Gaffney, South Carolina 29342

Alan Wilson
South Carolina Attorney General
Post Office Box 11549
Columbia, South Carolina 29549

S/ Jay Walter Tate Jr.
Jay Walter Tate Jr. #131879
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010

Sworn and subscribed to before me
on this 9th day of July, 2020
Notary Public for South Carolina
My Commission Expires: 09/04/2029

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C
2020 JUL 15 PM 3:49
BRANDY W. MCBEE

20CP-110489

Jay Walter Tate, Jr. #131879 F-6-1131
Lee Correctional Institution
990 Wisacky Highway
Bishopville, S.C. 29010

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2020 JUL 15 PM 3:47
BRANDY W. MCBEE

July 10, 2020

Dear Honorable Clerk of Court of Cherokee County;

Enclosed please find **PCR Application** and **Request of Inpanelment** documents, including the **State Petition, Supporting Materials and Inpaneling Judge's Order**, requesting a clock-dated stamped copy along with **Summons**:

1. **Please put the same case number on the Request that's assigned to the PCR.**
2. **I have enclosed an envelope with prepaid postage for you to return a copy of the PCR and Request.**
3. **The originals will have Notary Seal on them.**
4. **Ms. McBee, will you please grant me the Request of Inpanelment documents, including the State Petition, Supporting Materials and Inpaneling Judge's Order. Please let me know if you will honor this request.**
5. **PLEASE APPOINT COUNSEL.**

Thank you for your assistance.

Sincerely,

S/ Jay Walter Tate, Jr.

Jay Walter Tate, Jr.

ay Walter late, Jr. #131899 F-6-A-1131
ee Correctional Institution
90 Wisacky Highway
ishopville, South Carolina 29010

449

FILED IN THE OFFICE OF THE
CLERK OF COURT
CHEROKEE COUNTY, SC
2020 JUL 15 PM 3:46

UNITED STATES POSTAGE
PITNEY BOWES
02 1P $ 006.
0000830020 JUL 09
MAILED FROM ZIP CODE 2

BRANDY W. MCBEE

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL®

7019 2280 0002 1981 8309

Honorable Brandy W. M
Clerk of Court, Cherokee
Post Office Drawer 228
Gaffney, South Carolina 2

Cherokee County Clerk of Court Office

BRANDY W. MCBEE
CLERK OF COURT

PO DRAWER 2289
125 E. FLOYD BAKER BLVD.
GAFFNEY, SC 29342
PHONE: (864) 487-2571
FAX: (864) 487-2754

July 16, 2020

Jay Walter Tate, Jr., 131879
Lee Correctional Inst., F6A-1131
990 Wisacky Hwy.
Bishopville, SC 29010

Re: Request for Grand Jury Information

Mr. Tate:

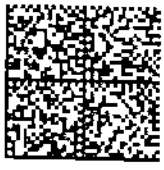
I have included a copy of your warrants, indictments and sentencing sheets along with your PCR application. Copies are generally $0.50 per page. However, this office cannot release any information with regard to the Grand Jury. That information is not public record. However, you may write to the Chief Administrative Judge, and relay to him what you are requesting and the reason you are requesting it. He may approve your request and order me to release that information to you. The Chief Administrative Judge for General Sessions is R. Keith Kelly.

Sincerely,

Court Services

2020 JUL 16 PM 4:37

BRANDY W. MCBEE



County

Jay Walter Tate, Jr., 131879
Lee Correctional Inst., F6A-1131
990 Wisacky Hwy.
Bishopville, SC 29010

2020 JUL 16 PM 4:40

BRANDY W. MCBEE

neopost
07/16/2020
US POSTAGE $0C

ZIP
041L1

To:
V. McBee
, Cherokee County
awor 2289
20342

SC Attorney General's Office
ATTN: PCR Division-7th Circuit
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Jay Tate, #131879, Applicant, v. State of South Carolina, Respondent.	Case No. 2020-CP-11-0489 **RETURN AND MOTION TO DISMISS**

FILED IN THE OFFICE OF THE CLERK OF COURT
2021 MAY 31 A 9:20

NOW COMES Respondent, making its return and moving to dismiss the post-conviction relief (hereafter "PCR") application filed on July 15, 2020 by Jay Tate (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In January 1995, the Cherokee County Grand Jury indicted Applicant for murder (1994-GS-11-928) and assault and battery of a high and aggravated nature (1994-CP-42-929). Richard Warder, Esquire represented Applicant. Solicitor Holman Gossett and Assistant Solicitor Trent Pruett, Esquire prosecuted the case. On January 17-18, 1995, Applicant proceeded to trial before the Honorable Sidney T. Floyd, circuit court judge, and a jury. Judge Floyd sentenced Applicant to life imprisonment for murder and nine years' imprisonment for assault and battery of a high and aggravated nature.

Applicant filed a timely notice of appeal on January 23, 1995 that was perfected by Richard Warder, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion for failure to timely serve the record on appeal and provide proof of service to the

Supreme Court, as provided for in Rule 209, SCACR. The remittitur was issued on November 20, 1995.

First PCR Action: (1995-CP-11-382)

Applicant subsequently filed his first PCR application on December 4, 1995, alleging:

1. Ineffective assistance of counsel; and
2. Ineffective assistance of Counsel for failure to file an appeal.

Respondent made its return on March 5, 1996. An evidentiary hearing into the matter was convened on November 13, 1997, at the Cherokee County Courthouse. Applicant was present at the hearing and was represented by R. Keith Kelly, Esquire.[1] Chris Samellas, Esquire, represented Respondent. On July 31, 1998, the Honorable J. Derham Cole issued the order of dismissal denying Applicant's PCR application. The State conceded he was entitled to a direct appeal and Judge Cole permitted Applicant to refile his *Anders* brief.

