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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Post Conviction Relief

Honorable D. Craig Brown, Circuit Court Judge  
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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Appellate Case No.: 2023-000885

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Johnnie Walker Gaskins,

Petitioner,

vs.

State of South Carolina,

Respondent.

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APPENDIX  
VOLUME IV of IV

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1 Q. The issue two.

2 A. Pardon?

3 Q. Issue two.

4 A. I'm sorry?

5 Q. Issue two.

6 A. Well, issue two deals with two different  
7 things.

8 Q. The anonymous call?

9 A. The anonymous call.

10 Q. Highly prejudicial.

11 A. Well, first off, the objection was overruled.  
12 When an objection is sustained, then it -- in my  
13 mind, appropriate and always necessary to preserve  
14 the issue for appeal to make a motion to strike and  
15 desirable to make a motion for a curative  
16 instruction, although it's easier to explain away  
17 not doing that than the motion to strike.

18 But in this case, the objection to the  
19 statement made on the phone call, that objection was  
20 overruled. So I would be hard pressed to see any  
21 defense lawyer, no matter how good they are,  
22 convince a judge to strike evidence that he's  
23 overruled the objection to.

24 Q. And with regards to the -- now going back to  
25 the regards to the Biggers issues, obviously there

1       were a lot of identity issues challenged pretrial.

2       Is there a reason that that wasn't argued on appeal?

3       A.     Reason why it was not argued on appeal?

4       Q.     Yes.

5       A.     Yes.

6       Q.     Okay.

7       A.     You want to hear it?

8       Q.     Yes, please.

9       A.     Obviously, identification issues are another  
10       area that consume a large bit of my time, doing  
11       appellate work.

12            In this case, there were multiple -- there were  
13       a number of factors. There wasn't just one witness  
14       making an ID under questionable circumstances.  
15       There were multiple witnesses, all with varying  
16       degrees of opportunity to observe the person, all  
17       expressing equal certainty that they could identify  
18       him.

19            A number of them had been in extremely closed  
20       quarters with him. They had seen him very up close.  
21       Some of them knew him in advance. And a lot of the  
22       arguments that could be made in terms of Neil vs.  
23       Biggers analysis in this case would have gone to  
24       matters that addressed the weight of the evidence as  
25       opposed to its admissibility.

1           In other words, just because someone saw  
2           someone under less than optimum circumstances is not  
3           a reason to exclude it -- necessarily a reason to  
4           exclude it from evidence, although it's certainly  
5           something defense counsel wants to spend a lot of  
6           time arguing look how fleeting his opportunity was;  
7           look how scared they were; look at how crowded the  
8           place was and how much commotion was -- all the  
9           factors that you would use to, hopefully, challenge  
10          the reliability or the weight the jury should give  
11          that testimony or -- if being out-out and  
12          inadmissible is quite another.

13           Another thing is that in this case, the  
14          testimony was laid out in such a way that the  
15          witnesses, by and large, made it very clear what  
16          they were identifying him as. And by that I mean,  
17          for example -- just one second -- there was one --  
18          and I'm sorry. I'm trying to find that person.

19           Tamara Barnett testified that she was merely  
20          identifying the person that she saw confronting the  
21          bartender, Helman, and getting escorted away. She  
22          didn't see the shooter.

23          Q.     In fact, most of them didn't see the shooter.

24          A.     Exactly. But the prosecutor had been skillful  
25          enough to have them state exactly what they were

1 identifying the person as. In other words, she  
2 didn't -- she made clear she had not seen the  
3 shooting; all she could say was that he was the  
4 person she saw confronting the bartender. And there  
5 were other examples.

6 And given all those factors, I decided that it  
7 was not promising in terms of its chances of winning  
8 and it would muddy the waters with regard to what I  
9 thought were other stronger or more meritorious  
10 issues that stood a better chance of winning.

11 Q. And what's a Telfair charge?

12 A. Pardon?

13 Q. Am I saying that correctly? Is there a charge  
14 on -- is it Telfair? A charge on the -- on what you  
15 were talking about that goes to the weight of the  
16 admissibility of an identification versus the --

17 A. There are. You're talking about the Telfair  
18 charge?

19 Q. Yes.

20 A. And there have been some problems with Telfair,  
21 as I'm sure you're aware. There are versions of  
22 that charge that I believe have been disapproved of  
23 in various settings.

24 But the Court did -- if -- again, if memory  
25 serves me, it's been a long time, did charge the

1 charge the jury that identity was one of the things  
2 they had to find beyond a reasonable doubt.

3 Q. And that's your recollection, right?

4 A. Pardon?

5 Q. If he did, it would be in the record, right?

6 A. Oh, of course.

7 Q. Okay. And if he didn't, that would be  
8 something that you would, perhaps, want to add to a  
9 jury charge, correct?

10 A. If I -- I feel fairly confident in saying that  
11 if he didn't, there was no objection to it not being  
12 charged, or that would have been an issue that I  
13 would have considered raising.

14 I can't say here today definitively that that's  
15 something I would have briefed compared to the other  
16 issues or considered adding to. But with it not  
17 being objected to, I certainly would have.

18 Q. And then I believe you were here for -- on page  
19 1,051 when I asked about the objections to the  
20 closing, specifically inflaming the passions of the  
21 jury, misstating evidence and -- I forget what the  
22 third one was.

23 Was there a reason that those weren't briefed?

24 A. There was no contemporaneous objection. If  
25 there's -- there are few issues in the realm of

1 criminal appellate work that you can find as much  
2 precedent for as that issue. You know, there are  
3 just even more cases than even someone like me, who  
4 is an appellate geek, could count, where the Court  
5 has said, you must make a contemporaneous objection;  
6 if it's sensitive and you need to be heard outside  
7 the presence of the jury, so be it, but you must  
8 make a contemporaneous objection.

9 If you object and your objection is sustained,  
10 in order to preserve the objection, you must go that  
11 step further and ask for a mistrial.

12 Q. Right. And you didn't see that in this case?

13 A. No.

14 Q. And, lastly, there were several -- or at least  
15 one major motion made for what you could consider  
16 discovery violations. Is that -- is there a reason  
17 that that issue didn't -- you didn't feel it was  
18 worth arguing?

19 A. Well, my understanding of Rule 5 -- and, again,  
20 I'm not trying to jump on you. But I didn't get  
21 these issues until this morning, and I got them from  
22 the Attorney General. So I haven't had an  
23 opportunity to go back and research this. But --  
24 and I'm trying to look at how it is couched.

25 Rule 5, as I understand it, requires that the

1 State turn over to you written statements given by  
2 any witness they anticipate calling, in advance of  
3 that person being cross-examined by defense counsel.

4 Now, in practice, they normally give you the  
5 stuff when you file your discovery motions. And so  
6 it kind of raises a hybrid issue in the sense that  
7 because they normally give it to you sooner than the  
8 law would actually require them to give it to you,  
9 then it sets up an expectation that you've got  
10 everything.

11 But, nevertheless, my experience, particularly  
12 with this judge, is that when anything like that  
13 comes out, that he generally gives the defense  
14 attorneys an opportunity to have time to look into  
15 it further and prepare to combat it.

16 Again, I obviously thought it should not have  
17 been admitted. It was one of the three issues that  
18 I pursued for Mr. Gaskins, and I was very upset.  
19 That issue really bothered me.

20 But as far as raising it as -- it wasn't raised  
21 as -- the emphasis I chose to pursue was on the  
22 inadmissibility of the testimony as hearsay, as  
23 opposed to as a Brady violation or a Rule 5  
24 violation because, in my experience, the Court would  
25 have said that defense counsel had adequate

1 opportunity to combat that.

2 Q. Okay.

3 A. Adequate opportunity to -- he articulated a  
4 perfectly good objection to it, preserved it for  
5 appeal, and I just believed that it would not likely  
6 be fruitful as a direct appeal issue if it was  
7 hinged on Rule 5. And so I chose to approach it  
8 from the fact that it was blatant hearsay.

9 Q. And I know that you sat here for  
10 Mr. McCulloch's testimony. And I asked him several  
11 times, because the search warrant relied on the  
12 video; there were several witnesses testified to the  
13 video, and the jury asked to see the video again  
14 during deliberations.

15 And as you sit here today, is that something  
16 you just can't remember whether or not you had seen  
17 or examined that video or if you realized that it  
18 wasn't the complete video?

19 A. I believe I testified earlier that I have no  
20 present recollection of whether or not I saw it. I  
21 know that there were no specific objections or  
22 motions made with reference to it. If there had  
23 been, I could tell you with certainty that I would  
24 have seen it.

25 Looking back, it is something I very well might

1 have done, but I don't independently recall.

2 Remember.

3 Q. Thank you.

4 MS. ZMROCZEK: I have no further questions.

5 THE COURT: Okay.

6 MS. KINARD: Good morning. Thank you for being  
7 here.

8 THE WITNESS: Afternoon.

9 CROSS-EXAMINATION

10 BY MS. KINARD:

11 Q. You have certainly testified competently and  
12 thoroughly regarding Ms. Zmroczek's questions, as  
13 well as regarding what your theories were and how  
14 you prepared for this case.

15 When it comes to choosing your issues, you  
16 stated you usually go through, read the transcript,  
17 go back and find, basically, issues spot, and then  
18 weigh those in terms of likelihood of success; is  
19 that --

20 A. Yes. That's correct.

21 Q. And so when you narrow it down to these three  
22 issues, you determined these were the three issues  
23 most likely to be successful at the appellate level?

24 A. That is correct.

25 Q. And you're aware -- I'm assuming; please tell

1 me if I'm wrong -- that you are required to raise  
2 every possible issue on appeal?

3 A. Certainly.

4 Q. And from the questions that Ms. Zmroczek asked  
5 you, you testified, regarding the search warrant,  
6 Biggers hearings, closing argument, and the Rule 5  
7 violations, and I believe you testified as to why  
8 you decided not to pursue any of those.

9 A. There was one aspect of the Rule 5 issue that I  
10 didn't really get to.

11 Q. Okay.

12 A. If -- and I don't recall whether there was. If  
13 the gentleman who was testifying to answering the  
14 phone and hearing two women in the background and  
15 hearing the statement that was objected to, if there  
16 had been a written statement from him in which he  
17 recorded that incident and that conversation, if you  
18 will, that he had heard on the phone, and that  
19 written statement had not been given to him in the  
20 discovery package, that would have been -- would  
21 have made the Rule 5 argument stronger.

22 Certainly, I don't recall anything about trial  
23 counsel introducing a statement that he had  
24 discovered or questioning whether or not there was a  
25 written statement concerning that phone and that

1       confrontation in the context of the discussion about  
2       this at trial.

3       Q.     And that is an if, correct?

4       A.     Pardon?

5       Q.     That is an if statement, if that were --

6       A.     Yeah.  If that individual -- and, again, I'm  
7       sorry.  What I was able to pull off the computer is  
8       not as detailed as my handwritten notes would have  
9       been.  But if you look at Lynburg Porterfield's  
10      testimony -- he is the gentleman who said he found  
11      the phone and answered it when it was ringing --  
12      somewhere 451 and 465 in the complete transcript, he  
13      is the one that conveyed the information that when  
14      the phone was answered, two ladies called out, one  
15      said Blackey and then, of course, the rest of the  
16      statement that was objected to.

17             I don't recall anywhere in the colloquy that  
18      followed between the prosecutor, trial counsel, and  
19      the Court, there being any discussion about the  
20      State having withheld a written statement from  
21      Mr. Porterfield concerning that phone or what was  
22      heard at the other end of it.

23             If the defense had had knowledge of a written  
24      statement, if there had been a written statement  
25      that was withheld in discovery, that would have been

1       certainly a stronger issue than not anticipating and  
2       telling defense counsel about an oral statement that  
3       he had relayed to them but not put in writing.

4       Q.    Is it fair to state that during your testimony  
5       today a few of your answers have included potential  
6       explanations; meaning, if you had had this, it would  
7       have been a stronger issue; if this had been  
8       objected to, it would have been a stronger issue?

9       A.    Yeah.  I mean, I think the point you're trying  
10      to make is that I have to evaluate the relative  
11      weight and merit of issues based on the cold record  
12      I've got between the transcript cover and the court  
13      reporter's certification.  I can could woulda,  
14      coulda, shoulda all day long, but, you know, I can  
15      only work with the clay that's on the wheel.  If  
16      it's not there, it's not there.

17      Q.    And in sum, everything that you've reviewed in  
18      your preparation for today and even things that  
19      might've occurred to you during questioning, do you  
20      still feel and stand by the briefing of the three  
21      issues that you did as being the most solid issues?

22      A.    I do.  I wish there -- I felt very strongly  
23      about particularly the first and second issue on  
24      appeal.  I, despite, my extremely high regard for  
25      the trial judge in this case, I did consider the

1 fact that the presiding judge had gone into the jury  
2 room to be a serious question, and I wish that would  
3 had been preserved. That's a separate issue. To be  
4 candid, I doubt it would have won, if it had been.  
5 But that was a concern of mine.

6 But, particularly, the first and second issues,  
7 I really had high hopes for. And I'm still  
8 disappointed in the decision that --

9 MS. KINARD: I have no further questions.  
10 Thank you.

11 THE COURT: Any redirect?

12 MS. ZMROCZEK: Just briefly.

13 REDIRECT EXAMINATION

14 BY MS. ZMROCZEK:

15 Q. When you said if it's not there, it's not  
16 there, and it's not there because it's not preserved  
17 by the trial attorney, correct?

18 A. Correct.

19 Q. Okay.

20 I have nothing further, Your Honor.

21 A. If I can clarify one thing, when I said what I  
22 said about the -- if there had been a written  
23 statement from Mr. Lynburg, I believe his name was,  
24 that's purely hypothetical. I don't have any  
25 recollection. I would have reviewed the discovery

1 back then.

2 But I don't recall today whether or not there  
3 was a written statement from him documenting that  
4 incident with that cell phone at all. I doubt there  
5 was, because I find it hard to believe trial counsel  
6 would have expressed such shock and dismay over that  
7 testimony if he had seen that language in the  
8 statement.

9 MS. ZMROCZEK: And, Your Honor, with that, I  
10 have an additional question and something I need to  
11 mark.

12 THE COURT: Go ahead.

13 (Applicant's Exhibit No. 4 marked for  
14 identification.)

15 BY MS. ZMROCZEK:

16 Q. When you appeal cases, do you additionally go  
17 through the discovery or do you just base it off of  
18 the transcripts?

19 A. I go through the discovery in PCR cases. But  
20 for a direct appeal, as much as I would like to help  
21 the client, I can find the biggest smoking gun in  
22 the world in the discovery, and it is not going to  
23 help him on appeal.

24 Q. So I'm going to show you Applicant's  
25 Exhibit 4 --

1 A. Okay.

2 Q. -- and ask if you've ever seen that.

3 A. You know, as I read this, it's somewhat  
4 familiar to me. So I am inclined to think that I  
5 may have had it, perhaps had been given it by  
6 Mr. Gaskins, or may have gotten some in discovery.  
7 I don't remember, and I'm sorry I don't have my  
8 file.

9 But this is exactly what I'm talking about. If  
10 this was in fact in the discovery, then there is no  
11 discovery issue, there is no discovery violation.  
12 The State turned it over. If this was in the  
13 discovery, ergo, available to trial counsel  
14 preparing, then the appropriate way to handle that,  
15 I with think, would be to file a motion in limine in  
16 advance of the trial.

17 You always want to stop the bell from being  
18 rung, because once the jury hears it, even if you  
19 prevail on an objections, you can't purge their  
20 memories. So if you can, file a motion in limine in  
21 advance and get a ruling. Unfortunately, if you  
22 don't prevail in that motion, you have to renew that  
23 objection in the course of the trial.

24 But you've got a shot of laying that issue to  
25 rest before the jury ever even hears about it. So I

1 would say that, in light of this statement, which, I  
2 again say sounds familiar, if it was, in fact, in  
3 trial counsel's file, indicating that he had it from  
4 the discovery provided to him, then it is no longer  
5 a discovery issue, but it becomes a question of what  
6 measures he took in advance of the trial to have  
7 that matter laid to rest in limine and dealt with  
8 appropriately in terms of renewing the objection  
9 during the trial.

10 MS. ZMROCZEK: Your Honor, at this time, we'd  
11 move Applicant's 4 into evidence.

12 MS. KINARD: No objection, Your Honor.

13 THE COURT: Very well.

14 (Applicant's Exhibit No. 4 admitted into  
15 evidence.)

16 MS. ZMROCZEK: Those are all the questions I  
17 have.

18 MS. KINARD: Your Honor, if I may have a brief  
19 recross?

20 THE COURT: Yes, ma'am. Go ahead.

21 RECROSS-EXAMINATION

22 BY MS. KINARD:

23 Q. Ms. Shurling, would you mind looking at the  
24 transcript. I'm going to guess this is in volume  
25 two of those.

1 MS. ZMROCZEK: If you can tell me what part of  
2 the testimony, I can tell you --

3 Q. 466.

4 A. Pardon?

5 Q. Page 466.

6 A. Got it.

7 Q. That page does not have line numbers, but the  
8 first thing the Court says: See whether it's in the  
9 statement or not in the statement. Is that correct?

10 A. Correct.

11 Q. Okay. And if you flip to the page before that  
12 and look at around line 9 of that paragraph, does  
13 that reflect, quote, Blackey, was that you out there  
14 shooting?

15 A. I'm sorry. I'm trying to read and listen to  
16 you at the same time.

17 Q. I'm sorry.

18 A. May I have a moment to actually read this?

19 Q. Sure.

20 A. And your question is?

21 Q. On page 465, is that --

22 A. 465?

23 Q. Yes, where you were just reading that  
24 paragraph. Does that set up that we are speaking  
25 about the phone call that Mr. Porterfield received

1 on Mr. Gaskins' phone?

2 A. I'm sorry. Are you asking me to read it?

3 MS. KINARD: If I may, Your Honor, I don't know  
4 if this is proper to ask Ms. Shurling to testify to  
5 this. I'm trying to get into the record that a few  
6 of these pages may not lineup with her prior  
7 testimony regarding what was --

8 THE COURT: Certainly. She needs to understand  
9 where the testimony occurs, whether it's in the  
10 appellate record or the transcript.

11 MS. KINARD: Thank you.

12 THE WITNESS: As I read this record, it appears  
13 that the witness is testifying and says that, well,  
14 as soon as I answered the phone -- and goes into the  
15 exact testimony that was objected to, and that's on  
16 465, lines --

17 THE COURT: Hold on. Hold on.

18 MS. KINARD: I'm trying to get into that point  
19 as well as three pages, about 470 and 471. There  
20 are two different hearsay statements that are being  
21 argued. And when it comes to the issue of  
22 preservation, I think it's important to distinguish  
23 between those.

24 THE COURT: Just go up there and show her.

25 MS. KINARD: Okay. I certainly can.

1 THE WITNESS: Here's what you got --

2 THE COURT: Ms. Shurling, just wait a minute.

3 She hasn't asked a question.

4 BY MS. KINARD:

5 Q. All right. I'm trying to differentiate  
6 between -- if we could look at page 461.

7 A. And that's going to be concerning the witness's  
8 identification testimony?

9 Q. The dying declaration, so to speak.

10 A. All right.

11 Q. At the bottom of the page, I believe it says:  
12 You shot me dog, or something like that?

13 A. The guy that we put out shot me was shooting.

14 Q. Okay. So there's that one statement. And then  
15 on page 465, there's the other statement made via  
16 the telephone.

17 A. And that's 465, lines 11 through 13. Okay.

18 Q. And then -- if I could glance there, please.

19 When we get into argument, once the objections  
20 are made, there's certainly the hearsay argument on  
21 page 47. Would you agree with that?

22 A. Correct.

23 Q. And then if we move on, on page 469, there's  
24 more about the dying declaration. And then when we  
25 get to page 470 where Mr. McCulloch moves for a

1       mistrial or an instruction and redaction from the  
2       jury's memory, those are lines 23 through 25,  
3       correct?

4       A.     Uh-huh.

5       Q.     And then on page 471, we get into Rule 5?

6       A.     Correct.

7       Q.     And then at the bottom of page 471, we get to  
8       Mr. Porterfield's statement being referenced by Mr.  
9       McCulloch?

10      A.     Correct.

11      Q.     And then he argues about admissible hearsay on  
12      page 472. And they talk about, as he testified  
13      earlier, instructing the jury to disregard; is that  
14      correct?

15      A.     Correct.

16      Q.     But we're actually talking about here, on page  
17      472, line 12, be what Mr. Adams said. And that  
18      refers to the dying declaration, correct?

19      A.     Correct, to the best of my recollection.

20      Q.     Okay. But read along with me. So in other  
21      words, the point I'm trying to make is that when we  
22      get to whether something was preserved for the  
23      record or not, based on his objection, there are two  
24      different issues we're talking about when it comes  
25      to this statement.

1           One would be Mr. Adams' dying declaration; one  
2           would be the phone call; is that correct?

3           A.     Correct.

4           Q.     And I would submit that, in these pages, most  
5           of the argument is about the dying declaration. And  
6           you have the statement in front of you. Does that  
7           reference at all Mr. Adams' dying declaration?

8           A.     May I see Applicant's 4?

9           Just a moment, please.

10           It doesn't, but this says that it is page 2 of  
11           3 and 3 of 3. I don't have 1 of 3, so I can't say  
12           whether or not it did.

13           Q.     Excellent to know. Okay. So that -- that's  
14           the rest of my question, at least, is that the  
15           argument just may or may not hold water because some  
16           of the argument was about the dying declaration from  
17           Mr. Adams as well as about the phone call; is that  
18           accurate, both of those arguments going at the same  
19           time?

20           A.     I'm sorry. The questions are getting  
21           confusing.

22           The record reflects trial counsel saying these  
23           problems just keep happening; first, we've got the  
24           dying declaration, and now this. And if memory  
25           serves me, I believe he said on the record that he

1       was totally surprised by the testimony about the  
2       phone and what he heard said on the phone, which,  
3       perhaps, you know, unfortunately, Mr. McCulloch  
4       isn't here to answer for himself. But it indicates  
5       he was surprised by it and that, at least, would  
6       appear to be the obvious interpretation to me that  
7       it was the conversation about what he heard on the  
8       phone that Mr. McCulloch was stating he ha not  
9       heretofore been aware of.

10      Q.    And that's your recollection of the transcript?

11      A.    I can find it for you, if you give me a second.

12            If you look at Mr. McCulloch's statements on  
13       the record on page 470 beginning at line 23, and  
14       going down on over to 471, again, it's lines 7  
15       through 14, and once again on 471 beginning at line  
16       22 through 25, it initially appeared that  
17       Mr. McCulloch was saying that he was surprised by  
18       that testimony concerning the hearsay statement from  
19       the telephone.

20            But if you look at the bottom of page 471,  
21       Mr. McCulloch says, Mr. Meadors says: You know,  
22       what's in the statement and has been provided to us  
23       two years ago was close enough.

24            So it appears that Mr. Meadors pointed out to  
25       Mr. McCulloch at that juncture that this statement

1 had been provided.

2 MS. KINARD: I see that as a possible  
3 interpretation. I suppose mine differens in that I  
4 read that as referring to Mr. Adams and --

5 A. Pardon?

6 Q. I read that as referring to Mr. Adams and the  
7 dying declaration.

8 So that, I suppose, is all that is before the  
9 Court, unless you have anything further to add.

10 A. And, of course, that's the problem with people  
11 not being precise on records, because you really  
12 can't tell.

13 Q. Thank you for indulging me and going through  
14 that.

15 Thank you, Your Honor.

16 A. To answer your earlier question, I've now  
17 glance back over page 2 of 3 and 3 of 3, and I don't  
18 see anything about the dying declaration in that. I  
19 have no way of knowing what would have been in page  
20 1 of that statement.

21 MS. KINARD: Thank you for clarifying.

22 THE COURT: Ms. Zmroczek?

23 MS. ZMROCZEK: Nothing further, Your Honor.

24 THE COURT: All right.

25 You certainly may get down.

1 Any further witnesses?

2 MS. ZMROCZEK: The only other witness we have,  
3 Your Honor, is Mr. Watkins. He can testify to an  
4 issue specifically related to what we were just  
5 discussing with regarding the discovery and  
6 Applicant's 4, how it was page 2 of 3 and 3 of 3,  
7 and what he did recover in that discovery.

8 In addition to -- because he went through  
9 Mr. McCulloch's entire file. And in addition to  
10 that, Your Honor, there's just the issue of the  
11 video. And if the Court is not inclined to accept  
12 it -- I think that I have to proffer because of the  
13 new case out about how now you can't PCR a PCR  
14 attorney. And so I didn't know if we needed to  
15 discuss that at some point. I know it's getting --

16 THE COURT: Well, I was thinking about a  
17 proffer myself. And while Ms. Shurling was  
18 testifying, I reviewed the -- Mr. McCulloch's  
19 examination of the witness that presented and  
20 brought the video in and he -- of course he -- and  
21 while on his examination of that witness, he did not  
22 object to the testimony -- I mean, the video being  
23 admitted. But I think he went through the entire  
24 thing, as he should have.

25 What I'm -- and now I'm confused about -- you

1       said this witness can testify that the video has  
2       been altered, now you're saying he can testify to  
3       something else. Is that --

4               MS. ZMROCZEK: What he did, Your Honor, was he  
5       went through Mr. McCulloch's entire file; for  
6       example, searching for the 911 calls, looking at the  
7       videos, looking for -- looking at all the evidence  
8       for issues for us to raise on the PCR.

9               And one of the things that he will testify to  
10      -- because there was a question as to where is page  
11      1 and 3 of Applicant's 4, regarding the testimony  
12      about issue 2 on the appellate counsel, and he will  
13      testify to -- as to what he found in Mr. McCulloch's  
14      file.

15              THE COURT: All right. Well, as to the  
16      video --

17              MS. ZMROCZEK: Right.

18              THE COURT: To begin with, the State was given  
19      no notice that you had analyzed the video. And all  
20      I can find, in terms of notice to the State, is item  
21      2 where you say he did not move to suppress the  
22      video.

23              Of course, I've read the testimony and whether  
24      he should or should not have moved to suppress it, I  
25      know on what grounds he would have since he

1       thoroughly -- or what you contend he should have  
2       done since he did thoroughly questioned the officer  
3       who had it and where he got it and where it was.

4               Of course, he didn't ask if it -- he did ask if  
5       it had ever been altered and the testimony was no.

6               Was the video edited in any way?

7               Answer: Changed? Oh.

8               From the time you viewed it on the monitor, as  
9       the department records would show it was burned on  
10      the CD, was that video changed in any way?

11              No, it was not.

12              Distorted?

13              No.

14              So Mr. McCulloch did inquire and asked  
15      the officer -- the testimony was allowed that it had  
16      been in no way altered. And to -- you know, I'm  
17      almost thinking you're trying to make a  
18      prosecutorial misconduct argument here that the  
19      State intentionally altered this and then didn't  
20      tell -- and that the witness, Mr. -- whatever his  
21      name was -- lied on the stand.

22              You know, it goes -- to me, it goes beyond the  
23      pale of a PCR hearing. And I just don't think if  
24      that testimony is as you say it is, that there's  
25      been sufficient notice to the State. I mean, the

1 State -- I mean, I take Ms. Kinard's point  
2 well-taken. If that testimony were allowed and the  
3 Court were allowed to rely on it, I think the State  
4 would have the opportunity to bring their own expert  
5 in and challenge your expert --

6 MS. ZMROCZEK: Exactly.

7 THE COURT: -- if, in deed, your witness can  
8 even be qualified as an expert. I don't know that.  
9 But that's my thinking; that at this late stage,  
10 it's terribly unfair to the State to bring this up  
11 as -- I assume it's somewhat of a surprise or, as we  
12 used to say, an ambush.

13 And, you know, even if the tape had been  
14 altered, I'm not certain where that fits into a  
15 postconviction relief hearing here. I assume you're  
16 challenging the ineffectiveness of Ms. McCulloch.  
17 But, for the record -- from the record, he, just at  
18 first glance, did what he should have done; whether  
19 he should have done something else outside of the --  
20 in other words, when he received the video, if he  
21 should have taken some steps at that point to  
22 analyze it and see that it was or was not altered.

23 MS. ZMROCZEK: And that's my position, is that  
24 he didn't take those steps, so that when he was  
25 asking those questions, he was simply relying on

1        what the State's witness was telling him without  
2        having sufficient knowledge to know how to challenge  
3        it.

4                THE COURT: Well, I still think the notice  
5        issue is a big issue. Now, I don't know about this  
6        other issue that you've raised now.

7                Let me ask Ms. Kinard again about the State's  
8        position about Mr. Watkins testifying. That he's  
9        went through Mr. McCulloch's file and found  
10       something that's divergent from what his testimony  
11       was.

12               MS. KINARD: Your Honor, you have everything in  
13       front of you that I had in front of me as of today.  
14       We have no notice of him testifying -- of  
15       Mr. Watkins' intent to testify whatsoever. If it's  
16       his testimony on a brief matter that might clarify  
17       why we're missing a page of that statement, I  
18       wouldn't object to a very, you know, few questions  
19       on that.