On June 22, 2000, Applicant, through Counsel, filed a petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant in the South Carolina Supreme Court on the issue of whether counsel was ineffective for failing to challenge the fact that the indictments were not dated or, alternatively, that jurisdiction was not shown by the indictment. Oral arguments occurred on May 22, 2001. On June 25, 2001, by written order the South Carolina Supreme Court affirmed the ruling of the lower court in denying PCR relief. The remittitur was issued on August 8, 2001.

First Habeas Corpus Action: (2001-CP-11-604)

Applicant subsequently filed his first habeas corpus action with the Cherokee Clerk of

---

[1] Judge Kelly is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit, but because he represented Applicant in his first PCR action, the motion to dismiss and proposed conditional order of dismissal are being sent to the Honorable Grace Gilchrist Knie, Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit.

Court on November 2, 2001, alleging the circuit court did not have jurisdiction to entertain the case and sentence him. Respondent made its return and motion to dismiss on August 1, 2002. The Court summarily dismissed the petition and granted the State's motion to dismiss for back of subject matter jurisdiction and, to the extent the petition was construed as a PCR application, the matter was summarily dismissed for untimeliness, successiveness, and because the claim that the trial court lacked subject matter jurisdiction was without merit.

Applicant filed a *pro se* notice of appeal, dated October 23, 2003. Following the submission of an *Anders* brief and a *pro se* brief, both of which argued the circuit court lacked subject matter jurisdiction, the South Carolina Court of Appeals dismissed the appeal on May 23, 2005. The remittitur was issued on June 8, 2005.

Writ of Mandamus Action: (2005-CP-11-392)

Applicant subsequently filed a writ of mandamus in the circuit court on November 14, 2005. Respondent made its return and motion to dismiss on April 8, 2006. A motion hearing into the matter was convened on September 19, 2006, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Rodney Richey, Esquire. S. Prentiss Counts, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On April 6, 2007, the Honorable Doyer A. Early, III, issued the order of dismissal denying Applicant's PCR application, dismissing the writ for successiveness, untimeliness, and lack of subject matter jurisdiction.

A notice of appeal was filed April 24, 2007, and perfected by Counsel Richey, who made the brief of petitioner on February 11, 2008. Applicant made his *pro se* brief on March 10, 2008. The brief of respondent was made December 15, 2008. An unpublished order affirming the decision of the circuit court was filed. *Tate v. State*, Up. Op. No. 2009-UP-413 (S.C. Ct. App.

filed Sept. 2, 2009). The remittitur was issued on September 18, 2009.

Second Habeas Corpus Action: (9:05-cv-02269-GRA-GCK)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 25, 2005. Applicant set forth the following grounds for relief:

1. "Conviction obtained by action of the Cherokee County Grand Jury; unconstitutional process of indictment."
2. "Conviction obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant."
3. "Judicial Misconduct of Trial Judge."
4. "Ineffective assistance of trial counsel."

Respondent made its return and motion for summary judgment on March 9, 2006. On May 10, 2006, Applicant filed a motion to dismiss without prejudice, which was not opposed by Respondent and, subsequently, was granted by written order on May 15, 2006, by Magistrate Judge George C. Kosko, pursuant to Rule 41 of the Federal Rules of Civil Procedure.

Second PCR Action: (2008-CP-11-0681)

Applicant subsequently filed his second PCR application on August 8, 2008, alleging:

1. Newly Discovered Evidence.
2. Constitutional Violation.

Respondent made its return on May 1, 2009. The Honorable J. Mark Hayes, II, signed the conditional order of dismissal on May 16, 2009, finding the matter should be summarily dismissed for successiveness, untimeliness, and failure to establish a *prima facie* case of newly discovered evidence. The final order of dismissal was signed by Judge Hayes on November 20, 2009.

A notice of appeal was made on October 7, 2010. The matter was dismissed by the Supreme Court of South Carolina for failure to provide a sufficient explanation pursuant to Rule 243(c), SCACR, by written order on November 18, 2010. The remittitur was issued on

December 6, 2010.

Third Habeas Corpus Action: (0:11-cv-00332-TMC)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on April 4, 2011. Applicant set forth the following grounds for relief:

1. "The State Court decision denying me relief on my claim of ineffective assistance of counsel was objectively unreasonable to clearly establish federal law as determine by the United States Supreme Court."
2. "The State Court decision denying me relief on my claim of an unconstitutional burden shifting reasonable doubt jury instruction was objectively unreasonable to clearly established federal law as determine by the United States Supreme Court."
3. "The State Court decision denying me relief on my claim of lack of subject matter jurisdiction, or lack of jurisdiction for my indictments not being filed with the clerk of court was objectively unreasonable to clearly establish federal law as determined by the United States Supreme Court."
4. "The State Court decision denying me relief for a violation of the 180 day rule, was objectively unreasonable to clearly established federal law as determine by the United States Supreme Court."
5. "The State Court decision denying me relief on my writ of mandamus was objectively unreasonable to clearly establish federal law as determined by the United States Supreme Court."

Respondent made its return and motion for summary judgment on September 2, 2011. On March 26, 2012, Magistrate Judge Paige J. Gossett issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Tate v. Warden Eagleton*, 0:11-cv-00332-TMC (D.S.C. filed Mar. 26, 2012). Applicant's objection to the Report and Recommendation was made on November 14, 2011.

On August 1, 2012, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *Tate v. Warden Eagleton*, 0:11-cv-00332-TMC (D.S.C. filed Aug. 1, 2012). Applicant appealed this matter to the United States Court of Appeals for the Fourth Circuit on August 12, 2012, which was denied. Applicant filed a petition for rehearing, which was denied on December 11, 2012. The court issued its mandate on December 18, 2012.