20               But in the event or in the case it would go  
21       into his entire investigation of the case or  
22       anything further, I'd have to object to that on the  
23       grounds of notice as well.

24               THE COURT: Well, I'm not sure he's  
25       testified -- that he's qualified to testify about

1        anything about his opinion about the legality in  
2        legal matters.  There's a -- well, I just don't  
3        know.

4                MS. KINARD:  And that would certainly --

5                THE COURT:  All right.  I'll allow you to  
6        proffer that evidence, Ms. Zmroczek, on the basis  
7        I'm going to rule on the State's objection once I  
8        hear the proffer.

9                MS. ZMROCZEK:  And, Your Honor, as I will call  
10       him, I just do want to clarify that I did receive  
11       the motion for specific -- you know, specificity  
12       three weeks ago, and I was in trial.  So that late  
13       notice is my fault, absolutely; however, you know --

14               THE COURT:  You could have moved for a  
15       continuance today, too.

16               MS. ZMROCZEK:  Right.  And I know that this  
17       case has been continued numerous times and a lot of  
18       it --

19               THE COURT:  The issue is you didn't notify the  
20       State what you found out and shared it with the  
21       State so they could be prepared to either challenge  
22       it or accept it today.  The State's allowed -- it  
23       has not objected to a lot of things.

24               MS. ZMROCZEK:  Certainly.

25               THE COURT:  So if you wish to call Mr. Watkins

1 for that limited purpose, I'll allow you to do so.

2 MS. ZMROCZEK: The purpose of the trial of the  
3 discovery or can I proffer the other --

4 THE COURT: Well, I'm going to sustain the  
5 State's objection to the introduction of evidence  
6 that the videotape was altered. I sustain the  
7 State's objection based on the fact that  
8 insufficient evidence -- insufficient notice was  
9 given to the State. The State hasn't even seen what  
10 you're talking about, and here we are.

11 MS. ZMROCZEK: Beg the Court's indulgence.

12 And, Your Honor, at this time, we'll withdraw  
13 that testimony. And, Your Honor, given the fact  
14 that the late notice was, you know, my fault, what I  
15 would move to do at this time, Your Honor, is to  
16 withdraw that specific allegation with leave to  
17 present it as after-discovered evidence.

18 THE COURT: Yeah. I mean, that's what it is.

19 MS. ZMROCZEK: Right. Under Rule 29(b), Your  
20 Honor.

21 THE COURT: All right. So you're withdrawing  
22 that?

23 MS. ZMROCZEK: That, right.

24 THE COURT: That what?

25 MS. ZMROCZEK: That allegation, under Rule

1 29(b) .

2 THE COURT: So you're not going to call  
3 Mr. Watkins?

4 MS. ZMROCZEK: Correct. That would be our  
5 position, Your Honor. I'm not sure what the State's  
6 position is.

7 MS. KINARD: I don't think I can object to  
8 that, as long as she's withdrawing it. And then she  
9 certainly will have that right to present that in a  
10 posttrial motion, if she sees fit.

11 THE COURT: Right. Well, you presented --

12 MS. ZMROCZEK: I rest at this time. Thank you.

13 THE COURT: All right. Are you resting or are  
14 you going to call your client?

15 MS. ZMROCZEK: No, no. Resting.

16 THE COURT: Anything on behalf of the State?

17 MS. KINARD: No, Your Honor. I'm happy to  
18 present closing argument, if you'd like.

19 THE COURT: I'm sorry?

20 MS. KINARD: I'd be happy to present a closing  
21 argument, if you'd like.

22 THE COURT: Not necessary. How long do you  
23 need to prepare proposed orders?

24 Ms. Kinard, I count that you have 12 cases this  
25 week, so --

1 MS. KINARD: Yes, Your Honor.

2 THE COURT: Be judicious in your estimation of  
3 tome.

4 MS. KINARD: I would ask for 30 days.

5 THE COURT: Any objection?

6 MS. ZMROCZEK: No, Your Honor.

7 THE COURT: 30 days, folks, both parties. Post  
8 orders within 30 days. Thank you both very much.

9 -- END OF TRANSCRIPT OF RECORD --

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## C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Richland County, South Carolina, on the 18th of July, 2017.

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

July 31, 2022

s/Bethanie K. CrepponBethanie K. Creppon  
Circuit Court Reporter

## Trial Attorney

Fail to properly prepare / call witnesses / utilize evidence  
Fail to preserve obvious issues for appeal

- 1) Did not move to suppress search of vehicle - illegally obtained
- 2) Did not move to suppress video -
  - saves with completeness
  - editing
- 3) Did not move to suppress phone -
  - never reviewed calls
  - never examined
- 4) Did not object to Judge's behavior / chilling effect on other
- 5) Did not object to Judge going into jury room
- 6) Did not object to premature deliberations
- 7) Did not argue jury charges / Beckler -
  - fail to request charges
- 8) Did not object to bolstering
- 9) Never received / reviewed all calls

## Appellate Attorney

- 1) Did not argue Baggers
- 2) Did not argue search warrants -
  - validity of Becker
  - hearsay
- 3) Did not argue closing argument preservation
- 4) Did not argue Brady / Rule 5 violations

### Statement

State of South Carolina )  
County of Richland ) S.S.

Personally appeared before me this 5th day of February, 2007, at 0230 hours, an officer duly and legally authorized to administer oaths in the above named county and state aforesaid, comes one Sidney Patrell Williams of \_\_\_\_\_ Daytime telephone number \_\_\_\_\_ Nighttime telephone number \_\_\_\_\_

Who makes the following statement under oath to wit:

Q: K. Isenhoward.

R: Sidney Williams

**Q: What happened at 826 Bush River Road tonight?**

R: I went to club 360 with my girlfriend, Kimberly Jeter. We go there just after the Super Bowl ended. We had a couple of drinks. We saw Johnny Gaskins "Black". We spoke to him a while and went on talking to other people. A while later, I saw Johnny arguing with this guy. The security guards threw the guy he was arguing with out of the club. Me and my girl continued on enjoying ourselves. A little while later, it was about 12:45, I saw three security guards taking Johnny out of the club. They were by the door. It looked like it was getting physical they were arguing. Johnny was talking shit. I walked over to them and asked them what was going on. The security guard was telling him that he was about to lock him up for disorderly conduct. I pleaded with them not to lock him up. I told them that he was just drunk. I kept asking them not to lock him up. I heard one of the security guards tell someone to get Richland County out there. A girl named Diane came outside and told Johnny to shut up. Johnny was telling the security guard, "Ya'll gangsta". Just talking noise. The security guard said that he already gave him a chance and that he was going to jail. I saw that Johnny was in handcuffs. The guard told Johnny to sit down beside the black car. Johnny said, "Come on why you doing me like this, you know me". The officer said, "because you talking to me like I'm from your hood, I'm not from your hood, your being disrespectful". Johnny told him that he was sorry. The officer said, "O.K., I'm going to let you go. You are to get in your car and go home right now". I told the officer that I appreciated that. The officer said, "Make sure he goes straight to his car, don't turn around and just go home". They took him out of handcuffs and watched him as he stumbled through the parking lot. I was trying to get him to his car. He couldn't find his car because he was so drunk. He found the car but was putting the wrong set of keys in the car. He went to a car beside it and went back to his car. He drives a blue Impala and the car parked next to it was a black one. He went back to his car and found the right set of keys. He got in his car. I started walking back toward the club. Johnny pulled out fast stopped in front of the door to the club and started shooting from inside the car. He shot several times and drove off. I was walking back and the security guard started shooting back. I hit the ground. After they stopped shooting, I got up and starting walking back in the club. That's when one of the security guards who was dealing with us started

This statement was made in the presence of Inv. Kevin Isenhoward of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me  
this 5th day of February, 2007.

**Signed:**

**Witness:**

**Witness:**

Notary Public for South Carolina  
My commission expires 10/08/2014.

Page 1



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Statement

State of South Carolina)

) S.S.

County of Richland )

questioning me and put me in handcuffs. He told me that I better tell his name because he knew that I know him. That was that. I went inside and waited with them. I saw Malik the owner and explained it to him. Malik told me to tell that guys name and that I would be ok.

Q: Did you come to the club with Johnny Gaskins?

R: No just my girl Kim. We just saw him there.

Q: How long have you known Johnny Gaskins?

R: For about a year or so. My girlfriend knew him first and I kind of met him through her. He lives out there where she does.

Q: Have you had anything to drink tonight?

R: No, I don't drink or do drugs. I have seizures.

Q: Do you know anyone else by name that was outside the club and may have witnessed the shooting?

R: No. There wasn't anyone outside but me, Johnny, and the security guards. The girl that was out there left and went home before the shooting.

Q: Did anyone threaten or do anything to Johnny Gaskins to warrant him shooting at them?

R: No. They were doing their jobs.

Q: Did the security guards have Johnny in handcuffs at one time and then let him out and allow him to leave?

R: Yes.

Q: Have you ever seen Johnny with a gun before?

R: Yes. It was a while ago. He got arrested for having it.

Q: Did you see him with one tonight?

R: No, not until he started shooting.

Q: Describe the car that Johnny was driving.

R: It was like a 2001-2002 Chevy Impala. It was blue I think it may have been black. It was one of the newer small Impalas.

This statement was made in the presence of Inv. Kevin Isenhoward of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me  
this 5th day of February, 2007.

Signed: \_\_\_\_\_

Witness: \_\_\_\_\_

Witness: \_\_\_\_\_

  
Notary Public for South Carolina  
My commission expires 10/08/2014.

Statement

State of South Carolina)

) S.S.

County of Richland )

Q: Did Johnny have anyone with him when he left?

R: No. It was just him in the car.

Q: Do you have anything else to add to your statement?

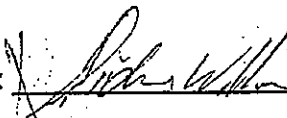
R: No.

End of Statement 02/05/07 @ 0327hrs\*\*\*\*\*

This statement was made in the presence of Inv. Kevin Isenhoward of the Richland County Sheriff's Department.

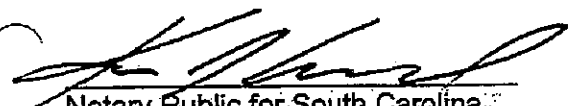
I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me  
this 5th day of February, 2007.

Signed: 

Witness: \_\_\_\_\_

Witness: \_\_\_\_\_

  
Notary Public for South Carolina  
My commission expires 10/08/2014.

Statement

State of South Carolina)  
County of Richland ) S.S.

Personally appeared before me this 5th day of February, 2007, at 0810 hours, an officer duly and legally authorized to administer oaths in the above named county and state aforesaid, comes one Lamont Davis of \_\_\_\_\_  
\_\_\_\_\_ Daytime telephone number \_\_\_\_\_  
\_\_\_\_\_ Nighttime telephone number \_\_\_\_\_

Who makes the following statement under oath to wit:

Q: K. Isenhoward

R: Lamont Davis

Q: What happened this morning at 826 Bush River Road?

R: I was working security inside 360 sports bar. One of my other security officers, Quintan Harris, was escorting a gentleman from behind the bar, where the bartenders are. I walked up to Quintan and asked him what the problem was. He told me that he was being very rude to the other patrons. I asked him to walk over to a more secluded area where we could talk. As I was talking to him he was being very rude and vulgar. I told him to relax and that he was being disorderly. He was cussing and asked me, "What do you fucking want, me to leave"? I took his drink from him. I sat it on the table and told him that he had to leave. I put him in handcuffs and had him calm down for a while. He told me that he was calm and I believed him. I told him that I was going to let him go but that he couldn't come back. Quintan and I walked him out the front door. When we were outside, his buddy was asking me to let him go. He said that he would take him home. I took him out of handcuffs and told him that the next time I would have him arrested. He said, "You ain't no gangsta but I'm leaving". His buddy and him were walking into the parking lot. I noticed that Quintan was escorting another man out of the club. I told him to take him to the car. I was watching Quintan escort the guy into the parking lot away from the door. I was standing next to Wolf, a bouncer. We were both standing in front of the double doors, the front door to the club. That's when I noticed the guy I put out driving a blue Chevy Impala past the door moving across the front of the club coming from the direction of Heartbreakers. He was leaning back in his seat looking out the back window and he had a gun pointing out the driver's window. He started shooting at us. I saw the glass breaking and I saw Wolf fall down and Quintan run around the corner. The guy in the blue Impala sped off. When he turned the car to go up the hill I started firing back at him. I shot 3 or 4 times at him. I don't know if I hit him or the car. He sped off onto Bush River Road. I turned around and saw Wolf lying on the ground in front of the door. I looked into the club and saw a girl lying on the ground next to the first set of pool tables. I heard someone say that there was another one shot in the back. I asked Quintan if I was hit. I felt a little burn. He told me that I was shot in the back and that Wolf was shot in the stomach. We went inside and I told the door guy to call 911, and he said that he already did. I was talking to Wolf and he seemed OK. I waited out front for the police and ambulance.

This statement was made in the presence of Inv. Kevin Isenhoward of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me  
this 5th day of February, 2007.

Signed: \_\_\_\_\_

Witness: \_\_\_\_\_

Witness: \_\_\_\_\_

Notary Public for South Carolina  
My commission expires 10/08/2014.



Statement

... e of South Carolina)

) S.S.

County of Richland )

Q: Which officers were actually involved in the incident with the man who shot?

R: Me and Quintan.

Q: Do you know which bartender was having problems with him?

R: I believe that was Erin.

Q: What was the guy who shot at you wearing?

R: He had on black jeans; he had a black flight jacket with fur around the collar. He had a red and white dress shirt on under it.

Q: Describe the man's physical appearance?

R: He was about 5'11 190lbs. He was a dark black male with a low haircut. He had a goatee on his face. He was about 25-26 years old.

Q: Have you seen him before today?

R: No.

Q: What type of weapon were you shooting?

R: It is a Rossi .38 five shot.

What did you do with the gun?

After the shooting I put the gun in the truck of my car.

Q: Do you know the man who asked you to let the shooter go?

R: No. Another security guard named Palmer grabbed him and put him in cuffs.

Q: Did you ever see that man with the shooter before he asked you to let him go?

R: Yes. He was with him inside the bar.

Q: Was there anyone else with them?

R: Yes, a black female. I don't know her. I saw her outside the club saying that they would take him home.

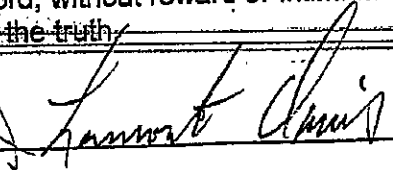
Q: Was she outside when the shooting started?

R: I didn't see her.

This statement was made in the presence of Inv. Kevin Isenhoward of the Richland County Sheriff's Department.

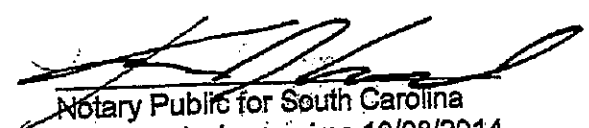
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Sworn to and subscribed before me  
this 5th day of February, 2007.

Signed: 

Witness: \_\_\_\_\_

Witness: \_\_\_\_\_

  
Notary Public for South Carolina  
My commission expires 10/08/2014.

Statement

State of South Carolina)

) S.S.

County of Richland )

Q: Are you absolutely sure that the person who was shooting at you was the same person you were dealing with just before that?

R: Yes.

Q: Do you have anything else to add to your statement?

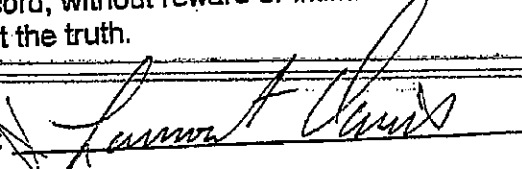
R: No.

End of Statement 02/05/07 @ 08:52hrs\*\*\*\*\*

This statement was made in the presence of Inv. Kevin Isenhoward of the Richland County Sheriff's Department.

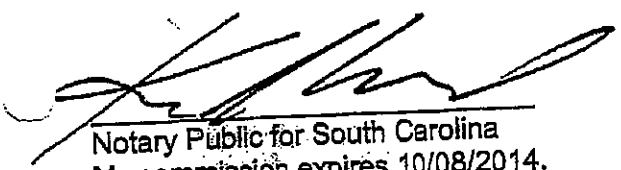
I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me  
this 5th day of February, 2007.

Signed: 

Witness: \_\_\_\_\_

Witness: \_\_\_\_\_

  
Notary Public for South Carolina  
My commission expires 10/08/2014.

STATE OF SOUTH CAROLINA

County of Richland

SEARCH WARRANT

Date: February 5, 2007  
Officer: Inv Matt Ellis



000374

STATE OF SOUTH CAROLINA }

AFFIDAVIT

COUNTY OF RICHLAND }

Personally appeared before me, one INV Matt Ellis who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Any firearms or firearm paraphernalia. Said items would include, but not limited to, actual firearms, shell casings (spent or unspent), and ownership paperwork or materials associated with the possession and/or acquisition of firearms. Any forensic evidence related to the homicide of Lamont Davis. Said evidence would include, but not limited to, blood, hair, fiber, DNA, fingerprints, photographs, gunpowder residue and etc. Any clothing that might contain evidence from a shooting. Any type of identification to include but not limited to driver's license, identification cards, social security cards, credit cards, bank account numbers or records, gas receipts, cell phone bills or other bills and etc. Any potential relevant evidence, which would aid in the investigation of the homicide outlined in the attached affidavit.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)  
TO BE SEARCHED

5623 Two Notch Road, Richland County Sheriff's Department Forensic Building  
Columbia, South Carolina 29223  
2005 Chevrolet Impala Blue in color  
SC Tag 233VMY  
VIN: 2G1WF52E059293953

REASON FOR AFFIANT'S BELIEF THAT THE  
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On 02-05-07 the security at 826 Bush River Rd (Club 360) escorted an intoxicated patron, later identified as Johnnie Gaskins, out of the club for being disorderly. As security was escorting Gaskins out of the club Sidney Williams approached them and asked if he could take Gaskins home because he knew him. Security agreed to let Gaskins go on the basis that Sidney Williams was going to take Gaskins home and remove him from the club property. Lamont Davis, head of security at the club watched as Gaskins walked towards and got into a dark colored sedan, possibly a blue Impala. Davis walked back into the entranceway of the club and saw Sidney Williams coming back into the club. A short time later Davis saw the dark color car coming towards the front of the club and suddenly come to a stop. When the car stopped Davis heard a gunshot and felt a burning sensation in his back. Several more shots followed and Davis pulled his 38 cal. handgun and shot back at the car as it was fleeing the scene. After the shooting stopped security detained Sidney Williams

Sworn to and Subscribed before me

this 5<sup>th</sup> day of February, 2007

(LS)

Signature of Judge

Affiant

Address Richland County Sheriff's Department  
5623 Two Notch Road, Columbia, S.C. 29223

Phone (803) 576-3000

000376

DATE: 02/05/07 TIME: 0215

I was going to put the Verizon <sup>phone</sup> into my office & return it to the owner.

I kept receiving phone calls on the Verizon cell phone from woman asking for Black & was <sup>he</sup> at the place where you shooting at 360? TIF

I got a call from a guy who asked could he come and get the phone? Dasey 518-1266 came up on the pho

I also received a call from another woman - asking me where I was. Her name on the Verizon phone came up -

Kim G

I pretended to be "Black" in order to get information from the callers -

This statement was made in the presence of S/SGT Tom Anderson  
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS \_\_\_\_ DAY OF \_\_\_\_ 20\_\_.

SIGNED: *[Signature]*

WITNESS: \_\_\_\_\_

WITNESS: \_\_\_\_\_

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES \_\_\_\_\_



Lindburgh Peterfield III  
(CONTINUED)

DATE: 02/05/07 TIME: 0215

I followed them to the front door & I saw them escorted the patron to his car. I walked back into the ~~club~~ Sport grill.

About twenty minutes later & I heard some gunshots & people were running everywhere. I ran to the front door & tried to assist a girl who lying on the floor by the pool table & two other girls trying to help the girl; along with a second girl who had been shot. My staff member 'Wolf' was on the ground in front of the door & he had been shot on his left side.

The security Guard 'New York' had also been shot & he was walking around.

I also had found a Verizon phone around a hour before the shooting in the parking lot. I gave it to the DJ - Gitlow who held it for about 45 minutes. The guy never came & got it according to the DJ.

This statement was made in the presence of S/SGT Tom Arriaga of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS \_\_\_\_ DAY OF \_\_\_\_ 20\_\_.

SIGNED: Lindburgh Peterfield III

WITNESS: \_\_\_\_\_

WITNESS: \_\_\_\_\_

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES \_\_\_\_\_.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
THE COURT OF COMMON PLEAS

## JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2015CP4003169**

Johnny Walker Gaskins

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ 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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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.

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 |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

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.**

Circuit Court Judge \_\_\_\_\_

Judge Code \_\_\_\_\_

Date \_\_\_\_\_

## For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Oct, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Aimee Jendrzewski Zmroczek

Jessica Elizabeth Kinard

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-40-03169

Johnny Walker Gaskins, 313590,

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL**

FILED  
2017 OCT 16 PM 12:50  
JESSICA E. KINARD, CLERK  
COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

This court convened an evidentiary hearing into this matter on July 18, 2017, at the Richland County Courthouse. Applicant was present at the hearing and represented by Aimee J. Zmroczek, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant's attorneys, Joseph M. McCulloch, Esquire ("trial counsel") and Tara Dawn Shurling, Esquire ("appellate counsel"), were present and testified. Applicant was also present but did not testify, as is his right. This court had before it a copy of the trial transcript, the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the appellate record, and the pleadings in this matter. This court finds as follows:

### **I. PROCEDURAL HISTORY**

Applicant was indicted at the July 2008 term of the Richland County Grand Jury for two (2) counts of murder (2008-GS-40-1626, -3448), three (3) counts of assault and battery with intent to kill (2008-GS-40-1629, -1631, -1632), and one (1) count of use of a firearm during the commission of a violent crime (2008-GS-40-1627). Joseph M. McCulloch, Jr., Esquire, and Kathy R. Schillaci, Esquire, represented Applicant.

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On April 13, 2015, Applicant proceeded to trial before The Honorable L. Casey Manning. Applicant was found guilty of all charges as indicted. Judge Manning sentenced Applicant to incarceration for life for both counts of murder, which are set to run concurrently. Applicant was sentenced to consecutive twenty (20) year sentences for each count of assault and battery with intent to kill. Applicant was also sentenced to a consecutive sentence of five (5) years for use of a firearm during the commission of a violent crime.

Applicant filed a timely notice of appeal. An appeal was perfected by Tara Shurling, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Gaskins, Op. No. 2013-UP-304 (S.C. Ct. App. filed July 3, 2013). Applicant filed a writ of certiorari to the South Carolina Supreme Court, in which the court subsequently denied certiorari. State v. Gaskins, Appellate Case No. 2013-001904 (S.C. filed August 6, 2014). The Remittitur was returned on August 15, 2014.

## **II. ALLEGATIONS**

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

1. "Ineffective assistance of trial counsel"
  - a. "Failure to properly prepare Applicant prior to trial"
  - b. "Failure to call witnesses and utilize evidence"
2. "Ineffective assistance of appellate counsel"
  - a. "Failure to raise all meritorious issues on appeal"

The morning of the hearing, Applicant emailed Respondent and this court a handwritten document listing amended allegations, which were the following:

### Trial Attorney

Fail to properly prepare/call witness/utilize evidence

Fail to preserve obvious issues for appeal

- A. Did not move to suppress search of vehicle
  - a. Illegally obtained
- B. Did not move to suppress video
  - a. Issues with completeness



- b. Editing
- C. Did not move to suppress phone
  - a. Never reviewed calls
  - b. Never examined
- D. Did not object to Judge's behavior/chilling effect on defendant
- E. Did not object to Judge going into jury room
- F. Did not object to premature deliberations
- G. Did not argue jury charges/Belcher
  - a. Fail to request charges
- H. Did not object to bolstering
- I. Never received/reviewed 911 calls

Appellate Attorney

- A. Did not argue Biggers
- B. Did not argue search warrants
  - a. Validity of tipster
  - b. Hearsay
- C. Did not argue closing argument preservations
- D. Did not argue Brady/Rule 5 violations

Respondent objected to the submission of these amendments pursuant to SCRCF Rule 15(a), and moved for a continuance in order to prepare to defend these allegations. This motion was denied, though this court cautioned Applicant about the presentation of late amendments in the future. In evaluating these allegations, it is the court's position that Applicant's original allegations were folded into and described in more detail by the amendments, which will be discussed further below.

**III. STATEMENT OF FACTS**

On February 5, 2007, Johnnie Gaskins was removed from the Super Bowl party at the Club 360 for unruly behavior. According to bar manager Erin Hellman, Gaskins had demanded service: "give me a f—ing Hennessy" (cognac). When she offered him a menu, he retorted again "give me a f—ing Hennessy bitch," and threw money at her. Gaskins then approached aggressively toward her behind the bar. At that point, security for the club came and took him out the front door of the club. Hellman described Gaskins as being very sweaty and unsteady on

his feet, and having a difficult time keeping his head up. She identified Gaskins in court (and in a photographic line-up) as the unruly person. Around 20 minutes later, she heard shots being fired.

Prior to the shooting, Shannavia Williams arrived at the Club 360 around midnight. After staying for a while, she decided to leave to go to another club with her friends. Before leaving, she sat her drink down, but spilled it. She left her friend, Deirdre Houston, there and went to get something to clean the spill. Two other friends, Shanna Williams and Shanelle Whack, were in the back of the bar.

Quinton Harris and Lamont Davis had taken Gaskins outside with security and handcuffed him. Gaskins stated that the security thought they were gangsta, but "I'll show them gangsta." Sydney Williams, a friend of Gaskins, approached them and talked them out of calling the police concerning Gaskins. The handcuffs were removed and he was allowed to return to his car.

Gaskins was still angry as he walked back toward the car he came in - a Chevy Impala. Another security guard, Epsil Palmer, remained concerned about Gaskins because he was still acting rowdy at the car. Palmer went and talked to Gaskins and asked him to leave. Subsequently, he was seen getting in the car by himself.

Harris and Davis returned inside the club to remove another patron, Christopher Lyles. As they were doing that, Gaskins returned to his car.

Next, Harris and Davis took Christopher Lyles, another rowdy patron, outside. At that time, Gaskins had gotten in his Impala and driven to the front of Club 360 where he proceeded to open fire. Harris, while tussling with Lyles, looked up and saw Gaskins, whom he had removed from the club, firing from the Impala. Independent witnesses identified Gaskins as either shooting from the car or walking to the car immediately before the shooting. Victim Lamont

Davis identified Gaskins as the individual he saw shooting from the car, victim Quinton Harris identified Gaskins as the person he saw in the car with the gun, Sydney Williams identified Gaskins as getting in the car that stopped in front of club when shooting started, and Epsil Palmer identified Gaskins as person who entered vehicle from which he saw flashes emanating, although it was too far at the time to see the actual shooter.

Security guard John Adams was hit and subsequently died. Inside the bar, Deirdre Houston was shot while she was waiting for Shannavia Williams to return and clean the spilled drink. Shannavia Williams was returning to clean up the spill and was shot in the head, resulting in her death. Security guard Lamont Davis was also shot. Quintin Harris was also shot on his knuckle, but avoided other bullets in his direction. At that point, the Chevy Impala left the scene. Calls were made to 911. The acquaintance of Gaskins, Sydney Williams, was handcuffed by security because they believed he knew something about the shooter.

The owner of the club, Lindburgh Porterfield, recovered a cell phone in the parking lot. This phone was later turned over to the Sheriff's Department. The Chevy Impala was ultimately found. Inside the vehicle, the police located documents with Gaskins' name, as well as gunshot residue and trace evidence linking Gaskins' DNA to the vehicle. In addition, a shell casing was found inside the vehicle. Forensic testing of the shell casing in the Impala linked it to 40 caliber shell casings found in the club's parking lot as being fired from the same weapon.

#### **IV. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL**

##### **Applicable Law**

This Court finds that Applicant has failed to satisfy his burden to prove that Counsel was deficient or that he was prejudiced by Counsel's alleged deficiencies. Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813,



814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether Counsels provided representation within the range of competence required in criminal cases. Id.

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This court finds both attorneys' testimony was credible, and does not factor into its ultimate decision the fact that Applicant chose not to testify. Regardless, this court finds that Applicant has failed to satisfy his burden to prove that either counsel was deficient. Applicant also failed to prove he was prejudiced by the alleged deficiency. For the reasons below,

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Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is, therefore, denied and dismissed:

Analysis

At the evidentiary hearing, trial counsel testified to his recollection of the evidence the prosecution had against Applicant, and characterized it as overwhelming. He described it as a "hope for the best" defense, describing that as trying to defeat the State's burden of proof by poking holes in their presentation. The evidence against Applicant was that many witnesses identified him, shell casings were found in his car, as well as near where the car stopped and fired. His cell phone was found inside of the club, and potential testimony from a woman with whom he was romantically involved that he confessed to her was presented to the defense several days before trial. Trial counsel testified that they went through the list of usual defenses, including alibis and mental incompetence, but none refuted the evidence. Additionally, many witnesses to the incident would not meet with the defense team, including Sydney Williams. Ultimately, trial counsel's summary was that there was no real defense and Applicant knew that.