II. Current Action Before the Court

In his PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. After discovered evidence.
   a. "[O]n September 16, 2019, Applicant made a discovery of after discovered evidence collected by Officer Duncan. Evidence collected at the crime scene, a set of house keys. Whereby, Officer Duncan took the keys and unlocked the door, opened the door, entered and searched Applicant's dwelling without a search warrant or inventory search, verifying proof of persons handling evidence seized at a crime scene."

Attached to and incorporated herein are the Cherokee County Clerk of Court records, Applicant's South Carolina Department of Corrections records, prior PCR, direct appeal, and habeas corpus records, and the records for this PCR action. Respondent reserves the right to amend this return based upon receipt of additional relevant information.

III. Motion to Dismiss

Respondent moves for summary dismissal pursuant to section 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, Respondent requests the Court not appoint counsel in this matter, and instead issue a conditional order of dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.[2] *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases*

[2] A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

Before the Circuit Court, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). Respondent moves for summary dismissal for failure to establish a *prima facie* case of newly discovered evidence.

Respondent contends that Applicant's claim of newly discovered evidence should be summarily dismissed because Applicant has failed to make a *prima facie* showing he is entitled to relief for his claim. A person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). To prevail, Applicant must show the newly-discovered evidence:

> (1) is such that it would probably change the result if a new trial were granted;
> (2) has been discovered since the trial;
> (3) could not in the exercise of due diligence have been discovered prior to the trial;
> (4) is material; and
> (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Applicant claims he is entitled to relief based on newly discovered evidence that no search warrant existed when his home was searched. However, the only document he attached to the application that supports this believe is a letter from the Cherokee County Sheriff, stating that they did not have a search warrant in their possession, but that they originated with the

Magistrate's Office and that he should make the request of that office instead. That one institution does not possess documents originating within another institution does not mean that the search warrants do not exist at all. Additionally, this evidence could have been discovered through exercising due diligence before trial.

Further, the trial transcript reflects that officers entered the residence, not because they wanted to search the home, but because the witnesses accused Applicant of committing the stabbing and pointed in the direction of the trailer when asked what direction he took off in. (Tr. 182-83). Thus, officers seemingly entered the home in hot pursuit of Applicant, which is an exception to the search warrant requirement. *See e.g. State v. Key*, 431 S.C. 336, 344-45, 848 S.E.2d 315, 319 (2020) (quoting *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2173 (2016) (exigent circumstances permit warrantless searches and entries into private property when "police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence."). Accordingly, even if Applicant is correct in there being no search warrant in the case, one was seemingly not needed because of an applicable exception, leaving the results of the proceeding unchanged because of the immateriality of this discovery. Thus, Applicant has failed to make a *prima facie* case for why he is entitled to relief on this claim and, as such, this court should dismiss this claim for failure to make a *prima facie* case of Newly Discovered Evidence.

IV. Other Allegations Denied

Each and every other allegation in the Applicant's PCR application not explicitly admitted, qualified, or explained in this Return is hereby denied by the Respondent.

V. Conclusion

WHEREFORE, Respondent moves to summarily dismiss the application because it fails to establish a *prima facie* case of newly discovered evidence.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-0386

May 26, 2022

FILED IN THE OFFICE
CLERK OF COURT
2022 MAY 31 A 9:20
BY
CHEROKEE COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	Case No.: 2021-CP-11-0489
JAY TATE, #131879	)	
	)	
Applicant,	)	
	)	
vs	)	CERTIFICATE OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
	)	

FILED IN THE OFFICE
CLERK OF COURT
2022 MAY 31 A 9:20
CHEROKEE COUNTY, SC

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 and Motion to Dismiss in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jay Walter Tate, Jr., #131879 (F2B-2253-B)
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

DATED this 26th day of May 2022.

Grayson Horton

Grayson Horton, Legal Assistant
For Respondent

ALAN WILSON
ATTORNEY GENERAL

FILED IN THE OFFICE
CLERK OF COURT
2022 MAY 31 A 9:20
CHEROKEE COUNTY, SC

May 26, 2022

The Honorable Brandy W. McBee
Cherokee County Clerk of Court
P. O. Box 2289
Gaffney, SC 29342-2289

Re: **Jay Tate, #131879 v. State of South Carolina**
2020-CP-11-0489

Dear Ms. McBee:

Enclosed for filing please find the State's original Return and Motion to Dismiss and accompanying attachments in the above-captioned case.

Sincerely,

Chelsey F. Marto
Assistant Attorney General

CFM/geh
Enclosure

cc: The Honorable Grace Gilchrist Knie
Jay Tate, #131879

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2020CP1100489

Jay Walter Tate Jr.		**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: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2022 JUN -8 AM 9:53
BRANDY W. MCABEE

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

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.

S/ Grace Knie	2760	6/8/2022
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on 06/08/2022, and a copy mailed first class or placed in the appropriate attorney's box on **06/08/2022**, to attorneys of record or to parties (when appearing pro se) as follows:

Jay Walter Tate Jr. Lee Ci 990 Wisacky Hwy Bishopville, SC 29010

Alan McCrory Wilson S.C. Attorney General's Office PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Court Reporter

Brandy W. McBee - 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.

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	)	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Jay Tate, #131879, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2020-CP-11-0489 **CONDITIONAL ORDER OF DISMISSAL**

FILED IN THE OFFICE
CLERK OF COURT
2022 JUN 6 P 1:19
BRANDY W. HOSEE
CHEROKEE COUNTY, SC

This matter comes before the Court by way of a post-conviction relief application filed by Applicant Jay Tate on July 15, 2020. Respondent made its return, requesting the application be summarily dismissed.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In January 1995, the Cherokee County Grand Jury indicted Applicant for murder (1994-GS-11-928) and assault and battery of a high and aggravated nature (1994-CP-42-929). Richard Warder, Esquire represented Applicant. Solicitor Holman Gossett and Assistant Solicitor Trent Pruett, Esquire prosecuted the case. On January 17-18, 1995, Applicant proceeded to trial before the Honorable Sidney T. Floyd, circuit court judge, and a jury. Judge Floyd sentenced Applicant to life imprisonment for murder and nine years' imprisonment for assault and battery of a high and aggravated nature.

Applicant filed a timely notice of appeal on January 23, 1995, that was perfected by Richard Warder, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion for failure to timely serve the record on appeal and provide proof of service to the Supreme Court, as provided for in Rule 209, SCACR. The remittitur was issued on November

20, 1995.

First PCR Action: (1995-CP-11-382)

Applicant subsequently filed his first PCR application on December 4, 1995, alleging:

1. Ineffective assistance of counsel; and
2. Ineffective assistance of Counsel for failure to file an appeal.

Respondent made its return on March 5, 1996. An evidentiary hearing into the matter was convened on November 13, 1997, at the Cherokee County Courthouse. Applicant was present at the hearing and was represented by R. Keith Kelly, Esquire.[1] Chris Samellas, Esquire, represented Respondent. On July 31, 1998, the Honorable J. Derham Cole issued the order of dismissal denying Applicant's PCR application. The State conceded he was entitled to a direct appeal and Judge Cole permitted Applicant to refile his *Anders* brief.

On June 22, 2000, Applicant, through Counsel, filed a petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant in the South Carolina Supreme Court on the issue of whether counsel was ineffective for failing to challenge the fact that the indictments were not dated or, alternatively, that jurisdiction was not shown by the indictment. Oral arguments occurred on May 22, 2001. On June 25, 2001, by written order the South Carolina Supreme Court affirmed the ruling of the lower court in denying PCR relief. The remittitur was issued on August 8, 2001.

First Habeas Corpus Action: (2001-CP-11-604)

Applicant subsequently filed his first habeas corpus action with the Cherokee Clerk of Court on November 2, 2001, alleging the circuit court did not have jurisdiction to entertain the

[1] Judge Kelly is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit, but because he represented Applicant in his first PCR action, the motion to dismiss and proposed conditional order of dismissal are being sent to the Honorable Grace Gilchrist Knie, Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit.

case and sentence him. Respondent made its return and motion to dismiss on August 1, 2002. The Court summarily dismissed the petition and granted the State's motion to dismiss for back of subject matter jurisdiction and, to the extent the petition was construed as a PCR application, the matter was summarily dismissed for untimeliness, successiveness, and because the claim that the trial court lacked subject matter jurisdiction was without merit.

Applicant filed a *pro se* notice of appeal, dated October 23, 2003. Following the submission of an *Anders* brief and a *pro se* brief, both of which argued the circuit court lacked subject matter jurisdiction, the South Carolina Court of Appeals dismissed the appeal on May 23, 2005. The remittitur was issued on June 8, 2005.

Writ of Mandamus Action: (2005-CP-11-392)

Applicant subsequently filed a writ of mandamus in the circuit court on November 14, 2005. Respondent made its return and motion to dismiss on April 8, 2006. A motion hearing into the matter was convened on September 19, 2006, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Rodney Richey, Esquire. S. Prentiss Counts, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On April 6, 2007, the Honorable Doyer A. Early, III, issued the order of dismissal denying Applicant's PCR application, dismissing the writ for successiveness, untimeliness, and lack of subject matter jurisdiction.

A notice of appeal was filed April 24, 2007, and perfected by Counsel Richey, who made the brief of petitioner on February 11, 2008. Applicant made his *pro se* brief on March 10, 2008. The brief of respondent was made December 15, 2008. An unpublished order affirming the decision of the circuit court was filed. *Tate v. State*, Up. Op. No. 2009-UP-413 (S.C. Ct. App. filed Sept. 2, 2009). The remittitur was issued on September 18, 2009.

Second Habeas Corpus Action: (9:05-cv-02269-GRA-GCK)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 25, 2005. Applicant set forth the following grounds for relief:

1. "Conviction obtained by action of the Cherokee County Grand Jury; unconstitutional process of indictment."
2. "Conviction obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant."
3. "Judicial Misconduct of Trial Judge."
4. "Ineffective assistance of trial counsel."

Respondent made its return and motion for summary judgment on March 9, 2006. On May 10, 2006, Applicant filed a motion to dismiss without prejudice, which was not opposed by Respondent and, subsequently, was granted by written order on May 15, 2006, by Magistrate Judge George C. Kosko, pursuant to Rule 41 of the Federal Rules of Civil Procedure.

Second PCR Action: (2008-CP-11-0681)

Applicant subsequently filed his second PCR application on August 8, 2008, alleging:

1. Newly Discovered Evidence.
2. Constitutional Violation.

Respondent made its return on May 1, 2009. The Honorable J. Mark Hayes, II, signed the conditional order of dismissal on May 16, 2009, finding the matter should be summarily dismissed for successiveness, untimeliness, and failure to establish a *prima facie* case of newly discovered evidence. The final order of dismissal was signed by Judge Hayes on November 20, 2009.

A notice of appeal was made on October 7, 2010. The matter was dismissed by the Supreme Court of South Carolina for failure to provide a sufficient explanation pursuant to Rule 243(c), SCACR, by written order on November 18, 2010. The remittitur was issued on December 6, 2010.