Trial counsel testified in further detail about individual pieces of evidence, many of which were listed as specific allegations. For example, Applicant alleged a general failure to prepare, call witnesses, or utilize evidence, which all go hand in hand with other allegations such as failure to suppress different items. Trial counsel was questioned about the vehicle in question at the crime scene, including why he did not move to suppress the search of the vehicle as being illegally obtained. The record reflects that trial counsel did move to challenge the validity of the search warrants of Applicant's residence and vehicle, but was not successful. PCR counsel questioned trial counsel specifically about whether the warrant was illegally obtained, and whether an anonymous tip could have influenced the issuance of the warrant. Trial counsel

SL 7

argued that he would always be concerned if a warrant was based on an anonymous tip, but it was apparent that the information was verified and corroborated by law enforcement, as was evidenced in the trial court's ruling.<sup>1</sup> Id. South Carolina law holds that even an attorney who may have performed deficiently in failing to object to a defective warrant may not be found ineffective if the Applicant fails to show prejudice. Gantt v. State, 354 S.C. 183, 520 S.E.2d 133 (2003). That is not the case at hand, as trial counsel took the steps he deemed necessary to challenge the warrants and ensure that no adverse evidence or rulings were entered against Applicant. This certainly does not rise to the level of deficient performance or prejudice as considered by Strickland, supra. The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Regarding the video of the incident from nearby security cameras, trial counsel testified that he did not move to suppress it, as alleged. He could not recall when he received the video, but did remember that he showed it to Applicant. He remembered it being an exterior security camera from the business next door. He testified that it showed people leaving the club, two people going to a vehicle, one getting in the back of the vehicle, the car pulling around to the front of the club, and what the State characterized as gunfire coming from the car. Trial counsel further testified that he had no reason to believe that the video was altered in any way and, because it corroborated the accounts of the witnesses, he believed it was an accurate presentation. Therefore, he did not hire an expert to explore the video further. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State,

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<sup>1</sup> During argument, the trial court opined that, "I think [Applicant's] name wasn't just casually mentioned. They put him in the car, they put the gun in his hand, the bullets came out of the gun that was in his hand." Tr. p. 65;25 - 66;3.

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309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

"Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Specific testimony was elicited regarding the aforementioned phone call of a confession made to Ms. Sykes, a former romantic interest of Applicant. Trial counsel testified that he did not look too deeply into the phone call or other issues regarding Applicant's phone because he was aware that the phone was collected at the crime scene. He did not believe that the phone was an issue, because its location at the scene was bad enough; therefore, he gave the phone no further examination or weight. When the issue of the phone came up at trial, specifically when the club's owner, Lindbergh Porterfield, began to testify regarding calls he answered on the phone after he found it, trial counsel made all appropriate objections, including a motion for a mistrial and curative instruction. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Applicant made further allegations regarding trial counsel failing to receive and/or review 911 calls regarding the incident. The only evidence presented at the evidentiary hearing

regarding 911 calls was the fact that an anonymous tip regarding the location of the vehicle was submitted via 911. Trial counsel testified that he had no way to know more information about the 911 tip, and did not see that it was relevant, given that his suppression motion was denied. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

When considering the fact that the trial judge went into the jury room, trial counsel testified that it is not very unusual and had happened to him during prior trials. He testified that he did not object because he saw no aggravation to the jury, so any objection would not serve a purpose. He further testified that he would have objected if it had been prejudicial, but the conduct seemed inoffensive. Overall, the allegations relating to trial counsel's failure to object to the trial judge's behavior do not meet the burden required to prove ineffective assistance of counsel. Rather, they show sound judgment and well-reasoned strategy Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State,

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308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Therefore, the allegation is dismissed with prejudice.

There were further allegations regarding jury conduct, specifically, that the jury sent a note to the trial court before the trial had ended regarding details of testimony. When questioned about this at the evidentiary hearing, trial counsel testified that he had concerns to the extent that the jury is told not to discuss the case before they retire to deliberate. He elaborated, though, that he has been in trials where jurors raised their hands and asked questions. He further testified that he believed the trial judge handled the situation appropriately by asking the jurors to keep listening to the entire presentation and the charges before asking any questions. There was no evidence presented showing that trial counsel's conduct was deficient or prejudicial, and therefore the standards of Strickland, supra, cannot be satisfied. The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Also regarding the jury, Applicant alleged that trial counsel was ineffective by not requesting any specific jury charges and failing to ask for a Belcher<sup>2</sup> charge, specifically. The record reflects that trial counsel did make an argument to the trial court about the language regarding intent as reflected by Belcher, even though the case had only recently been decided. Trial counsel testified that he did not recall specific jury instructions, though he usually submitted written ones. When asked why he did not submit an instruction on multiple charges, he stated that he does not always submit that specific instruction because it is a standard instruction. When asked about submitting an instruction on intent, he testified that he could not recall a reason he did not request one. Lastly, when asked why he did not request a charge

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<sup>2</sup> State v. Belcher, 385 S.C. 597685 S.E.2d 802 (2009).

regarding spoliation, he testified that judges rarely charge on the facts and he did not believe this was necessary. This court agrees with trial counsel's assessment of the jury instructions as they were presented at trial. Further, it finds that any perceived failure to request an instruction regarding intent was remedied by the discussion on the record about Belcher. There was no evidence presented showing that any of trial counsel's conduct was deficient or prejudicial, and therefore the standards of Strickland, supra, cannot be satisfied. The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Applicant's last issue regarding conduct with the jury was that trial counsel did not object to bolstering during the State's closing argument. However, the record reflects that trial counsel objected three times during the State's closing. These were made contemporaneously with the testimony and explained to the court at the bench, then put on the record after all closings were completed. These objections, as trial counsel described at the evidentiary hearing, dealt with repetition, inflaming the jury's passions, mischaracterized testimony, and reference to a "gangsta style" shooting. This court finds that trial counsel's performance was not deficient or prejudicial, and therefore the standards of Strickland, supra, cannot be satisfied. The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

The last allegation regarding trial counsel was that of failure to preserve issues for appeal. This court finds that no evidence has been presented, independent of the aforementioned allegations and their analysis, which would constitute a failure to preserve an issue for appeal. Therefore, this court finds that trial counsel's performance was not deficient or prejudicial, and therefore the standards of Strickland, supra, cannot be satisfied. The evidence submitted

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strong one, as many witnesses knew Applicant in advance of the shooting and/or had seen him up close during the incident. She further felt that this would go to weight rather than admissibility of identification evidence. Furthermore, appellate counsel testified that she felt the solicitor was careful to get the witness to testify how they were able to identify Applicant, for example that he was harassing the bartender. Appellate counsel testified that she felt that, overall, briefing this issue would muddy the waters for good issue. As considered above, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift, 302 S.C. at 539, 397 S.E.2d at 526. Appellate counsel exercised her discretion in the decision not to brief this issue, and is not ineffective for that. This court finds these arguments persuasive and does not find that appellate counsel's conduct was deficient or prejudicial. Therefore, Applicant has failed to meet the burden required by Strickland, supra and Southerland, supra, and the allegation is dismissed with prejudice.

When questioned about the potential appellate issues surrounding objections during the state's closing argument, appellate counsel testified that she believed the fact that the objections were not contemporaneously ruled upon was problematic. She also believed that trial counsel was required to object and move for a mistrial, rather than simply object and explain it after arguments were completed. Regarding potential discovery violations, appellate counsel testified that she addressed this in her second issue on appeal. These alleged violations stemmed from the testimony of the club's owner, Lindbergh Porterfield, testifying to two surprise pieces of evidence that were both potential hearsay problems – a dying declaration by the victim and a confession by Applicant. These both drew objections from trial counsel; however, Applicant alleged in this PCR that they were potentially Rule 5, SCRCrimP and Brady<sup>4</sup> violations because

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<sup>4</sup> 373 U.S. 83 (1963).

regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

## **V. Ineffective Assistance of Appellate Counsel**

### **Applicable Law**

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. This is the same standard as stated for trial counsel in Strickland, supra. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

“Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is ‘difficult to demonstrate that counsel was incompetent.’” United States v. Mason, No. 3:06-607-CMC, 2012 WL 5845807 at \*1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). “For judges to second-guess

reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “‘Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.’” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

“To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at \*1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

This court finds both attorneys’ testimony was credible, and does not factor into its ultimate decision the fact that Applicant chose not to testify. Regardless, this court finds that Applicant has failed to satisfy his burden to prove that either counsel was deficient. Applicant also failed to prove he was prejudiced by the alleged deficiency. For the reasons below, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is, therefore, denied and dismissed:

#### Analysis



Appellate counsel testified that she was retained to represent Applicant in his direct appeal. She stated that she prepared the case by reading the entire transcript and identifying the issues that were preserved and most meritorious for appeal. Appellate counsel was asked if there were any unpreserved issues, and she responded that there may have been some that she did not argue. She testified that she was most concerned with what she identified as Issue 3 in the appellate case regarding the trial judge's response to one of trial counsel's objections, as she thought it could be successful even without an underlying objection from trial counsel.

Most of appellate counsel's testimony centered on potential challenges to the search warrants. Substantially, it was because appellate counsel did not believe that those grounds were meritorious. Specifically, she testified that there was consent from a resident to search the house, where they found clothing in plain view. The search continued until law enforcement saw that an attic door was open and asked if anyone was up there, and consent was revoked by the owner of the house. Regarding the car, Sydney Williams gave a statement immediately after the incident that said Applicant drove a blue Impala. This statement was bolstered by the video that law enforcement received. Furthermore, appellate counsel testified that there were many sustaining grounds to allow the warrant, including that Applicant had no expectation of privacy for the vehicle, as it was not his, and he later returned it to her home. This court finds these arguments persuasive and does not find that appellate counsel's conduct was deficient or prejudicial. Therefore, Applicant has failed to meet the burden required by Strickland, supra and Southerland, supra, and the allegation is dismissed with prejudice.

Testimony was also elicited regarding identification testimony and the Neil v. Biggers<sup>3</sup> hearing. Appellate counsel testified that she did not think the issue of proper identification was a

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<sup>3</sup> 409 U.S. 188 (1972).

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they were inconsistent with the witness's prior statements. Appellate counsel stated that she pursued the hearsay aspect of this witness's testimony, as she believed that the reviewing court would find that Applicant and his counsel had sufficient time to review the written statements that were turned over in advance of cross-examination, as well as due to trial counsel's solid objection and record preservation. She further testified that if there had been a written statement from Mr. Porterfield that had not been turned over in discovery, it would have been a much stronger issue for appeal. As considered above, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift, 302 S.C. at 539, 397 S.E.2d at 526. Appellate counsel exercised her discretion in the decision not to brief this issue, and is not ineffective for that. This court finds these arguments persuasive and does not find that appellate counsel's conduct was deficient or prejudicial. Therefore, Applicant has failed to meet the burden required by Strickland, supra and Southerland, supra, and the allegation is dismissed with prejudice.

#### V. CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate



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review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 6 day of October, 2017.

  
\_\_\_\_\_  
G. THOMAS COOPER, JR.  
Presiding Judge  
5<sup>th</sup> Judicial Circuit

Camden, South Carolina

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Johnny Walker Gaskins, 313590,  
Full name and prison number (if any) of Applicant. )

v. )

State of South Carolina )

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

2022 APR -3 PM 15

**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 Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210
2. Name and location of Court which imposed sentence Richland County Court of General Sessions, 1701 Main Street, Columbia, SC 29201
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2008-GS-40-1626, 3448: murder
  - (b) 2008-GS-40-1629, 1631, 1632: assault and battery with intent to kill
  - (c) 2008-GS-40-1627: possession of a weapon during a violent crime
5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

- (a) October 9, 2009: concurrent life terms
- (b) October 9, 2009: 20 years, consecutive
- (c) October 9, 2009: 5 years consecutive
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty X
- (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. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. Convictions and sentences affirmed
- ii. Certiorari denied
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. January 8, 2013
- ii. August 6, 2014
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpub. Op. No. 2013-UP-304
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in

Revised 3/2003

custody unlawfully:

(a) Pursuant to Austin v. State, 305 S.C. 453 (1991), Applicant is requesting a belated appeal of the Order of Dismissal issued on Case No. 2015-CP-40-03169.

(b) \_\_\_\_\_

(c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Applicant's counsel failed to file an appeal following the issuance of the Order of Dismissal, which was filed on October 10, 2017.

(b) \_\_\_\_\_

(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? 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)? \_\_\_\_\_

(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. PCR Application (2015-CP-40-03169)

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(b) the name and location of the Court in which each was filed:

i. Richland County Court of Common Pleas

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(c) the disposition thereof:

- i. Dismissed
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (d) the date of each such disposition:
  - i. October 10, 2017
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- 14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?  
No
- 15. If you answered "yes" to (14) identify:
  - (a) which grounds have been presented:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the proceedings in which each ground was raised:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
- 16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
  - (a) Applicant was not advised regarding the dismissal of his Application and/or the

filing of an appeal.

(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? Yes

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. Joseph McCulloch, PO Box 11623, Columbia, SC 29211

ii. Tara Shurling, 3614 Landmark Drive, Ste. A, Columbia, SC 29204

iii. Aimee Zmroczek, PO Box 11961, Columbia, SC 29211

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

i. trial

ii. direct appeal

iii. post conviction relief

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

A belated appeal of prior PCR Application.

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

No

STATE OF SOUTH CAROLINA

County of Richland

VERIFICATION

I, Johnny Walker Gaskins, 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.

Johnny Walker Gaskins

SWORN to and subscribed before me this 24  
day of March, 2022

Frederick B. Gaskins (L.S.)  
Notary Public

My Commission Expires: 8/30/2026

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT

) CASE NO. 2022-CP-40-1854

)

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## I. PROCEDURAL HISTORY

1 Respondent's return was due to be filed within ninety days of receipt. See Rule 12(a), SCRPC  
2 ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-  
3 conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and  
4 90 days if it arises out of a trial."). However, Respondent was unable to timely complete and file  
5 this return due to a heavy caseload. Respondent respectfully requests that this Court accept this  
6 return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the  
7 time in which the State must respond and that "respondent shall file with its answer the record or  
8 portions thereof that are material to the questions raised in the application."); Guinyard v. State,  
9 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and  
10 that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

GS-40-1626; 2008-GS-40-3948), three counts of Assault and Battery with Intent to Kill (ABWIK) (2008-GS-40-1629; 2008-GS-40-1631; 2008-GS-40-1632), and one count of Use of a Firearm during the Commission of a Violent Crime (2008-GS-40-1627). Applicant proceeded to a jury trial on October 19 – 27, 2009, before the Honorable L. Casey Manning. Applicant was represented by Joseph McCulloch, Esquire, and Kathy R. Schillaci, Esquire. Deputy Solicitor John P. Meadows and Assistant Solicitor Joanna A. McDuffie of the Fifth Circuit Solicitor's Office prosecuted the case.

On October 27, 2009, Applicant was convicted as indicted. Judge Manning sentenced Applicant to imprisonment for life for each count of Murder, twenty years' imprisonment for each count of ABWIK, and five years' imprisonment for the Use of a Firearm during the Commission of a Violent Crime. The two life sentences were to be served concurrently, with the remaining sentences to be served consecutively.

Applicant filed a timely Notice of Appeal.

#### ***Applicant's Direct Appeal***

Applicant pursued a direct appeal, and his appeal was perfected by Tara D. Shurling, Esquire. On appeal, Applicant raised the following instances of trial court error:

- I. The trial court did not abuse its discretion in the admission of a series of photographs from the crime scene which showed blood where they had probative value in a case where the photographs were not unduly prejudicial or inflammatory. Further, it appears at the time of the introduction of the "close-up" photographs the Appellant had abandoned the earlier objection
- II. Where the trial court instructed the jury to disregard evidence concerning an unexpected assertion in a dying declaration of one of the victims and an interrogative from an unknown caller to the Appellant's cell phone, the trial court did not abuse his discretion in denying the motion for a mistrial
- III. A new trial is not warranted where the trial judge gave a cautionary instruction to the jury after a series of exchanges

between counsel for the prosecution and defense concerning the form of questions on re-direct required the Court to intervene to maintain civility between counsel in the courtroom. The Appellant's contention that defense counsel ability to represent the Appellant in the eyes of the jury was undermined in not supported by the record where both the state and defense were admonished to relax.

Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. Gaskins, No. 2013-UP-304 (S.C. Ct. App filed July 3, 2013). Applicant filed a Petition for Rehearing on July 18, 2013. By Order dated August 6, 2013, the Court of Appeals denied the Petition. Applicant then filed a Petition for Writ of Certiorari on January 6, 2014. The Supreme Court of South Carolina denied the Petition for Writ of Certiorari on August 6, 2014. The Remittitur was issued on August 15, 2014.

***Applicant's Initial Post-Conviction Relief Action (2015-CP-40-03169)***

Applicant then filed a post-conviction relief action on May 27, 2015, alleging ineffective assistance of counsel. In response, Respondent made its Return on October 1, 2015. On June 27, 2015, Respondent made its Return and Motion for a More Definite Statement. In his application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
  - a. "Failure to properly prepare Applicant prior to trial"
  - b. "Failure to call witnesses and utilize evidence"
2. "Ineffective assistance of appellate counsel"
  - a. "Failure to raise all meritorious issues on appeal"

The morning of the hearing, Applicant emailed Respondent and the court a handwritten document listing amended allegations, which were the following:

Trial Attorney

- Fail to properly prepare/call witness/utilize evidence
- Fail to preserve obvious issues for appeal
  - a. Did not move to suppress search of vehicle

- i. Illegally obtained
- b. Did not move to suppress video
  - i. Issues with completeness
  - ii. Editing
- c. Did not move to suppress phone
  - i. Never reviewed calls
  - ii. Never examined
- d. Did not object to Judge's behavior/chilling effect on defendant
- e. Did not object to Judge going into jury room
- f. Did not object to premature deliberations
- g. Did not argue jury charges/Belcher
  - i. Fail to request charges
- h. Did not object to bolstering
  - i. Never received/reviewed 911 calls

Appellate Attorney

- a. Did not argue Biggers
- b. Did not argue search warrants
  - i. Validity of tipster
  - ii. Hearsay
- c. Did not argue closing argument preservations
- d. Did not argue Brady/Rule 5 violations

Respondent objected to the submission of these amendments pursuant to SCRCR Rule 15(a), and moved for a continuance in order to prepare to defend the allegations. The motion was denied, though the court cautioned Applicant about the presentation of late amendments in the future. In evaluating the allegations, the court's position was that Applicant's original allegations were folded into and described in more detail by the amendments.

An evidentiary hearing into the matter was convened on July 18, 2017, before the Honorable G. Thomas Cooper, Jr. Applicant was present at the hearing and was represented by Aimee J. Zmroczek, Esquire (PCR Counsel). Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant's attorneys, Joseph M. McCulloch, Esquire (Trial Counsel) and Tara Dawn Shurling, Esquire (Appellate Counsel), were present and testified. Applicant was also present but did not testify, as is his right.

Following the hearing, Judge Cooper denied relief. An Order of Dismissal was filed on

October 10, 2017.

Applicant did not file an appeal challenging the denial of relief.

## **II. STATEMENT OF FACTS GIVING RISE TO THE CONVICTION**

On February 5, 2007, Johnnie Gaskins (Applicant) was removed from the Super Bowl party at Club 360 for unruly behavior. (Trial Tr. p. 257, ll. 20-24; p. 259, ll. 12-19; p. 352, l. 21; p. 353, l. 6). According to bar manager Erin Hellman (Hellman), Applicant had demanded service: "give me a f—ing Hennessy" (cognac). When she offered him a menu, he retorted again, "give me a f—ing Hennessy bitch," and threw money at her. Applicant then approached aggressively toward her behind the bar. (Trial Tr. pp. 254, 257). At that point, security for the club came and took him out the club's front door. (Trial Tr. pp. 257, 281). Hellman described Applicant as very sweaty and unsteady on his feet, with difficulty keeping his head up. (Trial Tr. p. 258). She identified Applicant in court (and in a photographic line-up) as the unruly person. Around 20 minutes later, she heard shots being fired. (Trial Tr. pp. 259-60).

Prior to the shooting, Shannavia Williams arrived at Club 360 around midnight. After staying for a while, she left to go to another club with her friends. Before leaving, she set her drink down but spilled it. (Trial Tr. p. 580-581). She left her friend, Deirdre Houston, and went to get something to clean the spill. Two other friends, Shanna Williams and Shanelle Whack were in the back of the bar.

Quinton Harris (Harris) and Lamont Davis (Davis) had taken Applicant outside with security and handcuffed him. Applicant stated that the security thought they were gangsta, but "I'll show them gangsta." (Trial Tr. p. 553-554). Sydney Williams, a friend of Applicant, approached them and talked them out of calling the police concerning Applicant. (Trial Tr. p. 354, ll. 13-24; p. 503, ll. 15-25). The handcuffs were removed, and Applicant was allowed to return to

his car.

Applicant was still angry as he walked back toward the car he came in - a Chevy Impala. Another security guard, Epsil Palmer (Palmer), remained concerned about Applicant because he was still acting rowdy at the car. Palmer went and talked to Applicant and asked him to leave. (Trial Tr. pp. 555-56; pp. 566-67). Subsequently, Applicant was seen getting in the car by himself. (Trial Tr. p. 508, ll. 5-10).

Next, Harris and Davis took Christopher Lyles (Lyles), another rowdy patron, outside. At that time, Applicant had gotten into his Impala and driven to the front of Club 360, where he proceeded to open fire. (Trial Tr. p. 588). While grappling with Lyles, Harris looked up and saw Applicant, whom he had removed from the club, firing from the Impala. Independent witnesses identified Applicant as either shooting from the car or walking to the car immediately before the shooting. (Trial Tr. p. 356, 359) (victim Lamont Davis identified Applicant as the individual he saw shooting from the car); (Trial Tr. p. 431) (victim Quinton Harris identified Applicant as the person he saw in the car with the gun); (Trial Tr. p. 506, 531) (Sydney Williams identified Applicant as getting in the car that stopped in front of club when shooting started); (Trial Tr. p. 272) (Epsil Palmer identified Applicant as person who entered vehicle from which he saw flashes emanating, although it was too far at the time to see the actual shooter).

Security guard John Adams was hit and subsequently died. (Trial Tr. p. 606-607, 790). Deirdre Houston was shot inside the bar while she was waiting for Shannavia Williams to return and clean spilled drink. (Trial Tr. p. 581-83). Shannavia Williams was returning to clean up the spill and was shot in the head, resulting in her death. (Trial Tr. p. 796). Security guard Lamont Davis was also shot but did not die. (Trial Tr. p. 356-358). Quintin Harris was also shot on his knuckle but avoided other bullets in his direction. (Trial Tr. p. 438-439). At that point, the Chevy

Impala left the scene. Calls were made to 911. The acquaintance of Applicant, Sydney Williams, was handcuffed by security because they believed he knew something about the shooter. (Trial Tr. p. 514).

The owner of the club, Lindburgh Porterfield, recovered a cell phone in the parking lot and turned it over to the Sheriff's Department. (Trial Tr. p. 458, 464-465). The Chevy Impala was ultimately found, and deputies located documents with Applicant's name, gunshot residue, and trace evidence linking Applicant's DNA to the vehicle. (Trial Tr. pp. 749-752; pp. 808-811; pp. 889-895). In addition, a shell casing was found inside the vehicle. Forensic testing of the shell casing in the Impala linked it to 40 caliber shell casings found in the club's parking lot as being fired from the same weapon. (Trial Tr. pp. 847-848, 852).

### **III. CURRENT APPLICATION**

In his second and current application for post-conviction relief, Applicant alleges he is entitled to belated appellate review of his initial post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Attached to this Return and incorporated by reference are the records of the Richland County Clerk of Court regarding the subject convictions and sentences, Applicant's records from the South Carolina Department of Corrections, the transcript from Applicant's trial, Applicant's appellate records, the records from Applicant's first post-conviction relief matter, and this current application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

### **IV. RESPONSE TO ALLEGATIONS RAISED**

Successive applications such as the one before this court are disfavored. S.C. Code Ann. § 17-27-90. However, here Applicant alleges that he was denied the right to appeal the dismissal

of his previous post-conviction relief application because PCR Counsel failed to file an appeal following the issuance of the Order of Dismissal, filed October 10, 2017. Inherent in this claim is the allegation of ineffective assistance of PCR counsel.

The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under [S.C. Code Ann.] § 17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. Austin provides for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal the final judgment by post-conviction relief court).

But Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394.<sup>2</sup> Pursuant to Austin, an evidentiary hearing may be conducted in regard to a successive post-conviction relief application "on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." Austin, 305 S.C. at 454, 409 S.E.2d at 396. "If the circuit court finds that the petitioner never, in fact, sought discretionary review, the petitioner may appeal that finding." Id. at 455, 409 S.E.2d at 396. Austin, therefore, allows an applicant to petition the Supreme Court for discretionary review of the dismissal of his initial post-conviction relief application and may do so outside of the ordinary time limits for bringing such an appeal.

---

<sup>2</sup> Aice was issued in conjunction with Austin, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

In the present case, Applicant asserts prior PCR Counsel failed to file an appeal on his behalf. At the present time, Respondent lacks sufficient information to determine whether Applicant made a knowing, voluntary, and intelligent waiver of his right to seek appellate review from the denial of his first post-conviction relief action. Accordingly, Respondent requests an evidentiary hearing to determine if he is entitled to Austin review of his initial post-conviction relief action.

**V. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS**

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been retained an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to Love v. State, 428 S.C. 231. 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. See Love (Kittredge, J., dissent) ("If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRPC. See also Rules 15(a)-(b), SCRPC. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. See Rule 15(a), SCRPC.

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery

processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. The State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

**VI. CONCLUSION**

WHEREFORE, Respondent respectfully requests this Court convene an evidentiary hearing to determine whether Applicant is entitled to Austin review and any other relief proper.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

D. RUSSELL BARLOW, II  
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

August 19, 2022

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
 )  
Johnnie Walker Gaskins, 313590, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

2022-CP-40-1854

AMENDMENT TO APPLICATION  
FOR POST CONVICTION RELIEF

2022 NOV 14 AM 9:31  
JEANETTE W. McBRIDE  
C.C.P., G.S. & F.C.

RICHLAND COUNTY  
FILED

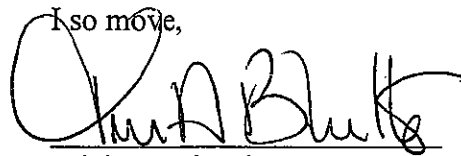
This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on April 8, 2022. The State submitted a Return on August 1, 2022. A hearing is scheduled for November 14, 2022.

Applicant, through counsel, would move to amend his Application, as addressed below. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

In addition to the information provided in response to question eleven on his Application, Applicant would add the following:

- (a) Applicant's counsel failed to provide him notice of the entry of the Order of Dismissal, failed to file a Motion under Rule 59, SCRCP, due to the Order omitting the matter of the Court sustaining the State's objection to a late amendment and/or expert witness, and failed to timely file an appeal. PCR Transcript pp. 90-96, 138-145.
- (b) Following the evidentiary hearing, Applicant was under the belief that further proceedings were going to take place regarding the matter of the late amendment and/or expert regarding video evidence. PCR Transcript pp. 90-96, 138-144.

In addition to the response provided to question nineteen on his Application, Applicant would add the following: A belated appeal of prior PCR Application or whatever relief the Court deems proper.

I so move,  


Tricia A. Blanchette  
Attorney for Applicant  
PO Box 2147  
Leesville, SC 29070

November 10, 2022

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
Johnnie Walker Gaskins, 313590, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

2022-CP-40-1854

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that Pursuant to the Order issued by the South Carolina Supreme Court "RE: Service by E-Mail in the Trial Courts," issued on May 6, 2022, that a true copy of an Amendment to Application for Post Conviction Relief has been served on opposing counsel this 10<sup>th</sup> day of November 2022 by sending an email to his following registered email address:

Russell D. Barlow, II, Assistant Attorney General  
RussellBarlow@scag.gov



Tricia A. Blanchette  
PO Box 2147  
Leesville, SC 29070  
(803) 908-3266

2022 NOV 14 AM 9:31  
JEANETTE W. MCBRIDE  
C.C.P., G.S., & F.C.

MICHLAND COUNTY  
FILED

November 10, 2022

State of South Carolina )  
County of Richland )

In the Court of Common Pleas  
Fifth Judicial Circuit  
2022-CP-40-1854

Johnnie W. Gaskins, )  
Applicant, )  
vs. )  
State of South Carolina, )  
Respondent. )  
\_\_\_\_\_ )

Transcript of Record

November 14, 2022  
Columbia, South Carolina

B E F O R E:

The Honorable D. Craig Brown, III, Judge

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

Tricia A. Blanchette, Esquire  
Attorney for the Applicant

D. Russell Barlow, II, Assistant Attorney General  
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM  
Circuit Court Reporter

I N D E X

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1           THE COURT: Y'all want to go ahead and call the case?  
2 I'll just go ahead and tell you up front. I don't like all  
3 this glass and stuff up here.

4           MR. BARLOW: Well, Your Honor, and, Madame Court  
5 Reporter, I'll try to speak loud enough so you can hear me.  
6 If you can't hear me, let me know, okay? And may it please  
7 the court?

8           THE COURT: Yes.

9           MR. BARLOW: Ross Barlow on behalf of the State of  
10 South Carolina. This is the post-conviction relief matter  
11 of *Johnnie Walker Gaskins v. the State*, case number  
12 2022-CP-40-1854 out of Richland County. Applicant was  
13 indicted at the July 2008 term of the Court of General  
14 Sessions for Richland County for two counts of murder,  
15 2008-GS-40-1626, 2008-GS-40-3948; three counts of assault  
16 and battery with intent to kill, 2008-GS-40-1629,  
17 2008-GS-40-1631, 2008-GS-40-1632; and one count of use of a  
18 firearm during the commission of violent crime,  
19 2008-GS-40-1627. Applicant proceeded to a jury trial on  
20 October 19th to the 27th of 2009 before the Honorable L.  
21 Casey Manning. Applicant was represented by Joseph  
22 McCulloch, Esquire, and Kathy R. Schillaci, Esquire.  
23 Deputy Solicitor John P. Meadors and Assistant Solicitor  
24 Joanna A. McDuffie of the Fifth Circuit solicitor's office  
25 prosecuted the case. On October 27, 2009, applicant was

1 convicted as indicted. Judge Manning sentenced applicant  
2 to imprisonment for life for each count of murder, twenty  
3 years' imprisonment for each count of ABWIK, and five  
4 years' imprisonment for the use of a firearm during the  
5 commission of a violent crime. The two life sentences were  
6 to be served concurrently, with the remaining sentences to  
7 be served consecutively.

8 Applicant filed a timely notice of appeal, and Tara  
9 Dawn Shurling, Esquire, perfected. Following briefing, the  
10 South Carolina Court of Appeals affirmed applicant's  
11 convictions and sentences in an unpublished opinion, *State*  
12 *v. Gaskins*, number 2013304, South Carolina Court of  
13 Appeals, filed July 3, 2013.

14 Applicant filed a petition for rehearing on July 18,  
15 2013. By order dated August 6, 2013, the court of appeals  
16 denied the petition. Applicant then filed a petition for  
17 writ of certiorari on January 6, 2014. The Supreme Court  
18 of South Carolina denied the petition for writ of  
19 certiorari on August 6, 2014. The remittitur was returned  
20 to the lower courts on August 15, 2014.

21 Applicant then filed a post-conviction relief action  
22 on May 27, 2015, alleging ineffective assistance of counsel  
23 and ineffective assistance of appellate counsel. In  
24 response, the respondent made its return on October 1,  
25 2015. On June 27, 2015, respondent also made a return and

1 motion for a more definite statement.

2 The morning of the hearing, applicant emailed  
3 respondent and the court a handwritten document listing  
4 amended allegations which were the following. Allegations  
5 towards the trial attorney include failure to properly call  
6 or call witnesses, prepare or utilize evidence, failure to  
7 preserve obvious issues for appeal, did not move to  
8 suppress search of vehicle, did not move to suppress video,  
9 issues with completeness and editing, did not move to  
10 suppress the phone, never reviewed calls, never examined,  
11 did not object to judge's behavior, chilling effect on  
12 defendant, did not object to judge going into jury room,  
13 did not object to premature deliberations, did not argue  
14 jury charges, *Belcher*, failure to request charges, did not  
15 object to bolstering, never received or reviewed 911 calls.  
16 And allegations towards appellate attorney: did not argue  
17 *Biggers*, did not argue search warrants, validity of a  
18 tipster and hearsay, did not argue closing argument  
19 preservation, and did not argue *Brady* and Rule 5  
20 violations.

21 An evidentiary hearing into the matter was convened on  
22 July 18, 2017, before the Honorable G. Thomas Cooper, Jr.  
23 Applicant was present at the hearing and was represented by  
24 Aimee J. Zmroczek, Esquire; Jessica E. Kinard, Esquire, of  
25 the South Carolina attorney general's office represented

1 respondent. Applicant's attorneys Joseph McCulloch,  
2 Esquire, trial counsel, and Tara Dawn Shurling, Esquire,  
3 appellate counsel, were present and testified.  
4 Following the hearing, Judge Cooper denied relief, and an  
5 order of dismissal was filed on October 10, 2017.  
6 Applicant did not file an appeal challenging the denial of  
7 relief.

8 In his second and current application for  
9 post-conviction relief, applicant is alleging he is  
10 entitled to a belated appellate review of his initial  
11 post-conviction relief pursuant to *Austin v. State*, 305 SC  
12 453. Respondent made its return, filed on October 12,  
13 2022.

14 Applicant through counsel then amended his application  
15 for post-conviction relief to allege the following:  
16 applicant's counsel failed to provide the notice of the  
17 entry of the order of dismissal; failed to file a motion  
18 under Rule 59, SCRCP, due to the order omitting the matter  
19 of the court sustaining the state's -- objected to a late  
20 amendment and an expert witness; and failed to timely file  
21 an appeal. Following the evidentiary hearing, applicant  
22 was under the belief that further proceedings were going to  
23 take place regarding the matter of the late amendment  
24 and/or expert regarding video evidence.

25 At this time, we would ask PCR counsel to indicate

1     which allegations she intends to move forward on.

2             THE COURT:   Ms. Blanchette.

3             MS. BLANCHETTE:   Yes.   Thank you, Your Honor.   Tricia  
4     Blanchette here on behalf of Johnnie Gaskins.   As the state  
5     referenced, and just to make sure I make a clear record,  
6     the amendment was just filed today.   It was served on the  
7     attorney general's office last week, but in discussions  
8     with Mr. Barlow, I thought it would be best, and upon  
9     information that we received in preparing for this hearing,  
10    to further amend his application.

11            So, we're going forward on the application as it's  
12    stated, but in the amendment I clarified that in response  
13    to question 11 on his application, we would add the  
14    following two grounds that are listed as A and B in the  
15    amendment.   It also states that in addition to the response  
16    to question 19 on his application, applicant would add the  
17    following: a belated appeal of prior PCR application or  
18    whatever relief the court deems proper.

19            This amendment is truly just an amendment to the prior  
20    application.   So, we're going forward on the application  
21    with the amendment as set forth in the amendment filed  
22    today, November 14, 2022.   I do have a copy of that if Your  
23    Honor needs it, as well as the court reporter.

24            THE COURT:   Ms. Blanchette.

25            MS. BLANCHETTE:   Yes, Your Honor.

1 THE COURT: You gave me a copy of that beforehand.

2 MS. BLANCHETTE: Okay.

3 THE COURT: So, I didn't know how many copies you had,  
4 so -- but I do have a copy of that.

5 MS. BLANCHETTE: Okay. Thank you, Your Honor.

6 MR. BARLOW: And, Your Honor, for the record, just  
7 that the state would object to the amendment due to the  
8 fact that we believe it's a collateral attack on prior PCR  
9 counsel's performance, and it's not an appropriate action  
10 under *Austin*.

11 THE COURT: Okay. Anything in response?

12 MS. BLANCHETTE: No, Your Honor. Just the state was  
13 very kind in providing the lengthy procedural history. I  
14 do have two additional documents that I believe are not  
15 part of the packet that Your Honor received that would  
16 assist in the hearing that we're going to have today. The  
17 first is an ex parte funding order that was filed February  
18 2, 2016, in the original 2015 PCR action, and I would move  
19 to admit that as Applicant's Number 1.

20 MR. BARLOW: No objection, Your Honor.

21 (FUNDING ORDER MARKED INTO EVIDENCE AS APPLICANT'S  
22 EXHIBIT NUMBER 1.)

23 MS. BLANCHETTE: And, Your Honor, the second filed  
24 document is the consent order substituting counsel. This  
25 is the order by which Ms. Zmroczek was substituted in as

1 Mr. Gaskins's counsel in the underlying PCR application,  
2 and this was filed July 25, 2016. I would move to admit it  
3 as Applicant's Number 2.

4 MR. BARLOW: No objection, Your Honor.

5 THE COURT: All right, so admitted as Applicant's  
6 Number 2.

7 (CONSENT ORDER MARKED INTO EVIDENCE AS APPLICANT'S  
8 EXHIBIT NUMBER 2.)

9 MS. BLANCHETTE: Your Honor, at this time the  
10 applicant is prepared to call its first witness.

11 THE COURT: Proceed, please. ma'am.

12 MS. BLANCHETTE: Your Honor, I would call attorney  
13 Aimee Zmroczek to the stand.

14 AIMEE J. ZMROCZEK, BEING DULY  
15 SWORN, TESTIFIES AS FOLLOWS:

16 BAILIFF: Have a seat in the witness box. State your  
17 full name for the record, and spell your first name -- your  
18 last name, excuse me.

19 WITNESS: Aimee Jendrzewski Zmroczek,  
20 J-e-n-d-r-z-e-j-e-w-s-k-I Z-m-r-o-c-z-e-k.

21 DIRECT EXAMINATION BY MS. BLANCHETTE:

22 Q. Thank you, Ms. Zmroczek. I could not do that. Can  
23 you please tell us what your current profession is?

24 A. I'm currently a member of the South Carolina Bar, a  
25 practicing attorney in the state. I'm also a member of the

1 Fourth Circuit in the United States Court of Appeals and  
2 district court as well.

3 Q. And how long have you been a practicing attorney in  
4 the State of South Carolina?

5 A. Since 2008.

6 Q. Okay, and what is your primary area of practice or ---

7 A. Criminal defense.

8 Q. Do you recall your representation of Mr. Gaskins?

9 A. I do.

10 Q. And how was it that you came to represent him?

11 A. I was asked by, I think, Appellate Defense to take  
12 over, either by Appellate Defense or someone in Indigent  
13 Defense to take over as his PCR attorney.

14 Q. And I have already admitted the consent order  
15 substituting you in as counsel. Do you recall taking over  
16 for Mr. Allen in the ---

17 A. I do.

18 Q. Okay, and that would have been in July of 2016?

19 A. Correct.

20 Q. Okay. Do you recall kind of your interaction with him  
21 leading up to the PCR hearing? Did you have the  
22 opportunity to meet with him at all?

23 A. With Mr. Gaskins?

24 Q. Yes.

25 A. Yes. We had discussed a lot about the issues of the

1 case, yes.

2 Q. Okay, and I've also already introduced an ex parte  
3 funding order that was issued prior to your representation.

4 A. Right.

5 Q. For a, for a private investigator to be involved. Did  
6 you work with a private investigator in this case?

7 A. I did.

8 Q. Okay, and who was that?

9 A. Also even though it was ex parte, it was still filed,  
10 so I think that makes it not ex parte anymore. But, again,  
11 that was done before I got involved, and that was Chris  
12 Watkins.

13 Q. Okay, and you worked with Mr. Watkins in preparation  
14 leading up to the evidentiary hearing?

15 A. Correct.

16 Q. Okay. Now, I just want to jump forward because we're  
17 here primarily today about what happened after the order  
18 was issued and the filing of the appeal, but I do want to  
19 walk you through a little bit of the hearing and what  
20 transpired at the hearing.

21 Now on the hearing, at the hearing in front of Judge  
22 Cooper on July 18, 2017 -- do you have the transcript up  
23 there in front of you?

24 A. I do.

25 Q. I believe it's on page 5. The transcript reflects at

1 that point that there are amendments that you wanted to  
2 make to his original application, and the state has  
3 referenced already in the opening of this case a  
4 handwritten document that had those allegations listed.  
5 Can you just take us through that and what transpired  
6 there?

7 A. So, there had -- obviously when we have PCRs, you  
8 don't just show up the morning without having  
9 communications with anybody on the other side, and I had  
10 had numerous conversations with the other side so that they  
11 knew what was coming. And they led me to believe, oh, it's  
12 no big deal. Just get it to us in the morning, and so I  
13 did, and then it turned into a big deal.

14 Q. And then ---

15 A. A big deal meaning that they started to object to all  
16 of the things that, that we had already previously talked  
17 about.

18 Q. And ultimately on page 7, beginning on line 9, the  
19 judge said he will allow you to go forward with those  
20 amendments. Is that court?

21 A. Correct.

22 Q. Okay. Now after that, you called Mr. McCulloch and  
23 during his testimony, do you recall asking him questions  
24 about the video that was introduced at trial?

25 A. I do.

1 Q. And what was your strategy or reasoning for asking him  
2 about that video?

3 A. So, the videos is where I think the expert really  
4 landed his expertise, and it turned into an issue. And so  
5 just getting Mr. McCulloch's understanding and take of it,  
6 that's where we were going with that, to lay the foundation  
7 for it.

8 Q. Now, if you jump forward to page 89 -- and I'll give  
9 you a minute to turn there -- beginning on line 8.

10 A. Yeah.

11 Q. You inform the court that your next witness was Mr.  
12 Watkins, and you discussed that with Ms. Kinard at the  
13 break?

14 A. Yes.

15 Q. You explained he was hired by one of the previous  
16 attorneys and had done work on the video aspect of it?

17 A. Yes.

18 Q. And then beginning on line 20, you explain:

19 I, I'd like to present what he's found in regards  
20 to the video. Maybe we could leave the record  
21 open to do that.

22 If you could just -- have you had a chance to review  
23 this recently, this portion of the transcript?

24 A. I have. I have.

25 Q. Okay.

1 A. So.

2 Q. If you could just kind of walk us through what's  
3 happening there? We obviously can read it, but you lived  
4 it. If you could explain that to us.

5 A. Well, again, like I said, it, it was just a little bit  
6 -- I was met with a different kind of mindset when I showed  
7 up at the hearing that day. Prior to the hearing,  
8 everything was okay. Yeah. That's fine. It'll be great.  
9 It'll, it'll -- whatever. Then we get to the hearing, and  
10 it's like I never had any conversations with anybody, and  
11 then all of a sudden -- and I don't know if it was just --  
12 I don't know. I don't know what it was, but all of a  
13 sudden she was, like, well, I need more time to review or I  
14 need to, you know, hire an expert to counter this. And I  
15 said, well, we're already all the way through the hearing.  
16 You know, one thing that we've done in the past is leave  
17 the record open so that you can have an opportunity to do  
18 that and come back because we've already put a lot of the  
19 testimony on the hearing as we were going forward. So,  
20 that, that was my mindset in there.

21 Q. And so for those next couple of pages or that next  
22 period of time at the hearing, you all are discussing  
23 leaving the record open, the state needing more time. And  
24 would you agree that you leave it at you were going to  
25 address it later and call Ms. Shurling and potentially

1 proffer his testimony?

2 A. Right.

3 Q. Okay, and then Ms. Shurling is called to the stand,  
4 and would you agree that during her testimony, you also  
5 asked her questions about this video in question?

6 A. Right.

7 Q. Okay, and then if you could flip forward towards the  
8 end of the transcript? This is where it appears that you  
9 guys revisit the issue on page 138.

10 A. One of us talks a lot. Probably me. Sorry. Okay.

11 Q. Beginning on line 2, it is you speaking where you  
12 again address the issue, and you tell the court essentially  
13 if he's not inclined to hear the testimony, you think you  
14 at least need to proffer it. Can you kind of take us  
15 through what transpires from there forward?

16 A. Right. So -- and obviously that was a little bit  
17 different from the ruling that we have in the beginning of  
18 the case. So, at this point I'm very confused, and the  
19 judge is, is -- obviously it's not reflected in the  
20 transcript because it doesn't pick up movements and things  
21 like that, but the whole time that I'm, I'm trying to make  
22 this argument to tell him that I think I need to proffer  
23 it, and he's shaking his head no. So, that -- so, I was  
24 just -- I was trying not to make it a more aggressive  
25 situation than it needed to be at that point.

1 Q. That's understood, and the discussion goes back and  
2 forth over the next couple of pages, as reflected in the  
3 transcript. He points out that the state would need time  
4 to bring their own expert. There is a lack of notice. He  
5 also brings up the issue of he's not certain where it fits  
6 into a post-conviction relief action. Do you recall that  
7 and kind of where you all went with that?

8 A. I do because before he had said something about a Rule  
9 29, and I was -- and then the more that I'm thinking about  
10 -- obviously when you're in court and things are happening,  
11 you're trying to process it while talking at the same time,  
12 which is never a good situation. But the more that I -- I  
13 could tell that he wasn't going to let it in. I was trying  
14 to figure out how to preserve or how to get it in there  
15 because I do believe that it's a -- it is a post-conviction  
16 issue. That, you know, had an expert been hired, had the  
17 evidence that the expert found been reviewed and presented,  
18 I think that that does fall under post-conviction.

19 Q. Now, if you could jump forward ---

20 A. Application.

21 Q. --- to page 143 because that's where you -- y'all had  
22 had some back and forth, but beginning on line 5, the judge  
23 again said he's been going to allow you to proffer the  
24 evidence and then says: I'm going to rule on the state's  
25 objection once I hear the proffer. Immediately thereafter,

1 you concede that it's your fault regarding the late notice,  
2 but then I don't see where the proffer ever takes place.  
3 So, is that what you were explaining about he's saying  
4 proffer, but you understood you weren't ever going to get  
5 to do it?

6 A. That's my -- that was my understanding of it while I  
7 was in there.

8 Q. Because it doesn't appear in this transcript there was  
9 ever a proffer, and there was no proffer of Mr. Watkins.  
10 Is that correct?

11 A. Right.

12 Q. Okay. Again, there's more back-and-forth and then on  
13 page 144, and I'll try to read this slowly for Madame Court  
14 Reporter. The judge says beginning on line 4:

15 Well, I'm going to sustain the state's objection  
16 to the introduction of evidence that the  
17 videotape was altered. I sustain the state's  
18 objection based on the fact that insufficient  
19 evidence -- insufficient notice was given to the  
20 state. The state hasn't, hasn't even seen what  
21 you're talking about, and here we are.

22 So, at that point did you consider that a final  
23 ruling?

24 A. I, I did and even -- because if you look at the line  
25 before that, I even said: Or I can proffer the testimony.

1 So at that point, I was still prepared to proffer, but he  
2 went ahead and ruled. It, it was just very confusing.

3 Q. Well, and that's -- I was confused reading it, to be  
4 candid, Ms. Zmroczek, because it appears you're preparing  
5 for a proffer, and then the court makes the final ruling.

6 A. Yes.

7 Q. Okay, and that, that was your understanding, too? You  
8 were still preparing for a proffer. Then you get a ruling.

9 A. Right.

10 Q. Now, if you could just review your response beginning  
11 on line 11 where you state: We'll withdraw that testimony.  
12 And then if you could explain to us what happened then?

13 A. Again, there was no testimony, so it must have been  
14 confusing to me, which is probably why I said that. I was  
15 just -- since he had -- he had basically already ruled. I  
16 was just trying to figure out a way, I guess, to try to  
17 preserve it and bring it back in under Rule 29. And I  
18 think that we'll probably get to that later because when I  
19 went back and looked under Rule 29, I don't know that it  
20 would necessarily fall under that category. So, I, you  
21 know, I had boxed myself into a corner that I don't think I  
22 could've gotten out of at that point. And again, because  
23 this was all happening that morning different than the  
24 discussions that I had had previously.

25 Q. So, your understanding and position today is that it

1 was an issue you were properly attempting to bring under  
2 the guise or under the heading of ineffective assistance of  
3 counsel?

4 A. Right. Right.

5 Q. You at no time intended to raise it as an issue of  
6 newly discovered evidence under a subsequent Rule 29  
7 motion?

8 A. No.

9 Q. And did you ever file a subsequent Rule 29 motion?

10 A. I, I didn't. I don't think, I really don't think it  
11 would have fallen under that category.

12 Q. And just to make sure we have a complete record, can  
13 you explain why?

14 A. Yes. That was -- like I said, after discovered --  
15 basically the Rule 29 is after-discovered evidence that  
16 couldn't have been discovered at the time of any hearings.  
17 But the whole point was had the lawyer hired someone and  
18 looked at the video, it could have been discovered at that  
19 time. And so I don't think that it necessarily fell under  
20 that, that properly under Rule 29.

21 Q. And in the handwritten list that you handed up that  
22 also these issues appear in the order of dismissal that was  
23 subsequently issued, you had listed did not move to  
24 suppress the video, issues with completeness and editing.

25 A. Right.

1 Q. And is that the issue you were anticipating calling an  
2 expert, or Mr. Watkins, under?

3 A. Correct.

4 Q. Okay.

5 A. The editing specifically.

6 Q. All right. Now, at the close of the hearing, the  
7 judge, as reflected on page 146, gives both parties thirty  
8 days to submit a proposed order. Do you recall submitting  
9 a proposed order on Mr. Gaskins's behalf?

10 A. I do not and I could not find one in my notes. The  
11 only, the only thing that I can think of is -- that  
12 happened is -- so, this was -- this PCR was in July, and so  
13 at that time I was also trying a bunch of cases. So, I  
14 probably just missed a deadline. I was pretty -- I was  
15 being put on the trial docket every two weeks throughout  
16 the state, and so I know that I had trials and that that's  
17 why neither the 59 nor the eventual appeal was filed.

18 Q. Okay, and just jumping back at the very beginning when  
19 you're making the late amendments, you actually explain  
20 that to the court, that you were on an incredibly busy  
21 trial docket. Is that correct?

22 A. Yes, and that's what -- and that's why I thought it  
23 was probably best if it just continued, so we wouldn't end  
24 up in this mess, but nobody would agree with me, which  
25 happens a lot, unfortunately.

1 Q. Now, let's talk about the order of dismissal because  
2 there was an order of dismissal. It was issued on October  
3 6, 2017, signed by the Honorable G. Thomas Cooper, Jr. Do  
4 you recall receiving a copy of that order?

5 A. I mean, I don't have independent knowledge that I  
6 received it. That seems to -- that seems to be an issue  
7 because I don't know if the AG, the assistant attorney  
8 general -- I know that she had left some time around either  
9 then or after, and so I know that there was a problem with  
10 them getting mail and email. I still should have checked  
11 the public index. So, either way it's on me.

12 Q. Do you recall any communication with Mr. Gaskins or  
13 his family following the hearing?

14 A. I know they contacted me, and I think probably after  
15 they contacted me was probably when I checked the public  
16 index, and then I think I suggested to file a PCR to fix my  
17 mistake.

18 Q. Okay. Do you recall ever giving them the  
19 understanding that it was still pending?

20 A. I mean, that's certainly possible. I think that I  
21 didn't look until after they called, so.

22 Q. Okay. Now, in the order of dismissal that was signed  
23 on October 6th, filed on October 10th, upon my careful  
24 review -- and I assume you had the opportunity to review it  
25 -- I do not see any reference to your attempt to raise this

1 issue regarding Mr. Watkins.

2 A. That's correct.

3 Q. And you agree with that?

4 A. Right.

5 Q. Now, if you had reviewed this order of dismissal and  
6 noticed that, would you have filed a Rule 59 or anything  
7 subsequent to address the omission of a reference to that?

8 A. I would have. I think I would have filed a Rule 59 to  
9 at least get it in the order. I still don't think he would  
10 have allowed that to be heard at that time, but to at least  
11 get it in the order that it was denied, I would have, yes.

12 Q. And would you agree that under *Marlar* and its progeny,  
13 it's your duty as a PCR attorney to file a 59 to make sure  
14 all issues are in the order and preserved correctly?

15 A. Absolutely.

16 Q. Okay, but you do not recall reviewing this order to  
17 make sure it was complete?

18 A. I do not. I believe -- I mean, I know that I was in  
19 the depths of murder trials during that, that whole year.

20 Q. And then just regarding the appeal, to make sure  
21 we're very clear for the record, you did not file an appeal  
22 on ---

23 A. I did not.

24 Q. --- his behalf?

25 A. And that is my responsibility and I did not, yeah.

1 Q. And at no time -- or let me re-ask that question. Did  
2 he ever indicate to you he did not want you to file an  
3 appeal?

4 A. No, not all. No, he wanted an appeal.

5 MS. BLANCHETTE: Your Honor, if I could beg the  
6 court's indulgence one moment?

7 THE COURT: Yes, ma'am.

8 (A PAUSE.)

9 MS. BLANCHETTE: Your Honor, I have no further  
10 questions.

11 CROSS-EXAMINATION BY MR. BARLOW:

12 Q. Good morning ---

13 A. Good morning.

14 Q. --- Ms. Zmroczek. All right, you, you testified that  
15 you had talked back and forth with the state. Did you  
16 inform the state that you had video evidence that was  
17 potentially edited?

18 A. Yes, and not only that. I mean, they -- even though  
19 it's entitled an ex parte order, it was filed. So, I know  
20 that it was also part of the file, too, that there was  
21 money for an expert on there.

22 Q. Okay, but ex parte is not allowed in PCR, is it?

23 A. Right, right. That was done before ---

24 Q. Right.

25 A. That was done before me, so that's why, I mean, I

1 think that's probably why it was probably filed. So.

2 Q. Right.

3 A. So, I know that they were aware of it.

4 Q. And so did you inform the state that you -- that with  
5 this, this video evidence that you intended to call an  
6 expert before the day of trial?

7 A. I, I did. That's why I had -- when -- I think she had  
8 suggested, well, go ahead and handwrite it because we had  
9 had these conversations before. And we had had the  
10 conversations before the PCR hearing that morning, and it  
11 was my understanding that, that even up until the day of  
12 the hearing or on the day of the hearing, those amendments  
13 were still allowed. So, those were ---

14 Q. And ---

15 A. Those were my understandings.

16 Q. And on the day of the hearing, when this occurred, did  
17 you request a continuance?

18 A. I didn't see it reflected in the record, but I know  
19 that we had had multiple discussions about it because at  
20 that point, I was trying to come up with ways for them to,  
21 since they didn't want an actual continuance, ways to leave  
22 the record open so that they could still have these things  
23 done.

24 Q. And in the testimony -- so, when you were talking  
25 about the 29(b), you were going to file a 29(B), correct?

1 A. At that point, I felt like that was the only other  
2 option I could find at that point, yes.

3 Q. Okay, and so you withdrew your -- you withdrew the  
4 testimony, correct? You withdrew the allegation to file  
5 the 29(b). Is that correct?

6 A. Well, it says I withdrew the testimony, so -- and I  
7 wish that I had taken notes, but I understand that while  
8 I'm trying to answer questions, I couldn't also take notes.  
9 So, so, admittedly it was very confusing. So, I didn't  
10 intend to withdraw that part of it. I think that -- I  
11 don't know what I was thinking at that time, to be quite  
12 honest, because, like, when I said withdraw the testimony -  
13 - because I know that I was asked about that numerous  
14 times. Then I went back and read it and I'm, like, yeah.  
15 I have no idea. It says testimony, and so there was --  
16 like, because I was still trying to proffer him, but then  
17 the judge already had made the ruling. So, then I was just  
18 confused. I think I was just confused.

19 Q. Okay.

20 A. At times.

21 Q. So, I guess my question then would be if you thought  
22 that his, his sustaining the objection was a final ruling,  
23 why did you withdraw it?

24 A. I don't know. I don't. I can tell you I do not know.  
25 I, I went back and, and tried to reread it but not only

1 reread it. Just, like, think about what happened, and I  
2 just -- it was, it was happening very fast. So, I honestly  
3 don't remember.

4 Q. Do you recall being served with the state's proposed  
5 order of dismissal in this case?

6 A. I don't recall it. I'm not saying that they didn't. I  
7 just don't have any independent recollection.

8 Q. Do you recall serving the state's order of dismissal  
9 on your client, your prior client?

10 A. I do not.

11 Q. Okay. Is it your job to serve that ---

12 A. Absolutely, it is.

13 Q. --- on your client?

14 A. Yes.

15 Q. And it was your testimony you do not recall reviewing  
16 the order of dismissal, too?

17 A. I don't remember.

18 Q. Correct?

19 A. I don't recall doing that, no.

20 MR. BARLOW: Beg the court's indulgence.

21 THE COURT: Yes, sir.

22 (A PAUSE.)

23 MR. BARLOW: Nothing further, Your Honor.

24 THE COURT: Ms. Blanchette, anything else?

25 MS. BLANCHETTE: Briefly, Your Honor.

1 REDIRECT EXAMINATION BY MS. BLANCHETTE:

2 Q. Ms. Zmroczek, if I could direct your attention to page  
3 138 of the PCR transcript?

4 A. What number? Sorry.

5 Q. Sorry. 138.

6 A. Thank you.

7 Q. My voice does not project, and specifically on page  
8 138, line 11. If you could just review 11 through 15.

9 A. Page 130?

10 Q. 138 beginning on line 11.

11 A. Yes.

12 Q. And there you tell the court you want to proffer  
13 because there's a new case that you can't PCR your PCR  
14 attorney. Can you explain your concern there and what you  
15 were trying to convey to the court?