Third Habeas Corpus Action: (0:11-cv-00332-TMC)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on April 4, 2011. Applicant set forth the following grounds for relief:

1. "The State Court decision denying me relief on my claim of ineffective assistance of counsel was objectively unreasonable to clearly establish federal law as determine by the United States Supreme Court."
2. "The State Court decision denying me relief on my claim of an unconstitutional burden shifting reasonable doubt jury instruction was objectively unreasonable to clearly established federal law as determine by the United States Supreme Court."
3. "The State Court decision denying me relief on my claim of lack of subject matter jurisdiction, or lack of jurisdiction for my indictments not being filed with the clerk of court was objectively unreasonable to clearly establish federal law as determined by the United States Supreme Court."
4. "The State Court decision denying me relief for a violation of the 180 day rule, was objectively unreasonable to clearly established federal law as determine by the United States Supreme Court."
5. "The State Court decision denying me relief on my writ of mandamus was objectively unreasonable to clearly establish federal law as determined by the United States Supreme Court."

Respondent made its return and motion for summary judgment on September 2, 2011. On March 26, 2012, Magistrate Judge Paige J. Gossett issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Tate v. Warden Eagleton*, 0:11-cv-00332-TMC (D.S.C. filed Mar. 26, 2012). Applicant's objection to the Report and Recommendation was made on November 14, 2011.

On August 1, 2012, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *Tate v. Warden Eagleton*, 0:11-cv-00332-TMC (D.S.C. filed Aug. 1, 2012). Applicant appealed this matter to the United States Court of Appeals for the Fourth Circuit on August 12, 2012, which was denied. Applicant filed a petition for rehearing, which was denied on December 11, 2012. The court issued its mandate on December 18, 2012.

II. Current Action before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. After discovered evidence.
   a. "[O]n September 16, 2019, Applicant made a discovery of after discovered evidence collected by Officer Duncan. Evidence collected at the crime scene, a set of house keys. Whereby, Officer Duncan took the keys and unlocked the door, opened the door, entered and searched Applicant's dwelling without a search warrant or inventory search, verifying proof of persons handling evidence seized at a crime scene."

Before this Court are the Cherokee County Clerk of Court records, Applicant's South Carolina Department of Corrections records, prior PCR, direct appeal, and habeas corpus records, and the records for this PCR action.

III. Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application for failure to establish a *prima facie* case of newly discovered evidence.

This Court finds Applicant's claim of newly discovered evidence must be summarily dismissed because Applicant has failed to make a *prima facie* showing he is entitled to relief for his claim. A person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C.

Code Ann. §17-27-45(C). To prevail, Applicant must show the newly-discovered evidence:

> (1) is such that it would probably change the result if a new trial were granted;
> (2) has been discovered since the trial;
> (3) could not in the exercise of due diligence have been discovered prior to the trial;
> (4) is material; and
> (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Applicant claims he is entitled to relief based on newly discovered evidence that no search warrant existed when his home was searched. However, the only document he attached to the application that supports this believe is a letter from the Cherokee County Sheriff, stating that they did not have a search warrant in their possession, but that they originated with the Magistrate's Office and that he should make the request of that office instead. That one institution does not possess documents originating within another institution does not mean that the search warrants do not exist at all. Additionally, this evidence could have been discovered through exercising due diligence before trial.

Further, the trial transcript reflects that officers entered the residence, not because they wanted to search the home, but because the witnesses accused Applicant of committing the stabbing and pointed in the direction of the trailer when asked what direction he took off in. (Tr. 182-83). Thus, officers seemingly entered the home in hot pursuit of Applicant, which is an exception to the search warrant requirement. *See e.g. State v. Key*, 431 S.C. 336, 344-45, 848 S.E.2d 315, 319 (2020) (quoting *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2173 (2016) (exigent circumstances permit warrantless searches and entries into private property when "police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence."). Accordingly, even if Applicant is correct in there being no search warrant in the

case, one was seemingly not needed because of an applicable exception, leaving the results of the proceeding unchanged because of the immateriality of this discovery. Thus, Applicant has failed to make a *prima facie* case for why he is entitled to relief on this claim and, as such, this court dismisses this claim for failure to make a *prima facie* case of Newly Discovered Evidence.

IV. Conclusion

Pursuant to South Carolina Code Annotated Section 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this order upon him to show why this order should not become final. Applicant shall file any reasons he may have with the Cherokee County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Chelsey F. Marto, Esquire
PCR Division – Seventh Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Cherokee County Clerk of Court and opposing counsel within twenty days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 1 day of June, 2022.

GRACE GILCHRIST KNIE
Chief Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

ALAN WILSON
ATTORNEY GENERAL

FILED IN THE OFFICE
CLERK OF COURT
2022 JUN -6 P 1:19
CHARITY W. MCBEE
CHEROKEE COUNTY, SC

May 26, 2022

The Honorable Grace Gilchrist Knie
~~13th~~ 7th Circuit General Sessions Chief Administrative Judge
180 Magnolia Street
Spartanburg, SC 29306

Re: Jay Tate, #131879 v. State of South Carolina
2020-CP-11-0489

Dear Judge Knie:

Enclosed please find the proposed Conditional Order of Dismissal in the above-captioned PCR case. The State's Return and Motion to Dismiss has also been sent to your chambers. Judge Kelly, the current chief administrative judge, has a conflict because he represented Applicant in his first PCR action. Therefore, if this proposed order meets your approval, please sign and forward to the Cherokee County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Chelsey F. Marto
Assistant Attorney General

CFM/geh
Enclosure(s)

cc: Jay Tate, #131879

STATE OF SOUTH CAROLINA **COUNTY OF CHEROKEE**	)	**IN THE COURT OF COMMON PLEAS**
Jay Walter Tate Jr., Applicant, v. State of South Carolina, Respondent.	)	**APPLICANT OPPOSITION TO SUMMARY ORDER OF DISMISSAL** **2020-CP-11-0489**

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2022 JUL 11 AM 9:51
BRANDY W. MCBEE

Applicant takes exception with respondent contentions, the Police entrance was effectuated by "Hot Pursuit" of applicant (Resp. Mo. To Dismiss Pg. 8). What respondent overlooks is fact. Testimony at trial reveals officers did not see applicant and, hence, had no legal basis for entering this residence (Tr. Tr. Pg. 183; Line 1 – 13).

Still further, Respondent's citation of **State v. Key, 431 S.C. 336 (2020)**, quoting **Birchfield v. North Dakota, 136 S. Ct. 2160 (2016),** are misplaced. In both these cases, factual analysis are not dispositive of facts herein. Case at bar, Police found keys outside of residence; once looking inside, they did not find applicant. Obviously, Respondent's interpretation of hot pursuit is vastly at odds with the court's.

Therefore, since Police were not physically in pursuit as **Key, Birchfield** required, the court should find no exigent circumstances are present, warranting Police entrance of home without a warrant justifiable.

Moreover, our State Supreme Court stated in **State v. Easler, 489 S.E.2d 617 ( ):**

> **"The relationship between the two constitutions is significant because state courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the federal constitution." - State v. Easler, id.**

Herein, Applicant is seeking this court to apply State Appellate Court Stare decisis to case at bar, and in so doing, as the court in **Kentucky v. King, 563 U.S. 452, 459 (2011)**, the King court stated:

"The text of the Fourth Amendment does not specify when a search warrant must be obtained. What the text explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use." - King, id. at 459

Our state precedents have inferred that a warrant must be secured. **See State v Dobbins, 420 S.C. 583 (2017); Payton v. New York, 446 U.S. 573 (1980).** Our appellate courts, based on Applicant's research, that the question whether and under what circumstances an officer may enter a suspect's home, in hot pursuit, has not been settled by appellate court.

A substantial difference between the intrusion which attends an entry for the purpose of searching (**see State v. Bailey, 276 S.C. 32 (1981)**) and that which results from a hot pursuit and warrantless entry into a home, is a significant difference in the government interest in achieving the objective of this intrusion. **Payton, id. at 581.**

"Hot Pursuit" is one form of exigent circumstances justifying a warrantless entry into a residence under the Fourth Amendment (**see United States v. Santana, 427 U.S. 38 (1976)** as argued. Hot pursuit means some sort of chase; thus, this court should dismiss the hot pursuit and protection of the public because no chase existed, and Petitioner was no longer in the area. Further, court must also determine whether there was an exigency situation (**see Welsh v. Wisconsin, 466 U.S. 740 (1984).**

Newly Discovered Evidence

Applicant contends he can satisfy all five factors; (1) the search is an integral part of this case; thus, its suppression nullifies trial; (2) was discovered post trial/peril; (3) was told by counsel they had a search warrant and it was in proper form; (4) is relevant to this verdict; (5) is not merely cumulative or impeaching.

Contrary to Respondent's contentions, failure of state to turn this document over violates **Brady** and **Rule 5**. As such, while the Sheriff's Office should have warrant, it is no excuse for Respondent's office not to have it, and thus, since State is hiding discoverable material, then it could not be discovered before trial.

Wherefore, it is prayed that this court grants this hearing.

Respectfully Submitted,

Jay Walter Tate Jr.

Date: _30_ day of ____June____, 2022

STATE OF SOUTH CAROLINA **COUNTY OF CHEROKEE**	**IN THE COURT OF COMMON PLEAS** **MOTION FOR RELIEF FROM JUDGMENT** **# 95-CP-11-382** **HEARING REQUESTED**
Jay Walter Tate Jr., Applicant, v. State of South Carolina, Respondent.	

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2022 JUL 11 AM 9:5
BRANDY W. MCBEE

Honorable Chief Administrative Judge:

Please take notice that applicant above-named files this motion pursuant to South Carolina Ann. Sec. 17-27-90 (cum. supp. 19); Fishburne v. State, 427 S.C. 505 (2019); Sec. 17-27-80; whereas the issues set forth herein were not addressed in first per order, or was inadequately raised.

Please take further notice, pursuant to Fishburne, sec. 17-27-80, this court is asked to address motion for stay filed in this court. But never addressed by court in its final order (see Attached Motion).

First, the appellate court proceeding was not in accordance with South Carolina Appellate Court Rule 602(e)(3)(4). Because trial counsel filed a Anders Brief in this case, it is applicant contentions counsel had no authority to do so without approval of court and no proof exist to show applicant retained counsel to do so.

Moreover, at the hearing counsel testified he did file a brief, but what was not addressed is counsels unauthorized actions. Without applicant's consent, which counsel failed to provide during collateral process, or the appellate court authorizing counsel to do so. PCR court did not adequately rule on this motion addressing issue.

In ruling on a PCR application, "the PCR court shall make specific findings of fact and state expressly its conclusions of law, relating to each issue presented. See South Carolina Code Ann. Sec. 17-27-80 (cum. supp. 20). The South Carolina Rules of Civil Procedure apply to PCR matters. See Suton v. State, 361 S.C. 644 (2004). Rule 52(a) provides in pertinent part that:

> "In all actions tried upon facts without a Jury, the court shall find facts specifically and state separately its conclusions of law"
>
> -Rule 52(a)

Similarly, under rule 71.1(G) and rule 602 mandates an analysis no state precedents have not addressed factual circumstances as herein. Documentary evidence must be shown to the authorizing court to allow counsel to file briefs.

Question Two: Fourth Amendment Violation

On its facts as a matter of rudimentary fourth amendment jurisprudence, this case is controlled by State v. Dobbins, 420 S.C. 583 (2017) where the police did not have exigent circumstances to search the residence.

As herein, this officer testified that he found a key and used the key to enter the residence, even after acknowledging that no one was in the residence, inter alia, and once police were told by witnesses that the person ran away from the scene.