16 A. I'm sorry. Ask the question. Ask the question again.

17 Q. Just summarizing what you say there, you're asking the  
18 court, you say I have to proffer.

19 A. Right.

20 Q. Because there's a new case that you can't PCR your PCR  
21 attorney.

22 A. Right.

23 Q. Just when the state was asking you about the proffer.  
24 I was hoping you could unpack that a little bit and explain  
25 what you were trying to convey to the court.

1 A. Well, I mean, I mean, I still had -- I remember  
2 because Mr. Watkins ---

3 There's a bench under there. Sorry.

4 Mr. Watkins, Mr. Watkins was still in the courtroom,  
5 and we were still trying to get that information in front  
6 of the court, and I think you can maybe -- I think I even  
7 mentioned how late it was because, because of all the  
8 misconception or not -- or misunderstandings. Like, it  
9 just kept drawing later and later, and I know it's not  
10 really -- things aren't reflected in a transcript, but  
11 sometimes there are outside influences, you know, from the  
12 court's either behavior or court staff being hungry or what  
13 -- all of these things that really you start to kind of  
14 feel the pressure of needing to go forward.

15 And even -- I mean, this was in 2017, so that was  
16 quite a few years ago. As I've gotten older, I've maybe  
17 taken a little more of a stance that judges are going to be  
18 mad at me, but if I keep talking -- but sometimes I need to  
19 keep talking, and I think this was one of those situations  
20 that I was picking up that I should probably stop talking  
21 and did. But I don't know that I would still do that  
22 today.

23 Q. But in saying that, that you can't PCR a PCR attorney,  
24 were you attempting to build a record so that this could be  
25 reviewed that you weren't allowed to go forward with ---

1 A. Yes.

2 Q. --- that issue?

3 A. Yes.

4 Q. And the way for that to be reviewed then would have  
5 been for you to file the appeal and make sure this issue  
6 was in the order. Is ---

7 A. Exactly.

8 Q. --- that correct? And as far as the handwritten list,  
9 and we discussed that before and the state asked you about  
10 it as well. On page 139, the judges references on lines --  
11 beginning on line 20 there that it may actually fall under  
12 issue number 2.

13 A. Right.

14 Q. And that was your position. Is that ---

15 A. Right.

16 Q. --- correct?

17 A. Correct, and I think that, I think that part of the  
18 issue was it came up in the, it came up in the beginning of  
19 the hearing, and I think that that -- the rulings were  
20 being made without the judge really having a full  
21 understanding of what the video meant to the case, if that  
22 makes sense. And, and I think kind of that's probably  
23 where my Rule 29 idea was, like, oh wait. This is not  
24 going to fall under after-discovered evidence. So, I think  
25 that I was still trying to make sure that that was brought

1 up.

2 Q. And was this the only issue you had an additional  
3 witness for, the ---

4 A. Yes.

5 Q. --- after -- everything else was addressed by the  
6 attorneys. Is that correct?

7 A. Correct.

8 Q. And was this the primary issue in your representation  
9 of his PCR case?

10 A. It was.

11 MS. BLANCHETTE: Your Honor, I have no further  
12 questions.

13 THE COURT: Anything further from the state?

14 MR. BARLOW: Nothing further.

15 THE COURT: Ma'am, you may step down. Thank you.

16 WITNESS: Thank you.

17 (THE WITNESS EXITS THE STAND.)

18 MS. BLANCHETTE: Your Honor, Ms. Zmroczek is here  
19 under the state's subpoena. I was going to ask if it would  
20 be okay if she'd be released. I know she has other matters  
21 she needs to get to.

22 THE COURT: Any objection?

23 MR. BARLOW: No objections.

24 THE COURT: Ms. Zmroczek, you are released from your  
25 subpoena. Have a nice day.

1 WITNESS: Thank you. I'll be in a bond hearing in  
2 Chester if anyone needs me.

3 MS. BLANCHETTE: Thank you.

4 Your Honor, my final witness will be Mr. Johnnie  
5 Gaskins.

6 THE COURT: Sir, if you'd come around and be sworn,  
7 please.

8 JOHNIE GASKINS, BEING DULY SWORN,  
9 TESTIFIES AS FOLLOWS:

10 BAILIFF: Have a seat in the witness box. Watch your  
11 step up. State your full name for the record and spell  
12 your last name.

13 WITNESS: Johnnie Gaskins, G-a-s-k-i-n-s. Johnnie  
14 Gaskins, G-a-s-k-i-n-s.

15 THE COURT: Thank you, sir.

16 Ms. Blanchette.

17 MS. BLANCHETTE: Thank you, Your Honor.

18 DIRECT EXAMINATION BY MS. BLANCHETTE:

19 Q. Mr. Gaskins, we're here today on the PCR application  
20 docketed at 2022-CP-40-01854. You're familiar with that  
21 application. Is that correct?

22 A. Yes, ma'am.

23 Q. Okay. You're also familiar with the amendment that I  
24 recently filed on your behalf?

25 A. Yes.

1 Q. Okay, and we've had the opportunity to meet to go over  
2 your case file and discuss the allegations in your  
3 application and the relief that you're requesting from the  
4 court. Is that correct?

5 A. Correct.

6 Q. Okay. Now, I want to take you back a little bit to  
7 the beginning. The state put in the complete procedural  
8 history. I'm not going to go through everything, but do  
9 you recall going to trial here in Richland County back in  
10 October 2009 beginning the 19th of that month in front of  
11 Judge Manning?

12 A. Yes, I do.

13 Q. Okay, and who represented you at that trial?

14 A. McCulloch.

15 Q. Okay, Mr. McCulloch?

16 A. Uh-huh.

17 Q. Okay, and was his partner, Ms. Schillaci, also with  
18 you?

19 A. Yes, ma'am.

20 Q. Okay, and then following that trial, were you  
21 convicted?

22 A. Yes.

23 Q. Okay, and you received multiple life sentences with  
24 concurrent sentences -- I'm sorry, with consecutive  
25 sentences of twenty years. Is that correct?

1 A. Yes, I did.

2 Q. And also a five-year charge -- or a five-year sentence  
3 for a firearms charge?

4 A. Yes, ma'am.

5 Q. Now following the trial, who handled your appeal?

6 A. Tara Dawn Shurling, Shurling.

7 Q. Okay, and Ms. Shurling perfected that appeal to the  
8 South Carolina Court of Appeals and petitioned the supreme  
9 court on your behalf. Is that correct?

10 A. Yes. Yes.

11 Q. And that was ultimately denied, and your case was sent  
12 back down to the lower court in August of 2014?

13 A. Yes.

14 Q. Okay.

15 A. That's it.

16 Q. Now, thereafter you filed a PCR application. Is that  
17 correct?

18 A. Yes, ma'am.

19 Q. And at that time, I actually assisted you in filing  
20 that as a courtesy?

21 A. Yes, you did.

22 Q. Okay, and after I assisted you in filing that, were  
23 you appointed an attorney, or did you retain one?

24 A. I was appointed. I think David Allen.

25 Q. Okay, and the records reflect you were appointed Mr.

1 Allen. Do you recall ever meeting with him?

2 A. No. I think I spoke to his secretary once.

3 Q. Okay.

4 A. Not sure.

5 Q. Now, I've already introduced as one of your exhibits a  
6 order, a funding order that Mr. Allen obtained for a  
7 private investigator. Did you meet with a private  
8 investigator, or were you aware that he had one involved?

9 A. No, I wasn't.

10 Q. Okay. Did you ever meet with anybody that you thought  
11 was an expert in the case?

12 A. Not, not from David Allen, no.

13 Q. Okay. So during his representation, that was it, and  
14 then who took over?

15 A. Aimee, Aimee Zmroczek.

16 Q. Okay, and when Ms. Zmroczek took over, did you ever  
17 meet with a private investigator or someone that informed  
18 you he was an expert?

19 A. Yes. Eventually I met, met up with Chris, Christopher  
20 Watkins.

21 Q. Okay, and you recall meeting with him once or more  
22 than once?

23 A. Well, I don't -- I think I might have met him, met him  
24 once, but I talked, talked to him on the phone a lot.

25 Q. Okay, and who did you have more interaction with, Ms.

1 Zmroczek or Mr. Watkins?

2 A. Mr. Watkins.

3 Q. Okay, and did he inform you of an issue he was working  
4 on in your case?

5 A. Yes, he did.

6 Q. And what was that issue?

7 A. The issue with the video.

8 Q. Okay. What did you understand it to be at the time?

9 A. Well, it was -- he told me it was edited. That it had  
10 been, you know, blowed up or whatever and couldn't really  
11 see anything. Said, like, the date and time was out of --  
12 was not in there, not on video, date and time.

13 Q. Okay, and in your communication with him and your  
14 limited communication with Ms. Zmroczek, did you understand  
15 that was an issue that was going to be presented at your  
16 PCR hearing?

17 A. Yes, I did.

18 Q. Okay. Let's jump forward to that PCR hearing held on  
19 July 18, 2017. At the beginning of the hearing, as you  
20 heard me reference today, Ms. Zmroczek hands up a  
21 handwritten list of issues, and the state does object,  
22 saying it's late, but the court allows it to go forward.  
23 Were you aware of that list of issues? Did you see it that  
24 morning?

25 A. Yes, I did.

1 Q. Okay. What was your understanding regarding those  
2 issues?

3 A. That she -- that was just the late amendments or  
4 whatever that she had put up. She had just made it that  
5 day, I guess.

6 Q. Okay. Did she show it to you that morning for ---

7 A. Yeah.

8 Q. --- the first time?

9 A. Yes.

10 Q. Okay, and you and I are used talking to each other,  
11 and I can be bit of a problem for Ms. Madame Court  
12 Reporter. Just make sure you wait to answer my question  
13 until I finish because we're ---

14 A. All right.

15 Q. --- kind of talking at the same time, which is hard  
16 for her, okay?

17 A. Okay.

18 Q. Now, you saw the amendment that morning, and she was  
19 allowed to go forward with it. Did you know there was any  
20 concern about whether or not Mr. Watkins would be able to  
21 testify about the video evidence?

22 A. No, I did not.

23 Q. And as far as the issue involving Mr. Watkins, was  
24 that -- what was your understanding of the importance of  
25 that issue?

1 A. I ---

2 Q. I can rephrase my question.

3 A. All right.

4 Q. As far as calling Mr. Watkins and him talking about  
5 the video, did you think that was one of your primary  
6 issues?

7 A. Yes, I did.

8 Q. Now, I talked to Ms. Zmroczek. Through the hearing,  
9 about middle of the hearing, after Mr. McCulloch is called  
10 to the stand, she brings up the issue of wanting to call  
11 Mr. Watkins, and there's back and forth at that time. What  
12 was your understanding as to what was going on?

13 A. Well, I know that the state wasn't prepared for it,  
14 for my expert, and I thought that was going to be a  
15 continuance.

16 Q. So, you are taking it all to mean that there may be a  
17 continuance on this issue?

18 A. Yeah. I thought that the judge was going to give the  
19 state time to prepare for it.

20 Q. Okay, and then if we flip more towards about page 138,  
21 the end of the hearing.

22 A. Uh-huh.

23 Q. So, Ms. Zmroczek calls Joe McCulloch. Then they have  
24 the discussion about Mr. Watkins, and then she calls Tara  
25 Dawn Shurling to the stand, and then they revisit the

1 issue, and there's back and forth?

2 A. Uh-huh.

3 Q. At the conclusion of that back-and-forth when you were  
4 there in the courtroom that day, what was your  
5 understanding of where things stood?

6 A. Well, I thought that the judge was going to give,  
7 like, give the state time to, to prepare for that, for that  
8 amendment, and I thought that he wasn't going to make a  
9 ruling until that was done.

10 Q. Now, I want to talk to you about a little bit of the  
11 discovery of how you found out your PCR had been denied.  
12 Did you ever receive a proposed order from Ms. Zmroczek?

13 A. No, I did not.

14 Q. And was there an event in your life that took place  
15 after this hearing that kind of diverted your attention  
16 away from your PCR?

17 A. Yes. My father had passed like ---

18 Q. Okay, and when ---

19 A. --- that following ---

20 Q. --- did your ---

21 A. --- year.

22 Q. I'm sorry. When did your father pass away?

23 A. The following year.

24 Q. Now after going through that, did you begin reaching  
25 out to Ms. Zmroczek's office?

1 A. Yes, I did, and it was really hard to get in touch  
2 with her, but when I did get in touch with her, she told me  
3 she hadn't received anything.

4 Q. And what was your understanding as to procedurally  
5 where you were at and what could happen next in your case?

6 A. Well, I thought that I was still waiting on the rule,  
7 rule on my case, waiting on the state to, to come back, you  
8 know, for the -- on the video. I thought that they was  
9 supposed to do the -- they was supposed to, you know,  
10 prepare for the video and they was going to rule on it  
11 after they did the discovery or whatever.

12 Q. Did Ms. Zmroczek ever talk with you about her filing  
13 a, a motion under criminal rule 29 regarding the video  
14 evidence?

15 A. Well, we -- they talked about it that day in court,  
16 but I never heard anything else about it after that.

17 Q. Okay. Now, you became aware at some point -- and if  
18 you can explain how -- that there was an order entered on  
19 the public index. Is that correct?

20 A. A friend of mine's showed me how to go on the public  
21 index, and I went on there and found out that my court --  
22 that my case had been ruled on.

23 Q. Okay.

24 A. Yes, ma'am.

25 Q. And then what did you do after discovering that on the

1 public index?

2 A. I got in touch with my mother, and that's when she got  
3 in touch with you.

4 Q. Okay, and as a result of the information I was able to  
5 obtain from the attorney general's office, the order of  
6 dismissal, you filed the instant application. Is that  
7 correct?

8 A. Correct.

9 Q. Now, once I became your attorney and we were waiting  
10 on the PCR transcript -- because it's something you had  
11 never seen after your hearing. Is that right?

12 A. Correct.

13 Q. And due to some mailing issues, some issues at the  
14 prison, and a copy issue, you did not get to review that  
15 transcript until October 11th just about a little bit over  
16 a month ago. Is that correct?

17 A. Correct.

18 Q. And then I had the opportunity to come to the prison  
19 and go over it with you?

20 A. Yes, you did.

21 Q. Okay. Now your understanding, if I am correct in  
22 summarizing your testimony, was that the case was  
23 essentially left open to further address the video issue.  
24 Is that correct?

25 A. Yes.

1 Q. And upon reading through this, especially with my  
2 assistance, did you understand there were different things  
3 discussed at the hearing?

4 A. Yeah. Could you repeat the question?

5 Q. Yeah, I can repeat that. Upon review of the  
6 transcript, do you now understand that the judge actually  
7 denied your ability to go forward on that issue?

8 A. Oh, yeah. Yeah.

9 Q. But that was not your understanding that day in the  
10 courtroom?

11 A. No, it was not.

12 Q. Okay, but that something, once you had the chance to  
13 read it and break it down ---

14 A. To understand.

15 Q. --- you have a different understanding?

16 A. Yes, ma'am.

17 Q. Now -- but that's never anything Ms. Zmroczek  
18 discussed with you either that day as the hearing was  
19 concluding or, or thereafter?

20 A. No, she did not.

21 Q. I may have already asked this, but did she ever reach  
22 out to you about filing an appeal on your behalf and  
23 notifying you that she had gotten the order of dismissal?

24 A. No, she did not.

25 Q. Okay, and as you stated, you discovered it on your

1 own. Did you ever at any time indicate to her you did not  
2 want an appeal and you did not want your issues addressed?

3 A. No, I did not.

4 Q. Did you ever have the opportunity prior to the filing  
5 of this PCR to see the order of dismissal and see what it  
6 addressed?

7 A. No, I did not.

8 Q. If you would have had the opportunity to go over that  
9 order, would you have asked her to ensure that all of the  
10 issues were addressed and the order was complete?

11 A. Yes, I would have.

12 Q. Okay. Now, Mr. Gaskins, what is the relief that  
13 you're asking the court to allow you to have?

14 A. To, to let me get my appeal back and preserve this  
15 issue.

16 Q. You want to see this issue is addressed as well?

17 A. Yes, ma'am.

18 MS. BLANCHETTE: Your Honor, if I could beg the  
19 court's indulgence?

20 THE COURT: Yes, ma'am.

21 MS. BLANCHETTE: Thank you, Your Honor. I have no  
22 further questions.

23 CROSS-EXAMINATION BY MR. BARLOW:

24 Q. Good afternoon, Mr. Gaskins.

25 A. Good afternoon.

1 Q. Let me ask you. The amendment that we have here today  
2 is that you -- that your counsel failed to file a motion  
3 under Rule 59, correct?

4 A. Correct.

5 Q. And what you're asking this court to do is to permit  
6 this issue to be preserved, right?

7 A. Correct.

8 Q. Because counsel failed to file that for you?

9 A. Correct.

10 Q. Okay, and, let's see. Did you request an appeal? Did  
11 you ever ask Ms. Zmroczek to file an appeal for you?

12 A. Well, I never thought that the case was ruled on yet.  
13 So, I wasn't at that point yet.

14 Q. Did you ever indicate to Ms. Zmroczek that you would  
15 want to appeal if you lost at your PCR hearing?

16 A. I was under the assumption that we would appeal, yeah.

17 Q. Were you aware of any issues that you could appeal?

18 A. Yes, this -- the video.

19 Q. Even though that, that issue was withdrawn, correct?

20 A. Well, I never knew that she withdraw that.

21 Q. Were you present ---

22 A. I didn't understand ---

23 Q. --- at the hearing ---

24 A. --- that until I ---

25 Q. --- that day?

1 A. --- I got the ---

2 Q. I'm sorry.

3 A. --- transcript. I didn't, I didn't even know that she  
4 withdrew it until I got the transcripts.

5 Q. Were you present that day at the PCR hearing?

6 A. Yeah, I was.

7 Q. And you were present for the testimony that she  
8 withdrew?

9 A. I, I, I missed that part. I didn't hear that.

10 MR. BARLOW: Beg the court's ---

11 A. I thought that it was a continuance.

12 THE COURT: Yes, sir.

13 MR. BARLOW: Beg the court's indulgence.

14 (A PAUSE.)

15 MR. BARLOW: Nothing further, Your Honor.

16 MS. BLANCHETTE: Briefly, Your Honor.

17 REDIRECT EXAMINATION BY MS. BLANCHETTE:

18 Q. Mr. Gaskins, you were in the courtroom today for Ms.  
19 Zmroczek's testimony. Is that correct.

20 A. Yes, ma'am.

21 Q. And you heard her answers and an attempt to explain  
22 what was going on at that time?

23 A. Yes, ma'am.

24 Q. Okay, and was she able to provide an explanation even  
25 here in court today?

1 A. No, she wasn't.

2 Q. Okay. So, you, you were confused that day, and she  
3 kind of reiterated that confusion here today?

4 A. Yes, she did.

5 MS. BLANCHETTE: Your Honor, I have no further  
6 questions.

7 THE COURT: Anything further by the state?

8 MR. BARLOW: Nothing further, Your Honor.

9 THE COURT: Sir, you may step down. Thank you.

10 (THE WITNESS EXITS THE STAND.)

11 MS. BLANCHETTE: Your Honor, applicant has no further  
12 witnesses and no further evidence to introduce at this  
13 time. I do have a couple cases that I can end up at the  
14 appropriate time.

15 THE COURT: Mr. Barlow.

16 MR. BARLOW: No witnesses from the state, Your Honor.

17 THE COURT: Anything by way of arguments?

18 MS. BLANCHETTE: Your Honor, I'm happy to. As we --  
19 as you gave us the opportunity to discuss in chambers, this  
20 is procedurally a unique case.

21 THE COURT: Yeah.

22 MS. BLANCHETTE: I had pulled *Austin* and I have a copy  
23 of it, but as I stated, I discussed with you, if this was  
24 as simple as *Austin*, we may not even be here.

25 THE COURT: Right.

1 MS. BLANCHETTE: It may well be conceding that he was  
2 denied his right to an appeal of his PCR action. But upon  
3 review of the transcript, it's just not that simple.

4 I also have a copy of *Marlar*, which addresses the duty  
5 of a PCR attorney to file a 59, and I am in no way trying  
6 to make this application successive by saying that Ms.  
7 Zmroczek had a duty to do these things, but she did and she  
8 did not review the order. She did not check for  
9 completeness.

10 What is completely omitted from this order is this  
11 issue that's addressed throughout, this issue that led him  
12 to believe that his case was still pending, this issue that  
13 it appears that she didn't even have a complete  
14 understanding on but yet was trying to make a record so it  
15 could be reviewed by a higher court.

16 So with that said, I do believe she had a duty to file  
17 a 59, and I think that goes hand-in-hand with her duty to  
18 file the appeal. If she would have timely filed the  
19 appeal, then we could get into the land of the case of  
20 *Fishburn* or *Maple* -- and I have a copy of both of those --  
21 where an issue is addressed, does not appear in the order,  
22 does not appear in a 59, but then our appellate court sees  
23 fit to either remand or address the issue on appeal because  
24 it is in the record, but we are not there because he hasn't  
25 had his appeal yet. So, that's where -- we are just very

1 unique in our procedure and placement in this case.

2 I also pulled a copy of *Martinez v. Ryan*. I believe  
3 that's the case she was referring when she said there's a  
4 new case that you can't PCR your PCR attorney. When  
5 *Martinez v. Ryan* came down in 2012, my understanding of  
6 *Martinez* -- but I'll give it to Your Honor and defer  
7 obviously to your understanding -- is that an applicant in  
8 a federal habeas can raise issues regarding their PCR  
9 attorney's ineffectiveness but you -- that the federal  
10 courts were going to open the door to file a second or  
11 subsequent PCR on your PCR counsel.

12 So, again, in no way are we trying to do that here  
13 today. I am just trying to make sure that we make a proper  
14 record, his issues are properly preserved and addressed for  
15 our appellate court to review this because he has not had  
16 the opportunity for an appeal, and I believe that's at no  
17 fault of his own, and we're established that here today.

18 THE COURT: Well, if I, if I ---

19 I'm sorry, Mr. Barlow, anything in response?

20 MR. BARLOW: Yes, Your Honor. Just briefly. Your  
21 Honor, what we've, what we've gone through here today is  
22 basically we're looking at Ms. Zmroczek and what she did  
23 and did not do, and it's her performance that we are really  
24 looking at here. And, and, Your Honor, it, it's the  
25 state's position that a collateral attack on PCR counsel's

1 performance is not permitted, and even *Austin* addresses  
2 that, Your Honor. And to bring this as ineffective  
3 assistance of counsel, of PCR counsel to get it in so that  
4 it can then be appealed is not the appropriate vehicle and  
5 is better suited in a federal habeas, Your Honor.

6 And one of the cases that was, that was cited here  
7 today is the *Love v. State*. We've talked about it in  
8 chambers, Your Honor. But the *State v. Love*, it focuses on  
9 prejudice to the opposing party. And in that, the, the  
10 court found that the late amendment -- what -- did not  
11 prejudice the state or the applicant because the trial  
12 counsel was there and was present and could get testimony  
13 at that moment.

14 In this situation, Your Honor, the PCR counsel  
15 presented an issue the day of trial, had an expert witness  
16 there ready to testify, and the state had no notice of  
17 that, and the state was not aware that an expert was going  
18 to be presented, and they did not have an opportunity to  
19 prepare for that. Ms. Zmroczek could have moved for a  
20 continuance, but she did not. She also, Your Honor,  
21 withdrew the testimony at the trial. Even though the court  
22 had initially ruled on it, she withdrew that testimony,  
23 which was no longer part of the record or no longer part --  
24 an allegation, Your Honor. And the state would just submit  
25 that that in and of itself is -- the order did not need to

1 address something that had been withdrawn.

2 And again, Your Honor, we, we would just point that  
3 basically here what we're trying to do with this one issue  
4 is it's being framed as ineffective assistance of PCR  
5 counsel, and that's not permissible to bring in an  
6 allegation in this case, Your Honor. Thank you.

7 THE COURT: Thank you, sir.

8 Anything else, Ms. Blanchette?

9 MS. BLANCHETTE: Your Honor, just to be clear, we are  
10 asking for an *Austin* appeal. I want to make sure I have in  
11 no way abandoned that.

12 THE COURT: Yes.

13 MS. BLANCHETTE: That that is our primary request.

14 THE COURT: That is abundantly clear.

15 MS. BLANCHETTE: I don't want to be back for a third  
16 PCR because I in some way waived or abandoned ---

17 MR. BARLOW: And ---

18 MS. BLANCHETTE: --- the *Austin* claim, Your Honor.

19 MR. BARLOW: And, Your Honor, for the record, the  
20 state is not objecting to the *Austin* appeal. The state is  
21 objecting to the amended applica -- the amendment to this  
22 application, not to the actual *Austin* appeal. That in and  
23 of itself, Your Honor, we were going concede to the *Austin*  
24 appeal. We're just objecting to this amendment.

25 THE COURT: Right.

1 MS. BLANCHETTE: And, Your Honor, I have those cases  
2 that I referenced, as well as the *Love* case the state  
3 referenced.

4 THE COURT: Thank you so much.

5 So, I guess it's the state's position that Mr.  
6 Gaskins's only avenue of recourse on Ms. Zmroczek failing  
7 to file a Rule 59 would be through a habeas. Is that  
8 right?

9 MR. BARLOW: Correct, Your Honor, and, Your Honor, we  
10 would cite to *Aice v. State*, *A-i-c-e v. State*, and it's  
11 also in *Austin* in a footnote.

12 RULING OF THE COURT:

13 THE COURT: Okay. All right, I'll take a look at what  
14 you all have submitted. I'll tell you today, certainly  
15 going to grant his *Austin* appeal, and so I guess I need to  
16 address this other issue in part. I don't have the --  
17 certainly don't have the authority to rule upon the 59  
18 issue, Rule 59 issue. Just trying to think.

19 MS. BLANCHETTE: Your Honor, may I?

20 THE COURT: Yes, ma'am.

21 MS. BLANCHETTE: When Mr. Barlow was arguing the  
22 prejudice of raising that, I had -- was not asking this  
23 court today to have to rule on Judge Cooper's ruling. I  
24 think that's appropriate for the appellate court to do.  
25 The purpose of the amendment was to make sure we're

1 preserving this issue and addressing this issue since it's  
2 not in the order of dismissal.

3 THE COURT: Well, and let me ask this question. I  
4 told you back in chambers I was going to allow you to  
5 elicit this testimony in light of the state's objection  
6 because I wanted it in the record because if it's something  
7 that, you know, Mr. Gaskins is entitled to, I want it on  
8 the record. I want it out there for the appellate courts  
9 to look at. So, I guess at this point, in granting an  
10 *Austin* appeal, I guess the state, in essence, is really  
11 just preserving its objection to it for the appellate  
12 level. Fair enough? Is that a fair enough statement?

13 MR. BARLOW: Your Honor, to anything beyond an *Austin*  
14 appeal. Like to include the 59(e). That -- the 59(e)  
15 issue is, is not -- we're objecting to that. It's not  
16 appealable.

17 THE COURT: So -- but, however, in granting the *Austin*  
18 appeal, I'm sure if Ms. Blanchette is doing the appeal  
19 pursuant to the court's ruling of granting an *Austin*  
20 appeal, she'll raise this issue of which the state would,  
21 in turn, object and, in essence, be arguing to the  
22 appellate court that which you are arguing to me today.  
23 Fair? Is that a fair enough statement?

24 MR. BARLOW: Yes, sir, or that it's not preserved,  
25 correct. Yes, sir.

1 THE COURT: Okay. All right. So, Ms. Blanchette, if  
2 you'll get me an order granting the *Austin* appeal. Make  
3 sure the state's copied on that. I want to make sure the  
4 language within that is how, how it needs to be so  
5 everybody's protected here, okay?

6 MS. BLANCHETTE: And, Your Honor, in that vein, I  
7 wouldn't typically ask for this in a hearing that's so  
8 short, but would you allow me time to get the transcript so  
9 I can make sure that I have any testimony of Ms. Zmroczek  
10 properly quoted in that order? I mean, even though I know  
11 we're essentially agreeing, and I'm not trying to speak for  
12 the state about the propriety of the *Austin*. I just --  
13 with kind of how this case has gone, I would really love  
14 having that transcript to rely upon.

15 THE COURT: And I'll be happy to do that. I don't  
16 have any problem with that; I don't think the state would  
17 either.

18 MR. BARLOW: No, Your Honor.

19 MS. BLANCHETTE: It would just delay my submission of  
20 the order.

21 THE COURT: I'll give you time, whatever time you need  
22 to get it.

23 MS. BLANCHETTE: Thank you, Your Honor.

24 THE COURT: And get that to me. I guess you'll need  
25 to make a formal request for the transcript. If I need to

1 sign anything, you know, to facilitate or expedite that  
2 process, you let me know; reach out to my office, and I'll  
3 do what I need to.

4 MS. BLANCHETTE: It shouldn't be needed, Your Honor.  
5 I just wanted to make sure I had your permission to take  
6 the time to do it.

7 THE COURT: You do.

8 MS. BLANCHETTE: Thank you, Your Honor.

9 THE COURT: Once you get it, if you would do this for  
10 me. Let -- advise me or my office and the state when you  
11 receive it. Once you receive it, would thirty days be  
12 enough?

13 MS. BLANCHETTE: It should be, Your Honor, but the way  
14 with our court schedules and things go these days, it may  
15 be a crazy season. So, if I could just communicate it to  
16 your office?

17 THE COURT: All right, let's just, let's say thirty  
18 days from the day of receipt.

19 MS. BLANCHETTE: Okay.

20 THE COURT: But if you need any additional time, just  
21 reach out to me and we'll work with you on that.

22 MS. BLANCHETTE: And also I wanted to make sure I give  
23 the state time to review it once I draft it.

24 THE COURT: And once -- yeah, if you'll do that, that  
25 will be great, okay?

1 MS. BLANCHETTE: Okay. Thank you, Your Honor.

2 THE COURT: All right. Thank you very much.

3 MR. BARLOW: Thank you, Your Honor.

4 ---- END OF TRANSCRIPT OF RECORD ----

**CERTIFICATE**

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED  
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH  
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 HEARING  
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE  
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON  
THE 14TH DAY OF NOVEMBER, 2022.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,  
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JANUARY 8TH, 2023

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
2015-CP-40-03169

Johnny Walker Gaskins #313590, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

EX-PARTE FUNDING ORDER

RICHLAND COUNTY  
FILED  
2016 FEB -2 AM 10:21  
JEANETTE W. HARRIS  
C.C.P. & C.S.

This matter comes before the Court upon the motion of David K. Allen, attorney for the above named Applicant. It appears that the Applicant was charged with two counts of Murder and three counts of Assault and Battery with Intent to Kill. It further appears to the Court's satisfaction that obtaining private investigation services are reasonable and necessary to assist in the defense and representation of the Applicant.

I further find that because of the serious nature of the case that payment for these services in excess of the amount set forth in South Carolina code Section 17-3-50 (B) are both reasonable and necessary in order to provide effective assistance of counsel and that such payment is appropriate. Therefore, for good cause shown,

IT IS HEREBY ORDERED that the attorney be allowed to obtain private investigation services on behalf of the Defendant.

IT IS FURTHER ORDERED that the attorney is authorized to incur expenses not to exceed Two Thousand Five Hundred and 00/100 (\$2,500.00) Dollars subject to the approval of the Court as authorized by law, and such services be paid by the Office of Indigent Defense upon proper submission of necessary documents and Court Order.

It is so ordered this 29<sup>th</sup> day of January, 2016 in Columbia, South Carolina.

  
Robert E. Hood  
Presiding Circuit Judge

I SO MOVE:

\_\_\_\_\_  
David K. Allen  
Appointed attorney for Applicant

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4003169

Johnny Walker Gaskins

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ 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.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ 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.

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 PUBLIC 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 |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

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.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 2 February 2016 to attorneys of record or to parties (when appearing pro se) as follows:

David Kellum Allen

James Clayton Mitchell III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

*Janette W. McBride*

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Johnny Walker Gaskins, #313590 )

Docket No.: 2015-CP-40-03169

Applicant, )

vs. )

CONSENT ORDER SUBSTITUTING  
COUNSEL

The State of South Carolina, )

Respondent. )

This matter comes before me on the motion of attorney David K. Allen, who requests an Order for Substitution of Counsel in the above-referenced case.

The Applicant has filed a Post-Conviction Relief matter, and attorney David K. Allen was appointed as Counsel in this case on September 11, 2015. Applicant's counsel has consulted with attorney Aimee J. Zmroczek, who has agreed to be substituted as counsel in the case in order to more efficiently represent the interests of the Applicant. I find the substitution of counsel for the Applicant to be both reasonable and necessary.

Counsel has informed the Court that this case is not at any critical stage of representation and that substitution of counsel will not adversely affect Applicant nor create any delay in this case.

This Order is issued pursuant to the Defense of Indigents Act, S.C. Code Section 17-3-10, *et. seq.*, and specifically including the Court's discretionary authority to appoint counsel pursuant to S.C. Code Section 17-3-100.

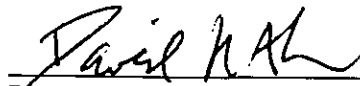
IT IS THEREFORE ORDERED that attorney David K. Allen is relieved as counsel for Johnny Walker Gaskins;

IT IS FURTHER ORDERED that the Applicant be appointed the services of Aimee J.

Zmroczek, with an office mailing address of P.O. Box 11961, Columbia, SC 29211.

AND IT IS SO ORDERED.

This 25 day of July, 2016



David K. Allen, Esquire  
The Allen Law Firm, P.A.  
P.O. Box 3241  
West Columbia, SC 29169

  
The Honorable ~~William P. Keesley~~  
Chief Administrative Judge – CP  
Eleventh Judicial Circuit

*FHM*

*Deandra Benjamin*



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

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

## JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2015CP4003169**Johnny Walker GaskinsState of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC Vol. (Insult);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ **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.

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

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|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

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Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

## For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 29 day of July, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Aimee Jendrzewski Zmroczek

Jessica Elizabeth Kinard

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W. McBride*

|                                   |                                    |
|-----------------------------------|------------------------------------|
| STATE OF SOUTH CAROLINA )         | IN THE COURT OF COMMON PLEAS       |
| COUNTY OF RICHLAND )              | FIFTH JUDICIAL CIRCUIT             |
| Johnnie Walker Gaskins, 313590, ) | 2022-CP-40-1854                    |
| Applicant, )                      |                                    |
| v. )                              | ORDER ON APPLICATION               |
| State of South Carolina, )        | FOR POST-CONVICTION RELIEF         |
| Respondent. )                     | GRANTING BELATED APPEAL            |
|                                   | PURSUANT TO <i>AUSTIN V. STATE</i> |

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RICHLAND COUNTY  
FILED

This matter comes before the Court pursuant to an Application for Post-Conviction Relief filed on April 8, 2022. The State submitted a Return on August 19, 2022. On November 14, 2022, Applicant, through counsel, filed an Amendment, which stated the following:

Applicant, through counsel, would move to amend his Application, as addressed below. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

In addition to the information provided in response to question eleven on his Application, Applicant would add the following:

- (a) Applicant's counsel failed to provide him notice of the entry of the Order of Dismissal, failed to file a Motion under Rule 59, SCRCP, due to the Order omitting the matter of the Court sustaining the State's objection to a late amendment and/or expert witness, and failed to timely file an appeal. PCR Transcript pp. 90-96, 138-145.
- (b) Following the evidentiary hearing, Applicant was under the belief that further proceedings were going to take place regarding the matter of the late amendment and/or expert regarding video evidence. PCR Transcript pp. 90-96, 138-144.

In addition to the response provided to question nineteen on his Application, Applicant would add the following: A belated appeal of prior PCR Application or whatever relief the Court deems proper.

An evidentiary hearing was conducted on November 14, 2022, at the Richland County Courthouse in front of the Honorable D. Craig Brown. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by D. Russell

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Barlow, II, Assistant Attorney General. During the hearing, Applicant took the stand and called Aimee J. Zmroczek, Esquire. Applicant introduced two exhibits.

At the conclusion of the evidentiary hearing, this Court found that Applicant was entitled to a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), and discussed the other relevant claims with counsel for both parties. Hearing pp. 45-52. This Court requested that Applicant's counsel submit an Order, and she obtained permission to obtain the hearing transcript. Hearing pp. 52-53. This Court granted such permission, and Applicant's counsel submitted a proposed Order, from which this Order follows.

#### PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Richland County Clerk of Court. Applicant was indicted during the July 2008 term of the Richland County Grand Jury for two counts of murder (2008-GS-40-1626; -3948), three counts of assault and battery with intent to kill (ABWIK) (2008-GS-40-1629; -1631; -1632), and use of a firearm during the commission of a violent crime (2008-GS-40-1627).

On April 15, 2015, Applicant proceeded to trial in front of the Honorable L. Casey Manning and a jury. Applicant was represented by Joseph M. McCulloch, Jr., Esquire, and Kathy R. Schillaci, Esquire. Applicant was found guilty as indicted. The Honorable L. Casey Manning sentenced Applicant to concurrent terms of life for the two counts of murder. Applicant was sentenced to consecutive terms of twenty years for each count of ABWIK, and a consecutive term of five years for use of a firearm during the commission of a violent crime.

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A timely direct appeal was filed and perfected by Tara D. Shurling, Esquire. On July 3, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Gaskins*, Op. No. 2013-UP-304 (S.C. Ct. App. filed July 3, 2013). A Petition for Rehearing was filed on January 18, 2013. An Order denying the Petition was issued by the South Carolina Court of Appeals on August 6, 2013.

On January 6, 2013, a Petition for Writ of Certiorari was filed in the South Carolina Supreme Court. An Order denying the Petition was issued on August 6, 2014, and the Remittitur was handed down on August 15, 2014.

An Application for Post-Conviction Relief was filed on May 27, 2015, with the Richland County Clerk of Court. On September 11, 2015, David K. Allen, Esquire, was appointed to represent Applicant. On October 1, 2015, a Return was filed, and Return and Motion for More Definite Statement was filed on June 27, 2015. An *Ex Parte* Order for Funding to obtain a private investigator was issued on January 29, 2016. An Order of Substitution, which appointed Aimee J. Zmroczek, Esquire, was entered on July 25, 2016.

On July 18, 2017, an evidentiary hearing was conducted at the Richland County Courthouse in front of the Honorable G. Thomas Cooper, Jr. Applicant was present and represented by Aimee J. Zmroczek, Esquire. Respondent was represented by Jessica E. Kinard, Esquire. Applicant, through counsel, made a verbal Amendment of his PCR Application and called Joseph M. McCulloch, Jr., Esquire, and Tara D. Shurling, Esquire, to the stand. Applicant introduced four exhibits.

At the conclusion of the hearing, the court gave both parties thirty days to submit proposed Orders. On October 6, 2017, an Order of Dismissal was issued, which was filed

and mailed to counsel on October 10, 2017. No appeal was filed in the South Carolina Supreme Court.

### FINDINGS OF FACTS AND CONCLUSIONS OF LAW

#### I. Summary of the Relevant Portions of the July 2017 Hearing

At the beginning of the evidentiary hearing on July 18, 2017, Applicant's counsel informed the court that she had amendments to make to the original application. PCR p. 5. Respondent stated that she had received a copy of the amendments that morning and objected due to timeliness. PCR pp. 6-7. Judge Cooper found that the amendments were general in nature and allowed Applicant to proceed with the amendments that were handwritten as follows:

#### Trial Attorney

Fail to properly prepare / call witnesses / utilize evidence  
Fail to preserve obvious issues for appeal

- 1) Did not move to suppress search of vehicle
  - illegally obtained
- 2) Did not move to suppress video
  - issues with completeness
  - editing
- 3) Did not move to suppress phone
  - never reviewed calls
  - never examined
- 4) Did not object to Judge's behavior / chilling effect on defense
- 5) Did not object to Judge going into jury room
- 6) Did not object to premature deliberations
- 7) Did not argue jury charges / *Belcher*
  - fail to request charges
- 8) Did not object to bolstering
- 9) Never received / reviewed 911 calls

#### Appellate Attorney

- 1) Did not argue *Biggers*
- 2) Did not argue search warrants
  - validity of tipster

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-hearsay

- 3) Did not argue closing argument preservation
- 4) Did not argue *Brady* / Rule 5 violations

After the court allowed the amendments, Joseph M. McCulloch, Jr., Esquire, was called to the stand and questioned by both parties about his role as Applicant's trial counsel. When Applicant's counsel asked about Applicant's investigator reviewing the discovery, Mr. McCulloch responded that he had put all the boxes on his conference room table for the investigator to review in the prior few days. PCR p. 16. Counsel also questioned Mr. McCulloch about the video obtained by law enforcement. PCR pp. 30-31. Later, she also asked counsel extensive questions about the video evidence. PCR pp. 43-50.

After Mr. McCulloch's testimony, Ms. Zmroczek informed the court that she intended to call Christopher Watkins who was hired by one of the prior attorneys to work on the "video aspect of it." PCR p. 89, lns. 8-15. She explained that she had just informed Respondent about his testimony and proposed leaving the record open to allow the State adequate time to prepare for his testimony. PCR p. 89. Respondent objected due to the timing. PCR pp. 90-91. In response, the court questioned what Applicant intended to offer through Mr. Watkins testimony, and counsel responded: "[W]hat he will testify to is that the video was altered; that the video was not presented to the defense in the way that it was received." PCR p. 91, lns. 18-25. She informed the court that she had received Mr. Watkins final report the night before. PCR p. 94, ln. 21. After continued discussion, the court held: "Well, I'm going to sustain the State's objection at this time. At the conclusion of this presentation and your other witnesses, I will review it in-camera and

see if I can understand what you're trying to say. And I'll view it with attorneys, let's put it that way." PCR p. 95, ln. 15-20.

Applicant's next witness was Tara Dawn Shurling, Esquire, and she was questioned by both parties regarding her handling of Applicant's appeal. PCR pp. 96-137. Regarding the video, she did not have an independent recollection of reviewing it, but she noted that she did not recall any objections or motions made in the record she reviewed while preparing the appellate brief. PCR pp. 122-23.

Following her testimony, the court revisited the matter of Mr. Watkins testimony. Applicant's counsel identified the issues from the amendment that his testimony related to, which included testimony regarding his review of counsel's entire file. Counsel stated that she needed to at least proffer his testimony since "you can't PCR a PCR attorney." PCR p. 138, lns. 2-15. After back and forth with Applicant's counsel, the court noted that Respondent was given no notice that Mr. Watkins analyzed the video and all he could consider as possible notice was issue two on the amendment. PCR pp. 139-140. Referencing trial counsel's questioning of the officer about the video at trial, the court asked if counsel was trying to make a prosecutorial misconduct argument, which seemed to go beyond the "pale of a PCR hearing." PCR pp. 139-141, p. 140, lns. 16-23. In response, counsel agreed with the court that Applicant was trying to show that trial counsel failed to take steps to analyze the video to ensure it was not altered. PCR p. 141. While acknowledging the notice issue, the court asked for the parties position on Mr. Watkins testifying about what he found in trial counsel's file that was divergent from his testimony. In response, Respondent objected due to notice.

After the court stated that he would allow the proffer and rule on the objection after, Applicant's counsel admitted that the late notice was her fault, and the court noted that she could have requested a continuance and that she failed to notify Respondent when she became aware of the matter. PCR p. 143. During further discussion before conducting a proffer, the court sustained the State's objection. The court ruled:

Well, I'm going to sustain the State's objection to the introduction of evidence that the videotape was altered. I sustain the State's objection based on the fact that insufficient evidence – insufficient notice was given to the State. The State hasn't even seen what we're talking about, and here we are.

PC Rp. 144, Ins. 4-10. Applicant's counsel requested indulgence, after which the following took place:

Counsel: And, your Honor, at this time, we'll withdraw that testimony. And, you Honor, given the fact that the late notice was, you know, my fault, what I would move to do at this time, Your Honor, is to withdraw that specific allegation with leave to present it as after-discovered evidence.

Court: Yeah, I mean, that's what it is.

Counsel: Right, under Rule 29(b), Your Honor.

PCR p. 144, Ins. 11-20. Respondent informed the court that she did not object if the matter was being withdrawn and stated that counsel would have the right to present it in a post-trial motion. PCR p. 145, Ins. 7-10.

At the conclusion of the hearing, the court requested proposed orders from both parties in thirty days. PCR pp. 145-146. On October 6, 2017, an Order of Dismissal was issued, which listed the issues raised in the handwritten amendment on the day of the evidentiary hearing. The Order of Dismissal made no mention of counsel's attempt to call Mr. Watkins or the discussions had regarding the same.

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## II. Summary of the November 2022 Hearing

After Respondent provided the procedural history detailed above, Applicant's counsel was asked to clarify the allegations on which Applicant was moving forward. Counsel responded that based upon discussions with Respondent she filed an Amendment that morning, which was previously provided to Respondent, to clarify and further support the allegations made in the Application. Therefore, Applicant was going forward on the Application and the Amendment filed on November 14, 2022. Hearing p. 7. Respondent informed the court that the State objected to the amendment since it was a collateral attack on prior PCR counsel's performance and not appropriate under *Austin*<sup>1</sup>. Hearing p. 8. Before calling Applicant's first witness, counsel moved the orders providing for funding and substitution of counsel in the 2015 PCR Action into evidence as Applicant's Exhibit one and two, without objection. Hearing pp. 8-9.

When Aimee Zmroczek, Esquire, took the stand, she recalled taking over Applicant's PCR per the substitution order and that funding had been obtained for Mr. Watkins via the order issued prior to her representation. Hearing pp. 10-11. Referencing the prior evidentiary hearing transcript, counsel was asked if she could explain what was going on with the amendments the morning of the hearing. Hearing pp. 11-12. She explained that she had discussed the matter with Respondent prior to that morning, and she was led to believe the timing of the amendments were "no big deal." Hearing p. 12, lns. 7-13, p. 24. She recalled it turning into a big deal when Respondent "started to object to all of the things that, that we had previously talked about." Hearing p. 12, lns. 7-17. On

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<sup>1</sup> *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

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cross-examination, she recalled multiple discussions about a continuance even if her requesting a continuance was not reflected in the record. Hearing p. 24.

Regarding her questioning of Mr. McCulloch about the video, she explained that she was attempting to lay the foundation to call the expert, Mr. Watkins, about his work in the case. Hearing p. 13. When asked about when she brought up the matter of Mr. Watkins and leaving the record open if needed, she explained again that she was caught off guard by Respondent claiming lack of notice and need for time to obtain an expert, so she proposed leaving the record open since testimony had already been taken. Hearing pp. 13-14. She agreed that at that point the matter of Mr. Watkins' testimony was left to be further discussed and/or proffered after Ms. Shurling's testimony. Hearing pp. 14-15. She agreed that she questioned Ms. Shurling about the video evidence. Hearing p. 15.

Turning to what occurred after Ms. Shurling's testimony, counsel explained that she more aggressively tried to make her argument that she needed to at least proffer Mr. Watkins' testimony because she was confused by the court's ruling that differed from his initial ruling. Hearing p. 15. She also explained "obviously it's not reflected in the transcript because it doesn't pick up movements and things like that I'm, I'm trying to make this argument to tell him that I need to proffer and he's shaking his head no." Hearing p. 15, lns. 19-23. When asked about the court's comments that the matter fell outside the purview of PCR, she responded that she did not agree, but she was trying to find a way to preserve the issue once she could tell he was not going to let it in. Hearing p. 16. She explained that she was prepared to proffer and was very confused when the court issued his final ruling before the proffer was conducted. Hearing pp. 17-18. She acknowledged that she tried to figure out a way to preserve the issue and mentioned filing

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under Rule 29, but she later determined that it did not fall under Rule 29, SCCrimP.

Hearing pp. 18-19, 25. She concluded that she was boxed in and trying to find a way out, but she found the issue to be proper for PCR and attempted to raise it via her handwritten amendment. PCR p. 18, lns. 13-24, pp. 19-20.

On cross-examination when asked about her withdrawal of the issue, she explained that she was confused then and confused when reviewing the transcript now, but she did not intend to withdraw it. Hearing pp. 25-26. On redirect, she explained that her comments about not being able to PCR a PCR attorney demonstrated her attempts to preserve the matter for appellate review. Hearing pp. 28-29. She also agreed that the video issue was a primary issue in the PCR case. Hearing p. 30, lns. 8-10.

When asked about the court's instruction to submit a proposed order, she responded that she had checked her notes and did not have a record of submitting a proposed order. Hearing p. 20, lns. 6-10. She explained that she was trying a bunch of cases at the time and likely missed a deadline. Hearing p. 20, lns. 12-14. She also explained that her busy trial docket was the reason that "neither the 59 nor the eventual appeal was filed." Hearing p. 20, lns. 14-17.

Regarding the Order of Dismissal, she stated that she did not have independent knowledge of receiving it, and she should have checked the public index. Hearing pp. 21, 26. She concluded: "So, either way it's on me." Hearing p. 21, ln. 11. When asked about being contacted by Applicant or his family, she said it was "certainly possible" that she led them to believe it was still pending and likely discovered her error when she checked the public index following such contact. Hearing p. 21, lns. 12-21.

As to the content of the Order of Dismissal, she agreed that the matter involving the video and Mr. Watkins was not addressed in the order and that she should have filed a Rule 59, SCRCPP, motion to ensure the completeness of the order. Hearing p. 22. She also agreed that under *Marlar*<sup>2</sup> and its progeny, it was her duty as PCR counsel to file a Rule 59 Motion to ensure that all issues were addressed in the order and preserved correctly. Hearing p. 22. She agreed that it was her duty to timely file an appeal, which was a duty she did not fulfill. Hearing p. 22. She also testified that Applicant wanted an appeal and never instructed her not to file one on his behalf. Hearing p. 23.

When Applicant took the stand, he acknowledged his familiarity with the instant Application and subsequent Amendment. Hearing p. 31. He also agreed that he had reviewed the same with counsel and understood the relief he was requesting. Hearing p. 32.

Regarding his prior PCR Application, he recalled meeting with and talking on the phone with Mr. Watkins after Ms. Zmroczek took over his case. Hearing pp. 34-35. He further recalled Mr. Watkins informing him about the issue he was working on regarding the video evidence and the possibility of the video being edited. It was his understanding that the matter was going to be addressed at his PCR hearing as a primary issue. Hearing pp. 35, 37.

Turning to the day of his PCR hearing, he remembered seeing the handwritten amendment for the first time that morning and being unaware of any concern over Mr. Watkins testifying. Hearing p. 36. As it began being discussed, Applicant recalled thinking the hearing was going to be continued to give the State time to prepare. Hearing

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<sup>2</sup> *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007).

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p. 37, Ins. 16-19. When asked about the later discussion of the issue, he explained that he understood that the court was giving the State more time and a final ruling would not be made until that was done. Hearing p. 38, Ins. 3-9, p. 40. He agreed that upon recently reviewing the evidentiary hearing transcript he now understood that he was not correct about the court's ruling. Hearing p. 41. On cross-examination, he responded that he did not understand at the hearing that Ms. Zmroczek withdrew the issue. Hearing p. 44.

He testified that he did not receive a copy of the Order of Dismissal from Ms. Zmroczek, and he was delayed in reaching out to her due to the passing of his father. Hearing pp. 38-39. He recalled it being difficult to reach her, and when he did it was his understanding his case was still pending, which he took to mean that they were still waiting on the State to address the video issue. Hearing p. 39. He explained that he found out that his PCR was denied by accessing the public index. Thereafter, he asked his mother to reach out to current counsel. Hearing pp. 39-40.

Regarding the filing of a Rule 29, SCRCrimP, he recalled that counsel mentioned it in the courtroom, but it was never discussed further. Hearing p. 39. He testified that he never heard from Ms. Zmroczek about filing an appeal on his behalf and he never informed her that he did not want an appeal filed. PCR pp. 41-43. He also testified that he would have wanted Ms. Zmroczek to ensure that all issues were properly addressed in the Order of Dismissal. Hearing p. 42. When asked what relief he was seeking, he said: "To, let me get my appeal back and preserve this issue." Hearing p. 42, Ins. 12-15, p. 43.

### III. Discussion

In *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), the South Carolina Supreme Court provided for a belated appellate review of an initial post-conviction relief

action where prior post-conviction relief counsel fails to timely appeal the denial of the application. *Id.* at 454, 409 S.E.2d at 396; *see also* S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). Pursuant to *Austin*, an evidentiary hearing may be conducted in regard to a successive post-conviction relief application “on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review.” *Id.* at 454, 409 S.E.2d at 396. “If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal the finding.” *Id.* at 455, 409 S.E.2d at 396. *Austin*, therefore, allows an applicant to petition the South Carolina Supreme Court for discretionary review of the dismissal of his initial post-conviction relief application, and may do so outside the ordinary time limits for bringing such an appeal.

Here, an evidentiary hearing was held and this Court finds that Applicant requested and was denied an opportunity to seek appellate review of his initial post-conviction relief application due to the admitted failure of his counsel on his initial post-conviction relief application. This Court finds credible the testimony of Ms. Zmroczek and Applicant. This Court has also considered that Respondent did not object to and consented to the request for *Austin* relief. Hearing p. 49, lns. 19-20. After careful consideration of the record before this Court and the applicable case law, this Court finds that Applicant is entitled to a belated appellate review of his initial post-conviction relief application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

This Court notes that Applicant, through counsel, must serve a notice of appeal within thirty days from receipt by counsel of written notice of entry of the judgment to secure the appropriate appellate review, and file such notice in the South Carolina

Supreme Court within ten days of service. Rule 203 & 243, SCACR. Furthermore, Applicant and counsel are directed to Rule 203, 207, and 243, SCACR to ensure the proper filing and perfecting of an appeal.

This Court also agrees with counsel that Applicant's case is not simply a matter of whether Applicant is entitled to an *Austin* appeal. Hearing p. 45, lns, 22-24, pp. 45-51. Here, Ms. Zmroczek readily admitted that she did not have an independent recollection of receiving or reviewing the Order of Dismissal. She also stated that she would have filed a Rule 59, SCRCP, motion if she had reviewed the Order for the purposes of preserving the issue regarding the video evidence, expert, and ensuring the completeness of the Order. She acknowledged that it was her duty to file such a motion, but she did not in this case. Additionally, this Court finds credible Applicant's testimony that he was under the belief that further action was going to be taken regarding the issue with the video evidence, expert, and that he was led to believe that his PCR Action was still pending until he independently discovered otherwise.

This Court is constrained by the existing precedent to grant relief on counsel's failure regarding the first PCR Action beyond her failure to file an appeal, but this Court is highly concerned about these failures. Admittedly, counsel provided a handwritten Amendment on the day of the hearing, attempted to call an expert on Applicant's primary issue without providing adequate notice to the State, failed to request a continuance as noted by the PCR court, failed to submit a proposed order, and failed to ensure that the issue regarding the video evidence was properly ruled upon and preserved for appellate review.<sup>3</sup> Therefore, this Court wants to make it abundantly clear that the Applicant has

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<sup>3</sup> Counsel also had confusion on whether she withdrew the issue and failed to file a timely Rule 29(b), SCRCP, motion as she indicated to the court she would do.

raised these issues via Amendment and at the evidentiary hearing and it is being addressed herein to ensure that the additional admitted failures of counsel in representing Applicant on his first PCR Application are properly preserved for review by the appellate court and/or in a federal action in whatever way may be proper.

**IT IS THEREFORE ORDERED:**

1. That Applicant is granted a belated appeal of his initial post-conviction relief application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

**AND, IT IS SO ORDERED.**



Honorable D. Craig Brown  
Presiding Judge  
Fifth Judicial Circuit

February 15, 2023

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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Johnnie Walker Gaskins, #313590,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT  
)

) CASE NO. 2022-CP-40-1854  
)

) **RESPONDENT'S MOTION PURSUANT**  
) **TO RULE 59(e) AND 60(b), SCRCP**  
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)  
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This matter comes before the Court by way of Applicant Johnnie Walker Gaskins' successive post-conviction relief (PCR) application filed on April 8, 2022, asserting he was denied the right to appellate review of the denial of his initial post-conviction relief action. Respondent made its Return on August 19, 2022, requesting an evidentiary hearing. An evidentiary hearing was convened on November 14, 2022, before the Honorable D. Craig Brown. Applicant was present and represented by Tricia A. Blanchette, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. The Court granted Applicant belated appellate review of his initial post-conviction relief action pursuant to Austin v. State<sup>1</sup> by Order filed February 28, 2023. Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRCP, and Motion for Relief from Judgment pursuant to Rule 60(b)(1), SCRCP, would respectfully show this Court:

#### **PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court orders of commitment. Applicant was indicted at the July 2008 term of the Court of General Sessions for Richland County for two counts of Murder (2008-

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<sup>1</sup> 305 S.C. 453, 409 S.E.2d 395 (1991).

GS-40-1626; 2008-GS-40-3948), three counts of Assault and Battery with Intent to Kill (ABWIK) (2008-GS-40-1629; 2008-GS-40-1631; 2008-GS-40-1632), and one count of Use of a Firearm during the Commission of a Violent Crime (2008-GS-40-1627). Applicant proceeded to a jury trial on October 19 – 27, 2009, before the Honorable L. Casey Manning. Applicant was represented by Joseph McCulloch, Esquire, and Kathy R. Schillaci, Esquire. Deputy Solicitor John P. Meadows and Assistant Solicitor Joanna A. McDuffie of the Fifth Circuit Solicitor's Office prosecuted the case.

On October 27, 2009, Applicant was convicted as indicted. Judge Manning sentenced Applicant to imprisonment for life for each count of Murder, twenty years' imprisonment for each count of ABWIK, and five years' imprisonment for the Use of a Firearm during the Commission of a Violent Crime. The two life sentences were to be served concurrently, with the remaining sentences to be served consecutively.

Applicant filed a timely Notice of Appeal.