Moreover, the police manufactured "exigent circumstances" falls short of the requirements as set forth in federal or state precedents. See Dobbins, id at 591-94; see also Hamrick v. State 426 S.C. 638 (2019). Moreover, the ruling by trial court erroneously applied federal law.

Wherefore, it is prayed that this court grants this motion.

Respectfully Submitted:

S/ Jay Walter Tate, Jr.
Jay Walter Tate Jr.

Dated: 30 Day of June 2022

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated Sheila Wright (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)
)
COUNTY OF Lee)

AFFIDAVIT OF PERSONAL SERVICE

On this 23 day of June 2022, I served the **Conditional Order of Dismissal (2020-CP-11-0489),** on *Inmate* Jay Tate, Jr. *SCDC Inmate* #131879 by delivering personally and leaving a copy of the same at **LEE Correctional Institution.** Deponent is not a party to this action.

s/ [signature]
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME
this 23 day of June, 2022
[signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/3/2024

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2022 JUL 11 AM 9:52
BRANDY W. MCBEE

ADMISSION OF SERVICE

Service of a copy of the within **Conditional Order of Dismissal (2020-CP-11-0489)** is admitted at the South Carolina Department of Corrections (Lee *Correctional Institution*), Bishopville, Lee County, SC this 23 day of June, 2022.

s/ [signature]
Inmate
SCDC *Inmate* #: 131879

STATE OF SOUTH CAROLINA **COUNTY OF CHEROKEE**	**IN THE COURT OF COMMON PLEAS** **FOR THE SEVENTH JUDICIAL CIRCUIT**
Jay Walter Tate Jr., Applicant, v. State of South Carolina, Respondent.	**CASE NO: 2021-CP-11-0489** **CERTIFICATE OF SERVICE BY MAIL**

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2022 JUL 11 AM 9:51
BRANDY W. MCBEE

1. I am the Applicant 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 Opposition to Summary order of Dismissal in the above-captioned matter on the following persons by depositing same in the United States mail, postage prepaid:

The Honorable Grace Gilchrist Kine
15th Circuit General Sessions Chief Administrative Judge
180 Magnolia Street
Spartanburg, South Carolina 29306

Office of the Attorney General
ATT: Chelsey F. Marto, Esquire
PCR Division – Seventh Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Honorable Brandy McBee
Clerk of Court, Cherokee County
Post Office Drawer 2289
Gaffney, South Carolina 29324

Date: 30 day of June, 2022

S/ Jay Walter Tate Jr.
Jay Walter Tate Jr.
Applicant

Jay Walter Tate, Jr #131879
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 290

July 10, 2022

Honorable Brandy McBee
Clerk of Court, Cherokee County
Post Office Drawer 2289
Gaffney South Carolina 29342

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2022 JUL 15 AM 11:48
BRANDY W. MCBEE

RE: Applicant Opposition To Summary Order of Dismissal 2020-CP-11-0489

Dear Clerk,

Please filed this with the Applicant To Summary Order of Dismissal of @ 2020-CP-11-0489. Thank you for your time

Sincerely,
Jay Walter Tate

STATE OF SOUTH CAROLINA)	
)	IN THE COMMON PLEAS COURT
COUNTY OF CHEROKEE)	
	36,782
JAY WALTER TATE, JR., #131879,)	CASE ACTION NO. 95-CP-11-382
APPLICANT,)	
)	
-VS-)	MEMORANDUM MOTION UPON THE
)	COURT TO STAY A FINAL COURT
STATE OF SOUTH CAROLINA,)	ORDER PURSUANT TO THE APPLICANT
RESPONDENTS.)	P.C.R. EVIDENTIARY HEARING.

Come the stated above applicant, a prisoner at the McCormick Correctional Institution. Herewith seek the above caption memorandum motion pursuant to Section 17-27-10 et seq. Code of Law of South Carolina, as well as Article I., Section 3 of the South Carolina Constitution following the November 13, 1997, P.C.R. evidentiary hearing of final Court order for the reason as follows:

FILED IN OFFICE OF CLERK OF COURT CHEROKEE S.C. NOV 28 8 31 AM '97

I.

STAY REASONS

1. That the respondents witness, Richard H. Warder, of the Greenville County Bar during November 13, 1997, deliberately committed perjury and obstruction of injustice to delete the applicant from receiving a fair P.C.R. evidentiary hearing. Since engaged with their witness to falsely mislead the Court through perjury testimony, by alleging he filed an Anders -vs- California brief appeal within the applicant behalf following his original Jury trial during January 17, 1995, before the State Highest Court.

2. That the applicant assigned counsel, R. Keith Kelly, of the Spartanburg County Bar engaged with the respondents and witness to taint a full and fair P.C.R. evidentiary hearing during November 13, 1997, from allowing false and perjury testimony to be given. Without providing effectiveness of representation in violation of his ethic standard or requirement of a lawyer and client relationship to receive due process and equal protection of law to a proper P.C.R. evidentiary hearing.

II.

DISCUSSION

This Common Pleas Court should order a stay of the final P.C.R. evidentiary hearing decision, under Section 17-27-10 et seq. Code of Law of South Carolina following prima facie facts and genuine issues. That the respondents main witness attorney Richard H. Warder, of the Greenville County Bar, knowingly or intentionally disregard the Court and P.C.R. evidentiary hearing by given false and perjury testimony under oath as an office of the Court about filing an Anders -vs- California appeal brief upon the State Highest Court in the applicant's behalf to taint a fact issue within the P.C.R. application, that a new hearing must be immediately ordered. See Article I., Section 3 of the S.C. Constitution.

Overmuch, also assigned counsel, R. Keith Kelly, of the Spartanburg County Bar, neglected to insure or professionally provide effectiveness of P.C.R. evidentiary hearing of representation, by adding to allow the respondents witness to perjury and falsely give testimony to be admitted without any objection to damage the applicant fact issue of being unlawful denial an appeal from the original trial upon which a new P.C.R. evidentiary hearing must be ordered. See Article I., Section 3 of the S.C. Constitution.