#### *Applicant's Direct Appeal*

Applicant pursued a direct appeal, and his appeal was perfected by Tara D. Shurling, Esquire. On appeal, Applicant raised the following instances of trial court error:

- I. The trial court did not abuse its discretion in the admission of a series of photographs from the crime scene which showed blood where they had probative value in a case where the photographs were not unduly prejudicial or inflammatory. Further, it appears at the time of the introduction of the "close-up" photographs the Appellant had abandoned the earlier objection
- II. Where the trial court instructed the jury to disregard evidence concerning an unexpected assertion in a dying declaration of one of the victims and an interrogative from an unknown caller to the Appellant's cell phone, the trial court did not abuse his discretion in denying the motion for a mistrial
- III. A new trial is not warranted where the trial judge gave a cautionary instruction to the jury after a series of exchanges

between counsel for the prosecution and defense concerning the form of questions on re-direct required the Court to intervene to maintain civility between counsel in the courtroom. The Appellant's contention that defense counsel ability to represent the Appellant in the eyes of the jury was undermined in not supported by the record where both the state and defense were admonished to relax.

Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. Gaskins, No. 2013-UP-304 (S.C. Ct. App filed July 3, 2013). Applicant filed a Petition for Rehearing on July 18, 2013. By Order dated August 6, 2013, the Court of Appeals denied the Petition. Applicant then filed a Petition for Writ of Certiorari on January 6, 2014. The Supreme Court of South Carolina denied the Petition for Writ of Certiorari on August 6, 2014. The Remittitur was issued on August 15, 2014.

***Applicant's Initial Post-Conviction Relief Action (2015-CP-40-03169)***

Applicant then filed a post-conviction relief action on May 27, 2015, alleging ineffective assistance of counsel. In response, Respondent made its Return on October 1, 2015. On June 27, 2015, Respondent made its Return and Motion for a More Definite Statement. In his application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
  - a. "Failure to properly prepare Applicant prior to trial"
  - b. "Failure to call witnesses and utilize evidence"
2. "Ineffective assistance of appellate counsel"
  - a. "Failure to raise all meritorious issues on appeal"

An evidentiary hearing into the matter was convened on July 18, 2017, before the Honorable G. Thomas Cooper, Jr. Applicant was present at the hearing and was represented by Aimee J. Zmroczek, Esquire (PCR Counsel). Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant's attorneys, Joseph M. McCulloch,

Esquire (Trial Counsel) and Tara Dawn Shurling, Esquire (Appellate Counsel), were present and testified.

The morning of the hearing, Applicant emailed Respondent and the court a handwritten document listing amended allegations, which were the following:

Trial Attorney

Fail to properly prepare/call witness/utilize evidence

Fail to preserve obvious issues for appeal

- a. Did not move to suppress search of vehicle
  - i. Illegally obtained
- b. Did not move to suppress video
  - i. Issues with completeness
  - ii. Editing
- c. Did not move to suppress phone
  - i. Never reviewed calls
  - ii. Never examined
- d. Did not object to Judge's behavior/chilling effect on defendant
- e. Did not object to Judge going into jury room
- f. Did not object to premature deliberations
- g. Did not argue jury charges/Belcher
  - i. Fail to request charges
- h. Did not object to bolstering
  - i. Never received/reviewed 911 calls

Appellate Attorney

- a. Did not argue Biggers
- b. Did not argue search warrants
  - i. Validity of tipster
  - ii. Hearsay
- c. Did not argue closing argument preservations
- d. Did not argue Brady/Rule 5 violations

Respondent objected to the submission of these amendments pursuant to Rule 15(a), SCRCP, and moved for a continuance in order to prepare to defend the allegations. The motion was denied, though the court cautioned Applicant about the presentation of late amendments in the future. In evaluating the allegations, the court's position was that Applicant's original allegations were folded into and described in more detail by the amendments.

Following the hearing, Judge Cooper denied relief. An Order of Dismissal was filed on October 10, 2017.

Applicant did not file an appeal challenging the denial of relief.

#### **CURRENT ACTION BEFORE THIS COURT**

In his *second* application for post-conviction relief, Applicant alleged he is entitled to belated appellate review of his initial post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). On November 10, 2022, Applicant, through Counsel, amended his application to allege the following:

- a. Applicant's counsel failed to provide him notice of the entry of the Order of Dismissal, failed to file a Motion under Rule 59, SCRCP, due to the Order omitting the matter of the Court sustaining the State's objection to a late amendment and/or expert witness, and failed to timely file an appeal. PCR Transcript pp. 90-96, 138-145.
- b. Following the evidentiary hearing, Applicant was under the belief that further proceedings were going to take place regarding the matter of the late amendment and/or expert regarding video evidence. PCR Transcript pp. 90-96, 138-144.

Following the evidentiary hearing, Judge Brown granted Applicant belated appellate review of his initial PCR action pursuant to Austin by Order filed on February 28, 2023. Further, the Court noted that it agreed with Applicant that his case "is not simply a matter of whether Applicant is entitled to an Austin appeal." (Order p. 14). In summation, the Court's Order provides that Applicant's amendments filed November 10, 2022, are addressed within the Order "to ensure the additional admitted failures of [PCR] counsel in representing Applicant on his first PCR Application are properly preserved for review by the appellate court and/or in a federal action in whatever way may be proper." (Order pp. 14 – 15).

#### **RULE 59(e), SCRCP, ARGUMENT**

In the Order on Application for Post-Conviction Relief Granting Belated Appeal Pursuant to Austin V. State (the Order), this Court granted Applicant's requested relief pursuant to Austin.

Respondent did not and still does not deny that Applicant has a right to the belated appeal of his first PCR action. However, Respondent submits that the Order issued by this Court in this action goes beyond the scope of Austin and inherently affirms the allegations of ineffective assistance of PCR Counsel. Also, Respondent submits that the Order issued by this Court should be amended to account for evidence discovered that was not discovered until after the hearing that refutes PCR Counsel's testimony, whether by mistake or inadvertence.

#### **BEYOND THE SCOPE OF AUSTIN**

The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (finding "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under [S.C. Code Ann.] § 17-27-90."). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. Austin provides for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal the final judgment by post-conviction relief court).

But Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394.<sup>2</sup> Pursuant to Austin, an evidentiary hearing may be conducted in regard to a successive post-conviction relief application "on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." Austin, 305 S.C. at 454, 409 S.E.2d at 396. "If

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<sup>2</sup> Aice was issued in conjunction with Austin, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

the circuit court finds that the petitioner never, in fact, sought discretionary review, the petitioner may appeal that finding." Id. at 455, 409 S.E.2d at 396. Austin, therefore, allows an applicant to petition the Supreme Court for discretionary review of the dismissal of his initial post-conviction relief application and may do so outside of the ordinary time limits for bringing such an appeal.

Here, this Court's Order in the last two paragraphs on pages 14 and 15, extends well beyond the narrow scope of Austin as to whether PCR Counsel failed to file an appeal. Admittedly, this Court conceded that "existing precedent" constrained this Court from granting relief on PCR Counsel's alleged deficiencies beyond her failure to file an appeal. Yet, this Court's Order further holds that Applicant's allegations regarding PCR Counsel's alleged deficiencies are "properly preserved for appellate review," circumventing Austin's narrow scope and fundamentally providing Applicant a vehicle to pursue appellate review of PCR Counsel's alleged deficiencies. Respondent respectfully submits that the language on pages 14 and 15 of the Order is wholly improper and in direct contravention of Austin and Aice. Further, Respondent submits that the Order should be amended to remove any language extending beyond the scope of whether PCR Counsel failed to file an appeal.

#### **RULE 60(b)(1), SCRPC, ARGUMENT**

Rule 60(b), SCRPC, provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise

vacated, or it is no longer equitable that the judgment should have prospective application.

Respondent submits that PCR Counsel's testimony at the November 14, 2022, evidentiary hearing, whether by mistake or inadvertence, is refuted by evidence discovered and is attached as Respondent's Exhibits 60(b)-01 and 60(b)-02. Specifically, Respondent discovered after the November 22, 2022, evidentiary hearing that PCR Counsel, contrary to her testimony, did submit a proposed order<sup>3</sup> to the court in Applicant's 2015-CP-40-3169 PCR action, and PCR Counsel objected to any reference to the video evidence<sup>4</sup> being in the order within emails to the Attorney General's Office and Judge Cooper's chambers.

The Order issued by this Court specifically outlined PCR Counsel's testimony regarding the proposed order of dismissal she was supposed to submit as follows:

When asked about the court's instruction to submit a proposed order, she responded that she had checked her notes and did not have a record of submitting a proposed order. Hearing p. 20, Ins. 6-10. She explained that she was trying a bunch of cases at the time and likely missed a deadline. Hearing p. 20, Ins. 12-14. She also explained that her busy trial docket was the reason that "neither the 59 nor the eventual appeal was filed." Hearing p. 20, Ins. 14-17. Regarding the Order of Dismissal, she stated that she did not have independent knowledge of receiving it, and she should have checked the public index. Hearing pp. 21, 26. She concluded: "So, either way it's on me." Hearing p. 21, In. 11. When asked about being contacted by Applicant or his family, she said it was "certainly possible" that she led them to believe it was still pending and likely discovered her error when she checked the public index following such contact. Hearing p. 21, Ins. 12-21.

(Order On Application for Post-Conviction Relief Granting Belated Appeal Pursuant To Austin V. State p. 10). Respondent submits that PCR Counsel's mistaken testimony is refuted by the attached exhibits. See Respondent's Exhibit 60(b)-01 and 60(b)-02. Also, contrary to PCR

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<sup>3</sup> See Respondent's Exhibit 60(b)-01.

<sup>4</sup> See Respondent's Exhibit 60(b)-02.

Counsel's recollection, she reviewed the State's proposed order and submitted objections to the State's proposed order in an email dated October 3, 2017, at 10:50 pm. See Respondent's Exhibit 60(b)-02.

This Court further outlined PCR Counsel's testimony regarding the preservation of video evidence for appellate review as follows:

As to the content of the Order of Dismissal, she agreed that the matter involving the video and Mr. Watkins was not addressed in the order and that she should have filed a Rule 59, SCRCP, motion to ensure the completeness of the order. Hearing p. 22. She also agreed that under Marlar and its progeny, it was her duty as PCR counsel to file a Rule 59 Motion to ensure that all issues were addressed in the order and preserved correctly. Hearing p. 22.

(Order On Application for Post-Conviction Relief Granting Belated Appeal Pursuant To Austin V. State p. 11). Respondent submits that contrary to PCR Counsel's mistaken recollection, she specifically objected to the State's inclusion of any of the video evidence in the order because it was "specifically removed" from the PCR hearing "as agreed upon by the Assistant Attorney General and specifically not pursued at the hearing." See Respondent's Exhibit 60(b)-02.

**{SPACE INTENTIONALLY LEFT BLANK | CONCLUSION PAGE FOLLOWS}**

CONCLUSION

Respondent respectfully requests that if this Court is inclined to deny Respondent's motion to amend and remove any language that exceeds the scope of Austin, then Respondent would request that the Order be amended to incorporate the evidence presented in this motion.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

D. RUSSELL BARLOW, II  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

March 9, 2023

Respondent.

## ORDER GRANTING RELIEF

### PROCEDURAL HISTORY

**1640**

Clerk of Court. Applicant was true bill indicted at the July 2008 term of the Richland County Grand Jury for two (2) counts of murder (2008-GS-40-1626, -3448), three (3 ) counts of assault and battery with intent to kill (2008-GS-40-1629, -1631, -1632), and one (1) count of use of a firearm during the commission of a violent crime (2008-GS-40-1627). Joseph M. McCulloch, Jr., Esquire, and Kathy R. Schillaci, Esquire, represented Applicant on the charges. Applicant proceeded to a jury trial before the Honorable L. Casey Manning on October 19-21, 23, and 26-27, 2009, in Richland County. On October 27, 2009, Applicant was found guilty of two (2) counts of murder (2008-GS-40-1626, -3448), three (3 ) counts of assault and battery with intent to kill (2008-GS-40-1629, -1631, -1632), and one (1) count of use of a firearm during the commission of a violent crime (2008-GS-40-1627). Judge Manning sentenced Applicant to terms of imprisonment as follows:

- Life for each (2) counts of murder to run concurrently;
- Twenty (20) years for each (3) counts of assault and battery with intent to kill to run consecutively with each other and to the murder sentences; and
- Five (5) years for possession of a weapon during the commission of a violent crime to run consecutive to all the sentences.

A notice of appeal was filed and an appeal perfected by Tara Dawn Shurling, Esquire. Following the submission of briefs, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Gaskins, Op. No. 2010-UP-304 (S.C. Ct. App. filed July 3, 2013). Applicant filed a writ of certiorari to the South Carolina Supreme Court, in which the court subsequently denied certiorari. State v. Gaskins, Appellate Case No. 2013-001904 (S.C. filed August 6, 2014). The Remittitur was returned on August 15, 2014.

### **ALLEGATIONS**

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

1. Trial Counsel failed to properly prepare for trial including but not limited to:
  - a. Failing to call witnesses;
  - b. Failing to utilize evidence;
  - c. Failing to move for suppression of the search of the vehicle and evidence obtained from that search; and
  - d. Failing to move for suppression of the search of the phone and presentation of that evidence to the jury.
2. Trial counsel did not object to or preserve objections including but not limited to:
  - a. Failing to object to array of improper and prejudicial acts and statements by the solicitor;
  - b. Failing to object to array of improper and prejudicial acts and statements by the Judge;
  - c. Failing to object to array of improper and prejudicial premature deliberations by the jury;
  - d. Allowing Solicitor to lead and elicit inadmissible and irrelevant material; and
  - e. Failing to request and/or argue against jury charges.
3. Appellate counsel did not raise all obvious and meritorious issues on appeal including but not limited to:
  - a. Failing to raise and argue the identification argument under Neil v. Biggers;
  - b. Failing to raise and argue hearsay with regards to the search warrant; and
  - c. Failing to raise and argue the discovery violations under Rule 5 S.C.R.E and Brady v. Maryland.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

#### **Ineffective Assistance of Trial Counsel as to Preserving Objections for Review**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the

evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). When the defendant claims that counsel’s failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded. Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. Allegro, Inc. v. Scully, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (2012); State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). Unless an objection is made at the time the evidence is offered and a final ruling is made, the issue is not preserved for review. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Because the evidence developed during trial may warrant a change in the ruling, the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for appeal. State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). In most cases, “[m]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.” State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) quoting State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). Where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable, and prejudice may be presumed. Cronic v. U.S., 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

#### Summary of Facts and Testimony

##### Automobile Search

Applicant alleges ineffective assistance of trial counsel because trial counsel failed to properly preserve for review the issue concerning the legality of the automobile search<sup>1</sup> and was ineffective for failing to preserve motion for suppression of the search of the vehicle and evidence obtained from that search. The trial court heard a motion in limine concerning the

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<sup>1</sup> Paragraph 1 subsection “c” enumerated page 3 of this order.

search<sup>2</sup> of the vehicle driven by the Applicant and the motion to suppress was denied at that time. Defense counsel failed to renew the objection at the time the pictures of the care and evidence were introduced<sup>3</sup> at trial against Mr. Gaskins and therefore, the issue was lost on appeal.

On February 5, 2007, there was a shooting at club 360. Richland County Sheriff's Department ("RCSD") was assigned to investigate. RCSD received an anonymous call regarding the vehicle Mr. Gaskins was driving.<sup>4</sup> The tip Investigator Insehoward relayed to the court stated that the tip said the vehicle as located at 53 Riverview Ct.<sup>5</sup> The tip actually stated car was parked at the dead-end of Darlington as testified by Investigator Matt Ellis.<sup>6</sup> The items that were collected and introduced were a shell casing located in the rear passenger seat back.<sup>7</sup> There was testimony regarding the facts gathered from the anonymous call. Trial counsel "challenged" the search based on the tip.<sup>8</sup> During the trial when the evidence was introduced trial counsel failed to object to any of the testimony during trial.

During the Post-Conviction Relief Hearing, trial counsel testified that he did not object to the introduction of evidence relating to the vehicle search because of his belief that the trial judge would again rule against his motion to suppress. Appellate counsel testified that she could not challenge the search because it was not properly preserved.

It is well established in South Carolina case law that in order to preserve an objection for appeal, the objection must be made at the time the evidence is presented at trial; otherwise, the issue is precluded from being raised on appeal. Further, even if a trial court rules on a motion in

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<sup>2</sup> Beginning on page 38 of the trial transcript.

<sup>3</sup> Beginning at page 725 of the trial transcript.

<sup>4</sup> Beginning at page 39 of the trial transcript.

<sup>5</sup> Page 40 lines 2-3

<sup>6</sup> Page 73 lines 2-7

<sup>7</sup> Item 131 p. 726 lines 10-12

<sup>8</sup> Page 78 lines 23-25

limine at a pretrial hearing, this issue is not preserved for review because a motion in limine is not a final determination. Here, trial counsel failed to protect the record. Despite his knowledge of the trial judge and despite the court denying defense counsel's motion in limine to suppress the search, he must object during the trial when evidence of the search is presented in order to preserve the issue for review. Defense counsel failed to protect the record on this matter that subsequently jeopardized Gaskin's rights on appeal. Therefore, trial counsel's performance was deficient, satisfying the first prong of Strickland.

As for the second prong of the test, trial counsel's deficient performance prejudiced Gaskins such that there is a reasonable certainty that, but for his errors, the result of the proceeding would have been different. Had defense counsel objected to the admissibility of the shell casing at trial, then that issue would have been preserved for appeal. Since he failed to object, appellate counsel could not raise the issue.

Trial counsel did not object to or preserve objections including but not limited to:  
Failing to object to array of improper and prejudicial acts and statements by the solicitor;  
Failing to object to array of improper and prejudicial acts and statements by the Judge;  
Failing to object to array of improper and prejudicial premature deliberations by the jury;

Undersigned addresses several items not preserved for appeal by trial counsel and agrees that Argument that counsel was ineffective for informing defendant that issue could be raised on appeal, when in fact it could not, was rejected because the trial judge's ruling was correct.

Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1998). An issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (therefore, PCR court should analyze this under prejudice prong). Trial counsel did not object to, or otherwise preserve, most of the improper, inflammatory and prejudicial comments made by the solicitor in his closing argument. Counsel's failure to object both denied applicant the right to a

fair trial, and failed to preserve the claims for review by the South Carolina Supreme Court on direct appeal.<sup>9</sup>

On page 993 of the trial transcript as well as 996, trial counsel objects and there are two bench conferences held. On page 1051 of the trial transcript trial counsel goes back and puts the objections on the record. He argues that the objections to the closing were based on three objections. The first was based on an improper appeal to the jury's sympathy and the second and third were attributed statements to witnesses that were not in the record. (Trial Tr. p. 1052 lines 12-18) There was prejudicial testimony recited by the assistant solicitor that was not spoken by a witness on the stand. Trial counsel also noted his objection at the bench, an objection regarding the comment about "gangsta style shooting of the firearm" on page 1052 of the trial transcript. There was no curative instruction requested nor was this issue briefed on direct appeal.

The assistant solicitor's opening statement and closing argument denied applicant the right to a fair trial guaranteed by South Carolina Law and the Fourteenth Amendment to the United States Constitution. The assistant solicitor's contained numerous improper, inflammatory, and prejudicial comments regarding the charged offenses. Furthermore, during the course of the argument, the assistant solicitor improperly interjected their personal opinions regarding applicant's guilt, as well as community sentiment into the case, and made numerous other inflammatory and improper comments, including but not limited to:

- 1) "I'm cold....And since I heard that, whatever day it was, it's etched in my brain and I ask it to be etched in your brain, now, in the jury room and forever, forever." (Trial Tr. p. 968 lines 11-20)
- 2) "...as you take the cloak off, I'm going to ask you to tear a little – tear half of it off for John Adams, to warm him with the verdict of guilty of murder. Take some of that off too, that cloak that the evidence has stripped off Johnnie Walker Gaskins and give some of it to Shannavia, warm her. Take a little bit off for – take a little bit of that robe that the evidence has taken off, give it to Q. Give Lamont some for his back

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<sup>9</sup> Appellate counsel testified she can only raise the issues that are preserved by trial counsel.

injuries, ladies and gentlemen. And for that final piece of cloth that the evidence has taken off, of that cloak, we want to make a little blanket for Dierdre to keep her warm.” (Trial Tr. p. 1006 lines 11-22)

Courts have held counsel was ineffective for failing to object to portions of solicitor's closing argument, which improperly injected parole considerations into the jury's sentencing decision and equated a finding of "guilty with a recommendation of mercy" with a much lighter sentence or an acquittal. Although evidence of guilt was overwhelming, applicant was still prejudiced because improper argument prevented jury from fairly considering the guilty with mercy verdict. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). Counsel ineffective for permitting two instances of hearsay testimony that identified petitioner as CSC victim's assailant. Counsel's explanation that he elicited one witness's testimony because the victim only offered an allegation was not a valid strategy since all hearsay testimony identifying an assailant could be characterized as an allegation. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002).

Improper corroboration testimony that is cumulative to the victim's testimony is prejudicial since “it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. This Court finds Applicant’s allegation that trial counsel was ineffective for failing to object or preserve objections to the solicitor’s closing argument has merit. This Court notes that “closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries’ positions.” State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), *aff’d*, 326 S.C. 199, 485 S.E.2d 918 (1997) (*citing Herring v. New York*, 422 U.S. 853 (1975)). “A solicitor's closing argument must be carefully tailored so as not to appeal to the

personal biases of the jury.” Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744. “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective.

Here, failure to object to solicitor's argument that equated applicant with a "gangster" and giving the jury pieces of Gaskins' jacket to “keep the victims warm” did so infect the trial as to deny applicant due process. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004).

Trial counsel's failure to object to trial judge's comments, which invited the jury to prematurely discuss the case, was not "strategic" where an error of law is involved and such comments are inherently prejudicial. Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992). Trial counsel's failure to object to trial judge's comments, which invited the jury to prematurely discuss the case, was not "strategic" where an error of law is involved and such comments are inherently prejudicial. Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

Trial counsel’s failure to object to the judicial yelling at defense counsel and abruptly halting the proceedings after a series of defense objections was an argument raised and briefed

by Appellate counsel to the Court of Appeals. This issue was briefed and argued at the appellate level. Had defense counsel objected to these statements they would have been preserved for appeal. Since he failed to object the Court of Appeals refused to review this issue. As argued above it is well established in South Carolina case law that in order to preserve an objection it must be made contemporaneously. Therefore the first prong is met.

As for the second prong of the Strickland test, defense counsel's deficient performance prejudiced Gaskins such that there is a reasonable certainty that, but for his errors the result of the proceeding would be different. Had defense counsel objected to the numerous points raised above and at the hearing, the issues would have been preserved for appeal. Based on all the information in the record and the testimony during trial the Court finds that Applicant has proven beyond a preponderance of the evidence that his trial counsel's representation was not reasonable under the professional norms, and that this deficient performance did prejudice that Applicant such that there is a reasonable probability that, but for defense counsel's errors, the result on appeal would have been different.

Accordingly, this Court finds that the Applicant has proven the first prong of the Strickland test, that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant presented specific and compelling evidence that trial counsel committed the error of failing to object to inclusion of material evidence during his representation of the Applicant.

This Court also finds that the Applicant has proven the second prong of Strickland, that he was prejudiced by trial counsel's performance. But for defense counsel failing to object, the issues would have been preserved on appeal, allowing the Court of Appeals the opportunity to review the issue of admissibility and the prejudicial effect at Gaskins' trial. This Court

concludes the Applicant has met his burden of proving counsel failed to render reasonably effective assistance. See Frasier *supra*, Butler, *supra*; and Cherry, *supra*. Therefore, the application is granted as to ineffective assistance of counsel for failure to object to the search of vehicle and prejudicial comments at trial.

Trial counsel did not object to or preserve objections including but not limited to:  
Failing to request and/or argue against jury charges.

There were no written charges submitted to the trial judge.<sup>10</sup> Trial Counsel was asked why he did not request specific jury charges on spoliation, a charge on eyewitness testimony, a charge on stricken testimony, multiple charges, a criminal intent charge, third party guilt charge, or a proper charge of malice under Belcher. Trial Counsel testified that he was sure that he had. Either counsel did not, or he did not preserve the objection to the exclusion of these charges. In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court referred to the first sentence of the Elmore charge as the standard implied malice charge and the second sentence as the permissive inference charge. The Court stated in a footnote that “[t]he standard implied malice charge remains valid, as does the general permissive inference instruction.” Id. The charge given by the trial judge in this case clearly deviates from the suggested Elmore charge as it does not contain the permissive inference language.

The complete omission of the permissive inference language and the failure to charge criminal intent is wholly improper. Here, trial counsel failed to request the charges and/or protect the record. Defense counsel failed to protect the record on this matter that subsequently jeopardized Gaskin’s rights on appeal. Therefore, trial counsel’s performance was deficient, satisfying the first prong of Strickland.

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<sup>10</sup> The jury charge begins on page 1031 of the transcript.

As for the second prong of the test, trial counsel's deficient performance prejudiced Gaskins such that there is a reasonable certainty that, but for his errors, the result of the proceeding would have been different. Because the charges were erroneous, the Court finds trial counsel in finding trial counsel was deficient for failing to object to the malice charge as well as failing to request a charge on intent. Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002), overruled on other grounds by State v. Belcher, supra (counsel was deficient in failing to object to a malice charge that shifted the burden of proof to the defendant); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995) (this Court must affirm the rulings of the PCR judge if there is any evidence to support the decision). In determining whether petitioner was prejudiced by trial counsel's deficient performance, this Court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury. Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992). The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge. Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008).

In this case, the PCR judge erred in finding there was evidence of malice other than the use of a deadly weapon. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000) (malice is hatred, ill-will, or hostility toward another person; a wrongful intent to injure another person indicating a wicked or depraved spirit intent on doing wrong; a formed purpose and design to do a wrongful act without legal justification or excuse); State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951) overruled on other grounds by State v. Torrence, supra (as used in the description of murder, malice does not necessarily import ill-will toward the individual injured, but signifies a general malignant recklessness toward the lives and safety of others, or a condition of the mind that

“shows a heart regardless of social duty and fatally bent on mischief.”). Because there was little evidence of malice aside from the use of a gun, petitioner was prejudiced by trial counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon. Gibson v. State, 416 S.C. 260, 264–66, 786 S.E.2d 121, 123–24 (2016), reh'g denied (June 15, 2016). Failure to request mere presence charge constituted ineffective assistance of counsel where crack cocaine was found in a bottle on the street after applicant's arrest, there was evidence that officer did not see or hear anything fall from applicant's clothing, and witness testified bottle was not retrieved from underneath co-applicant's foot. Brunson v. State, 324 S.C. 117, 477 S.E.2d 711 (1996). Trial counsel was ineffective for failing to object to a supplemental jury instruction because the instruction was in direct contravention to a specific act alleged in the indictment. The indictment for homicide by child abuse charged petitioner with inflicting an injury, but the judge charged the jury it could convict petitioner if it found there was "an act or omission" which caused harm; therefore, the instruction constituted a material variance or constructive amendment to the indictment. Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011).

When questioned, trial counsel insisted that he had requested the proper charges. The Court finds that trial counsel was ineffective for failing to provide the trial court with a proposed instruction on intent, malice, inference, as well as the others named above on page twelve (12). “The trial court is required to charge only the current and correct law of South Carolina.” State v. Mattison, 388 A.C. 469, 479, 697 S.E.2d 578, 583 (2010). “A request to charge a correct statement of the law on any issue raised by the indictment and the evidence presented at trial should not be refused.” Id. This Court finds that trial counsel’s deficient performance prejudiced Applicant.

*Trial Counsel failed to properly prepare for trial including but not limited to:*  
*a. Failing to call witnesses;*

*b. Failing to utilize evidence;*

The first two claims were merged and generally fall under trial counsels' failure to investigate. See Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009) (stating that for PCR applicant to show he was prejudiced by counsel's failure to investigate, he must present favorable evidence that counsel could have found upon investigation). To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Counsel's performance did not constitute "valid strategy" where counsel did not even consider question and thus failed to use discretion in employing an appropriate strategy. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002).

On page 30 of the trial transcript, trial counsel requested a continuance to obtain phone records to corroborate or impeach statements by potential witnesses. (Trial Tr. p. 30 lines 17-22) This is evidence that had been available to the defense for the entire course of his representation. This was evidence that trial counsel never requested tested or inquired about until seemingly the morning of trial.<sup>11</sup> Trial counsel testified that he did do an examination of the vehicle a while after it was in police custody. He said that he did take pictures that showed that there could have been evidence missed by the police, but did not want to risk losing last argument to present that evidence. Additionally there were several items that had potential exculpatory evidence that the defense team never requested testing be performed. (Trial exhibit 95, 103, 121, 127 and 140; Trial transcript p. 1024)

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<sup>11</sup> The State on p. 31 agrees that there will not bring this testimony out in the direct of the witness, however this could have been used to attack this witnesses (and others) credibility.

Trial counsel also did not pursue the evidence that a gun was found that matched the shooting by an officer in Perry South Carolina. Trial counsel did not present this evidence as he did not want to lose last argument. Rule 401 of the South Carolina Rules on Evidence states that “‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence,.” Under that definition, the testimony of the officer who made the report to RCSD was certainly relevant to prove that another shooter was responsible. Trial counsel failed to state the strategic decision not to call or put forth the evidence it had at his disposal.

Based on the foregoing, this Court finds trial counsels’ actions were not reasonable in the circumstances, and fell below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court notes Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a

valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Based on the foregoing, this Court finds trial counsel's lack of any strategy was not reasonable.

#### APPELLATE COUNSEL

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

*Appellate counsel did not raise all obvious and meritorious issues on appeal*

Appellate counsel was ineffective in failing to raise issues, preserved below, which would have entitled defendant to reversal on appeal. Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991). Appellate counsel is not required to raise every nonfrivolous issue that is presented by the record. The Court declined to adopt different rules for appellate and trial counsel in terms of strategy. State v. Tisdale, 357 S.C. 474, 594 S.E.2d 166 (2004). Where result of appeal would have been different had appellate counsel not been deficient, the appropriate remedy is to grant a new trial. Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001).

**Objections preserved pretrial not briefed:** Argued above. (Failing to raise and argue the identification argument under Neil v. Biggers).

**Objections preserved during closing argument not briefed:**

On page 993 of the trial transcript as well as 996, trial counsel objects and there are two bench conferences held. On page 1051 of the trial transcript trial counsel goes back and puts the objections on the record. He argues that the objections to the closing were based on three objections. The first was based on an improper appeal to the jury's sympathy and the second and third were attributed statements to witnesses that were not in the record. (Trial Tr. p. 1052 lines 12-18) There was prejudicial testimony recited by the assistant solicitor that was not spoken by a witness on the stand trial counsel also noted his objection at the bench, an objection regarding the comment about "gangsta style shooting of the firearm" on page 1052 of the trial transcript. There was no curative instruction requested nor was this issue briefed on direct appeal.

b. Failing to raise and argue hearsay with regards to the search warrant

Trial counsel argued a pretrial motion to suppress the search and subsequent evidence relating to the search of a vehicle beginning on page 30 of the trial transcript and argued on page 37 of the trial transcript. Appellate counsel argued hearsay but not in the context of the search warrant.<sup>12</sup>

c. Failing to raise and argue the discovery violations under Rule 5 S.C.R.E and Brady v. Maryland. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable

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<sup>12</sup> As argued above this was not preserved for appeal.

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)). Because Brady is founded upon a sense of fairness and justice, the focus in a Brady analysis should not be on the misconduct of the prosecutor, but rather on the fairness of the procedure. Gibson v. State, 334 S.C. 515, 528, 514 S.E.2d 320, 327 (1999). As the Court observed in Brady, “[t]he principle ... is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair[.]” Gibson, 334 S.C. at 528, 514 S.E.2d at 327 (quoting Brady, 373 U.S. at 87, 83 S.Ct. 1194). “If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.” Gibson, 334 S.C. at 528, 514 S.E.2d at 327 (quoting United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

As a result, “the Brady rule does not apply if the evidence in question is available to the defendant from other sources.’ ... [W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine.” United States v. Wilson, 901 F.2d 378, 380, 381 (4th Cir. 1990) (citation omitted)). The Fourth Circuit Court of Appeals’ decision in Wilson is followed in South Carolina and other jurisdictions. See State v. Moses, 390 S.C. 502, 519-20, 702 S.E.2d 395, 404 (Ct.App. 2010) (“Moses failed to show that he could not obtain other evidence of comparable value by other means; in fact, the State provided defense counsel with a high school yearbook to help Moses in identifying other witnesses who were present in the cafeteria”) (citing Wilson); Anderson v. Leeke, 271 S.C. 435, 438-39, 248 S.E.2d 120, 122 (1978) (“Although not expressly stated in the opinion, we think it is implicit that the

Brady rule applies only to favorable evidence which the prosecution has but which is Unavailable to the defendant”) (citing DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975) and United States v. Soblen, 301 F.2d 236 (2nd Cir. 1962), cert. denied, 370 U.S. 944, 82 S.Ct. 1585 (1962)); Anderson, 271 S.C. at 439, 248 S.E.2d at 122 (“We think it is inferable ... that where evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved”). See also United States v. Brothers Constr. Co., 219 F.3d 300, 316 (4th Cir. 2000); United States v. Davis, 787 F.2d 1501, 1505 (11th Cir. 1986), cert. denied, 479 U.S. 852, 107 S.Ct. 184 (1986); United States v. Grossman, 843 F.2d 78, 85 (2nd Cir. 1988) (no Brady violation when defendant “knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence”) (citations omitted); Lugo v. Munoz, 682 F.2d 7, 9-10 (1st Cir. 1982) (government has no Brady burden when facts are available to a diligent defense attorney).

#### Cell Phone

Applicant alleges ineffective assistance of trial counsel because trial counsel failed to properly preserve for review the issue concerning failing to move for suppression of the search of the phone and presentation of that evidence to the jury. Trial counsel moved for a continuance and moved to obtain cell phone records to challenge a “confession” that was provided in discovery days before the trial (and years after the arrest). The assistant solicitor advised the court that the Thursday before the trial a witness was prepared to testify that Gaskins had called her and discussed being involved in a shooting. The assistant solicitor agreed not to introduce that testimony and the court advised the evidentiary door was locked. This witness did not testify and this issue was not explored but there were clear issues of discovery left to examined.

### **ALL OTHER ALLEGATIONS**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

### **CONCLUSION**

Based on all the foregoing, the Court finds and concludes that the Applicant has established constitutional violations or deprivations that would require this Court to grant his application. There were deficiencies and inadequate defense counsel and appellate counsel were ineffective in this murder case for a number of reasons. The record establishes that in fact trial counsel had no trial strategy that played a role into the decision in what to present to the jury. Appellate counsel was ineffective in failing to assert counsel's ineffectiveness on direct appeal. Therefore, this application for post-conviction relief is granted as to the allegations for ineffective assistance of counsel regarding failure to timely object to improper evidence and statements of solicitor and the trial judge and failing to request/object to jury charges. All other allegations are denied and dismissed with prejudice.

This Court advises Applicant that as to all denied allegations of this proceeding, he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 452 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf.

**IT IS THEREFORE ORDERED**, that the application for Post-Conviction Relief is GRANTED as to the allegations of ineffective assistance of counsel regarding failure to timely object to improper evidence and statements of solicitor and the trial judge and failing to request/object to jury charges.

**IT IS FURTHER ORDERED**, based on all the foregoing, this Court finds and concludes based on the foregoing, Applicant's conviction be vacated and remanded for a new trial.

**AND IT IS SO ORDERED** this \_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
G. THOMAS COOPER, JR.  
Presiding Judge  
Fifth Judicial Circuit

\_\_\_\_\_, South Carolina

**From:** Jessica Kinard  
**To:** "Aimee Zmroczek"; Cooper, G. Thomas Law Clerk (Jamie Rutkoski)  
**Cc:** FifthCircuitocr  
**Subject:** RE: PCR Proposed Order - Johnny Walker Gaskins  
**Date:** Wednesday, October 4, 2017 1:37:00 PM

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All -

Regarding Ms. Zmroczek's objections –

She is correct that only one shell casing was found in the car. I had the appropriate singular on pages 5 and 6, but mistyped on page 7.

Testimony was taken at the PCR hearing regarding the cell phone, and it speaks to trial counsel's effectiveness and actions. The State believes it is appropriate to leave it in.

Testimony was also taken regarding the video evidence. Though it was withdrawn as an allegation, the State believes that the testimony is proper to remain in the order, as it speaks to counsel's actions. If the Court would like me to supplement the order with specific language that the allegation was withdrawn, I will be happy to do so.

Regarding Ms. Zmroczek's proposed order –

There are several instances where I believe she is citing to supporting case law, but it seems to conflate the facts of those cases with the facts of the instant case. Examples – p.9 regarding Simmons and Ingle; p. 14 regarding Brunson and Bailey.

Several arguments are raised in the order that were not pursued at the evidentiary hearing including, but not limited to:

p.8 – specific quotes from the solicitor's closing argument that were not provided at the hearing

p.16 – alleged failure to pursue a gun matching the shooting

Argument regarding the cell phone is included on page 20 under the portion regarding appellate counsel, but refers only to trial counsel, and its inclusion is antithetical to PCR counsel's objection regarding the State's order.

Please let me know if I can be of any further assistance or make edits to the order.

I am in the process of working on the other orders from this term, and have received Mr. Waller's proposed orders.

Thank you –

Jessica E. Kinard  
Assistant Attorney General  
Post-Conviction Relief – 5<sup>th</sup> Judicial Circuit  
Office of the Attorney General  
State of South Carolina  
P.O. Box 11549  
Columbia, SC 29211-1549

---

**From:** Aimee Zmroczek [mailto:ajzlawfirm@gmail.com]  
**Sent:** Tuesday, October 03, 2017 10:50 PM  
**To:** Cooper, G. Thomas Law Clerk (Jamie Rutkoski)  
**Cc:** Jessica Kinard; Fifthcircuitpcr  
**Subject:** Re: PCR Proposed Order - Johnny Walker Gaskins

Also-

I feel like I need to object to a few items in the State's brief:

Page 7: there were not shell casings (plural) found in Gaskins car

Page 7: the cell phone and potential testimony was never presented to the jury and should not be considered in this hearing

Pages 8-9: The video evidence was specifically removed from this hearing as agreed upon by the Assistant Attorney General and was specifically not pursued in this hearing.

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On Tue, Oct 3, 2017 at 10:45 PM, Aimee Zmroczek <ajzlawfirm@gmail.com> wrote:  
apologies for the late response, please see attached.

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On Mon, Sep 25, 2017 at 9:57 AM, Cooper, G. Thomas Law Clerk (Jamie Rutkoski)  
<GCooperLC@sccourts.org> wrote:  
Ms. Zmroczek,

I do not have a proposed order from you in regards to this PCR. Please submit one to me as soon as possible.

Thank you,

Jamie Rutkoski  
Law Clerk to the Honorable G. Thomas Cooper, Jr.  
Circuit Court of South Carolina, Fifth Circuit  
1121 Broad St., Rm. 313  
Post Office Box 1557  
Camden, SC 29021

Fax: (803) 425-5529

---

**From:** Jessica Kinard [mailto:JKinard@scag.gov]  
**Sent:** Friday, September 22, 2017 5:32 PM  
**To:** Cooper, G. Thomas Law Clerk (Jamie Rutkoski) <GCooperLC@sccourts.org>; Aimee Zmroczek <ajzlawfirm@gmail.com>  
**Cc:** Fifthcircuitpcr <Fifthcircuitpcr@scag.gov>  
**Subject:** PCR Proposed Order - Johnny Walker Gaskins

Ms. Rutkoski –

Attached, please find a proposed order in the PCR of Johnny Walker Gaskins. I am copying PCR counsel, Aimee Zmroczek, on this email so that she is aware of my submission.

This order was much lengthier than anticipated, and I will get the others to you and Judge Cooper as quickly as possible. Please note I will be attending the solicitors' conference in Myrtle Beach until Wednesday of next week.

Please let me know if there are any problems with the attachment or if I can be of any further assistance.

Jessica E. Kinard  
Assistant Attorney General  
Post-Conviction Relief – 5<sup>th</sup> Judicial Circuit  
Office of the Attorney General  
State of South Carolina  
P.O. Box 11549  
Columbia, SC 29211-1549  
Direct:

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--  
Aimee J. Zmroczek, Esq.  
A.J.Z. Law Firm, LLC  
Mailing Address:  
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**2003 Lincoln Street**  
**Columbia, South Carolina 29201**  
Phone: \_\_\_\_\_ (803) 403-8005  
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website: [www.ajzlawfirm.com](http://www.ajzlawfirm.com)

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--  
Aimee J. Zmroczek, Esq.  
A.J.Z. Law Firm, LLC  
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**Columbia, South Carolina 29201**  
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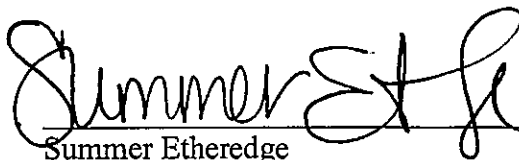
|                             |   |                              |
|-----------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA     | ) |                              |
|                             | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND          | ) |                              |
|                             | ) |                              |
|                             | ) | 2022-CP-40-1854              |
|                             | ) |                              |
| JOHNNIE W. GASKINS, #313590 | ) |                              |
|                             | ) |                              |
| Applicant,                  | ) |                              |
|                             | ) |                              |
| vs                          | ) | AFFIDAVIT OF SERVICE BY MAIL |
|                             | ) |                              |
| STATE OF SOUTH CAROLINA,    | ) |                              |
|                             | ) |                              |
| Respondent.                 | ) |                              |

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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 Motion Pursuant To Rule 59(e) and 60(b), SCRPC in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Tricia A. Blanchette, Esquire**  
**Law Office of Tricia A. Blanchette, LLC**  
**Post Office Box 2147**  
**Leesville, SC 29070**

DATED this 9th day of March, 2022.



Summer Etheredge  
 Legal Assistant for Respondent  
 Office of the Attorney General  
 Post Office Box 11549  
 Columbia, South Carolina 29211  
 (803) 734-3737

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Johnnie Walker Gaskins, 313590,  
☒ Plaintiff

v.

State Of South Carolina  
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.  
2022-CP-40-1854

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney:  
Tricia A. Blanchette, Bar No. 74904  
Address:  
PO Box 2147  
Leesville, SC 29070  
phone: 803-908-3266 fax:  
e-mail: blanchettelaw@gmail.com other:

Defendant's Attorney:  
Russell D. Barlow, II, Bar No.  
Address:  
PO Box 11549  
Columbia, SC 29211  
phone: 803-734-3737 fax: 803-734-4113  
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached  
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

March 21, 2023

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

- ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support  
(check reason) ☐ Domestic Abuse or Abuse and Neglect  
☐ Indigent Status ☐ State Agency v. Indigent Party  
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief  
☐ Motion for Stay in Bankruptcy  
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)  
☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.  
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: \_\_\_\_\_

Date Filed:

- ☐ MOTION FEE COLLECTED: \_\_\_\_\_  
☐ CONTESTED - AMOUNT DUE: \_\_\_\_\_

|                                 |   |                                |
|---------------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS   |
| COUNTY OF RICHLAND              | ) | FIFTH JUDICIAL CIRCUIT         |
|                                 | ) |                                |
| Johnnie Walker Gaskins, 313590, | ) | 2022-CP-40-1854                |
| Applicant,                      | ) |                                |
| v.                              | ) | RESPONSE TO MOTION PURSUANT    |
|                                 | ) | TO RULE 59(e) AND 60(b), SCRPC |
| State of South Carolina,        | ) |                                |
| Respondent.                     | ) |                                |

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on April 8, 2022. The State submitted a Return on August 19, 2022. On November 14, 2022, Applicant, through counsel, filed an Amendment, which stated the following:

Applicant, through counsel, would move to amend his Application, as addressed below. Pursuant to Rule 15(b), SCRPC, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

In addition to the information provided in response to question eleven on his Application, Applicant would add the following:

- (a) Applicant's counsel failed to provide him notice of the entry of the Order of Dismissal, failed to file a Motion under Rule 59, SCRPC, due to the Order omitting the matter of the Court sustaining the State's objection to a late amendment and/or expert witness, and failed to timely file an appeal. PCR Transcript pp. 90-96, 138-145.
- (b) Following the evidentiary hearing, Applicant was under the belief that further proceedings were going to take place regarding the matter of the late amendment and/or expert regarding video evidence. PCR Transcript pp. 90-96, 138-144.

In addition to the response provided to question nineteen on his Application, Applicant would add the following: A belated appeal of prior PCR Application or whatever relief the Court deems proper.

An evidentiary hearing was conducted on November 14, 2022 at the Richland County Courthouse in front of the Honorable D. Craig Brown. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by D. Russell

Barlow, II, Assistant Attorney General. During the hearing, Applicant took the stand and called Aimee J. Zmroczek, Esquire. Applicant introduced two exhibits.

At the conclusion of the evidentiary hearing, the Court found that Applicant was entitled to a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) and discussed the other relevant claims with counsel for both parties. Hearing pp. 45-52. The Court requested that Applicant's counsel submit an Order, and she obtained permission to obtain the hearing transcript. Hearing pp. 52-53. Applicant's counsel submitted a proposed Order on February 9, 2023. On February 15, 2023, the Honorable D. Craig Brown issued an Order on Application for Post-Conviction Relief Granting Belated Appeal Pursuant to *Austin v. State*, which was filed on February 28, 2023. On March 10, 2023, Respondent submitted a Motion Pursua[n]t to Rule 59(e) and 60(b), SCRPC.

In response, Applicant would submit the following factual information for the Court's consideration:

1. Respondent issued the Roster with Applicant's case scheduled for November 14, 2022 listing Aimee J. Zmroczek as Respondent's Anticipated Witness(es). Exhibit 1.
2. Prior to the hearing date, Applicant's counsel engaged in lengthy communication with Respondent regarding Applicant's claims, which was brought to the Court's attention in chambers prior to the hearing on November 14, 2022. This is also evidenced by email communication with Respondent on November 10, 2022, whereby Applicant's counsel provided the Amendment that was filed prior to the hearing on November 14, 2022. Exhibit 2.
3. As stated, a chambers meeting was held with all parties to apprise the Court of the Amendment and the matters that Applicant's counsel intended to address.
4. At the outset of the hearing, Applicant's counsel explained the allegations that Applicant was going forwarding on after being requested to do so by Respondent. Hearing p. 7. Respondent objected to the amendment arguing it

amounted to “a collateral attack on prior PCR counsel’s performance.”  
Hearing p. 8, lns. 6-10.

5. The hearing proceeded under the Amendment and Aimee Zmroczek, Esquire, and Applicant testified. Both witnesses were called by Applicant’s counsel and cross-examined by Respondent. The testimony offered is properly summarized in the standing Order and is reflected in the transcript obtained and provided to the Court.
6. As was instructed by the Court, Applicant’s counsel provided Respondent the Order to review on January 30, 2023 prior to submitting to the Court. After reviewing the Order, Respondent did not inform Applicant or the Court of the exhibits attached to the instant Motion.

In response to Respondent’s motion and argument, Applicant would rely upon the above stated facts and argue that Respondent’s motion should be denied as the alleged after discovered evidence should have been discovered by Respondent prior to the evidentiary hearing and addressed therein and also has not been properly authenticated. Additionally, the motion should be denied as the standing Order does not exceed the scope of granting an *Austin* appeal and simply discusses the Court’s concerns about matters addressed at the evidentiary hearing regarding counsel’s representation that led to her failure to properly file an appeal.

As to the alleged after discovered evidence attached as exhibits to Respondent’s motion, Applicant submits that the exhibits due not amount to after discovered evidence nor are they properly submitted for the Court’s consideration under Rule 59 and/or 60, SCRCF. By way of the motion, Respondent has failed to address where these documents came from and authenticate the documents. Additionally, Respondent has failed to explain why these documents were not provided to Applicant, his counsel or the Court prior to or during the evidentiary hearing. *See Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004) (Where a party could have discovered the ‘new’

evidence prior to trial, the party is not entitled to relief under Rule 60(b)(2) or (3)). As is established by the above set forth facts, Respondent had notice of Applicant's claims and at no time expressed a need for a continuance. Furthermore, PCR counsel was listed as Respondent's anticipated witness on the roster issued by Respondent and Respondent's motion fails to address why the exhibits were not discussed with PCR counsel prior to or when she took the stand at the evidentiary hearing. It appears the exhibits are not newly discovered but have simply been untimely discovered without explanation for the delay or source of the documents.

Again, it has not been explained in the Motion why Respondent has only now located the documents after the hearing and after an Order was signed, yet Respondent is asking the Court to alter, amend and/or reconsider the standing Order without authenticating the documents or offering testimony regarding the relevance of the same. Respondent submits that the documents refute PCR counsel's testimony, but counsel failed to utilize the documents in his cross-examination of PCR counsel at the evidentiary hearing. If the Court finds that the documents are proper to consider under Rule 59 and/or 60, SCRPC, Applicant submits that a hearing is necessary for the documents to be properly authenticated and for testimony to be offered by the proponents and/or source of the documents.

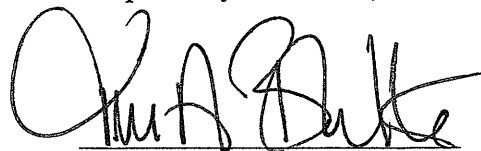
Turning to Respondent's argument that the standing Order exceeds the scope of *Austin*, Applicant's submits that this argument is in error. As is reflected in the standing Order, the Court ordered: "That Applicant is granted a belated appeal of his initial post-conviction relief application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395." Order p. 15. The Court's finding clearly does not exceed the scope of *Austin*.

It appears Respondent takes issue with the Court's discussion of the failures of PCR counsel that she testified about that preceded her failure to file Applicant's appeal. In arguing that the discussion of counsel's representation exceeds the scope of granting an *Austin* appeal, Respondent is errantly asking this Court to render a decision by examining counsel's failure to file an appeal alone and not in the context of her representation as a whole. Applicant submits that *Austin* and its progeny do not support the position that the Court cannot discuss and address counsel's representation of Applicant in his prior PCR Application. Applicant submits that to properly address a finding that a belated appeal is warranted, the Court must consider the testimony and evidence offered at the hearing regarding counsel's representation that preceded her failure to file a timely appeal.

Applicant cannot address whether the contents of the documents attached in the exhibits require the section of the Order at issue to be altered or amended as Respondent has failed to authenticate the documents and/or offer testimony regarding the documents. Even if the documents are relevant and/or refute the testimony offered by PCR counsel at the evidentiary hearing, Respondent failed to bring these documents to the attention of the Applicant or the Court prior to the hearing or issuance of the Order and has failed to establish that the documents are proper for the Court to consider at this time.

Based upon the foregoing, Applicant would respectfully request that the Court deny Respondent's Motion Pursuant to Rule 59(e) and 60(b), SCRCP. Alternatively, if the Court is inclined to consider the relief requested by Respondent, Applicant would ask that a hearing be held to address Respondent's motion and exhibits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

Tricia A. Blanchette

Bar No. 74904

PO Box 2147

Leesville, SC 29070

(803) 908-3266

March 21, 2023

## EXHIBIT 1

**POST-CONVICTION RELIEF HEARINGS FOR THE FIFTH JUDICIAL CIRCUIT**  
**THE HONORABLE D. CRAIG BROWN, PRESIDING JUDGE**  
**RICHLAND COUNTY COURTHOUSE**

Monday, November 14, 2022

| TIME    | APPLICANT                                                               | DOCKET<br>No./<br>COUNTY    | APPLICANT'S<br>ATTORNEY | RESPONDENT'S<br>ATTORNEY | RESPONDENT'S<br>ANTICIPATED<br>WITNESS(ES)/MOTIONS          |
|---------|-------------------------------------------------------------------------|-----------------------------|-------------------------|--------------------------|-------------------------------------------------------------|
| 9:30 AM | Carmen L. Rice<br>SCDC #308637<br><b>Leath Corr. Inst.</b>              | 2017-CP-40-6361<br>Richland | Arthur K. Aiken         | D. Russell Barlow, II    | John T. Mobley<br>Christopher R. Hart                       |
| 9:30 AM | Johnnie W. Gaskins<br>SCDC #313590<br><b>Broad River Corr. Inst.</b>    | 2020-CP-40-5786<br>Richland | Tricia A. Blanchette    | D. Russell Barlow, II    | <i>Austin Hearing</i><br>Aimee J. Zmroczek                  |
| 9:30 AM | Anthony Hackshaw<br>SCDC #343463<br><b>Lieber Corr. Inst.</b>           | 2015-CP-40-5695<br>Richland | Tricia A. Blanchette    | D. Russell Barlow, II    | Tara D. Shurling<br>Eleanor D. Cleary<br>Jeremy A. Thompson |
| 1:30 PM | Devonte K. Anderson<br>SCDC # 366426<br><b>Lee Corr. Inst.</b>          | 2020-CP-40-3535<br>Richland | Arthur K. Aiken         | Danielle Dixon           | Aimee J. Zmroczek                                           |
| 1:30 PM | Perry T. Edmonds, Jr.<br>SCDC #380145<br><b>Broad River Corr. Inst.</b> | 2020-CP-40-1686<br>Richland | Michael H. Lifsey       | D. Russell Barlow, II    | Arthur K. Aiken                                             |

## EXHIBIT 2



Tricia Blanchette &lt;blanchettelaw@gmail.com&gt;

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**Johnnie Gaskins v. State**

1 message

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**Tricia Blanchette** <blanchettelaw@gmail.com>

Thu, Nov 10, 2022 at 12:58 PM

To: Russ Barlow &lt;RussBarlow@scag.gov&gt;

Russ:

As we have discussed, I have attached an Amendment that was finalized today after speaking with Mr. Gaskins. I will file the Amendment in the Clerk's Office on Monday prior to the hearing. I will bring a copy for Judge Brown.

I appreciate all of your time in helping me navigate the issues in this case over the last few weeks!

Please contact me with any questions.

Thanks,

Tricia

--

Tricia Blanchette  
Attorney at Law

Law Office of Tricia A. Blanchette  
PO Box 2147  
Leesville, SC 29070

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 **gaskins.amendment.pdf**  
2592K

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
 )  
Johnnie Walker Gaskins, 313590, )  
Applicant, )  
v. )  
 )  
State of South Carolina, )  
Respondent. )

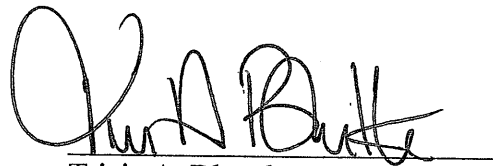
IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

2022-CP-40-1854

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that Pursuant to the Order issued by the South Carolina Supreme Court "RE: Service by E-Mail in the Trial Courts," issued on May 6, 2022, that a true copy of Response to Motion Pursuant to Rle 59(e) and 60(b), SCRCP, has been served on opposing counsel this 21<sup>st</sup> day of March 2023 by sending an email to his following registered email address:

Russell D. Barlow, II, Assistant Attorney General  
RussellBarlow@scag.gov



Tricia A. Blanchette  
PO Box 2147  
Leesville, SC 29070  
(803) 908-3266

March 21, 2023

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
)  
Johnnie Walker Gaskins, 313590, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

2022-CP-40-1854

ORDER DENYING MOTION PURSUANT  
TO RULE 59(e) AND 60(b), SCRCP

2023 MAY -2 AM 9:13  
FILED  
JANETTE MCGRIDE  
CLERK

RICHLAND COUNTY  
FILED

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on April 8, 2022. The State submitted a Return on August 19, 2022. On November 14, 2022, Applicant, through counsel, filed an Amendment, which stated the following:

Applicant, through counsel, would move to amend his Application, as addressed below. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

In addition to the information provided in response to question eleven on his Application, Applicant would add the following:

- (a) Applicant's counsel failed to provide him notice of the entry of the Order of Dismissal, failed to file a Motion under Rule 59, SCRCP, due to the Order omitting the matter of the Court sustaining the State's objection to a late amendment and/or expert witness, and failed to timely file an appeal. PCR Transcript pp. 90-96, 138-145.
- (b) Following the evidentiary hearing, Applicant was under the belief that further proceedings were going to take place regarding the matter of the late amendment and/or expert regarding video evidence. PCR Transcript pp. 90-96, 138-144.

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At the conclusion of the evidentiary hearing, the Court found that Applicant was entitled to a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). The Court requested that Applicant's counsel submit an Order, and she obtained permission to obtain the hearing transcript. Applicant's counsel submitted a proposed Order on February 9, 2023.

On February 15, 2023, the Honorable D. Craig Brown issued an Order on Application for Post-Conviction Relief Granting Belated Appeal Pursuant to *Austin v. State*, which was filed on February 28, 2023. On March 10, 2023, Respondent submitted a Motion Pursuant to Rule 59(e) and 60(b), SCRCP. On March 21, 2023, Applicant, through counsel, submitted a Response to Motion Pursuant to Rule 59(e) and 60 (b), SCRCP.

Pursuant to Rule 59(f), SCRCP, this Court finds that a hearing is not necessary on Respondent's motion and makes this ruling based upon the record before the Court. As a result of a thorough review of the record and filings before this Court, this Court finds that Respondent's motion is DENIED. This Court finds that the argument made under Rule 59(e), SCRCP, fails because the Order on Application for Post-Conviction Relief Granting Belated Appeal Pursuant to *Austin v. State* does not exceed the scope of *Austin*<sup>1</sup> and does not require amendment. This Court also finds that the argument made under Rule 60(b), SCRCP, fails as it does not meet the requirements of Rule 60(b) and is not

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<sup>1</sup> 305 S.C. 453, 409 S.E.2d 395 (1991).

meritorious. Even if the argument was proper under Rule 60(b), SCRCP, this Court is not convinced that the standing Order should be amended.

**IT IS THEREFORE ORDERED:**

1. Respondent's Motion Pursuant to Rule 59(e) and 60 (b), SCRCP, is DENIED.

**AND, IT IS SO ORDERED.**

  
\_\_\_\_\_  
Honorable D. Craig Brown  
Presiding Judge  
Fifth Judicial Circuit

4-26-, 2023