III.

CONCLUSION

Wherefore, it is prayed for all the foregoing facts and issues, that this Honorable Court immediately order a stay of the final

P.C.R. evidentiary hearing decision. And such other relief toward the respondents its may deem just and proper.

Dated 11-12-97.

Respectfully submitted,

s/ Harry Walton Tate JR.
APPLICANT

Sworn and subscribed to before me

this 17 day of November 1997.

Bob Anderson (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires OCT. 13, 2003.

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF McCORMICK)

I, Jay Walter Tate, Jr., at the McCormick Correctional Institution Route 2, Box 100/F4 McCormick, South Carolina. Appearing before the undersigned Notary Public with aforesaid documents Memorandum Motion Upon the Court to Stay a Final Court Order Pursuant to the Applicant P.C.R. Evidentiary Hearing, and Affidavit of Service by Mail to be mailed upon the following addresses: Clerk of Court, Cherokee County CourtHouse Post Office Box 1226 Gaffney, South Carolina 29342; Byron R. Roberts, South Carolina Attorney General Office Post Office Box 11549 Columbia, South Carolina 29211; And upon R. Keith Kelly, Post Office Box 6443 Spartanburg, South Carolina 29304.

Dated 11-17-97.

Respectfully submitted,

S/ Jay Walter Tate JR
APPLICANT

Sworn and subscribed to before me

this 17 day of November 1997.

Bob Anderson (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires OCT. 13, 2003

FILED IN OFFICE OF CLERK OF COURT CHEROKEE CO., S.C.
NOV 24 8 32 AM '97
VOL [illegible]

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Jay Tate, #131879, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2020-CP-11-0489 **FINAL ORDER OF DISMISSAL**

FILED IN THE OFFICE
CLERK OF COURT
2022 AUG 19 A 11: 29
BRANDY W. MCBEE
CHEROKEE COUNTY, SC

This matter comes before the Court pursuant to a post-conviction relief application filed by Applicant Jay Tate on July 15, 2020. Respondent moved to summarily dismiss the application on May 26, 2022, for failure to establish a *prima facie* case of newly discovered evidence.

Pursuant to this request, and after reviewing the attached pleadings pertinent to this matter, this Court issued a conditional order of dismissal dated June 1, 2022, provisionally summarily dismissing the application, but affording Applicant twenty days from service of the conditional order to provide sufficient reasons as to why this order should not be finalized. Applicant was personally served with this conditional order of dismissal on June 23, 2022, as evidenced by the attached affidavit of personal service.

Applicant offered three responses to the return and motion to dismiss and conditional order of dismissal. First, on July 11, 2022, he filed a document entitled "Applicant Opposition to Summary Order of Dismissal." In this response, he stated that testimony at trial revealed the officers did not see Applicant and had no legal basis for entering the residence. He stated no exigent circumstances existed to enter because they were not in hot pursuit of him at the time. He stated that absent an exigent circumstance, a warrant was needed, and that this was not secured. He stated that failure to turn relevant documentation over constituted a *Brady* violation. He states that this was recently discovered by him and that he is entitled to a hearing because he

established a *prima facie* case of newly discovered evidence.

Also on July 11, 2022, Applicant filed a document entitled "Hearing Requested." In this document, he claims that he is entitled to a hearing because the issue raised now was not adequately addressed in his prior actions.

On July 15, 2022, Applicant sent a letter to the Cherokee Clerk of Court, requesting a document filed in his 1995 PCR matter entitled "memorandum motion upon the court to stay final court order pursuant to the Applicant PCR evidentiary hearing." In this document, he requested the court stay the final PCR evidentiary hearing decision because witness Richard Warder allegedly committed perjured testimony concerning the filing of an *Anders* brief. He also claimed his PCR attorney, the Honorable R. Keith Kelly, permitted this perjured testimony to come in at the PCR hearing without objection.

This Court has reviewed the responses in full and finds they are not sufficient to warrant an evidentiary hearing. Consequently, this Court finds this application must be summarily dismissed with prejudice.

Applicant has not adequately shown why he is entitled to relief based upon newly discovered evidence. Applicant merely reiterated his original argument in his responses; he did not change the Court's ultimate analysis. Specifically, the only corroborating evidence he attached to the application that supports this belief is a letter from the Cherokee County Sheriff, stating that they did not have a search warrant in their possession, but that they originated with the Magistrate's Office and that he should make the request of that office instead. That one institution does not possess documents originating within another institution does not mean that the search warrants do not exist at all. Further, even if one was not used, he has failed to show how this could not have been discovered through reasonable diligence, how he could not or did

not discover this until within a year of filing the PCR application, or how it was material to the case. Accordingly, this Court finds the application shall remain dismissed for failure to establish a *prima facie* case of newly discovered evidence.

Before this Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965). Applicant has failed to make such a showing based on the information set forth in his responses, and, consequently, is not entitled to an evidentiary hearing. Thus, the Court reasserts its finding in the conditional order of dismissal that the current PCR application must be dismissed for failure to establish a *prima facie* case of newly discovered evidence. Accordingly, this Court finds no reason why the conditional order of dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons in this Court's conditional order of dismissal, the PCR application is hereby denied and dismissed with prejudice.

This court hereby advises Applicant that he must file and serve a notice of appeal within thirty days of the service of this order to secure appellate review. *See* Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 16 **day of** August **, 2022.**

GRACE GILCHRIST KNIE[1]
Chief Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

[1] The Honorable R. Keith Kelly is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit, but because he represented Applicant in his first PCR action, the proposed final order of dismissal is being sent to the Honorable Grace Gilchrist Knie, Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit.