STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Nov 01 2023

S.C. SUPREME COURT

Certiorari to Horry County

Debra R. McCaslin, Circuit Court Judge

EDWARD LEE WASHINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000730

APPENDIX

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEYS FOR RESPONDENT

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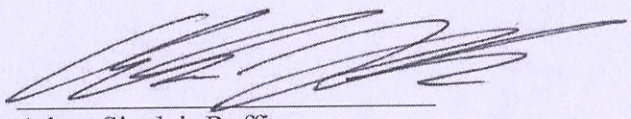
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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
STATE'S EXHIBIT NOS. 8-76 (PHOTOGRAPHS) FROM THE JUNE 3-5, 2019 TRIAL.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 4, 2020.



Adam Sinclair Ruffin
Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD LEE JOSEPH WASHINGTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Edward Lee Joseph Washington, 311014, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of March, 2020.

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of March, 2020.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.

RECEIVED
SEP 16 2020
SC Court of Appeals

STATE OF SOUTHCAROLINA
IN THE COURT OF APPEALS

ARGUMENT FROM APPELATE

THE STATE; RESPONDENT

V.

Edward Lee Joseph Washington APPELANT

APPELATE CASE NO 2019-000976

ISSUE #4

ERROR BY TRIAL JUDGE Exhibit A:

Defense counsel argued that the felony DUI Charge be dismissed Pursuant to City of Rock Hill V. Suchenski, 374 S.C. 12 646, S.E. 2d 879 2007. And S.C. code Ann. 56-5-2953. Counsel correctly Pointed out that this Statute requires that a recording of a DUI Must begin no later than the activation of the officer's blue lights and continue throughout the duration of the incident. Officers Guyett and Jordan's Body worn Cameras both died while they were at the hospital with APPELATE at least nine Minutes Prior to the blood draws. Counsel argued that the reason the Statute requires video is to ensure that juries can see the entire interaction between law enforcement and the Suspect. Counsel further Pointed out Suchenski dealt with the Same Situation which occured in APPELATES case, the officer's video recording ran out of tape - and that resulted in a dismissal of the - DUI Charge in Suchenski. Officer Jordan admitted that he never Submitted an affidavit explaining why he did not have the complete video recording of his interaction with APPELATE. (see Pg. 115 lines 13-15 of transcript) However, officer Guyett Submitted an affidavit explaining his failure to Produce the entire video recording because the APPELATE

was taken to the hospital for medical treatment and blood draw. the trial judge did not make a specific ruling on Jordan's failure to produce a complete video of his interactions with APPELLATE. In State Vs. Manning, 400 S.C. 257, 261, 734 S.E. 2d 314 (Ct. App. 2012), this court found that the trial judge properly denied the defendant's motion to dismissal of the felony DUI. In Manning this court found that it was physically impossible for the officer to videotape the defendant's conduct at the incident site because the defendant had already been transported away from the scene for medical treatment prior to the officer's arrival. Id. At 266, 734 S.E. 2d at 3 However the officer in Manning still failed to submitt an affidavit which this court found would have been grounds for dismissal unless another exception applied. The Manning court held that because the officer was investigating a traffic accident and the defendant was arrested at the hospital, the failure to produce video or an affidavit was not a ground for dismissal. Here GUYETT had video at the incident and also at the hospital. Unlike in Manning Guyett was on the scene at the same time as the APPELLATE a placed APPELLATE Under arrest at the scene. Although APPELLATE was ostensibly taken to the hospital for the purpose of medical treatment Guyett also admitted that he took the APPELLATE to the hospital for the purpose of getting a blood sample from him. The video did not cut off until approximately nine minutes until the blood draw had taken place and the explanation given by Guyett at the motion to suppress was that his body camera died. (see pg. 44 lines 1 pg 45 1, 4.) This was a completely different reason than the reason he gave in his sworn affidavit. In the affidavit,

Guyett claimed that it was physically impossible to video record APPELATE because he was taken to the hospital. This was clearly false because Guyett did have at least some video of APPELATE in the hospital. The failure to produce the complete video of APPELATE's conduct at the hospital including the blood draw was not because of Guyett's reason given in the affidavit. Therefore, the affidavit was insufficient to excuse Guyett's failure because the reason given in the affidavit was false. The trial judge erred in denying defense counsel's Motion to dismiss APPELATE'S felony DUI Charge. on Pg. 130 of the transcript, lines 3-5, the trial judge states the arresting officer did submit an affidavit as to why his body camera was not working that he believed complied with the requirements. This is false.

See City of Rock Hill vs. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007)

In Roberts the supreme court returned to the Suchenski decision and found that unexcused noncompliance with 56-5-2953 mandates dismissal for a DUI charge. As evidenced by this courts decision in Suchenski the legislature clearly intended for a Per se dismissal in the event a law enforcent agency violates the mandatory provisions of 56-5-2953. Notably the legislature specifically provided for the dismissal of a DUI Charge - unless the law enforcement agency can justify its failure to provide a videotape of a DUI arrest. The term dismissal is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of 56-5-2953.

Furthermore, it is instructive that the legislature has not mandated videotaping in any other criminal context. Despite the potential significance of videotaping oral confessions, the legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the legislature intended strict compliance with provisions with 56-5-2953 and in turn, promulgated a severe sanction for noncompliance.

See Roberts 393 S.C. at 346 713 S.E.2d 285

See Transcript for affidavit of failure to produce video tape of DUI (APPEAL TRANSCRIPT)

Error By Trial Judge Exhibit B:

On Pg. 130 of the transcript, lines 2 and 3 and 4, the Trial Judge states "that there is no requirement that an affidavit be submitted immediately." The arresting officer took two and a half years after the incident was fill out an affidavit involving section 56-5-2953. In the Town VS. Mt. Pleasant VS. Roberts the judge concluded that the towns failure to comply with the requirements a decade after the enactment of Section 56-5-2953 was unreasonable, and constituted a violation of the statute. In this case it took the arresting officer two and a half years two fill out the affidavit.

SEE Town of Mt. Pleasant VS. Roberts (393 S.C. 332 713 S.E. 2d 278)

Error By Trial Judge Exhibit C:

On Pg. 130 of the transcript, lines 15-17, the trial judge states that "being that there is no video of the APPELLATE'S blood draw he does not find it to be an violation of the Statute 56-5-2953". This Statute States that everything involved with a DUI case has to be recorded. An abuse of discretion occurs when the trial courts ruling is based on an error of laws. In this case the trial Judge Abused his discretion by allowing the Prosecution to Proceed in Persuing Prosecution for Felony DUI after the requirements were not met for section 56-5-2953.

SEE STATE VS. McDonald 343 S.C 319, 325, 540 S.E.2d 464, 467 (2000)

Error By Trial Judge Exhibit D:

On Pg. 413 of the transcript line one, the trial Judge denied the APPELATE's defense Motion for direct verdict. The APPELATE'S defense arsued that it was in two different areas on the elements of the Charge that the state had not been able to come up with concrete evidence for. One element in Particular happens to be Speeding of the Vehicle. The APPELATE'S defense arsued that none of the witnesses were cable to come up with an exact speed or anywhere close to an exact speed. In the exceedingly rare case when it is without legal Significance that speed was a contributing factor in an automobile collision and the record contains NO evidence of other negligent or wrongful acts by the speeding driver, the Judge may grant a speeding driver'S direct verdict Motion; there would be nothing for the Jury to resolve because, as a Matter of law, any excessive speeding could not have caused the accident. (SEE attatched documents of evidence of speed)

SEE Black vs. Caria 2011WL11734675 St S.C. App S.E.2d (June 17, 2014)

SEE Wright ex rel. Estate of Wright vs. Colleton County Sheriff Dept. 2014 wl 25754345 S.C. App Jan. 08 2014 S.E.2d

On Pg. 440 of the transcript, the Prosecutor States that ("Now I'm not going to sit here and tell you that he swerved to hit the victim; that's not the case. I'm not saying that. He didn't intentionally plow down an innocent man. I honestly don't believe that"! This proves that the the record contains no evidence of other negligent or wrongful acts by the speeding driver.

On PG. 442 the transcript states, on lines 20-22, the Prosecution States "The witnesses on scene are saying he's going 70 MPH. I bet it, there're lay people, they can't say exactly."
(See attatched documents)

This proves that the State could not come up with an exact speed by reasonable doubt as the Prosecution Claimed on Pg. 408 lines 7-8 in the transcript.

" find that the State has proven by Reasonable doubt the defendant was speeding, traveling in excess of the Posted 40 miles per hour speed limit in this case. And then that was the Proximate cause of death of the victim in this case."

Under Evidence if the defendant was traveling at a speed slightly above Posted limit on a protected highway it was not a contributing factor in MiShaR which occured when Plaintiff's decedent after stopping, Proceeded to cross a four lane highway from private entrance Shop. Code 1962 § 10-1951

SEE: TUBBS by Duren vs. Bowie 417 S.E.2d 550, 552 S.C. App. Oct 1992
SEE: Clark vs. Cantrell 529 S.E. 2d 528, 53 S.C. March 13, 2000
SEE: Black vs. Cayia 2011 WL 1173675 4th S.C. App June 17, 2011
SEE: Case vs. Eckert 327 S.E 2d 367, 369 S.C. App Feb 27, 1985
SEE: attatched document witness statement

COASTAL CAROLINA UNIVERSITY

Statement

Department of Public Safety

Statement of: ☐ Victim ☐ Witness ☐ Defendant

Date and Time 10-29-2016 Case file number 2016026010

Incident location 670 Hwy. 544

Statement of (name) X Olivia Malle

DOB [redacted] Hgt 5'04" Wgt 130 Hair brown Eye color hazel

Home address [redacted] piedmont resimee blvd. (room 21)

Telephone: Home (____) ____ Work (____) ____ Cell (307) [redacted]

I, _____, do hereby give freely and voluntarily this statement to

_____ and _____

who have identified themselves to be police officers of the Coastal Carolina University Department of Public Safety. I have been advised that I do not have to make this or any statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, and that if I am financially unable to obtain an Attorney, the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am ____ years old and reside at _____

I have a(n) _____ grade education, and I can read and write.

☐ Unlawful for a Person to Knowingly File a False Police Report: It is unlawful for a person to knowingly file a false police report. Any person violating the provisions of this section is guilty of a misdemeanor if a misdemeanor is reported and guilty of a felony if a felony is reported and upon conviction must be imprisoned and/or fined. S.C. § 16-17-722

☐ Unlawful to Make False Complaint: It is unlawful for any person to knowingly make a false complaint, or after notice of a criminal investigation, to give false information to any law enforcement officer concerning the alleged commission of any crime by another... Any person violating the provisions of this section is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed two hundred dollars or by a term of imprisonment not to exceed thirty days. S.C. § 16-17-725

By signing below, I certify that I have read the provision of the above sections (S.C. § 16-17-722 and S.C. § 16-17-725) and understand its contents. In addition, I certify I have read the above statement, and it is true and correct to the best of my knowledge.

Statement: Ryan, Erin, Adrianna and I were standing on the side of the street in front of the coop. We wanted to go and get some food [redacted] - at hicks. Ryan crosses the street, hes running and in the last lane he gets hit by a car. His body goes flying and the car keeps going straight. Not sure for how long - I was ~~was~~ waiting to see Ryans body. I was waiting for him to just pop up and say hes okay. I ran over after him. I see he was shredded to pieces. People were tieing his leg up and trying to stop the bleeding everywhere. I tried to talk to him and was holding his head. The ambulance came and I watched / looked at the white sheet ~~over~~ for I fel like 30 mins until I enced up Home.

Signature of person making statement _____

Witness _____ Witness signature X Olivia Malle

ccu pes - 1/10

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

AFFIDAVIT **ORIGINAL**

Personally appeared before me, one Det. J. Scott 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

Sought from the individual identified as Edward Lee Joseph Washington are samples of blood taken at the direction of law enforcement pursuant to this search warrant, or taken at the time of admittance to Conway Medical Center of October 29, 2016

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

An individual who is currently admitted or in police custody at Conway Medical Center in Conway, SC and has been identified under the name of Edward Lee Joseph Washington. Washington was involved in a vehicle collision that resulted in a death that is currently being investigated be the Conway Police Dept. Edward Lee Joseph Washington is a black male having the date of birth of 09-22-1985 and South Carolina driver license number 100476335.

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

On October 29, 2016 the subject was traveling West on Hwy 544 in lane two heading towards the City of Conway. The subject struck a pedestrian that was walking across the roadway resulting in the pedstrian's death. The subject did drive away from the scene but did return thinking someone threw a bottle at his windshield. SMPO Guyett stated that the subject has a strong odor of alcohol coming off his breath, and his eyes are blood shot and glassy. According to a witness that observed the collision, she stated that the subject's vehicle appeared to be traveling at least 70 MPH when contact was made. The speed limit on Hwy 544 in that section is 40 MPH. It was determined that the subject's speed was a contributing factor of the collision. It is this affiant's belief that the blood samples will determine any impairment due to alcohol and / or drugs.

Sworn to and Subscribed before me this 29th day of Oct 2016

Signature of Judge (L.S.)

Affiant

Address 1600 9th Ave
Conway SC 29526

Phone 843-248-1790

Det. J. Scott

1. ~~Mr. Scott Did you arrive to the scene of the incident mentioned at hand?~~ YES
2. And where was the defendant when you arrived on the Scene? On the scene
3. Where was the defendants car, do you know? On the scene
4. Before arriving to the scene of the incident, did you hear the dispatch over the radio? YES
5. What did you hear over the radio from the dispatch?
6. Did you hear anything about a hit and run over the radio dispatch? NO
7. Mr. Scott you did type up the Affidavit, signed by Judge Mackey, correct? YES
8. In that Affidavit, you state that the defendant was involved in a Vehicle Collision that resulted in a death correct? YES
9. Not a hit and run correct? YES
10. Also in that same Affidavit, you state that according to a witness, She stated that the defendant's vehicle appeared to be traveling at least 70 MPH when contact was made. You also stat that it was determined that the defendants speed was a contributing factor correct? YES

Show Speeds from Highway Patrol

COASTAL CAROLINA UNIVERSITY

Statement

Department of Public Safety

Statement of: ☐ Victim ☑ Witness ☐ Defendant

Date and Time 10-29-16 1. am. Case file number 20160226010

Incident location circle K gas station 544 (across from coastal club)

Statement of (name) Kelcee Cramer

DOB [redacted] Hgt 5'5" Wgt 120 Hair Brown Eye color Hazel

Home address 1634 Hwy 544 rm 101

Telephones: Home (619) [redacted] Work (____) ← Cell (____) ←

I, Kelcee Cramer, do hereby give freely and voluntarily this statement to

_____ and _____

who have identified themselves to be police officers of the Coastal Carolina University Department of Public Safety. I have been advised that I do not have to make this or any statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, and that if I am financially unable to obtain an Attorney, the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am ____ years old and reside at _____

I have a(n) _____ grade education, and I can read and write.

☐ Unlawful for a Person to Knowingly File a False Police Report: It is unlawful for a person to knowingly file a false police report. Any person violating the provisions of this section is guilty of a misdemeanor if a misdemeanor is reported and guilty of a felony if a felony is reported and upon conviction must be imprisoned and/or fined. S.C. § 16-17-722

☐ Unlawful to Make False Complaint: It is unlawful for any person to knowingly make a false complaint, or after notice of a criminal investigation, to give false information to any law enforcement officer concerning the alleged commission of any crime by another... Any person violating the provisions of this section is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed two hundred dollars or by a term of imprisonment not to exceed thirty days. S.C. § 16-17-725

By signing below, I certify that I have read the provision of the above sections (S.C. § 16-17-722 and S.C. § 16-17-725) and understand its contents. In addition, I certify I have read the above statement, and it is true and correct to the best of my knowledge.

Statement I was pulling out of the circle K on 544 when I saw a young man crossing the street & a car coming about atleast 70 mph & clipped the guy about 15-25 ft in the air and I watched it all happen until he hit the ground. I was the first to approach the scene & yell for someone to call 911 someone was hit. He never said a word. was still twitching when I was there, had a pulse but was going faint fast, eyes partly open. took my jacket to tie on his leg for turniquit, ripped of shirt to see further abdominal injuries. As we started to loose him, we started CPR all the way until the EMT got there to ~~prono~~ pronounce his time of death.

Signature of person making statement Kelcee Cramer

Witness _____ Witness signature Kelcee Cramer

CCUPS • 1/10

COASTAL CAROLINA UNIVERSITY

Statement Supplement
Department of Public Safety

Case number 2016026010

Statement of (name) Kelcee Cramer

(Statement continued)

shortly after the gentlemen had been hit we thought the car drove off, but then a gentlemen started screaming who hit my car & started swinging on everyone & hit a man who worked at the gas station, then ~~someone~~ KMC an officer pulled up and told him to get on the ground and he took it from ~~their~~ KMC there.

Signature of person giving statement Kelcee Cramer Date 10-29-16

Witness _____ Witness signature Kelcee Cramer

CCU DPS - 1/10

SOUTH CAROLINA HIGHWAY PATROL
MULTI-DISCIPLINARY ACCIDENT INVESTIGATION TEAM
MAIT Case Notes

DL-164-16

MAIT Case #	DL-164-16	Investigator:	Cpl. TJ Luther

Notes:

ANALYSIS NOTES:

System Status At Non-Deployment

Driver's Belt Switch Circuit Status: UNBUCKLED

Ignition Cycles At Non-Deployment 31773
Ignition Cycles At Investigation 31774

Maximum SDM Recorded Velocity Change (MPH) -2.49 along the X-Axis.
Algorithm Enable to Maximum SDM Recorded Velocity Change (msec) 100

One Non-Deployment Event was recorded complete and written correctly to the EEPROM.

This particular EDR records 5 sec of pre-crash data at a 1 sec resolution rate. It also records 8 sec of pre-crash braking data at a 1 sec resolution.

Event Record 1 (Non-Deployment):



The vehicle speed indicated 5 sec before Algorithm Enable (AE) was 42 mph with a open brake switch. The brake switch remained open throughout the 8 sec before AE. The vehicle speed indicated 1 sec before AE was 32 mph.

Final Analysis:

The data involved in this General Motors SDM was recorded and written correctly within the vehicle's safety system micro-computers. To ensure a complete analysis, the data was reviewed in the Bosch 17.0 and found to be matching.

ORIGINAL-CORRECTED

FATAL

Arrived 12:2

SOUTH CAROLINA DPS/OHS & DMV USE ONLY | Page # 1 Of 6 | SOUTH CAROLINA TRAFFIC COLLISION REPORT FORM TR-310 (Rev. 11/2011) | # Of Units 02 | X Amended - Attach Copy of Original Report Corrected | Notified 0042 | Arrived 0050

Date	Time of Collision	County	Collision Location (Rt. # / Name)	Miles	Dir.	In / Near City or Town of:
10-29-2016	0041	26	S 544 /		N E S W	CONWAY

1-Interstate 2-US Primary 3-SC Primary 4-Secondary 5-County 6-PP | 0-Main Line 2-Alternate 5-Spur 6-Connection 7-Business

Lane # / Dir.	Distance Offset	Direction	Base Intersection (Rt. # / Name)	GPS COORDINATES 00 00' 00.00"
# 2 Of 4 N E S W	.01 Miles Feet	N E S W	From / FOUNDERS DR	Latitude 33 47 53.95
R.R. Id.	From N E S W / Ramp Only 1-Entrance 2-Exit / To N E S W	1-Interstate 2-US Primary 3-SC Primary 4-Secondary 5-County 6-Other	Toward Second Intersection (Rt. # / Name) / EDWARDS LN	Longitude 79 01 08.92

0-Main Line 2-Alternate 5-Spur 6-Connection 7-Business 9-Other

DEGREES MINUTES SECONDS

Vehicle F-421607

Driver/Pedestrian's Full Name: WASHINGTON EDWARD LEE

Unit #	Sex	Race	Street
01	M	B	[redacted] PITTMAN ST

#Occ	Birth Date	City, State, & Zip
01	[redacted]	CONWAY SC 29526

State	Driver's License #	Class	Insurance Company:
SC	[redacted]	D	PROGRESSIVE

Year	Body	Vehicle Make	VIN #
2002	4S	SATU	1G8ZS52892Z251139

State	Year	License Plate #	Owner's D.L. #
SC	2016	LNI926	UNKNOWN

Home Telephone	Owner's Full Name
(843) 2485108	GREENE TALIB ABDUL MALIK

Bus. Telephone	Street
( )	[redacted] FOSTER AVE

Contributed To Collision	City, State, & Zip
Yes / No	CONWAY SC 29526

Estimated Speed	Speed Limit	C.D.L. Req: Yes / No	T/B S Req: Yes / No	Alc/Drg Info (see back): Yes / No				
42	40	Summons # 0622468	Code 99	Summons # 0622468	Code 96	Towed By SQUEAKY'S	Yes / No	

Vehicle F-421608

Driver/Pedestrian's Full Name: BIELAWA RYAN EDWARD

Unit #	Sex	Race	Street
02	M	W	[redacted] BRONZE LOOP APT 34

#Occ	Birth Date	City, State, & Zip
01	[redacted]	CONWAY SC 29526

State	Driver's License #	Class	Insurance Company:
NY	[redacted]	D	

Year	Body	Vehicle Make	VIN #
[redacted]			

State	Year	License Plate #	Owner's D.L. #

Home Telephone	Owner's Full Name
( )	

Bus. Telephone	Street
( )	

Contributed To Collision	City, State, & Zip
Yes / No	

Estimated Speed	Speed Limit	C.D.L. Req: Yes / No	T/B S Req: Yes / No	Alc/Drg Info (see back): Yes / No				
1	40	Summons #	Code	Summons #	Code	Towed By	Yes / No	

Vehicle

Driver/Pedestrian's Full Name:

Unit #	Sex	Race	Street

#Occ	Birth Date	City, State, & Zip

State	Driver's License #	Class	Insurance Company:

Year	Body	Vehicle Make	VIN #

State	Year	License Plate #	Owner's D.L. #

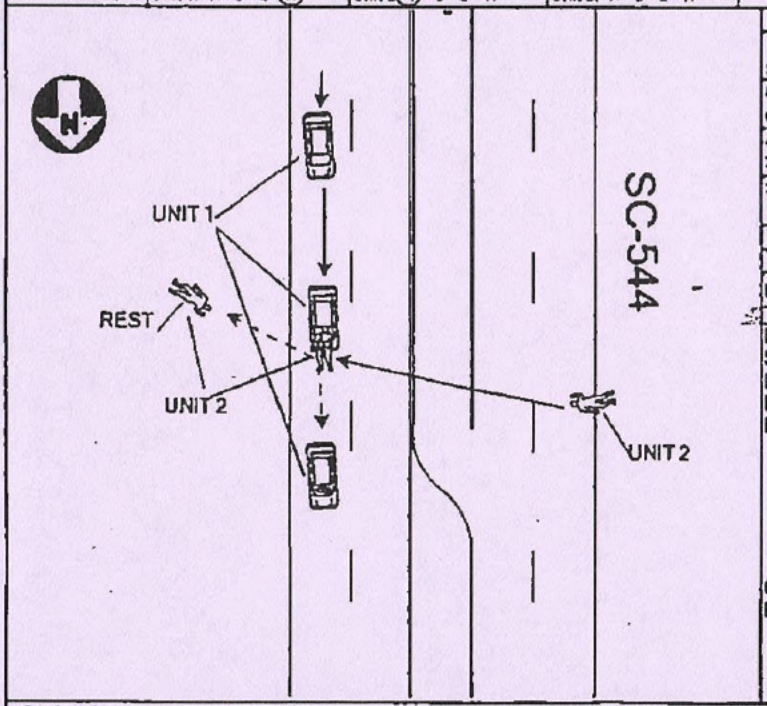
Home Telephone	Owner's Full Name
( )	

Bus. Telephone	Street
( )	

Contributed To Collision	City, State, & Zip
Yes / No	

Estimated Speed	Speed Limit	C.D.L. Req: Yes / No	T/B S Req: Yes / No	Alc/Drg Info (see back): Yes / No				
		Summons #	Code	Summons #	Code	Towed By	Yes / No	

Dir. of Travel: Unit 1: N S E W | Unit 2: N S E W | Unit 3: N S E W



Unit 1 Dam.	Unit 2 Dam.	Unit 3 Dam.	Prop.Dam. 1	Prop. Dam. 2
$ 4000	$ 0	$	$	$

Property Owner / Witness:	Property Owner / Witness:
CAREY PRESTON III G	CRAMER KELCEE
Address: 220 LOW COUNTRY DR CONWAY	Address: 634 HWY 544 CONWAY
State SC Zip: 29526 Phone 2403970543	State SC Zip: 29527 Phone 6168860480

Photo: Y / N

Describe What Happened (Refer to Units by Number)

UNIT 1 WAS TRAVELING NORTH BOUND AT A SPEED GREATER THAN THE POSTED SPEED LIMIT IN LANE 2 OF 4 ON SC-544 IN MY JURISDICTION. UNIT 2 WAS A PEDESTRIAN CROSSING SC-544 IN AN EAST BOUND DIRECTION. UNIT 1 STRUCK UNIT 2 RESULTING IN DEATH TO UNIT 2. UPON FURTHER INVESTIGATION THE DRIVER OF UNIT 1 WAS FOUND TO BE INTOXICATED AND CHARGED WITH FELONY DUI AND DUS.

Why Isn't the charges Correct?? HIT And Run!!!

CORRECTED: TIME NOTIFIED, TIME OF COLLISION, LANE DIRECTION, UNIT DIRECTION.

NOTICE - THE TR-310 IS FOR STATISTICAL REPORTING PURPOSES ONLY AND IS A REFLECTION OF THE OFFICER'S BEST KNOWLEDGE, OPINION AND BELIEF COVERING THE COLLISION BUT NO WARRANT IS MADE AS TO THE FACTUAL ACCURACY THEREOF.

Investigating Officer's Name	Rank	Badge #	Jurisdiction Code	Review Date	Reviewer's Name	Rank	Internal Agency Code
GUYETT - GLEN J.	SMPO	953	2602	04-05-2017	Jeff Jordan	JWJ	2016026010

Received Date: 04/04/2017 | WHY ISN'T RYAN DUI TEST RESULTS Notdocumented/Collision Report

In a wrongful death action, motion by defendant for a direct verdict was granted by the General Sessions Court, Sumter County, and the Plaintiff appealed. The Supreme Court held that under the evidence if the defendant was traveling at a speed slightly above the speed limit on a protected highway it was not a contributing factor in the mishap which occured when Plaintiff's decedent after stopping, proceeded to cross a four-lane highway from the private entrance of a shop. Defendant traveling on a favored highway was entitled to assume that the stopped vehicle entering the highway from a private drive or parking lot would wait to cross or enter the highway until it was safe to do so. Where defendant had seen the decedent stop defendant's actions there after in changing lanes checking for traffic approaching the intersection and not seeing decedent's vehicle until 30 feet away was not evidence of failure to keep a proper lookout.

SEE: Patsy Blanding VS. Richard Hammel 267 S.C. 552. 228 S.E. 2d 271

Error By Trial Judge Exhibit E:

The trial judge granted defendant's Motion for a direct verdict. He concluded that the Sole Proximate cause of the accident was the negligence or contributory negligence on the Part of the deceased. The lower court also held that if the defendant was negligent and his negligence was a concurring cause of the accident certainly more than half the negligence would be on the Part of the Plaintiff. We agree that the cause of the accident was the Sole negligence of the deceased and affirm the Judgement.

SEE Patsy Blanding VS. Richard Hammel 267 S.C. 352 228 S.E. 2d 257

SEE attached document from Progressive auto insurance

Under the Sudden Emergency doctrine, whenever driver of an automobile is confronted with a sudden emergency brought about by the negligence of another and not his own, and is compelled to act instantly to avoid a collision or an injury, that driver is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in a like position might make, even though he did not make the wisest decision. (See attached document, Progressive auto insurance statements).

SEE Estate of Haley ex rel. Haley Vs. Brown 634 S.E.2d 602, 370 S.C. App 24, 2006 S.E.2d

SEE Jackson vs. United States 2018 WL 1755503 18+, D.S.C. April 12, 2018, S.E.2d

SEE Garrett vs. Steenstra 2019 WL 6175109, 2, S.C. App. Nov 20, 2019 S.E

Sworn before me
on Sept 10, 2020
[illegible], notary public

My Commission Expires July 27, 2026

Respectfully Submitted,
Edward L. Washington
Edward Washington
9/10/20

Cv-4 Reservation of Rights Letter

PROGRESSIVE

Underwritten by Progressive Northern Insurance Company

Mike Marshall
2024 Corporate Centre Dr. Ste 201
Myrtle Beach, SC 29577
Phone# 843-213-3956
Fax# 844-268-4650
Email Michael_Marshall@progressive.com

July 12, 2020

Edward Washington #311014
Broad River Correctional Inst.
Wateree 284
4460 Broad River Rd.
Columbia, SC 29210

RE: Estate of Ryan Bielawa vs. Edward Washington
Claim Number: 174111964
Date of Loss: October 29, 2016

Dear Mr. Washington:

I received your letter dated July 3, 2020 regarding the above-mentioned accident and if Progressive Insurance considered it a hit & run.

Per your recorded statement you gave me and speaking with witnesses I didn't determine that this was a hit and run accident. You said you went down the road and turned around in an apartment complex and went back to the scene to find out what had happened.

I you should have any questions or concerns, please feel free to contact me at any time.

Sincerely,

Michael Marshall

Michael Marshall
Sr. Litigation Specialist

PROGRESSIVE

Underwritten by Progressive Northern Insurance Company

Mike Marshall
2024 Corporate Centre Dr. Ste 201
Myrtle Beach, SC 29577
Phone# 843-213-3956
Fax# 843-448-7239
Email Michael_Marshall@progressive.com

Edward Washington HCO2111826227
4150 J. Rueben Long Ave.
Conway, SC 29526

RE: Estate of Ryan Bielawa vs. Edward Washington
Date of loss: 10/29/16

Dear Mr. Washington,

I received your letter dated 11/9/18.

Progressive Northern Insurance found both you and Mr. Bielawa contributed to the accident equally since you both were under the influence and Mr. Bielawa wasn't crossing the street in the crosswalk.

The wording on the Covenant means that you are not liable to pay anything over the $25,000 we paid on your behalf to resolve the claim & lawsuit.

As far as the police officer's report is concerned, you would need to contact him to discuss any questions you have.

If you should have any questions or concerns, please feel free to contact me any time.

With kind regards,

Michael Marshall
Sr. Litigation Specialist

Claims representative (Progressiv
Mike Marshall

Mr. Marshall, explain your occupation as a Progressive Auto insurance SR Litigation Specialist.

. How long have you been a SR Litigation Specialist for Progressive auto insurance?

. So basically, you would be, or the insurance company would be experts in accidents, hit and runs, etc? YES

. How did you come to know about the defendant's situation? The victim's mother sued the insurance co the car was insured by that the defendant was driving which is Progressive

. The Victim's Mother, she sued Progressive auto insurance because it's the insurance company the defendant's car was insured by correct? YES

. Didn't the victims Mother demand a Jury trial for that particular Civil lawsuit? YES

7. Beings that the victim's mother demanded a Jury trial for the Civil lawsuit, what was the results of that trial? The Mother settled out and was Paid #25,000. There was no Jury trial.

8. So the Civil suit was settled by You (Progressive) and the law office of Michael O'sullivan correct? YES

9. Progressive Paid out #25,000 to Mother, but the insurance claim was $25,000 per person and $50,000 per accident bodily injury liability. The victims Mother was Paid out #25,000, why wasn't she Paid out the #50,000?

10.

10. MR. MARshall, You did a full investigation on this matter correct? yes

11. You Even did an investigation on hit and run in this matter correct? YES

12. IN your investigation on hit and run, did you interrogate or interview any other witnesses other than the defendant? YES

13. How many other witnesses did you interview?

14. You also interviewed the defendant correct? YES

15. And what was Progressive auto insurance's ruling of the hit and run after that investigation? They determined no hit and run

16. Mr. Marshall in the Complaint of the lawsuit, the Facts of the complaint, did the Victim's Mother's Attorney's Mention that the defendant Hit and Ran in the Complaint of the lawsuit at anytime? NO

17. Does the complaint State that the defendant fled the scene, which

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Edward Lee Joseph Washington, Appellant.

Appellate Case No. 2019-000976

Appeal From Horry County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2021-UP-387
Submitted October 1, 2021 – Filed November 3, 2021

APPEAL DISMISSED

Appellate Defender Adam Sinclair Ruffin, of Columbia, and Edward Lee Joseph Washington, pro se, both for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

PER CURIAM: Dismissed after consideration of Appellant's pro se brief and review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.

APPEAL DISMISSED.[1]

KONDUROS, HILL, and HEWITT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

FORM 5

STATE OF SOUTH CAROLINA)
IN THE COURT OF COMMON PLEAS
County of Horry)

Edward Lee Washington)
Full name and prison number (if any) of Applicant
#311014

v.

State of South Carolina, Respondent

2022 CP 26 0180

APPLICATION FOR POST-CONVICTION RELIEF

FILED
HORRY COUNTY
2022 JUN 10 P 2:23
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

INSTRUCTIONS B READ CAREFULLY

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

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

If the application is taken in fo[rma] pauperis, it shall include an affidavit (attached at the back of the form) setting forth information whi[ch] establishes that applicant will be unable to pay the fees and costs of the proceedings. When the applicatio[n] 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 Horry County Detention Center

2. Name and location of Court which imposed sentence Horry County Court House, General Sessions

3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2017-GS-26-01070

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Denied

ii. _____

iii. _____

(c) the date of each such result:

i. Nov. 3rd, 2021

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. N/A

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) N/A

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) _____

(b) * See attached

(c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) _____

(b) * See attached

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law? NO

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO

(d) any other petitions, motions or applications in this or any other Court?

NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i.
ii. N/A
iii.
iv.

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

i.
ii. N/A
iii.
iv.

(c) the disposition thereof:

i.
ii. N/A
iii.
iv.

(d) the date of each such disposition:

i.
ii. N/A
iii.
iv.

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

i.
ii. N/A
iii.
iv.

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. N/A

ii.

iii.

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

i.

ii. N/A

iii.

* 15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a)

(b) * All grounds set forth in (9) must initially be presented within

(c) an ineffective assistance of counsel claim via PCR.

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

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

17. If you answered "yes" to one or more parts of (16), list:

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

i. James Stanka 203 Laurel St. Conway, S.C. (Trial Counsel)

ii. Adam Ruffin P.O. Box 11629 Columbia, S.C. (Appeal Counsel)

iii.

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

i. Jame Stanka (Guilty verdict in trial)

ii. Adam Ruffin (Appeal denied)

iii.

18. State clearly the relief you seek in filing this application.

Seeking to overturn case for New Trial

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

NO

9.

(a) Ineffective assistance of trial counsel for failing to properly object to the State's introduction of several traumatic photographs of car crash victim, while the State's police officer witness detailed the sight of "fat [contents] coming out of his stomach" and only a piece of skin holding his foot to his leg, clearly calculated to improperly arouse sympathy and/or was irrelevent to the determination of whether defendant was guilty of driving under the influence.

(b) Ineffective assistance of counsel for failing to supplement the directed verdict motion with the key, testimonial evidence of witness Olivia Mallee, who was present with the car crash victim immediately prior to the collision, that as they walked towards a crosswalk the victim spontaneously decided not to use the crosswalk acknowledging he "decided to go across the traffic" where he was struck.

(c) Ineffective assistance of trial counsel for failing to request a continuance when the State presented evidence - in violation of Rule 5 - not turned over to the defense in time to incorporate exculpatory evidence into proper preparation of defense. see State's Exhibit 82.

10.

(a) There was little to no probative value in allowing the State to introduce the graphic photographs as they provided nothing material to the jury's proper determination of whether the elements of Felony DWI were met. By not objecting to their admission, trial counsel allowed the State to further arouse sympathy and emotional reactions that prejudiced his client. see *State v. Livingston*, 327 S.C. 17, 488 S.E. 2d 313 (1997) (reversing conviction as photograph of car crash victim taken shortly before her death was *not relevant* to determination of whether defendant was guilty of driving under the influence). This error was prejudicial where the actual speed of car at impact was contradictive as to whether petitioner was even above the speed limit at time of collision *and* where eyewitness testimony was given that victim refused to use crosswalk - in violation of traffic law - and acknowledged victim "just decided to go across the traffic". ROA 181, 11 1-2.

(b) This testimonial evidence was critical to showing victim directly contributed, through his own negligence, to the collision. With the underlying traffic violation of exceeding the speed limit contradictive, trial counsel should have reminded the court of the pedestrian's statutory obligation when crossing a highway to not only utilize a crosswalk - especially amidst the darkness of late night hours - but also to

(d) Ineffective assistance of trial counsel for failure to call witness Mike Marshall of Progressive Insurance - despite Petitioner's plea that they do so - who could have testified to the findings of their independent investigation that car crash victim *was contributory negligent* for the crash. Alternatively, failure of counsel to introduce the Investigative Report * into evidence at trial which was highly probative to key element of Felony DUI and to the defense theory that victim's decision to violate traffic law (foregoing the crosswalk) and spontaneously run across highway into path of petitioner's vehicle initiated / proximately caused the crash.

* see also "Wrongful Death Lawsuit" Settlement

(e) Ineffective assistance of counsel for failure to move for full disclosure of exculpatory information in the possession of the State and/or it's expert witnesses.

(f) Denial of due process of law during the jury trial because of prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Riddle v. Ozmint*, 369 S.C. 39 (2006); and Rule 5, SCRCP.

exercise ordinary care for their own safety under the law see *Carma v. Swindler*, 228 S.C. 550, 91 S.E. 2d 284 (1956) (finding the car crash victim negligent as a matter of law as, "It was [victim's] duty before attempting to cross the highway, to see that the way was clear, especially since she was about to cross at a point where vehicular traffic had the right-of-way; had she looked, she could not have failed to see... the lights of respondent's truck approaching.").

(c) Exculpatory evidence that is available to the defense but not obtained falls on the duties of the *State*. When the State - amidst trial - introduced evidence that had not been turned over to trial counsel *and* had exculpatory value to his client's case, counsel had a duty and obligation to request a continuance so as to have an adequate opportunity to examine and incorporate the evidence into defense. Given the value of the evidence, petitioner was prejudiced by counsels' failure to do so. Moreover, this was *not* a case of overwhelming evidence thus further supporting prejudice. see *South Carolina Supreme Court's analysis in Smalls v. State*, 422 S.C. 174, 810 S.E. 2d 836 (2018).

(d) Petitioner will present the Investigative Report of Progressive Insurance, the settlement reached in the collateral "Wrongful Death" Lawsuit, and/or the testimony of the litigation specialist (Progressive) to buttress the ground that trial counsel was deficient in not obtaining and/or presenting to the jury the rebuttive findings and conclusions that the car crash victim proximately caused the crash as a matter of law. Failure of counsel to do so prejudiced petitioner given the case was not one of overwhelming evidence. *Smalls, supra.*

(e) Petitioner will present evidence that the State failed to turn over material evidence - such as the critical *collision report* - that was critical to his defense. Trial counsel's failure to file a Motion to Compel Discovery, additional Rule 5 and '*Brady*' motions, and requests for sanctions prejudiced petitioner as he was effectually denied information crucial to a proper/full preparation of his defense.

(f) The State failed in their obligation to turn over *all* discoverable evidence, within a reasonable time prior to trial, so the defense could properly and fully prepare for trial. In a case that partly hinged on evidence of the vehicle's speed at time of collision, the State's failure to turn over all speed-specific evidence was especially prejudicial.

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

I, Edward [illegible], hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Edward [illegible]
Applicant

SWORN or affirmed to and subscribed before me this 6 day of January, 2022.

Jacqueline Murrell
Notary Public

My Commission Expires: 4.27.26

JACQUELINE MURRELL
Notary Public
South Carolina
My Comm. Expires April 27, 2026

FILED
HORRY COUNTY
2022 JAN 10 P 2:23
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

Revised 3/2003

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

- Duplicate -

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

- Duplicate -

VERIFICATION

STATE OF SOUTH CAROLINA)
)
County of Horry)

I, Edward ... 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.

Edward ...

FILED
HORRY COUNTY
2022 JAN 10 PM 2:12
RENEE C. LEE
CLERK OF COURT
HORRY CO., S.C.

SWORN to and subscribed before me this 6 day of January, 2022.

Jacqueline Murrell (L.S.)
Notary Public

My Commission Expires: 4.27.26

JACQUELINE MURRELL
Notary Public
South Carolina
My Comm. Expires April 27, 2026

Revised 3/2003

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Edward Washington, #311014, Applicant, v. State of South Carolina, Respondent.	Case No. 2022-CP-26-0180 **RETURN**

NOW COMES Respondent, making its return to the post-conviction relief (hereafter "PCR") application filed on January 10, 2022, by Edward Washington (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its February 2017 term, the Horry County Grand Jury indicted Applicant for leaving the scene of an accident (2017-GS-26-01069) and felony driving under the influence with death (2017-GS-26-01070). Applicant was represented by James D. Stanko and Clay W. Pinkerton, Esquires. Joshua D. Holford and Cara J. Walker, Esquires, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On June 3-5, 2019, Applicant proceeded to trial before the Honorable Steven H. John, circuit court judge, and a jury. The jury found Applicant guilty of felony DUI but not of leaving the scene of an accident. Judge John sentenced Applicant to twenty years' imprisonment to be served concurrent.

Applicant filed a timely notice of appeal on June 12, 2019, that was perfected by Adam Ruffin, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The

South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Washington*, 2021-UP-387 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur was issued on November 22, 2021.

II. Statement of Facts

On October 28, 2016, Ryan Bielawa was struck and killed by Applicant's vehicle while he was walking across a highway. Olivia Malle testified that she was hanging out with Bielawa and some other friends when they decided to walk to the campus dining hall. R. 175-77.

Bielawa began walking across the highway not within a cross walk. R. 177, 180-81. Malle recalled: "I heard him get hit, so I looked and I see a shoe fly and a shadow, which I think it was his body. And I turned and I say, [Bielawa] was just hit and my friends started to scream." R. 177. Kelcee Cramer also witnessed the accident and she testified that the vehicle that struck Bielawa did not stop initially but returned "five to seven"minutes later. R. 189-90.

Daniel Baker, a DNR officer, was driving by the Circle K where Bielawa was hit shortly after the accident when he witnessed Applicant fighting a group of people. R. 163-65. Baker approached the group of people who were fighting and detained Applicant. R. 167. Baker stated that he did not know anything about the collision at that time. R. 167. After realizing that a fatal car accident had occurred, Baker turned Applicant over to Glen Guyett with the Horry County Police Department. R. 169.

Guyett testified that he initially placed Applicant under arrest for "the leaving of the scene" until he got more information and charged Applicant with felony DUI. R.240. Guyett claimed that he could smell alcohol on Applicant's breath and that his eyes were "red and glossy." R. 240-41. Guyett placed Applicant in his patrol vehicle, read Applicant his Miranda rights, and then took Applicant to the hospital for a possible ankle injury. R. 241. Guyett further

stated that he did not conduct any standard field sobriety tests on Applicant because of Applicant's apparent ankle injury. R. 242. While at the hospital, law enforcement obtained a search warrant for Applicant's blood and two blood samples were collected. R. 248-51. Applicant was found to have an average blood alcohol content of .239. R. 400.

III. Current Action before the Court

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. Ineffective assistance of counsel for failing to properly object to the State's introduction of several traumatic photographs of car crash victim, while the State's police officer witness detailed the sight of "fat [contents] coming out of his stomach" and only a piece of skin holding his foot to his leg, clearly calculated to improperly arouse sympathy and/or was irrelevant to the determination of whether defendant was guilty of driving under the influence.

2. Ineffective assistance of counsel for failing to supplement the directed verdict motion with the key testimonial evidence of witness Olivia Mallee, who was present with the car crash victim immediately prior to the collision, that as they walked towards a crosswalk the victim spontaneously decided not to use the crosswalk acknowledging he "decided to go across the traffic" where he was struck.

3. Ineffective assistance of trial counsel for failing to request a continuance when the State presented evidence – in violation of Rule 5 – not turned over to the defense in time to incorporate exculpatory evidence in proper preparation of defense.

4. Ineffective assistance of trial counsel for failure to call witness Mike Marshall of progressive insurance – despite Petitioner's plea that they do so – who could have testified to Petitioner's plea that they do so – who could have testified to the findings of their independent investigation that car crash victim was contributory negligent for the crash. Alternatively, failure of counsel to introduce the Investigative Report into evidence at trial which was highly probative to key element of felony DUI and to the defense theory that victim's decision to violate traffic law (foregoing the crosswalks) and spontaneously run across highway into path of Petitioner's vehicle initiated/ proximately caused the crash.

5. Ineffective assistance of counsel for failure to move for full disclosure of exculpatory information in the possession of the State and/or it's expert witnesses.

6. Denial of due process of law during the jury trial because of prosecutorial misconduct.

Attached to and incorporated herein are Applicant's Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, the direct appeal records, and the current PCR application. Respondent reserves the right to amend this return upon receipt of additional relevant information.

IV. Argument

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense

counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Object

Applicant claims Counsel was ineffective for failing to properly object to the State's introduction of several traumatic photographs of car crash victim, while the State's police officer witness detailed the sight of "fat [contents] coming out of his stomach" and only a piece of skin holding his foot to his leg. Whether failure to object constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Respondent contends that Applicant likely cannot meet his burden of proof on this allegation but requests an evidentiary hearing to fully resolve the matter.

Directed Verdict

Applicant claims Counsel was ineffective for failure to supplement the directed verdict

motion. Respondent contends Applicant likely cannot meet his burden of proof in this allegation but requests an evidentiary hearing to fully resolve the matter.

Continuance

Applicant claims Counsel was ineffective for failure to pursue a continuance. However, he fails to state why this was needed, how he was deficient for failing to request the continuance, or how he was prejudiced. Respondent contends that Applicant likely cannot meet his burden of proof on this but requests an evidentiary hearing to fully resolve the matter.

Witness Mike Marshall

Applicant claims Counsel was ineffective for failure to call witness Mike Marshall. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could

have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Applicant claims Counsel was ineffective for failure to call witness Mike Marshall, who would have testified the victims were contributorily negligent. This has no baring on the issue at hand and Counsel was not deficient for failing to call an irrelevant witness and no prejudice can be found as a result. Accordingly, Respondent contends Applicant likely cannot meet his burden of proof on this but requests an evidentiary hearing to fully resolve the matter.

Investigative Report

Applicant contends that Counsel was ineffective for failure to introduce the Investigative Report into evidence at trial which was highly probative to key element of felony DUI and to the defense theory that victim's decision to violate traffic law foregoing the crosswalks and spontaneously run across highway into path of Petitioner's vehicle initiated or proximately caused the crash. Applicant has failed to show how this was admissible, favorable, or would have changed the result of the proceedings. He has also failed to show how Counsel was not reasonable and as a result deficient because of this alleged failure. Accordingly, Respondent contends Applicant likely cannot meet his burden of proof on this but requests an evidentiary hearing to fully resolve the matter.

Failure to Move for Discovery

Applicant claims Counsel was ineffective for failure to move for full discovery. Respondent contends that Applicant likely cannot meet his burden of proof on this but requests an evidentiary hearing to fully resolve the matter.

Prosecutorial Misconduct

Applicant raises an allegation of prosecutorial misconduct. Prosecutorial misconduct is most commonly found within the confines of a *Brady*[1] violation. *Brady* violations occur if four conditions are met: "the evidence was favorable to the accused", "it was in the possession of or known to the prosecution", "it was suppressed by the prosecution", and "it was material to guilt or punishment." *Gibson v. State,* 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Whether a *Brady* violation is material and, thus, sufficient to warrant relief, is contingent on where there is a "reasonable probability that, but for the government's failure to disclose *Brady* evidence, the

[1] *Brady v. Maryland,* 373 U.S. 83 (1963).

defendant would have refused to plead guilty and gone to trial." *Id.* at 325. Further, whether a mistrial is warranted remains contingent on "'(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the court.'" *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (quoting *United States v. Anwar*, 428 F.3d 1102, 1112 (8th Cir. 2005)).

Applicant has failed to state what constituted prosecutorial misconduct. Respondent contends that the allegations likely lacks merit, but requests a more definite statement and an evidentiary hearing to resolve the matter.

V. Other Allegations Denied

Each and every other allegation in Applicant's PCR application not explicitly admitted, qualified, or explain in this return is hereby denied by the Respondent.

VI. Assertion of Rights to Notice of Amendments, Experts

Applicant should raise any claims he intends to raise at the PCR evidentiary hearing well in advance of the hearing. Here, Applicant's court-appointed attorney is the only individual authorized to file amendments to this application, given his representative capacity, Rule 11(a), SCRCP and *pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing is a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) ("Since there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.").

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent or, in the alternative, continue the

matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) ("In most PCR cases . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases."); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) ("When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record."); *see also* Rules 15(a)-(b), SCRCP (explaining how to amend a pleading). Pursuant to Section 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless the Court grants leave upon good cause shown. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits withheld until the last minute resulting in undue prejudice to Respondent.

VII. Conclusion

WHEREFORE, Respondent requests that the Court hold an evidentiary hearing regarding Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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August 19, 2022

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
Edward Washington, #311014	)	**2022-CP-26-0180**
	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
State of South Carolina,	)	
	)	
Respondent,	)	
	)	

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

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

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

Steven W. Fowler
730 Main Street Unit # 237
North Myrtle Beach, SC 29582

DATED this the 19th day of August, 2022.

Erik Marcusson, Legal Assistant
for Respondent

STATE OF SOUTH CAROLINA **TRANSCRIPT OF RECORD**

COUNTY OF HORRY Case No. 2022-CP-26-0180

ORIGINAL - PCR

January 3, 2023

BEFORE: The Honorable Debra McCaslin

EDWARD L. WASHINGTON,

Applicant,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

APPEARANCES:

Steven Fowler, Esq.
Appearing for the Applicant.

Chelsey Marto, Esq.
Appearing for the Respondent.

Official Court Reporter
Natalie Dahl, RPR

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NOTE: *Pursuant to Rule 607 (h)(1)(B), SCACR "A COURT REPORTER SHALL RECEIVE THE FEE OF $1.00 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." All requests for a copy of the enclosed transcript shall be sent to: Natalie Dahl, RPR, P.O. Box 762, Conway, SC 29526*

P-R-O-C-E-E-DI-N-G-S

MS. MARTO: This is Edward Washington versus South Carolina, 2022-CP-26-180. Presently confined in the South Carolina Department of Corrections.

In February of 2017, he was indicted for leaving the scene of an accident, felony DUI with death. He was represented by James Stanko and Clay Pinkerton, and prosecuted by Josh Holford and Cara Walker.

June 3-5, 2019, he proceeded to trial before Judge John. The jury found him guilty of felony DUI, but not leaving the scene. He was sentenced to 20 years imprisonment.

He filed a Notice of Appeal on June 12, 2019, and the Anders brief was submitted by Adam Roughin (phonetic).

South Carolina Court of Appeals dismissed it, and the remittitur issued November 22, 2021. This application was filed January 10, 2022, and the State's return made August 19, 2022.

With that, I'll turn it over to Mr. Fowler.

THE COURT: Let me address Mr. Washington

really quick, though.

Mr. Washington, when you ask for post-conviction relief, two things can happen. I want to be sure that you understand. If I find that you are not entitled or I deny your post-conviction relief motion, you have to serve out the rest of your sentence; you understand?

MR. WASHINGTON: Yes, ma'am.

THE COURT: Now, on the other hand, if I grant your post-conviction relief, all I can do is vacate your sentence and send your case back to the State, and it starts all over from scratch again. That means if any of your charge s were reduced or if you have other companion charges that they dropped or dismissed, all of those come back to life again, and you will be facing all of those charges; do you understand that?

MR. WASHINGTON: Yes, ma'am.

THE COURT: Knowing that, do you wish to go forward?

MR. WASHINGTON: Yes, ma'am.

THE COURT: All right. I'll let your lawyer call his first witness.

MR. FOWLER: I'll call Mr. Washington to the stand, please.

(EDWARD WASHINGTON, having been duly sworn, testified as follows:)

THE WITNESS: Your Honor, before I state my name, can I ask for the Court to reflect everything that is being said here today in the court?

THE COURT: What do you mean?

MR. FOWLER: May I have a moment?

THE COURT: Sure. All we've done is I've just called your case and I have advised you of your rights. There is a court reporter taking a record.

MR. FOWLER: May I liberally approach the witness during this?

THE COURT: Absolutely.

(A brief pause in the proceedings as Mr. Fowler and Edward Washington confer.)

THE CLERK: State your name now.

THE WITNESS: My name is Edward Lee Joseph Washington, W-A-S-H-I-N-G-T-O-N.

MR. FOWLER: Your Honor, before I begin with speaking with Mr. Washington on the stand, there is a few items I would like to have judicial notice -- or I would like to request judicial notice for, Your Honor.

THE COURT: Okay.

MR. FOWLER: Mr. Washington -- this case was continued before Thanksgiving, around that time, Your Honor. He indicated to me that at that time he will be submitting a supplemental application for various items. He has provided that to me today, and I have made copies for the Court, the clerk, opposing counsel. I've provided a copy to opposing counsel.

He also indicated -- when he and I spoke earlier today, he indicated that one of the items he would like to go over today, Your Honor, is a Progressive Insurance policy and the surrounding documents with that, Your Honor. He provided that to me as well and made copies for the clerk, opposing counsel. I've already provided a copy for opposing counsel. I would like to ask the Court to take judicial notice of these documents at this time.

THE COURT: Any objection?

MS. MARTO: None, Your Honor.

THE COURT: All of these are from the accident that pertain to the accident?

MR. FOWLER: They are relating to his post-conviction relief application, Your Honor, and, yes, my understanding is that that is correct.

THE COURT: Well, I'll take judicial notice just for the fact that they are the insurance company that handled it. I'm not sure what they have to do with this criminal proceeding or -- this is a civil proceeding, but what it has to do with his criminal case, I'll let you explain that to me, and we'll put it into evidence.

MR. FOWLER: Yes, Your Honor. And I'll be providing this now. If I may approach?

THE COURT: Sure.

(Applicant's Exhibits 1 and 2 marked.)

MR. FOWLER: It is a supplemental, and we've provided copies to the opposing counsel.

If I may, Your Honor?

DIRECT EXAMINATION

BY MR. FOWLER:

Q You heard the Judge's statement earlier, correct?

A Yes, sir.

Q You -- she indicated that you would be facing all of the charges again from scratch, correct?

A Yes, sir.

Q You and I have gone over those charges?

A Yes, sir.

Q And you indicated that you wish to go forward

with this today; is that correct?

A Yes.

Q Also, you filled out a verification form with this PCR application; is that correct?

A Yes, sir.

Q And that's your signature notarized on the last page of the original application?

A Yes, sir.

Q You've also supplemented the documents with a listing provided to me earlier today, correct?

A Yes, sir.

Q And you verified that all of this is your -- is approved by you?

A Yes, sir.

Q You and I have spoken about this case several times, correct?

A Yes, sir.

Q And I've provided some information about the background of the PCR, correct?

A Yes.

Q When you and I spoke earlier today, normally I kind of go in order with your application, but it is something that you -- piqued my interest today was your discussion about one of the -- I think it is 10(d), as in "dog," in terms of ineffective

assistance of counsel, and a possible witness, Mike Marshall, with Progressive Insurance?

A Yes.

Q And you were in the courtroom when we submitted this Progressive information to the Court?

A Yes, sir.

Q Tell me about what this document is. How does it relate to the PCR application?

A Well, in his report, he states that in his investigation that he didn't find that there was a hit-and-run, and that he found that both me and the victim contributed equally to the incident, and that the victim was not at a crosswalk. I feel like if I was notified about contributory negligence during the time that my plea bargain was offered to me, that the victim contributed equally, that I probably would have pled out instead of going to trial.

Q You think this document and information shows that?

A Yes, sir. Yes, sir. The document basically states that the victim was contributory negligence.

Q Let's read 10(d) in your application. It says this -- referring to this document -- in

referring to this document --

MR. FOWLER: Is that No. 2, I believe?

COURT REPORTER: The Progressive is No. 1.

MR. FOWLER: Referring to No. 1, it says, "Ineffective assistance of trial counsel for failure to call witness, Mike Marshall, of Progressive Insurance, despite Petitioner's plea to do so who could have testified to the findings of their independent investigation that car crash victim was contributory negligence for the crash" -- which you stated just a few minutes ago -- "alternatively failure to control -- of counsel to introduce the investigative report into evidence at trial, which was highly probative to a key element of felony DUI, and to the defense theory that the victim's decision to violate traffic law foregoing the crosswalk and spontaneously run across highway in the path of Petitioner's vehicle proximately caused the crash."

You said also, "See wrongful death lawsuit settlement."

Is there a particular area in this document that we entered into as Exhibit 1 that you want to bring to the Court's attention?

A Right there.

Q You are referring to the -- appears undated, but I received your letter. It states on the first line that I received your letter dated 11/9/18. You want to read that paragraph for us?

A It says, "States that Progressive Northern Insurance found both you and Mr. Bielawa contributed to the accident equally since you were both under the influence, and Mr. Bielawa wasn't crossing the street in the crosswalk. The wording on the covenant means that you are not liable to pay anything over the $25,000 we paid on your behalf to resolve the claim in the lawsuit."

Q Okay. And you indicated this was an important part of your PCR application, correct?

A Yes, sir.

Q And you are saying that this adjuster, Mr. Mike Marshall, he could have -- in your opinion, what do you think he could have added to the case if he were called?

A In my behalf, that was the only witness I had that was exculpatory to me, and he wasn't called.

Q And I'm going to refer to him as Mr. Marshall. Did you speak with your attorney about calling Mr. Marshall?

A I presented plenty of witnesses to my lawyer

that I wanted him to subpoena for court, but none of them was subpoenaed.

Q Did he indicate why he did not subpoena these witnesses?

A I don't remember talking about none of that.

Q What about Mr. Marshall, in particular? I mean, you've raised this to me as kind of one of your number one issues. Did you go over Mr. Marshall's testimony and his apparent statement?

A I've had at once, but it was never pushed as an issue.

Q Did you push it?

A I brought it up.

Q And what did your lawyer say about it?

A To be honest, I can't even remember.

Q Is there anything else about this paragraph in your PCR application or Exhibit No. 1 that you want to bring to the Court's attention how it might have helped you or anything?

A Other than he wasn't called as a witness, no, sir.

Q All right. In terms of your PCR -- original PCR application, you mentioned in No. 9 -- you state that "ineffective assistance of counsel for failing to properly object to the State's

introduction of several traumatic photographs of the cash victim, while the State's police officer witness detailed the side of, quote, fat coming out of his stomach."

Tell me a little bit about that.

A The pictures?

Q I'm referring to 9(a) specifically.

A The pictures, to me, they were used to appease (*sic*) the jury as if -- as in -- I mean as in the State really, basically, didn't have any evidence stating that I was speeding. They used the pictures to arouse the sympathy of the jury.

Q So do you think -- was it inflammatory? Do you think that your lawyer should have done a better job in terms of objecting to those?

A Yes, sir.

Q Did you go over that with him? Did you talk to him about objecting to those matters?

A At the time, I didn't.

Q But you've done some research since then, correct?

A Yes, sir.

Q You feel like he should have objected?

A Yes, sir.

Q Is there anything else about this paragraph

that you feel needs to be brought to the Court's attention?

A No, sir.

Q In 9(b), it says, "Ineffective assistance of counsel for failing to supplement the directed verdict with the key testimony evidence of witness Olivia Mallee" -- it's spelled here M-A-L-L-E-E -- "who was present with the car crash victim immediately prior to the collision."

Tell me about this paragraph. What is relevant to this case about that?

A She was with the victim at the time of the crash. During the motion of the directed verdict, my trial counsel, he didn't present any case law with that to support the directed verdict. But she witnessed it, obviously, and I guess she could have -- at directed verdict, she could have -- she could have testified a little more, I guess.

Q Did you go over -- I'm going to pronounce it Mallee like M-O-L-L-Y.

Did you go over with your attorney how she could be called as a witness or anything? Did you go over with your attorney anything that related to this paragraph?

A I have no idea.

Q Anything else about this that you wanted to bring to the Court's attention?

A Other than that she stated that he decided to go across the traffic, no, sir, I don't.

Q Do you feel like if she had played more of a part in this trial and your representation, that it would have been more helpful to you?

A Could have, yes, sir.

Q But your lawyer didn't do that, right?

A No, sir.

Q Do you think based on what we read so far on both A and B that this relates to ineffective assistance of counsel for you?

A Yes, sir, I do.

Q Why do you believe that?

A Because it's a possible chance that it could have gave me a different outcome.

Q Let's go to 9(c). It says, "Ineffective assistance of trial counsel for failing to request a continuance when the State presented evidence in violation of Rule 5 not turned over to the defense in time to incorporate exculpatory evidence into proper preparation of defense."

Tell me about that. Did you go over a continuance with your lawyer. You mentioned that

in 9(c), tell me how that relates to this PCR action.

A Well, actually, we didn't go over a continuance. And besides State Exhibit 82, there were multiple things that were missing out of the Rule 5 such as autopsy reports, toxicology report of the victim. I think the speed and coordinates that they recorded wasn't in there either.

Q Well, obviously, you know that because you brought it up in your PCR application, correct?

A Yes, sir.

Q Did you know that at the time of trial? Or how did you find all of this out? You said you didn't know about it initially.

A Found that out afterwards.

Q So you found it out afterwards?

A Yes, sir.

Q So at the time you didn't have any opportunity to object or to talk with your lawyer about it, did you?

A No, sir.

Q Okay. Going to 10(a), and then here we get a little messy, but it's workable.

In 10(a), you state that there was little to no probative value in allowing the State to

introduce graphic photographs as they provided nothing material to the jury's proper determination of whether the elements of a felony DUI were met. By not objecting to their admission, trial counsel allowed the State to further cause sympathy and emotional reactions that prejudiced his client."

You quoted in here *State versus Livingston*. You go on further to state, "This error was prejudicial when the actual speed of the car at impact was contradicting as to whether Petitioner was even above the speed limit."

Tell me a little bit about this paragraph, 10(a), as is documented.

A Basically, it is the same as nine. Basically, it is stating that the pictures were arousing the jury.

Q Why do you think that?

A I think that because there was little evidence stating that I was actually speeding.

Q Okay. All right. Let's bring it into how this relates to your attorney's performance. How do you think -- and we went over this briefly with nine. How do you think this relates to your attorney's performance in this case, what you quote in 10(a) here?

A Ask again.

Q We're here because you are alleging that your attorney was ineffective, correct?

A Yes, sir.

Q How does this relate to your attorney being ineffective in your defense at trial?

A By not objecting to the admission of the pictures.

Q No. 10(b), "Testimonial evidence was critical to showing victim directly contributed through his own negligence to the collision, and the underlying traffic violation of exceeding the speed limit was contradicted. Trial counsel should have reminded the Court of the pedestrian statutory obligation when crossing a highway to not only utilize a crosswalk, especially in the dark and late night hours."

So are you basically saying that the victim -- that your lawyer should have looked into the victim's contributory negligence on this?

A Correct, sir.

Q Did he?

A Not to my knowledge.

Q Did you go over it with him?

A At the time, I didn't, no. At this time I

was green to the law. I didn't know.

Q This application is very lengthy, in my opinion, and has a lot of case law and is well thought out evidence -- or items. Have you done a review of this since your trial, or how did you come up with your application?

A Law library, on the tablet at the facility I'm at.

Q So a lot of these things you did not know of?

A At the time of the trial, no, sir.

Q And you feel like these relate to your ineffectiveness assistance of counsel, correct?

A Correct, sir.

Q We went over the Progressive Insurance as listed in 10(d). 10(e), "Ineffective assistance of counsel for failure to move for full disclosure of exculpatory evidence information in the possession of the State and its expert witnesses."

What exculpatory information do you feel like is relevant here and in -- that you are referring to?

A The toxicology report would be one.

Q Okay.

A The speeds and the coordinates, those were not in the Rule 5 either.

Q Did you talk with your attorney about it at the time?

A No, sir, I did not.

Q Why not?

A Like I said, I was green to the law at the time. I didn't know anything about a felony DUI or what I was charged with, so I relied on him to do his job.

Q But he didn't do his job, did he?

A I feel like he could have done a lot better.

Q Talk briefly about the toxicology report. I think you mentioned the speed. Did you have any information about the toxicology report before trial?

A Other than what was stated by, I think, the guy that did the autopsy, stating that the victim had -- was over the limit. That was it.

Q Do you feel like the toxicology report should have been more thoroughly brought into the trial?

A Yes, sir. It would have let the trial Court know that that was part of the victim being contributory negligent.

Q What about the speed? What information did you have about the speed at the time of your trial, you, personally, from your lawyer?

A The only thing -- the only information I had was from the MAIT report.

Q All right. Anything else about that exculpatory information you would like to bring to the Court's attention?

A The corrected police report I ended up getting from Progressive Auto Insurance, which I have over there. That is what I wanted to talk to you about earlier. I ended up getting the corrected police report from Progressive Auto Insurance. The police report that was in my Rule 5 was -- stated that it was still pending, but the police report that I got from Progressive Auto Insurance stated that I was doing 42 miles an hour in a 40.

Q Did you bring that person -- was that done by Progressive Insurance?

A They ended up sending that with the report that I just gave you a copy of.

Q Was Mr. Marshall familiar with that as well?

A Yes, sir. He sent it.

Q So you feel like both on -- with the speed and the other items brought up in Exhibit No. 1, that could have been helpful to you at trial?

A Yes, sir.

Q "Denial of due process of law during the jury trial." What makes you say that?

A It have -- it should have a Brady 5.

Q Let's read 10(f). "Denial of due process of law during the jury trial because of prosecutorial misconduct in the Brady."

Are you alleging some kind of prosecutorial misconduct here?

A That would be the Rule 5 with the missing autopsy report, toxicology report, speeds and coordinates, and the corrected police report. Those were not in -- I have a Rule 5 that I just recently sent to the Public Defender's Office that they sent to me, because the original was damaged in the flood, and those documents that I just mentioned were never in my Rule 5.

Q Is that because they weren't available at the time of your trial, or because your lawyer didn't do anything with them at the time of the trial?

A I have no idea. They are not even on the Solicitor's report.

Q So you are feeling that your lawyer should have perhaps pushed more for that type of evidence; is that correct?

A He could have done that, but I feel like the

State withheld them. That is what I feel.

Q Okay. Let's be clear here.

MR. FOWLER: If I may, Your Honor?

THE COURT: Absolutely.

Q (BY MR. FOWLER) We've gone through 9(a), (b), and (c). We've gone through 10(a), (b), and (d). So we're here now. I have it as 10(c), the correct numerical or alphabetical -- "Exculpatory evidence that is available to the defense, but not obtained falls on the duty of the State when the State introduced evidence that had not been turned over to trial counsel and had exculpatory value to the client's case. Counsel had a duty and obligation to request a continuance so to adequately examine."

Tell me about that, 10(c). Did you talk to him about a continuance, or do you feel like he should have asked for a continuance on his own, or what is your thoughts on that?

A I feel like he could have asked on his own, you know. If those things were missing, those -- I didn't know that they were missing at the time until I went back and found out that they were missing. Being counsel, you know, you should have known that they were missing.

Q So you are saying that he should have known

what you knew later at the time of trial?

A Yes.

Q And that is one of your basic arguments about him being ineffective?

A Yes, sir.

Q Anything about 10(c) that you wish to bring to the Court's attention?

A No, sir.

Q Is this the next one?

MR. FOWLER: May I have a moment, Your Honor?

THE COURT: Absolutely.

Q (BY MR. FOWLER) You are telling me that some of the application has duplicate matters?

A Yeah. They are just supportive of what was stated, that's all.

Q And you feel like we've gone over the things that we talked about fairly completely?

A Yes, sir.

Q Okay. Fantastic. I think that brings to an end your initial application.

Now, let's go to what you provided to me today. In our telephone call recently, we talked about writing them down?

MR. FOWLER: Your Honor, may I provide a copy?

THE COURT: You may.

Q (BY MR. FOWLER) Going over this -- these are the ones that I'm looking at, one, two, three, four, five, six, seven -- seven pages that we introduced and had judicial notice of today, correct?

A Correct.

Q That is Exhibit No. 2. So I'll refer to it as Exhibit No. 2.

You say, basically, "It is well-established that a conviction obtained through false evidence known to be used by such representatives of the State must fall under the 14th Amendment."

Tell me about that.

A Okay. In Issue No. 1 of my amendment -- amended issue, the arresting officer, Glenn Guyett, he was asked during trial what did he arrest me for, and he basically said that he initially arrested me for leaving the scene of the accident, and then further information was gathered for the felony DUI.

He's not the arresting officer of the hit-and-run warrant. Chief Dale Long is. My lawyer should have objected right then and there. That was a false statement.

Q So you mentioned Dale Long. Who was the police officer, law enforcement, you were referring to initially?

A Glenn Guyett.

Q How do you spell that last name; do you know?

A G-U-Y-E-T-T.

Q Who is -- you touched on it briefly, but who is Glenn Guyett?

A The arresting officer of the felony DUI.

Q You are saying something he said at trial was incorrect?

A Yes, sir, he did. He was asked what -- he was asked what did he arrest me for. He said that he initially arrested me for leaving the scene of the accident.

Q But you said Dale Long was the one who did that?

A Dale Long is the arresting officer of the leaving the scene of the accident.

Q What law enforcement agency were they with?

A Glenn -- well, both are with Conway Police Department.

Q So you are saying that Officer Guyett told a falsehood on the stand; is that correct?

A Basically, that's what I'm saying.

Q What did your attorney do about that?

A Nothing.

Q Did you mention to him that Guyett -- that was an incorrect statement?

A At that time, I showed him the arrest warrant of the hit-and-run, and he looked at me and said, I know. There was no objection to that at all.

Q So he didn't object to it?

A No, sir.

Q Do you feel like that relates to his representation of you with this?

A He should have objected, because it was false.

Q Moving on. These are not numbered, so I'll -- it says, "Failure to impeach the witness" --

A Basically, it is the same thing, just another case law.

Q Moving on down. At the bottom of this page, it says -- well, tell me about that paragraph, how it relates to what we were talking about, the bottom of Page 1.

A This paragraph is the back-up for the case law that is written above it.

Q And that is, what, the *U.S. ex Rel McCall*

versus O'Grady?

A Yes, sir.

Q Anything else about that page you would like to bring to the Court's attention?

A No, sir.

Q Moving to Page 2. There is a big "X" in that, in the middle of my Page 2, so I don't think that --

A I won't be using that one. The actual No. 2 I wanted to use is on the third page.

Q Do you want us to go there?

A Yes, sir.

Q So No. 2 on the third page -- and I think you and I have spoken about this -- there was an issue with Miranda; is that correct, Miranda rights?

A Yes.

Q Let's read it quickly and move on. "Ineffective assistance of counsel failed to provide *Jackson versus Denno* hearing." is that correct?

It says, "Driving under the influence video recording statute requiring that the video recording of the site of the DUI incident showed defendant being advised of his Miranda rights serves purposes of reducing the issues" -- read

that for me.

A "The ineffective assistance of counsel, counsel failed to provide statute or object and any case law failed -- failed to provide any case law in *Jackson versus Denno* hearing supporting Miranda rights violation. The driving under the influence video recording statute requiring that the video recording of the site of the felony DUI incident shows a defendant being advised of his Miranda rights."

Basically, what I'm trying to point out is that at the time my Miranda rights was being read, I was in the back seat of the police vehicle and I could not be seen. That is what this case, *State versus Taylor*, is pointing out.

Q You are saying that a technical aspect of the law is that you should have been seen?

A Seen.

Now, in the *Jackson versus Denno* hearing, the trial judge did state that while a better procedure could have been handled, that the Miranda rights were still given. But by statute, the defendant has to be seen.

Q So you're saying in the statute, that you quoted in this paragraph, that the technical issues

of the law were not being followed in your Miranda rights; is that correct?

A Correct, sir.

Q How does that relate to your attorney's performance in representing you?

A At the time, if he would have stated the statute, it could have been looked over. And, you know, he didn't state no case law or statute backing it up.

Q Is there anything else about that paragraph you wish to bring to the Court's attention?

A No, sir.

Q No. 3, "Ineffective assistance of counsel, counsel failed to properly induce the motion of dismissal of felony DUI by using failure to record blood drawing."

Tell me about that.

A Okay. In this, the implied consent does not necessarily state that the blood draw be recorded. In *Rock Hill versus Chestee* (phonetic) that he used, he was stating that the blood draw had to be recorded. But in Statute 56-5-2950(b) basically states that there need not be any video recording of all kinds of chemical testing. He used Rock Hill versus Chestee, but *State versus Brown*

overrides that stating that the State doesn't need video recording of the blood draw.

Q So how does that relate to your case? Tell me -- did your attorney object, or what is the thoughts?

A He used that to get in a motion to get the felony DUI dismissed.

Q How does that relate to his performance?

A If he would have looked over the statutes, he would have known -- and if he would have looked over the implied consent form, at the top of it, it asked if the video -- it asked if the video recording -- it asked if the chemical test, they ask you if it is going to be recorded or not. It plainly asks at the top.

Q Is there anything else about that No. 3 that you wish to bring to the Court's attention?

A No, sir.

Q On the next Page, No. 4, my notes indicate that counsel led the defendant to believe that the felony DUI could be dismissed.

Tell me about No. 4 as a paragraph.

At the beginning, it says, "Ineffective assistance of counsel, counsel failed to consider a contributory negligent victim. Had counsel

considered contributory negligence to defendant with guilty plea that was presented, defendant would have considered pleading guilty knowing that the victim equally contributed to the accident. Counsel led the defendant to believe that felony DUI" --

A Okay. Going back to the contributory negligence part. At the time, I didn't know anything about contributory negligence. While the guilty plea was being presented, if that had been presented to me, contributory negligence, I would have thought about it and be like, okay, I might need to plead out instead of going to trial.

The felony DUI motion for dismissal was already submitted. So, under my assumption, that was going to be dismissed -- or could have been dismissed. That is why I pushed the issue to go to trial.

Q Anything in that paragraph you wish to bring to the Court's attention?

A No, sir.

Q Page 4, "Ineffective assistance of counsel, counsel failed to provide any case law to support a directed verdict."

Tell me about that.

A I can remember directed verdict being asked for, but I don't remember any case law or anything supporting, you know, his reason asking for directed verdict.

Q So how did that relate to his representation of you in this case?

A It says right here, "When it is without significance that speed was a contributing factor in an automobile collision, and the record contains no other evidence of other negligent or wrongful acts by the speeding driver, the Judge may grant a directed verdict motion. There will be nothing for the jury to resolve because of the matter of law that excessive speed could not have caused the accident."

I feel as if he could have, you know, pushed the issue a little more and brought that up, brought that specific topic up right there.

Q Anything else about that paragraph you would bring to the Court's attention?

A No, sir.

Q Moving to the final two pages. Some of the things that I have noticed with this -- it says, "Counsel failed to prepare a defense," and then at the very bottom it says, "Counsel never objected or

provided any case law in defense."

Tell me about this paragraph. Are you saying that counsel never -- your legal counsel failed to prepare a legal defense in your --

A After the motion for dismissal was denied, it was just like there was nothing. Like, to me, it took the fight out of him.

Q What do you mean?

A Like he never objected to anything. Some of the witnesses the State called, a couple he didn't cross examine, you know. To me, it let me know that he gave up, to be honest. He could have prepared a little better.

Q Finally, it says, "Claims that his defense counsel did not understand the elements of felony murder."

Tell me about that.

A Okay. All right. This was supposed to go with No. 3, because in this case law, basically what this case law is stating that this defendant's counsel didn't know the law of what he was charged with, the elements of his case.

Going back to the felony DUI, like I was saying, if he would have reviewed the statute, he would have known that the State didn't need a blood

draw.

Q We've gone over your application, supplemental application, the elements. We have introduced the insurance documentation that you feel is relevant here. All of these -- there is almost like pieces of a puzzle. How would you describe your attorney's performance representing you in this matter?

A Ineffective.

Q Why do you say that?

A I'll go back again. He never objected. The missing documents in Rule 5, he could have asked for those; he never did. To me, that is big to me because, you know, my freedom was on the line.

Q In your opinion, we've gone over *Strickland versus Washington*, the case that talks about efficiency of performance. I sent you information on that?

A Yes, sir.

Q Do you feel like that -- in your opinion, do you fell like your lawyer's performance was deficient in your defense based on what we discussed today?

A Yes, sir.

Q Do you feel like because of that

insufficiency, as you indicated, that you are in the position you are in today?

A Yes, sir.

Q Do you have anything else you would like to bring to the Court's attention?

A No, sir.

MR. FOWLER: Nothing further.

THE COURT: Thank you.

CROSS EXAMINATION

BY MS. MARTO:

Q Good afternoon, sir.

A How are you doing?

Q Good. Are you stating that you knew there was contributory negligence in the civil action that would have caused you to plead?

A Yes, ma'am.

Q Why?

A Because I would have known that we equally contributed.

Q Why would that have caused you to plead though?

A Because it was basically both of our fault.

Q Whose fault do you think it was when you went to trial?

A Whose fault did I think it was?

Q Yes, sir.

A I thought it was his fault.

Q So the civil document showed you were guilty, is that what you are saying?

A The civil suit basically said that I'm not liable.

Q And you're stating all the witnesses you wanted to call, they were from the insurance company?

A He's just one of them. I asked for a couple more, but he was one of the main ones that I wanted to be called to trial.

Q Who else did you want to be called at trial?

A A couple of witnesses that I looked through my Rule 5 that I noticed that wrote statements.

Q So eyewitnesses?

A Yes. Yes, I guess.

Q Now, you're saying counsel was ineffective to object to pictures of the victim, right?

A Yes. Yes, ma'am.

Q How do you think they made a difference at trial?

A I think at a particular point in the trial that they aroused the sympathy of the jury. As to -- like I was stating, there was little to no

evidence stating that I was speeding other than opinions and lay witnesses.

Q So how did the pictures make a difference though?

A The pictures weren't shown -- the sympathy -- I think that they would have gotten the sympathy of the jury.

Q Now, what story did they present at your trial, in broad strokes? What did they say you did?

A The State?

Q Yeah.

A Speeding, for one. Not giving a proper lookout. Recklessness, I think it was. That's about it.

Q Did she say you were driving drunk?

A Yes, of course.

Q Did she say you hit a victim with your car?

A Of course.

Q Did they say you drove away?

A Yes.

Q Did they say you came back?

A Yes.

Q Did they say that you came back to fight somebody that potentially broke your windshield?

A Yes, that was said.

Q So their main argument is that you killed someone with a car while driving drunk, right?

A Yes, ma'am.

Q There was a *Jackson versus Denno* hearing at the trial?

A Yes.

Q And your main argument is you wanted counsel to cite case law?

A Yes. The statute, like I was saying, basically states that the defendant be seen on camera giving the Miranda rights.

Q You wanted him to bring up that case law?

A He could have.

Q Did you think the judge didn't know the case law regarding Miranda?

MR. FOWLER: Objection; speculation.

THE COURT: It is. Rephrase it.

Q (BY MS. MARTO) Why did you think that -- why did you want your counsel to tell the judge the case law?

A Because it's case law, and that's what the statute states. The statute states that that is supposed to happen.

Q Do you know why the contributory negligence

defense wasn't used at trial?

A I have no idea.

Q Are you alleging that after pretrial motions there was no trial strategy at all?

A There was no trial strategy at all. After the felony DUI motion was dismissed, there was no strategy.

Q Did you say you wanted counsel to move to continue the case?

A He could have, yes, ma'am. He could have. Being that there was missing documents out of the Rule 5, we could have continued it so we could get those to prepare a better defense.

Q What documents did you think were missing?

A Documents, autopsy, toxicology report, speeds and coordinates from the probation and parole office -- because I had an ankle monitor at the time -- corrected police report.

Q You were shown none of those before trial?

A None of them.

Q When did you find out about them?

A I actually got the corrected police report from Progressive.

Q But there were five or six different things you said the State didn't turn over, so when did

you learn about those?

A They were missing.

Q So Progressive gave you all of that evidence?

A No.

Q How do you know they existed then?

A I know the toxicology report exists because the forensic -- the dude that did the autopsy, he stated the -- the victim's toxicology report at trial. So if they didn't exist, particularly the speeds and the coordinates from the probation and parole office, how can they be used in trial if they didn't exist?

Q So they were used at trial?

A The speeds and coordinates. The toxicology report of the victim....

Q And counsel never shared any of that with you prior to trial?

A (Witness shakes head.)

MS. MARTO: Nothing further.

THE COURT: Any redirect?

MR. FOWLER: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. FOWLER:

Q You indicated that one of the initial statements or questions of the Attorney General was

about the Progressive letter that was introduced as Exhibit No. 1. Basically, it states what we've stated on direct, that Progressive found out you were not a hundred percent liable; is that correct?

A Correct.

Q And that lack of negligence or fault, or however you want to categorize it, would have led you to make a different decision in your plea or trial strategy; is that correct?

A Correct.

Q So when did you get this letter? Was this letter before or after trial?

A Before.

Q Well, how did this not play a part in your trial?

A How did it not?

Q How did this letter play a part in your trial? Did your attorney bring it up?

A I brought it up to my attorney, and he never used it.

Q You indicated there were gaps in Rule 5?

A Yes, sir.

Q If you would have known more about the Rule 5, you would have been -- there may have been more witnesses or information that you could have

provided at your defense?

A Correct. If I would have known more about any of this that I'm going through.

Q On cross examination she talked about pictures. Do you feel like those pictures were inflammatory?

A Correct.

Q Was there any objection brought up by your attorney?

A No, sir.

Q Winding up, you stated that, basically, after the felony DUI motion was dismissed, your words earlier on direct were he kind of gave up or there was an issue?

A There was no defense. There was no proper defense after the motion was denied.

Q Finally, you found out some things from Progressive. Did you have to get those on your own, or did your attorney get them for you?

A I actually ended up writing Progressive on my own from J. Reuben Long, and he sent me everything he had.

Q As a matter of fact, the letter is addressed to you at J. Reuben Long; is that correct?

A Yes, sir.

Q Do you feel like your attorney should have done that?

A He could have.

Q Do you feel like he should have?

A Yes, sir.

MR. FOWLER: Nothing further.

THE COURT: Can I let this witness down?

MS. MARTO: Yes. Thank you, Your Honor.

(A recess was taken.)

MR. FOWLER: After speaking with my client, Your Honor, I have no further witnesses.

THE COURT: All right. I'll turn to the State. Go ahead.

MS. MARTO: We call Mr. Jim Stanko to the stand.

(JIM STANKO, having been duly sworn, testified as follows:)

THE WITNESS: Jim Stanko, S-T-A-N-K-O.

DIRECT EXAMINATION

BY MS. MARTO:

Q You represented Mr. Washington in his criminal offense?

A I did.

Q And you worked for the Public Defender's Office at the time?

A I did.

Q Did you have the case from its inception?

A I didn't have it from the inception, but very shortly afterwards.

Q Roughly, how many times did you meet with Mr. Washington?

A I couldn't say for certain. It was definitely over five. There were some times when he was out on bond where he was in our office, and after he got arrested again, we met at J. Reuben Long a few times.

Q What did you discuss, in broad strokes, about the case?

A So, initially, we discussed the forthcoming MAIT report, because it hadn't come in. We had the broad overview. We had the report from the police department. One of the main issues -- one of his contentions is that the victim in this case was in the roadway. He kept telling me he couldn't be held at fault for it because he was in the road. He shouldn't be held liable for someone who was running across the street, but that is his own fault. I tried to explain a few times that it was not necessarily a defense we could go with, but that was what he wanted to pursue.

Q Did he talk to you about how he wanted to pursue contributory negligence?

A Initially, we just had the reports and didn't know the full details. Probably five, six months into my representation, we received supplemental from the State. We got the MAIT report, autopsy, toxicology -- sorry, the MAIT report came at once, and a month or two after that the autopsy report came after.

Once we reviewed all of that, showed him that there were definitely some things we could argue at trial, or some things we wanted to be sure to put in front of the jury. He insisted that he wouldn't plead guilty to anything. I explained to him that the victim had a BAC that was pretty high. I explained to him that he was in the roadway. Those were certainly things we would argue, but not necessarily just automatic magic bullets, that because of those things your case is dismissed.

I explained all of those, and he was insistent that he had done nothing wrong and wanted to go to trial.

Q Did he request you call the person from Progressive to the stand?

A He showed me the letter he received from

Progressive. We talked about it, again, about how that was not necessarily a defense. Contributory negligence being a civil standard is not something that necessarily was a valid argument in criminal court.

Again, given the facts of the case and the things we could present to the jury, there were definite mitigating factors and defenses that could lead potentially to a not guilty.

Q So it was your understanding that a contributory negligence argument wasn't appropriate in criminal proceedings?

A Not in general sessions, no.

Q Because of that, do you think it would have been successful if you raised it?

A Not at all.

Q Do you recall pictures of the victim being entered?

A I do.

Q Do you think they were objectionable?

A I will tell you that -- both myself and Clay Pinkerton represented Mr. Washington in this case. We split up the duties as far as witnesses went. I believe almost all, if not all, of the police officers involved were handled by Mr. Pinkerton.

We discussed trial strategy in combination, but everything related to those police officers did go through him at that time.

Q Did you think that that made a difference of the outcome of the trial?

A I don't think so.

Q Do you think if you asked for a continuance that would have made a difference?

A It was my understanding that he only wanted the continuance to talk to family members, I believe it was. If memory serves, once the prospect of trial became real, he tried to push it back.

He filed on his own a motion for a speedy trial back in -- so this went to trial, I want to say, June of 2019. He filed on his own just a handwritten motion for a speedy trial towards the end of 2018. So once it came up for trial, he started asking, Oh, can't we push it? Can't we push it back? I told him based on the age of the case and the fact we received everything from the State, it is unlikely that that would work.

Q Do you recall, to the best of your knowledge, was any discovery in the case that was not forwarded to your office?

A To the best of my knowledge, we had everything well in advance. Myself and Mr. Washington met about it a few times, and then Mr. Pinkerton joined the case probably two or three months before it was in the trial pipeline. It was towards the end, and then the three of us met a few times regarding trial strategy and everything that could potentially be introduced.

Q Did you discuss the option of a plea with Mr. Washington?

A We did. I laid out the State's case for him, told him his chances in it. From what I recall, I thought it was a range that was offered, but it might have been a cap. I believe it was a cap of 12 years that was offered. I told him the likelihood of the success at trial and what he could get based on that range.

Q Do you recall why this case proceeded to trial instead of resulting in a plea?

A Like I said, from the get-go he was insistent that because the victim was in the roadway, and later he found out that the victim was drunk, he didn't believe he had done anything wrong, and he wanted the opportunity to prove that to the jury.

Q What was your general trial strategy?

A Strategy in the case, we had a situation where we knew it was his car that caused the collision. We knew he was the one that was driving. The strategy in the case -- his BAC came back .239, but he was standing up, yelling, moving around. By the statute, you know, it is materially and appreciably impaired. Strategy was that numbers shouldn't matter. So it was rather than just going off of the number, had to be able to show that he was, in fact, drunk.

We knew that they were going to be likely to prove a traffic violation because they had a speed from that ankle monitor. It clocked, I want to say, every 30 seconds his speed moving up to the gas station, along with a GPS. So we focused very heavily on them not being able to show he was intoxicated.

Additionally, because he was charged with two things, he was also charged with leaving the scene of the collision. I wanted to put in front of the jury that, yes, he left, but he returned almost immediately. The fact was that -- I want to say he was gone maybe three minutes. He went to the gas station about 200, 250 yards down the street, pulled into a gas station -- not a gas station, but

like a snow cone place or something. But he got out, checked the front of the car, and returned right back to that spot. So we wanted to put to the jury that this wasn't someone that just got in a wreck and went home. He turned around, came back, and tried to figure what happened.

Q You pursued *Jackson versus Denno*?

A Yes, we did.

Q Is there any particular reason why you didn't cite more case law like Mr. Washington alleges?

A Because *Jackson v. Denno* is a case and it lays out within that case the parameters for what is going to be allowed in and what is not going to be allowed in, so we crafted our argument within that case. So further case law did not appear necessary based upon standard legal arguments.

Q And based upon your experience that was the case --

A Yes. I can't say I have seen a trial done where people specifically started citing extra case law, particularly in a *Jackson v. Denno* hearing.

MS. MARTO: Nothing further, Your Honor.

THE COURT: Redirect (*sic*)?

CROSS EXAMINATION

BY MR. FOWLER:

Q You stated that there were several mitigating factors and defenses that you could have used; what were they?

A The ones we discussed as it related to what he was calling contributory negligence, the fact that the victim in this case did wind up having a .187 BAC, the fact that he ran across the street wearing dark clothing at night without using a crosswalk.

Additionally, the defense, as I laid out before for the leaving the scene, that he was only gone a couple minutes and only went a few hundred yards down the street.

Q Were each of these brought up at trial?

A They were.

Q Did you have any witnesses that helped promote these defenses or mitigating factors?

A That we specifically called? No. It was all information that I wanted to elicit from the State's witnesses, and they did get that information out, most of them, on direct.

Q Let's go through some of the questions that I -- you were in the audience when Mr. Washington was

on the stand?

A I was.

Q He mentioned that there was several dramatic photographs that were entered into the record by the prosecutor. Did you object to any of those?

A I was not the attorney who was directly related to the police officers. To the extent that I was involved in that, I did not object, no.

Q Let me be clear on this. What was the apparent divided roles between you and the other defense counsel, what happened?

A So we split up what we knew would be the State's witnesses, just assigned -- I will handle these ones, you handle these. Then the prep work was essentially done. I did mine, he did his, and then we compared our notes before trial.

Q Did you have anything to do with the photographs being entered or being objected to?

A No.

Q In his direct -- or in his testimony, he indicated Olivia Mallee, M-A-L-L-E-E, was present with the car crash victim; what is your understanding of who she is?

A I believe she was a friend of the victim who had been drinking at a bar with him that evening.

Q Did you ever subpoena her as a potential witness for Mr. Washington?

A No.

Q Why not?

A Again, once we discussed our trial strategy, knowing the fact that the victim's BAC and where he was in the street would come out, it did not appear that that would be necessary.

Q Do you think it could have been helpful?

A Again, all of that information got out, so whether it came from her or from another witness, the fact remained that that information got out in front of the jury.

Q What other witness got out the information that she could have gotten out?

A You are talking about the BAC, or the fact that he wasn't in a crosswalk?

Q Both.

A The coroner testified to the BAC being .187, and several different individuals -- off the top of my head, I don't recall -- but testified that he ran across the street rather than going to the crosswalk.

Additionally, the points of impact that was testified to indicated where he was in the street.

Q In his application, it stated that Ms. Olivia Mallee said he decided to go across traffic. Were you familiar with her giving a statement to police or law enforcement?

A It must have been in discovery, yes.

Q You mentioned that he did request a continuance of this trial; is that correct?

A If I recall correctly, and this was about three years ago, once the trial got close, once we were a couple weeks away, he wanted to see if I could push it back, but never gave a good reason for it.

Q What did he indicate was his reason for pushing back the trial?

A He said he was not ready.

Q Well, did he indicate why he wasn't ready?

A He did not.

Q Did you ask him?

A I asked him. I said, Is this a legal situation, are we needing to get more things? He just indicated to us that he wasn't -- I would assume -- mentally ready to go to trial at that point.

Q But you didn't ask was it a specific lack of discovery, lack of toxicology, lack of a witness?

You didn't inquire why he wanted a continuance, did you?

A No. Just asked why, and he said he wasn't ready.

Q You didn't ask the Court for a continuance, did you?

A We did not, no.

Q In terms of the Progressive Insurance information we earlier entered --

MR. FOWLER: May I approach?

THE COURT: You may.

Q (BY MR. FOWLER) We entered Exhibit 1, this documentation. On that letter, which is towards the back, and then on the last page, I believe, it shows that it was -- that the letters were directed to him at J. Reuben -- Mr. Washington at J. Reuben, and Mr. Washington at Broad River; is that correct?

A The one I'm seeing is J. Reuben, and then Pittman Street, it looks like.

Q Wait. Let me see here. Well, none of these are addressed to you, are they?

A No.

Q What was your interaction with Progressive Insurance?

A I had no interaction with Progressive.

Q Is that because of your role in the case, or you just decided not to talk to Progressive?

A My role in the case was to defend him criminally. I had no role in the civil side. He showed me the letter he received from Progressive, and we discussed that that type of defense is not applicable in criminal court.

Q But you indicated -- let's be clear. You are indicating that a contributory negligence type of thing is a civil remedy perhaps, and not a criminal remedy, right?

A Right.

Q But you are saying that there were mitigating factors, correct?

A Yes.

Q Did you ever get in touch with Michael Marshall, who signed this letter, in terms of what his thoughts were or why he thought that Mr. Washington was not a hundred percent guilty, or what have you?

A No, I did not.

Q Was that because of the duties in the case, or you and your co-chair did not pursue that?

A We did not pursue that.

Q Do you think that Mr. Marshall might have

been a helpful witness in some capacity?

A I don't believe so.

Q Why not?

A Once again, it was a Progressive Insurance adjuster's opinion on what occurred. He is simply reading someone else's report on top of someone else's report. We discussed our own trial strategy, and the fact that an insurance carrier decided there was contributory negligence did not enter our defense discussion.

Q Did you ask Mr. Marshall what reports he was reading?

A Once again, I did not talk to Mr. Marshall.

Q In terms of the discovery, what was the timeline for discovery? Did you -- when did you get all of the discovery? I mean, there was mentions of toxicology reports, speed. Did all of this come in before trial, or how -- what was the timeline on that, roughly?

A Let me consult my notes here quick.

We initially received discovery in December of 2016. That was the standard report, police items on that.

Later on, in February of 2017, we received the MAIT report, and then on March 14 of 2017, we

received autopsy and toxicology reports.

Q How was this presented to Mr. Washington?

A On May 21 of 2018, there is a note in our file that the client was mailed a full copy of his discovery out at the J. Reuben Long Detention Center.

Q Did you personally present it to him?

A No. It was mailed to him.

Q Did you go over it with him?

A Yes, I went out to the detention center, and it would have been approximately three weeks after that, to sit down and discuss everything he had seen from that packet.

Q In terms of the discovery, what about the collision report? Are you familiar with a document under that name or terminology?

A You are talking about a TR-310?

Q I guess what I'm saying is in Mr. Washington's application it says, "Petitioner will present -- the State failed to turn over material evidence such as the critical collision report that was critical to his defense. Trial counsel's failure to file a motion to compel discovery was prejudicial to him."

So are you familiar with anything that sounds

like a collision report?

A That would be the MAIT report. They are the major accident investigation team. They would have prepared that report.

I see on our notes that on November 9, 2018 a second copy was mailed to the defendant at his home of record.

MR. FOWLER: If I may have a moment?

THE COURT: Sure.

(A brief pause in the proceedings.)

Q (BY MR. FOWLER) Are you familiar with this?

A Yes. That is the Solicitor's cover page for whenever they send discovery.

Q You see the following two pages, correct?

A I do.

Q There are things missing in that; is that correct?

A Yes.

Q What are some of those things?

A The Miranda form, statements of victim, toxicology, autopsy, SLED report, DNA, serology, ballistics, court orders, trace evidence, and other autopsy.

Q So those are things missing?

A Correct.

Q Do you know if all of those things were eventually ever given to him?

A Yes. So most of this toxicology/autopsy, that all came with the supplemental discovery that came in -- I believe it was in March of the following year.

MR. FOWLER: May I have a moment?

(A brief pause in the proceedings.)

MR. FOWLER: After speaking with my client, no other questions.

REDIRECT EXAMINATION

BY MS. MARTO:

Q Did you make any attempts to contact Olivia Mallee?

A No.

Q Do you recall if the State called her in their case in chief?

A If I may check?

I didn't -- she was called fourth by the State. Direct by Cara Walker and cross by Clay Pinkerton.

MS. MARTO: Nothing further, Your Honor.

EXAMINATION

BY THE COURT:

Q Did you go over the issue with Miranda with

him?

A Yes, we would have discussed that. And, actually, I believe there was a motion in limine before the trial happened where we sought to suppress the blood draw based on Miranda being off camera and a time issue, because the blood draw, I want to say, occurred three hours and 20 minutes after the initial arrest. I believe that was the case. The judge allowed it in anyway.

Q But you did address it with him?

A Yes, ma'am.

Q On Miranda, okay.

THE COURT: Anything else?

MS. MARTO: Nothing.

MR. FOWLER: I have a follow-up.

THE COURT: Sure.

RECROSS EXAMINATION

BY MR. FOWLER:

Q Your Honor mentioned Miranda, and you were here when Mr. Washington gave his testimony. He indicated that he was off camera at the time of Miranda; is that correct?

A I believe he was in the back of a vehicle, yes.

Q So isn't that some sort of statutory

violation of his Miranda rights that needed to be actually on camera as opposed in the back of a car?

A Yes. And I believe that was the basis of the motion in limine that we made, the fact that he was read them, but not on the actual video. I want to say it is 56-5-2950 or 45 that addresses it for purposes of a felony DUI.

MR. FOWLER: No further questions.

THE COURT: Okay.

MS. MARTO: Nothing further.

We call Clay Pinkerton to the stand.

(CLAY PINKERTON, having been duly sworn, testified as follows:)

THE WITNESS: My name is Clay Pinkerton, P-I-N-K-E-R-T-O-N.

DIRECT EXAMINATION

BY MS. MARTO:

Q Good afternoon. When did you become involved in this case?

A Two, maybe three months tops before the trial occurred.

Q You were second chair?

A I was, yes.

Q Did you discuss the discovery with Mr. Washington?

A I believe twice in jail, along with Mr. Stanko. But I came on very, very late in the trial process.

Q Do you recall seeing toxicology reports?

A I do.

Q To the best of your knowledge, was there any discovery not shared with the defense?

A To my knowledge, we had everything that the State was in possession of.

Q Did you share all the discovery you had with Mr. Washington?

A I'm sure it was. I believe he would have had everything by the time I came onto the case.

Q So at trial you handled the examinations of the police officers?

A Several of them, yes.

Q Do you recall pictures of him, the victim, coming in at trial?

A I do.

Q Do you think the admission of them was inadmissible?

A I do not.

Q Do you think if you would have objected that that would have been sustained?

MR. FOWLER: Objection; speculation.

THE COURT: It is speculation. Rephrase.

Q (BY MS. MARTO) Do you think that the admission of those pictures changed or altered the trial or strength of the defense's case?

A I do not.

Q Do you think a continuance would have made a difference?

A None, whatsoever.

Q Do you think contributory negligence was an appropriate defense at trial?

A Not in a criminal case.

Q Do you think that it would have made the defense's case stronger?

A I do not.

Q Did you handle the *Jackson v. Denno*?

A No. That was James Stanko. I don't recall if I handled any of the pretrial motions or not.

Q Do you recall what the general trial strategy was?

A It was to try to prove that he was not appreciably impaired at the time that the accident was caused, basically.

Q Was it ever a consideration of you to call Michael Marshall from Progressive Insurance?

A No. I was not even aware that there was

anything with Progressive Insurance involved.

MS. MARTO: Nothing further, Your Honor.

CROSS EXAMINATION

BY MR. FOWLER:

Q You stated you came onboard a couple months before trial?

A Yes, sir.

Q So why were you brought on at that late point?

A I was just brought on as a second chair. I had been at the Public Defender's Office for about a year, but the case was pending before I was in the office.

Q Explain to me what "second chair" means. I mean, did you have certain responsibilities totally related to that, or were you kind of like an assistant to the primary attorney? What were your defined roles in representing Mr. Washington.

A To review all of the evidence in the case, to see if there was anything that Mr. Stanko had missed. We divided up who we thought the witnesses the State would call would be. We said I'll take certain witnesses, you take certain witnesses, so we could primarily focus on each of them.

Q What witnesses were you responsible for; do

you remember?

A I believe I had Olivia Mallee, Officer Guyett, and Officer Susi (phonetic).

Q In the application -- Mr. Washington's application, it says that there was key testimony and evidence of witness Olivia Mallee. Were you in the courtroom when he testified earlier?

A I was, yes.

Q So what was special about Olivia Mallee's testimony?

A She was out drinking with the victim prior to this accident happening, and she was there when it happened.

Q Do you feel like she would have been a good testimonial witness for your side?

A Absolutely not.

Q Why not?

A She saw everything happen. She saw -- she stated she didn't actually see the accident happen, but she heard the accident happen, I believe. However, I don't believe her testimony would have made any difference as far as us arguing contributory negligence. If I recall correctly, I did ask her about the time of the day, the fact that they were drinking, he didn't use a crosswalk,

and the fact that there was a crosswalk close, and that he just bolted across the street.

Q In your opinion, what are the mitigating factors and defenses that could have been called in this case that you feel is relevant?

A The fact that he did come back and the fact that he -- mainly, the fact -- we were trying to get out that he was not appreciably impaired, but that was about the only mitigating factor.

MR. FOWLER: If I can have a moment?

THE COURT: Sure.

(A brief pause in the proceedings.)

Q (BY MR. FOWLER) A pedestrian should use a crosswalk, correct?

A In a perfect world, yes.

Q And in not using a crosswalk, there were, perhaps, statutory violations that the pedestrian performed, correct?

A Possibly.

Q Did you look into that?

A I did not.

Q Why not?

A Well, I did question her about that on the stand; however, contributory negligence is not a defense to a felony DUI.

Q Right, but it was stated earlier that there was mitigating factors and defenses, correct?

A I believe so.

Q Is there any way to draw that common pleas non-contributory defense -- is there any way to take what Progressive Insurance saw in their reports and use it to your advantage in Mr. Washington's criminal case?

A Are you talking about jury nullification?

Q Something like that, yes.

A When I questioned Ms. Mallee about him crossing the street in the middle of the night and not using a crosswalk, that is what I was doing, but I couldn't use the words "jury nullification" in front of the jury.

Q Why not?

A As far as I know, you can't use the words "jury nullification" in front of a jury.

(A brief pause in the proceedings.)

MR. FOWLER: Your Honor, after speaking with my client, no further questions.

MS. MARTO: Nothing further.

EXAMINATION

BY THE COURT:

Q I'm looking through this, and evidently there

was like a failure to produce a videotape because either it wasn't working or the officer didn't have one, or there was something going on; am I correct?

A In relation to which officer? Because there were several officers on the scene.

Q Looks like -- I'm handing him the transcript that shows the affidavit. I know you have to produce an affidavit if you don't have a video, it is one of the exceptions to the rule. So I'm just curious --

A Can you repeat the question, Your Honor? I apologize.

Q Was that of Mr. Washington?

A I believe it was, yes.

Q So I can safely assume that the videotape wasn't working that night, and that is why they supplied the affidavit?

A As far as Miranda is concerned, that is my knowledge.

Q Which is an exception to the statute?

A Yes, Your Honor.

Q Instead of saying that you must show Miranda, this case -- they might have added "recorded" or something, but it wasn't videotaped because there wasn't a video machine going?

A Yes, Your Honor.

Q And there was an affidavit, which makes it perfectly legal?

A Yes, Your Honor.

Q I had another question, too. The photographs, because I'm going to tell you, the photographs are probably the first thing that popped out at me. I see that happen all the time. I went through to see how many photographs were introduced. Do you remember these photographs? There was a good many number. Were these road signs? I mean, I've seen lawyers do all sorts of weird stuff as far as photos. I'll look at six photos of tree lines in a street at all hours of the night, and maybe only look at one or two of the victim for certain reasons. I know that you all have to prove the elements of the case, so do you remember?

A I don't remember how many photographs there were, but I believe the photos in question was pictures of the victim at the scene after the accident, at least the ones I didn't object to, Your Honor.

Q Were they turned black and white?

A I don't remember.

Q And you can't tell me how many of the photos there were?

A Not off the top of my head, Your Honor.

Q I'm curious, why was that not brought up in his appeal? Anyone know?

A I do not. I was not involved in the appeal, I believe that was Mr. Stanko.

Q That is usually something that comes up in an appeal.

MS. MARTO: This is speculation, of course, but I think that since it was not objected to, it was not preserved.

THE COURT: Got it. Got it. Okay.

Q (BY THE COURT) But as far as the autopsy, any records from his ankle bracelet to show he was speeding or anything else -- he saw all of that before trial?

A He had, Your Honor.

THE COURT: All right. I think that's all I have.

Anything else from the lawyers? Did I open a hornets nest for you?

MR. FOWLER: Can I ask a question?

THE COURT: Sure.

RECROSS EXAMINATION

BY MR. FOWLER:

Q In terms of the affidavit, it basically doesn't point to the video machine not working, it says that Mr. Washington was taken to the hospital. It wasn't about the quality of the video or lack of video, it was about him being displaced, going to the hospital; is that correct?

A May I check the notes, sir?

THE COURT: Seems like there is another box saying exigent circumstances and something else.

A I believe it said the defendant needed emergency medical treatment and other valid reasons for failing to produce the videotape. The defendant was taken directly to the hospital for a blood draw and medical attention.

Q (BY MR. FOWLER) So that affidavit, once again, does not go to the quality of the video, lack of the video? It talks about circumstances out of control, such as being taken to the hospital; is that correct?

A I believe so.

Q And with that being said, would the affidavit not addressing the quality, the lack of the video, et cetera, then that would prove beneficial for my

client, correct?

A I do not know.

THE COURT: It still falls under the exception.

MR. FOWLER: Thank you, Your Honor.

May I have a moment?

THE COURT: Sure.

(A brief pause in the proceedings.)

MR. FOWLER: After speaking with my client, no further questions.

MS. MARTO: No more questions for this witness.

THE COURT: Does anyone have the photos? I want to look at the photos.

MS. MARTO: We typically don't get exhibits from the trial, Your Honor. I don't know if....

MR. FOWLER: May I speak with opposing counsel?

THE COURT: Sure.

Let me see counsel for a second.

(A bench conference was had.)

THE COURT: Mr. Washington, for my peace of mind, I want to see the photos that you are talking about that were introduced in your trial.

MR. WASHINGTON: Yes, ma'am.

THE COURT: I will walk down there tomorrow and go look at these photos.

Is there any more testimony that needs to be put on in this case?

MR. FOWLER: May I speak with opposing counsel?

THE COURT: Sure.

MS. MARTO: Your Honor, I'll call Josh Holford to the stand.

THE COURT: This is what I'm going to do, just to let you all know. I would like to finish out the testimony in this case. Tomorrow I will go down and walk to the clerk's office and go look at these photos. I'm going to look at it, and then I'm going to take it under advisement.

MR. FOWLER: May I ask for brief -- who she's calling to the stand in this matter?

MS. MARTO: We're calling the prosecutor in this case, since they are raising prosecutorial misconduct claims.

MR. FOWLER: Was he serving as prosecutor at the time?

MS. MARTO: Yes.

MR. FOWLER: We object to this -- well, may I have a moment with my client?

(A brief pause in the proceedings.)

MR. FOWLER: I've spoken with my client, and my understanding is that the causal relief is based on Strickland against his defense attorneys and their standard of performance in this case.

THE COURT: That's right.

MR. FOWLER: So I don't see where the prosecutor comes in, unless he has some kind of unique knowledge about how my client related to his attorney. So I object to the prosecutor being called as a witness because the application, supplemental application, the Progressive Insurance all goes to the attorney/client relationship between my client, Mr. Stanko and the second chair, and not anything necessarily pointing a finger of guilt towards the prosecution.

Now, if the prosecution didn't provide something, it was up to my client's attorneys --

THE COURT: There was allegations from Mr. Washington that they didn't provide stuff. I want to hear from him. I'm going to allow it.

(JOSHUA HOLFORD, having been duly sworn, testified as follows:)

THE WITNESS: Joshua Holford, H-O-L-F-O-R-D, Senior Assistant Solicitor with the 15th Circuit.

DIRECT EXAMINATION

BY MS. MARTO:

Q You were the primary prosecutor in this case?

A I was.

Q Do you recall receiving the discovery and handing it to the defense?

A I do.

Q Do you recall whether or not you handed everything in your possession over?

A I do. Specifically, as it relates to the allegations, a MAIT report, paper product, 115 pages, DVD with MAIT photos, videos, storage and body camera, audio and video of probation and parole GPS tracking report, it was turned over and received by the Public Defender's Office -- turned over by our office by Martin Spratlin, who had the case briefly before me, on February 15, 2017. Received by their office on February 20, 2017.

I specifically sent the autopsy results that had been addressed on March 10, 2017. That was received by their office March 14, 2017.

It's been stated whether Mr. Washington had said that he did not receive these, but he wrote me a letter in May of 2019, directly to me, as he did often in this case. He was very prolific. He

wanted to write letters a lot about what was going on.

He said, "This letter is in regards to the three documents in my motion of discovery. The documents are as follows: The victim's --

MR. FOWLER: Objection, Your Honor. He's reading from a document I have not seen. Can I take a look at it before he reads it into evidence?

THE COURT: Sure. Share it with him.

A It's a document where his client admitted he received the things that he's told the Court today that he did not.

MR. FOWLER: Can I look at it?

THE COURT: I'll let you look at it.

MR. FOWLER: May we approach for a moment?

THE COURT: Sure.

(Whereupon, a bench conference was had.)

THE COURT: He would like a copy of his letter. Could he have a copy?

THE WITNESS: He wrote it to me. He can have a copy of his letter.

THE COURT: Do we have any more?

THE WITNESS: Letters? Oh, I have plenty of letters from him.

THE COURT: Thought we might make the copy

now.

MR. FOWLER: Thank you.

THE COURT: Go ahead. Sorry.

A Your Honor, as to the specific allegations in this case, which Mr. Washington stated to the Court that he was not in receipt of the victim's autopsy report, victim's toxicology report, or GPS monitoring and coordinates and speeds, in this letter, May of 2019, he wrote to me stating that he received from the Public Defender's Office on February 20, 2017. The documents were not in that motion of discovery, but he didn't receive them until March 14 of 2018, and that he received the GPS coordinates and speeds on November 15, 2018.

He states that the autopsy and toxicology reports were requested by James Stanko, his attorney, on March 10, 2017. Received by the Public Defender's Office on March 14, 2017. Those were also not in his motion of discovery, but he didn't receive it until March 14, 2017.

He says he received the autopsy and toxicology reports on August 6, 2018.

So in his own letter in 2019, which was before the trial that he went to, he admitted that in 2018, the prior year, he had received the items

that he has told the Court today that he was not in possession of, that his attorney had not given to him prior to going to trial.

This was also before he rejected the plea offer and chose to go to trial.

Q (BY MS. MARTO) Do you recall reviewing photographs in this case?

A I did.

Q Do you recall photographs of the victim?

A I do.

Q Do you recall, roughly, how many photographs there were?

A I don't remember in total. There were a number of photographs of the scene, of the victim, close-ups, yes.

Q Do you recall if they were entered in black or white or color?

A In color.

Q There was no objection, correct?

A I can't remember if there was an objection to certain ones. Typically what will happen is I'll have a whole list of photographs that are printed. There may be hundreds. Then that list is pared-down and edited to the ones I would purport to enter into evidence. I would show those to

defense counsel beforehand and see if we have any objection to these photographs, and sometimes we take them up with a judge beforehand or not.

At times, the defense will say, No, not these, and I might edit them or only submit the ones without the objection. We try to make it run smoothly.

They were not autopsy pictures. They were pictures of the victim as he was left by the defendant on the scene. It also showed some of the items that were left around the victim. It also showed the victim being thrown out of his shoes, which was corroborated by testimony. It showed the damage to the vehicle with the strike.

In this case, the speed was an important part because he also has to not only have a blood tox above .2, but he has to break some traffic law. Felony DUI is difficult in the fact that it is not enough to be grossly intoxicated and kill someone, which he did in this case, but he had to also violate a traffic law in doing so, and so we were arguing over the speed.

The pictures corroborated the speed, as well as some of the argument about the GPS coordinates, because he was wearing an ankle monitor at the

time, and his own statements.

Q Did you think that the pictures were overly inflammatory?

A No. They are certainly prejudicial. There is no question that pictures of a victim is prejudicial, but they were -- the prejudicial nature did not substantially outweigh the probative value.

The probative value is this is how the victim was at the time. You could see, based on the manner in which he hit the vehicle where the strike occurred. It is one thing to tell a jury he was hit on the side, it is another thing for them to see that what the witness is actually telling them is the truth and see with their own eyes the impact of the vehicle, and the impact it had on the body, the distance that it was thrown.

In the MAIT report -- actually, in this case, my own MAIT officer was not able to definitely say that the defendant was speeding. So that was an issue that the defense had raised, and they were able to point to. They said, Your own guy on MAIT can't say that the moment before the strike he was going over the 40-mile-an-hour speed limit.

So those pictures helped corroborate the

defendant's own statement that he was speeding earlier, back and forth, but also that the actual events that took place, as well as the video from Circle K.

Q Do you think they were primarily cumulative to other evidence presented?

MR. FOWLER: Objection; speculation.

THE COURT: I'll let him answer it.

A I wouldn't say they are primarily cumulative, no. There were -- in each one of the photographs, there was something -- and I would have to look at them again, honestly. I remember one of them had like an ID badge or some scissors, and it was the way it was positioned that that was the reason it was important --

MR. FOWLER: Your Honor, I would like to object to the testimony. He is going on and on about the photos. The photos, apparently, are in the clerk's office file downstairs. I would ask that his testimony be stricken about the photos until this Court -- or we can all go down there and look at the photos, or have them presented to the Court, because he's talking about scissors, and angles --

THE COURT: He's talking about why he let the

photos in and why he picked them, and I want to know, because I'm going to look at them. I want to know.

MR. FOWLER: Thank you, Your Honor.

THE COURT: The question was: Were they cumulative, which is a standard for photos. I know they are prejudicial; he's exactly right. The question is he needs to make his case and, again, I will tell you, all I've looked -- and I don't know this case, I haven't seen it, but I see that there is like 30 photos. That is why I was asking is it all the MAIT photos, skid marks, or whatever? I get to usually see them. Or is it of this victim? If anyone would know, he's the prosecutor in this case.

Go ahead.

Q (BY MS. MARTO) So, basically, your testimony today is that they were relatively crucial in establishing the State's case?

A I thought they were a crucial part of establishing the State's case. Could the jury have found him guilty without them? Possibly. But you never know with a jury. I wanted to prove beyond a reasonable doubt that Mr. Washington was guilty of what we had accused him of, and that is what the

jury found.

Q How long have you been prosecuting for?

A Since 2012. I did a year of defense, defense attorney from November of 2013 to January of 2015, and been back with the Solicitor's Office since January of 2015 until today.

Q How many, roughly, trials have you handled?

A Over 30.

Q Have you seen similar pictures entered in other trials?

A Yeah. Absolutely. We often fight over autopsy photos.

Q Again, none of these pictures were autopsy photos?

A That's correct.

MS. MARTO: Nothing further, Your Honor.

THE COURT: Anything?

CROSS EXAMINATION

BY MR. FOWLER:

Q Mr. Washington filed a disciplinary counsel against you; is that correct?

A He did.

Q And then he followed it up -- there seems to be several with various information; is that correct?

A I know I had to respond to at least one.

Q I think he provided information to the supreme court on October 12, 2018; is that correct?

A I would have to see the exact date.

Q In this, he indicates that you didn't provide him the autopsy report, toxicology report, or pictures of the car used in the crime; is that correct?

A That was his allegations, which were unfounded.

Q But you did not provide that to his attorney until after this letter was sent to the supreme court; is that correct?

A That's incorrect. They were provided in 2017.

MR. FOWLER: If I could have a moment, Your Honor?

(A brief pause in the proceedings.)

MR. FOWLER: I've spoken to my client, and I have no further questions.

MS. MARTO: Nothing further, Your Honor.

THE COURT: Can I excuse the Solicitor?

MR. FOWLER: Can I have a moment? May we approach?

THE COURT: Sure.

(Whereupon, a bench conference was had.)

THE COURT: Let's take a 10-minute break, and she'll bring the photos up. I'll keep you under oath. Don't talk to anyone about this case, just in case I have a question about the photos.

Mr. Pinkerton, you might have to answer something for me, too. So you stay, too.

(A recess was taken.)

THE COURT: Do you want to look at these pictures? These are the ones that I've seen and what I'll base my decision on.

The rest of these are -- I wrote down the exhibit numbers. I want to check the record to see if they were objected to. You don't remember?

THE WITNESS: Your Honor, I don't remember which pictures were -- one, we often mark a number of exhibits beforehand, so I don't know which ones were offered, objected to, or entered.

There is no question those were at least marked, but I don't know which ones were actually entered.

MR. FOWLER: The transcript on Pages 7 through 11 shows, "Photo, photo, photo." It is more than just four.

THE COURT: I know, but the ones I think

cause me concern as to whether someone should have objected to it.

MS. MARTO: I did skim through my notes and didn't see any objections.

THE COURT: I mean, there are seven of them. I know what he's showing. I wanted to see.

All right. So be it. Thank you for bringing them.

THE CLERK: You're welcome.

THE COURT: I'm done. Now can I let the Solicitor go?

MS. MARTO: Yes, Your Honor.

THE COURT: Thank you. Sorry we kept you so long.

MR. HOLFORD: That's all right. I work downstairs.

MS. MARTO: Nothing further, Your Honor.

THE COURT: All right. I'm going to take it under advisement, and I'll ask that both sides to send me a proposed order.

MR. FOWLER: Your Honor, may I bring something to the Court's attention?

THE COURT: Sure.

MR. FOWLER: In reviewing the transcript with my client, on Page 158, apparently there is --

Mr. Pinkerton said, "No objection, Your Honor."

Page 158 indicates that there was no objection to the photos as presented, Your Honor.

THE COURT: I'll go through it tonight. I just wanted to see. Those were Photos 22 and 28, and none of those are the ones that I have.

MR. FOWLER: What were the numbers again, Your Honor?

LAW CLERK: 8 Through 13 and 17.

THE COURT: Let me remind you, again, they have to prove their case. They have to introduce, you know, as horrible as some photos are, the State has the burden of proving that something happened to this person and what happened to him. So I will tell you most of those photos are right in line with what he told me. You know, I know that lawyers -- I watch them all day long. They get together and they know what is going to come in and what is not going to come in, most of the time, especially when you talk about a case like this. You try to either work with each other and consent and let those photos in.

The question is: When is it too much? I'm certainly not sitting up here as an appellant court, I'm just sitting here thinking did the

lawyer have a duty to object to those photos?

I'm also considering what the State has to prove. So if you all can send me your proposed orders by January the 27th, I'll have something filed for you all.

MR. FOWLER: Proposed orders by January 27th?

THE COURT: Yes, January 27th. And I'll tell you something, to give you fair warning -- talk to Lilly, Lilly knows -- I'm a stickler for time. I have other stuff, too. I know you do, too. So I'm giving you as long as I can give you. If you run into a problem, please, pick up the phone and call me. I certainly don't mind continuances. I don't. It's just when I don't hear from anyone and I can't find them, that makes life a little difficult.

All right. Anything else?

MS. MARTO: Nothing further, Your Honor.

MR. FOWLER: Nothing further thank you.

(Whereupon, the proceedings concluded.)

(Applicant's Exhibits 1 and 2 admitted.)

CERTIFICATE OF REPORTER

State of South Carolina)
County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 3rd day of January, 2023.

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

June 8, 2023.

Natalie Dahl, RPR

Natalie Dahl, RPR
Court Reporter

PROGRESSIVE®

2024 Corporate Centre Dr, Ste 201

Myrtle Beach , SC 29577-7410

December 04, 2017

Edward Washington
401 Pittman St
Conway, SC 29526

Policyholder:	Greene, Talib
Our Claim #:	174111964
Date Of Loss:	10/29/2016
Underwritten By:	Progressive Northern Insurance

Dear Mr. Washington

Please be advised that the lawsuit filed against you by Mary Bielawa as personal representative of the estate of Ryan Bielawa has been settled.
For your records I have attached a copy of the dismissal from the Court.

Thank you for your cooperation in regard to this matter. If you have any questions, please do not hesitate to call.

Sincerely,

Michael Marshall
Tel: 843-213-3956
Claims Representative

MRM/mm



copy

JOE&MARTIN
INJURY ATTORNEYS

Joe Sandefur
Joe@joeandmartin.com

Martin Stark
Martin@joeandmartin.com
Certified Civil Court Mediator

Rec'd by Myrtle Beach SC Office

November 01, 2017

Progressive Insurance Company

Michael Marshall
Progressive Northern Insurance
2024 Corporate Centre Drive; Suite 201
Myrtle Beach, SC 29577

Re: Mary Ellen Bielawa, as Personal Representative of the Estate of Ryan Edward Bielawa (deceased)
Your Insured: Edward Lee Washington
Claim No: 034951871-0003
DOA: October 29, 2016

Dear

Enclosed please find the fully executed Release with regard to the above-referenced case. It was a pleasure working with you and I look forward to doing so again in the near future.

As soon as the Judge has signed and filed the Order Approving Settlement, I will forward a copy for your file.

With kindest regards, I am

Parsons, Ouverson, Stark,
Guest, & Sandefur, P.A.
Sincerely,

Joseph S. Sandefur, Esquire

JSS/rlb
Enclosures

644

Mr. Washington,

Here is a copy of the Lawsuit you Requested. I Also included the Police Report

Thanks,
Mike Marshall
843 213-3956

NEW

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2016-CP - 26- 7574

PO Box 2850
Murrells Inlet, SC 29576

SC Bar #: 75310
Telephone #: 843-[redacted]
Fax #: 843-357-9991
Other:
E-mail: joe@joeandmartin.com

FILED
2016 NOV 29 P 12:52
CLERK OF COURT

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts	Torts - Professional Malpractice	Torts – Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20____-CP-____-_____	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☒ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)

Inmate Petitions	Administrative Law/Relief	Judgments/Settlements	Appeals
☐ PCR (500)	☐ Reinstate Drv. License (800)	☐ Death Settlement (700)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Judicial Review (810)	☐ Foreign Judgment (710)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Relief (820)	☐ Magistrate's Judgment (720)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Permanent Injunction (830)	☐ Minor Settlement (730)	☐ Municipal (930)
	☐ Forfeiture-Petition (840)	☐ Transcript Judgment (740)	☐ Probate Court (940)
	☐ Forfeiture—Consent Order (850)	☐ Lis Pendens (750)	☐ SCDOT (950)
	☐ Other (899)	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Worker's Comp (960)
			☐ Zoning Board (970)
			☐ Public Service Comm. (990)
		☐ Confession of Judgment (770)	☐ Employment Security Comm (991)
		☐ Petition for Workers Compensation Settlement Approval (780)	☐ Other (999)
		☐ Other (799)	

Special/Complex /Other	
☐ Environmental (600)	☐ Pharmaceuticals (630)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)
☐ Medical (620)	☐ Out-of-State Depositions (650)
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)
	☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** November 28, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO:2016-CP-26-7574
Mary Bielawa as Personal Representative of the Estate of Ryan Bielawa, Plaintiff, vs. Edward Washington, Defendant.	SUMMONS

FILED
2016 NOV 29 AM 11:59
MICHELLE HUGGINS-WARD
CLERK OF COURT

TO: THE ABOVE NAMED DEFENDANT EDWARD WASHINGTON:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, which is herewith served upon you, or to otherwise appear and defend, and to serve a copy of your Answer to said Complaint upon the subscribers at their office, 11915 Plaza Drive, P.O. Box 2850, Murrells Inlet, South Carolina 29576, or to otherwise appear and defend the action pursuant to applicable court rules, within thirty (30) days after service hereof, exclusive of the day of such service; except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of such service; and if you fail to answer the Complaint or otherwise appear and defend within the time aforesaid, the Plaintiff in this action will apply to the Court for relief demanded therein and judgment by default will be rendered against you for the relief demanded in the Complaint.

TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDE(S), AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Plaintiff.

YOU WILL ALSO TAKE NOTICE that pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, as amended effective September 1, 2002, the Plaintiff will move for a general Order of Reference to the Master in Equity for County, which Order shall, pursuant to

STATE OF SOUTH CAROLINA **COUNTY OF HORRY** Mary Bielawa as Personal Representative of the Estate of Ryan Bielawa, Plaintiff, vs. Edward Washington, Defendant.	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT** **CASE NO:2016-CP-26-** 7574 **COMPLAINT** (Wrongful Death, Negligence, Survival Action) JURY TRIAL DEMANDED

FILED
2016 NOV 29 AM 11:53
CLERK OF COURT

NOW COMES Plaintiff, above-named, complaining of Defendant above named, and does allege and show unto this Honorable Court as follows:

1. Plaintiff is a citizen and resident of the State of New York, and is the duly qualified and appointed Personal Representative of the Estate of Ryan Bielawa, deceased, and is bringing this action pursuant to the Wrongful Death Statute of the State of South Carolina, S.C. Code § 15-51-10 et seq. (1976, as amended) for the benefit of the statutory beneficiaries of the deceased and pursuant to the survival statute S.C. Code § 15-51-90 for the benefit of the Estate of Ryan Bielawa hereinafter known as "Decedent."

2. Defendant, Edward Washington (hereinafter "Washington") upon information and belief, is a citizen and resident of the County of Horry, State of South Carolina.

3. This Honorable Court has jurisdiction over the parties and the subject matter herein set forth.

FACTS

4. On or about October 29, 2016 at approximately 12:40 a.m., Washington was operating an automobile on Highway 544 in Horry County, South Carolina.

5. At the above-mentioned time, the Decedent was a pedestrian and was crossing Highway 544 in an area between Coastal Carolina University and the Monarch Apartments.

6. Washington, who was speeding and driving in a reckless and dangerous manner, struck the Decedent with the front of his car throwing him over the hood and onto the road

7. As a result of the accident, Decedent sustained severe head trauma and injuries to his body and was pronounced dead at the scene by first responders.

FIRST CAUSE OF ACTION
(Negligence)

8. The allegations contained in Paragraphs 1 through 7 are incorporated herein by reference as fully as if set forth herein verbatim.

9. Washington owed a duty to Decedent to operate the automobile in a reasonable and safe manner so as not to cause injury to him.

10. Washington was negligent, grossly negligent, wanton, reckless, and breached his duty to the Decedent by his acts and omissions in the following particulars:

a. In operating his vehicle in a dangerous and/or unsafe condition;

b. In failing to maintain a proper lookout;

c. In failing to keep his vehicle under proper control;

d. In driving too fast for conditions;

e. In driving in excess of the posted speed limit;

f. In failing to apply or timely apply the brakes on the vehicle he was driving;

g. In failing to yield the right-of-way;

h. In operating his vehicle in a reckless manner; and

i. In failing to use the degree of care and caution that a reasonable, prudent person would have used under the circumstances then and there existing.

All of which were the direct and proximate cause of the damages and injuries suffered by Plaintiff/Decedent herein, said acts being in violation of the statutory and common law of the State of South Carolina.

11. As a direct and proximate result of the aforesaid negligent, grossly negligent, careless, and reckless acts and omissions of Washington, Decedent suffered from severe debilitating injuries which resulted in his death on October 29, 2016.

12. As a result, Decedent's statutory beneficiaries have lost the aid, comfort, support, society, and companionship of Decedent and have suffered severe and extreme emotional distress, anxiety, grief, and sorrow, for which Plaintiff is entitled to recover on behalf of statutory beneficiaries actual and punitive damages in an amount to be determined by a jury at the trial of this action.

SECOND CAUSE OF ACTION
(Survival Action)

13. The allegations contained in Paragraphs 1 through 12 are incorporated herein by reference as fully as if set forth herein verbatim.

14. Plaintiff, as Personal Representative of the Estate of Ryan Bielawa, is bringing this action for the benefit of the Estate in accordance with the statutes in such cases made and provided and pursuant to the South Carolina Survival Statute, S.C. Code § 15-51-90 for the benefit of the Estate of Ryan Bielawa.

15. That by reason and in consequence of the aforementioned negligence, gross negligence, carelessness and recklessness of Washington and as a direct and proximate result thereof, Plaintiff's Decedent suffered internal and external physical and mental injuries causing extreme shock, pain, emotional distress and mental anguish, and his subsequent death, and as a

result thereof funeral expenses were also incurred, all to the damage of Plaintiff as Personal Representative for the benefit of the Estate of Ryan Bielawa.

16. Therefore, Plaintiff as Personal Representative for the Estate of Ryan Bielawa is informed and believes that she is entitled to a judgment against Defendant for actual and punitive damages in an amount to be determined by a trier of fact.

WHEREFORE, Plaintiff prays to this Honorable Court that she may recover judgment against Defendant as follows:

a. For actual and punitive damages in an amount to be determined by the trier of fact; and

b. For such other and further relief as this Honorable Court may deem just and proper.

PARSONS, OUVERSON, STARK,
GUEST, & SANDEFUR, PA

Joseph S. Sandefur – SC Bar # 75310
Martin L. Stark, Esquire – SC Bar #09639
11915 Plaza Drive
P.O. Box 2850
Murrells Inlet, SC 29576
Phone:(843) 357-8888
Fax: (843) 357-9991

And

LAW OFFICE OF MICHAEL J. O'SULLIVAN, LLC

Michael J. O'Sullivan – SC Bar # 73768
P.O. Box 1785
Conway, SC 29528
Phone: (843) 957-9279

ATTORNEYS FOR PLAINTIFF

November 10, 2016
Murrells Inlet, South Carolina

ELECTRONICALLY FILED - 2017 Nov 16 11:36 AM - HORRY - COMMON PLEAS - CASE#2016CP2607574

STATE OF SOUTH CAROLINA COUNTY OF HORRY Mary Bielawa as Personal Representative of the Estate of Ryan Bielawa, Plaintiff, vs. Edward Washington, Defendant.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO:2016-CP-26-7574 STIPULATION OF DISMISSAL WITH PREJUDICE

PLEASE TAKE NOTICE that the parties have this 1st day of November, 2017 reached a settlement in this case; and further take notice that the parties hereby stipulate and agree this action is hereby dismissed with prejudice from the above-captioned matter pursuant to Rule 41(a)(1)(B) of the *South Carolina Rules of Civil Procedure* and the matter is forever ended.

Parsons, Ouverson, Stark, Guest & Sandefur, PA

/s Joseph S. Sandefur
Joseph S. Sandefur– SC Bar # 75310
11915 Plaza Drive
P.O. Box 2850
Murrells Inlet, SC 29576
(843) 357-8888 Fax: (843) 357-9991
Email: joe@joeandmartin.com
ATTORNEYS FOR PLAINTIFF

November 16, 2017
Murrells Inlet, South Carolina

STATE OF SOUTH CAROLINA)
) COVENANT NOT TO EXECUTE
COUNTY OF HORRY)

This COVENANT made this 1 day of November, 2017, by and between Mary Bielawa, as Personal Representative of the Estate of Ryan Bielawa, hereinafter referred to as "Covenantor" and PROGRESSIVE DIRECT INSURANCE COMPANY, Edward Washington, and Talib Greene, hereinafter referred to as "Covenantees."

WHEREAS, on October 29, 2016 in Horry County, South Carolina, Ryan Bielawa was allegedly injured in a pedestrian/automobile accident with Edward Washington, resulting in his death on October 29, 2016; and

WHEREAS, the automobile being driven by Edward Washington was owned by Talib Greene and insured by PROGRESSIVE DIRECT INSURANCE COMPANY; and

WHEREAS, the automobile being driven by Edward Washington had only $25,000.00 per person and $50,000.00 per accident bodily injury liability coverage with the Covenantee, PROGRESSIVE DIRECT INSURANCE COMPANY, under Claim No.: 17-4111964; and
Bodily injury liability coverage helps pay for medical bills

WHEREAS, there may be additional liability coverage that applies hereto; and

WHEREAS, any execution of any judgment received as a result of the injuries claimed herein, will be satisfied from any additional or excess liability coverage or underinsured motorist coverage and not from the personal assets of Edward Washington and Talib Greene; and

WHEREAS, Covenantor agrees that her sole recovery additional hereto is limited to recovery under any additional liability or underinsured motorist policy and not from execution, except to the extent of any applicable liability and/or underinsured motorist coverage, against the personal assets of Edward Washington and Talib Greene; and

WHEREAS, this Covenant does not prohibit Covenantor from pursuing and collecting other liability coverage, whether denominated as excess or primary, or other underinsured motorist coverages.

WHEREAS, pursuit of other liability coverage or underinsured motorist coverage will not affect the personal or individual exposure of Edward Washington and Talib Greene, except to the extent of any applicable liability or underinsured motorist coverage; and

WHEREAS, the damages sustained by the Covenantor, in the automobile accident of October 29, 2016 may exceed the liability limits of the insurance policy of Covenantees Edward Washington and Talib Greene, and the Covenantor is desirous of protecting her right to proceed to suit against Edward Washington and Talib Greene for purposes of collecting additional liability coverage and/or underinsured benefits; and

NOW, FOR AND IN CONSIDERATION OF the payment to the Covenantor of the sum of Twenty Five Thousand and 00/100 ($25,000.00) Dollars by the Covenantees, the sufficiency and receipt of which is hereby acknowledged, the Covenantor and Covenantees agree as follows:

1. That in the event the Covenantor is are unable to resolve by agreement and settlement her claim with any additional liability insurance carrier or the underinsured carrier, the Covenantor shall have the right to bring suit against Edward Washington and Talib Greene and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that Edward Washington and Talib Greene, their respective heirs and assigns, shall never at any time, be liable to the Covenantor, her subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantor of the sum of Twenty Five Thousand and 00/100 ($25,000.00) Dollars, Covenantor, her subrogees, heirs, or assigns, shall not at any time, nor shall anyone for her or in her behalf, enforce against Edward Washington and Talib Greene, by execution or otherwise, any judgment that may be rendered in the above-mentioned lawsuit except as herein stated. Upon reduction to judgment of the aforementioned lawsuit, Covenantor, her subrogees, heirs, or assigns will immediately provide Edward Washington and Talib Greene with an executed Satisfaction of Judgment in any case presented by Covenantor against Covenantees for the accident dated October 29, 2016, unless such Satisfaction of Judgment will impede collection or pursuit of additional liability coverage or underinsured motorist coverage. If a Satisfaction of Judgment will impede collection or pursuit of additional liability coverage or underinsured motorist coverage, Covenantor, her subrogees, heirs, or assigns will provide Edward Washington and Talib Greene a Satisfaction of Judgment upon the earlier of the following events: (a) payment of said judgment by any other liability insurance carrier and/or underinsured motorist carrier or (b) final resolution of any additional liability coverage and/or underinsured motorist coverage claim. If immediate satisfaction of the judgment is not filed after either payment of the judgment or final resolution of any other liability or underinsured motorist claim, this Covenant may be recorded as a Satisfaction of Judgment.

3. Covenantor and Covenantees expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

4. Covenantor expressly represents that she has been represented by counsel and has been fully advised of all facets of potential lawsuit, and all claims arising out of or in relation thereto, and is aware and fully advised that the execution of this instrument will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against Edward Washington, Talib Greene, and their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys, except as herein stated.

5. In executing this agreement, Covenantor represents and warrants that she has relied on her investigation and on the investigation and advise of her attorney, Joseph S. Sandefur of Parsons, Ouverson, Stark, Guest & Sandefur, PA in Murrells' Inlet, South Carolina, and has not relied on any statement, representation, or commitment of any kind made by Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

6. All provisions and recitals in this Covenant are intended to be and are Covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. The Covenantor agrees that if there exists any subrogation, assignment, Medicare lien, Medicaid lien, Blue Cross/Blue Shield lien, and any other lien or interest, whether created by contract, statute or otherwise, that she will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend, hold harmless, and indemnify the Covenantees from any such subrogation, assignment, claims, or interests. The Covenantor further agrees and understands that she is responsible for negotiation and payment of all medical bills. By entering this agreement the Covenantees do not make any representation as to the effect of this agreement on the Covenantor's claim for additional liability coverage or underinsured motorist coverage and the Covenantor and her attorney expressly acknowledge their disclaimer.

Mrs. Bilawa did not receive Bodily injury liability coverage. Why??

8. The Covenantor and the Covenantor's attorney expressly agree to keep PROGRESSIVE DIRECT INSURANCE COMPANY, Edward Washington, and Talib Greene abreast of developments in their attempts to collect additional liability coverage and/or underinsured motorist benefits, including specific notice as to the date of trial, the amount of verdict, status of and whether a settlement has been obtained.

9. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

10. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

11. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

12. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

13. Further, Covenantor acknowledges that neither Edward Washington nor Talib Greene have made any representations on the availability of excess liability coverage and/or underinsured motorist coverage should this Covenant be executed.

14. Should any damages be incurred by Edward Washington and Talib Greene due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify the Covenantees from any and all liability therefor.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

Witness

Mary Ellen Bielawa 11/1/17
Mary Bielawa, as Personal Representative
of the Estate of Ryan Bielawa

Indemnify:
To protect someone by promising to pay for the cost of possible future damage, loss or injury

To secure against hurt, loss, or damage

Cv-4 Reservation of Rights Letter

PROGRESSIVE

Underwritten by Progressive Northern Insurance Company

Mike Marshall
2024 Corporate Centre Dr. Ste 201
Myrtle Beach, SC 29577
Phone# 843-213-3956
Fax# 844-268-4650
Email Michael_Marshall@progressive.com

July 12, 2020

Edward Washington #311014
Broad River Correctional Inst.
Wateree 284
4460 Broad River Rd.
Columbia, SC 29210

RE: Estate of Ryan Bielawa vs. Edward Washington
Claim Number: 174111964
Date of Loss: October 29, 2016

Dear Mr. Washington:

I received your letter dated July 3, 2020 regarding the above-mentioned accident and if Progressive Insurance considered it a hit & run.

Per your recorded statement you gave me and speaking with witnesses I didn't determine that this was a hit and run accident. You said you went down the road and turned around in an apartment complex and went back to the scene to find out what had happened.

I you should have any questions or concerns, please feel free to contact me at any time.

Sincerely,

Michael Marshall

Michael Marshall
Sr. Litigation Specialist

PROGRESSIVE

Underwritten by Progressive Northern Insurance Company

Mike Marshall
2024 Corporate Centre Dr. Ste 201
Myrtle Beach, SC 29577
Phone# 843-213-3956
Fax# 843-448-7239
Email Michael_Marshall@progressive.com

Edward Washington HCO2111826227
4150 J. Rueben Long Ave.
Conway, SC 29526

RE: Estate of Ryan Bielawa vs. Edward Washington
Date of loss: 10/29/16

Dear Mr. Washington,

I received your letter dated 11/9/18.

Progressive Northern Insurance found both you and Mr. Bielawa contributed to the accident equally since you both were under the influence and Mr. Bielawa wasn't crossing the street in the crosswalk.

The wording on the Covenant means that you are not liable to pay anything over the $25,000 we paid on your behalf to resolve the claim & lawsuit.

As far as the police officer's report is concerned, you would need to contact him to discuss any questions you have.

If you should have any questions or concerns, please feel free to contact me any time.

With kind regards;

Michael Marshall
Sr. Litigation Specialist

Claims representative (Progressiv
Mike Marshall

. Mr. Marshall, explain your occupation as a Progressive Auto Insurance ~~Risk~~ Litigation Specialist.

1. How long have you been a ~~Risk~~ Litigation Specialist for Progressive auto insurance?

3. So basically, you would be, or the insurance company would be experts in accidents, hit and runs, etc? YES

4. How did you come to know about the defendants situation? The victim's mother sued the insurance co the car was insured by that the defendant was driving which is progressive

5. The victim's mother, she sued progressive auto insurance because it's the insurance company the defendant's car was insured by correct? YES

6. Didn't the victim's mother demand a jury trial for that particular civil lawsuit? YES

7. Beings that the victim's mother demanded a jury trial for the civil lawsuit, what was the results of that trial? ~~The~~ Mother settled out and was paid $25,000. There was no jury trial.

8. So the civil suit was settled by you (Progressive) and the law office of Michael O'Sullivan correct? YES

9. Progressive paid out $25,000 to Mother, but the insurance claim was $25,000 per person and $50,000 per accident bodily injury liability. The victims Mother was paid out $25,000, why wasn't she paid out the $50,000?

10.

10. MR. MARSHALL, You did a full investigation on this matter correct? YES

11. You even did an investigation on hit and run in this matter correct? YES

12. In your investigation on hit and run did you interrogate or interview any other witnesses other than the defendant? YES

13. How many other witnesses did you interview?

14. You also interviewed the defendant correct? YES

15. And what was progressive auto insurances ruling of the hit and run after that investigation? They determind no hit and run

16. Mr. Marshall in the Complaint of the lawsuit, the facts of the complaint, did the victims Mother's Attorney's Mention that the defendant Hit and Ran in the Complaint of the lawsuit at anytime? NO

17. Does the complaint state that the defendant fled the scene, which would be a sign of negligance? or recklessness? NO

PROGRESSIVE CLAIMS
2024 Corporate Centre Dr.
Suite 201
Myrtle Beach, SC 29577

PROGRESSIVE®

Underwritten By:
Progressive Northern Insurance Company

Claim Number: 17-4111964
Loss Date: October 29, 2016
Document Date: August 2, 2018
Page 1 of 1

EDWARD L WASHINGTON
[redacted] ITTMAN ST
CONWAY, SC 29526

claims.progressive.com
Track the status and details of your claim, e-mail your representative or report a new claim.

Claim Information

RE: Estate of Ryan Bielawa vs. Edward Washington

Dear Mr. Washington,

I received your letter dated 7/30/18 requesting a copy of the Jury Trial transcript.

Please be advised that we settled the lawsuit against you prior to any jury trial. Therefore, there aren't any jury transcripts since there wasn't a trial.

I have enclosed a copy of the release we obtained from the attorney handling lawsuit on behalf of the Estate of Ryan Bielawa.

If you have any questions please don't hesitate to contact me.

Sincerely,

Michael Marshall

MICHAEL MARSHALL
Claims Department
1-843-213-3956
1-800-PROGRESSIVE (1-800-776-4737)
Fax: 1-843-448-7239
Michael_Marshall@Progressive.com
Form 2587 XX (01/08) SC

#1

Due Process, Misconduct, knowing of false testimony
Napue v. People v. Illinois, 360 U.S. 264, 3 L.Ed. 2d 1217 79 S.Ct. 1173

It is well established that a conviction obtained through use of false evidence, known to be such by representatives of the State, Must fail under the fourteenth amendment Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340 (omitted). The Same results obtains when the State, although not Soliciting false evidence, allows it to go uncorrected when it appears. (Reversed)

Failure to impeach witness Held to support IAC
U.S. Ex Rel. McCall v. O'Grady, 908 F. 2d 170 (CA 1990)

The court stated that, to the contrary, Several decisions of this Court established that defense counsel has not represented the defendant to the satisfaction of the Sixth amendment when counsel fails to pursue impeaching cross-examination or present additional evidence that would in all reasonable probability cast a reasonable doubt on the testimony of the government's Main identification witness. (Remanded to district court)

PLAINTIFF'S EXHIBIT 2 00 1-3-22

Amended Issues

1) Ineffective assistance of counsel, counsel failed to impeach arresting officer Glenn Guyett for Perjury Code 1976 16-9-10. His Statement was inconsistant and not true when asked what did he arrest the defendant for. See pg. 240 lines 15-20 of transcript Also see Felony DUS Arrest ticket and Hit and Run warrant.

2) Ineffective assistance of counsel, counsel failed to impeach Chief Dale Long for Perjury Code 1976 16-9-10. His Statement was inconsistant and not true when asked Other than assisting Highway patrol did he have any other involvement in the case. See pg. 300 lines 11-13, Also See Hit and Run warrants and Felony DUI ticket.

3) Burr v. Jackson, convictions obtained by knowing use of perjured testimony are fundamentally unfair and must be set aside if there is any reasonable likelihood that false testimony could have effected Jury's Judgement. U.S. Const. Amendment 5 U.S. v. Bakke 894 F.3d 593 A new trial is required when the government's knowing use of false testimony could affect Judgement of Jury. Bailey v. Bazzle 628 F. Supp. 2d 651 X To prevail on a due process claim based on false testimony by a prosecutor defendant Must show the testimony was false actually, the prosecution knew or should have known that the testimony was false and that the testimony was material.

USE Alt Case Law

(2) Ineffective assistance of counsel, counsel failed to provide statute, and
copy case law in Jackson v. Denno hearing supporting Miranda
rights violation. See State v. Taylor 436 S.C. 28 810 S.E. 2d 468,
State v. Kinard 427 S.C. 367, also S.C. code 56-5-2953 (A)(1)(a)(iii).
The driving under the influence video recording statute requiring
that the video recording of the site of the DUI incident show a
defendant being advised of his miranda rights serves purposes
of reducing surprise contents in DUI trials and reducing use
of fair procedures to protect the rights of the defendant.

(3) Ineffective assistance of counsel, counsel failed to properly
introduce motion of dismissal of felony DUI by using failure to
record blood draw using Rockhill v. Sucheski. Had counsel studied and reviewed
the statute 56-5-2950 (B) he would have discovered that the State
need not provide recording of chemical testing. Had counsel done
that, defendant would had plead guilty. Counsel led defendant to
believe felony DUI could be dismissed. See State v. Bacon 436 S.C. 505
In 2008 the legislature amended 56-5-2950 (B) to add the phrase
on which Bacon relies upon activation of the video equipment
and prior to the commencement of the testing procedure. The act that
amended this section in no way suggests the legislature intended
to mandate video taping of blood and urine test. See Act. No. 201, 2008 S.C. Acts
1644, 1674. The amended version simply specifies the time frame when the
implied consent rights must be provided both in written and orally to a driver
before the test began. This clause does not create a requirement to video record all types
of samples taken. The purpose of subsection (B) was to layout certain rights of a driver
in relation to implied consent. Even asks on the [illegible] consent form will the test be
recorded, yes or no

Case v. Singleton
Back Page of Number 7

Ineffective assistance of counsel, counsel failed to object to the prosecution using reading of EDR Module by Highway patrolmen Tyler Jennings. This readout was not submitted in the defendants rule 5 which is already in discovery. The reading plainly tells that the defendant was traveling at a speed greater than projected and that breaking was applied. See pg. 346-348 of transcript.

(b) 4 Ineffective assistance of counsel, counsel failed to consider Contributory negligence of victim. Had counsel considered contributory negligence to defendant with guilty plea that was presented defendant would have considered pleading guilty knowing that he and victim equally contributed to the accident. counsel led the defendant to believe that felony DUI could be dismissed, See Progressive auto insurance Report. Also See Woods v. Rabon S.C. App 288 295 S.C. 343, 368 S.E. 2d 471 The defense of contributory negligence does not depend on any duty owed by the injured Party to the party sued. All that is necessary to establish the defense is to prove to the satisfaction of the jury that the injured party did not in his or her interest take reasonable care of himself or herself and contributed by this want of care to his or her own injury. Also See, Bennett v. Wilbro Inc 310 S.C. 371 and victim's toxicology report. In defense, wilbro asserted williams was contributory negligent. The evidence showing williams was intoxicated was relevant to whether he contributed to his own injury is generally a question of fact to be determined by the jury.

Carma v. Swindler, 228 S.C. 550, 91 S.E. 2d The Pedestrian is always under general duty to maintain a proper lookout and to do those things for himself which are necessary for his safety.

(3) (6.) Ineffective assistance of Counsel, Counsel failed to provide any case laws to support directed Verdict. See pgs. 405-406 of transcript. Also See Clark v. Cantrell 339 S.C. 369

In the exceedingly rare case when it is without significance that Speed was a contributing factor in an automobile collision and the record contains no other evidence of other negligence or wrongful acts by the Speeding driver the judge may grant a speeding driver directed verdict Motion. There would be nothing for the jury to resolve because as a matter of law any excessive Speed could not have caused the accident.

Amended Issue #7 ALSO COMPULSORY Clause

Counsel Failed to Prepare a Defense: Pavel v. Hollins, 261 F.3d 210 (2d Cir. 2001)

Attorney Meltzer decided not to prepare a defense for Pavel solely because he was confident that at the close of Prosecutions presentation of evidence the trial judge would grant Meltzer's motion to dismiss the government's charges against Pavel. That Meltzer opted not to prepare a defense based entirely on this rationale militates strongly in favor of the conclusion that his representation of Pavel was constitutionally deficient. See Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990) several cases omitted

It is apparent from Meltzer's explanation that his decision as which ~~witnesses~~ witnesses to call was animated primarily by a desire to save himself labor, to avoid preparing for a defense that might ultimately prove unnecessary. Meltzer's decision not to call any witnesses other than Pavel was thus strategic in the sense that it related to a question of the trial strategy which witnesses to call. And it was strategic also in that it was taken by him to advance a particular goal. That goal however was mainly avoid working (conviction vacated and writ issued)

After Felony DUI motion of dismissal was denied, counsel had no proper defense for defendant. Counsel never objected, nor provided Any case laws in defense. And counsel failed to obtain a transcript of the testimony for the appeal.

#3

Attorney overestimated Abilities - Didn't know the laws.

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992)

Cave claims that his defense counsel did not understand the elements of felony murder and thus could not and did not defend him adequately at his trial. We are convinced the defense counsel misunderstood the laws of felony murder.

Counsel misunderstood implied consent rights when moving to dismiss felony DUI.

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Edward Washington, #311014, Applicant, v. State of South Carolina, Respondent.	Case No.: 2022-CP-26-0180 **ORDER OF DISMISSAL**

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This matter comes before this Court by way of Applicant's post-conviction relief application filed January 10, 2022. Respondent made its return on August 19, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on January 3, 2023, at Horry County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsels James D. Stanko and Clay W. Pinkerton, Esquires, and Senior Assistant Solicitor Joshua D. Holford, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its February 2017 term, the Horry County Grand Jury indicted Applicant for leaving the scene of an accident (2017-GS-26-01069) and felony driving under the influence with death (2017-GS-26-01070). Applicant was represented by James D. Stanko and Clay W. Pinkerton, Esquires. Joshua D. Holford and Cara J.

Walker, Esquires, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On June 3-5, 2019, Applicant proceeded to trial before the Honorable Steven H. John, circuit court judge. Applicant was found guilty of felony DUI but not of leaving the scene of an accident. Judge John sentenced Applicant to twenty years' imprisonment to be served concurrent.

Applicant filed a timely notice of appeal on June 12, 2019, that was perfected by Adam Ruffin, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Washington*, 2021-UP-387 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur was issued on November 22, 2021.

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Summary of Relevant Facts

On October 28, 2016, Ryan Bielawa was struck and killed by Applicant's vehicle while he was walking across a highway. Olivia Malle testified that she was hanging out with Bielawa and some other friends when they decided to walk to the campus dining hall. (R. 175-77).

Bielawa began walking across the highway not within a crosswalk. (R. 177, 180-81). Malle recalled: "I heard him get hit, so I looked and I see a shoe fly and a shadow, which I think it was his body. And I turned and I say, '[Bielawa] was just hit,' and my friends started to scream." (R. 177). Kelcee Cramer also witnessed the accident, and she testified that the vehicle that struck Bielawa did not stop initially but returned "five to seven" minutes later. (R. 189-90).

Daniel Baker, a DNR officer, was driving by the Circle K where Bielawa was hit shortly after the accident when he witnessed Applicant fighting a group of people. (R. 163-65). Baker approached the group of people who were fighting and detained Applicant. (R. 167). Baker stated that he did not know anything about the collision at that time. (R. 167). After realizing that a fatal car accident had occurred, Baker turned Applicant over to Glen Guyett with the Horry County

Police Department. (R. 169).

Guyett testified that he initially placed Applicant under arrest for "the leaving of the scene" until he got more information and charged Applicant with felony DUI. (R.240). Guyett claimed that he could smell alcohol on Applicant's breath and that his eyes were "red and glossy." (R. 240-41). Guyett placed Applicant in his patrol vehicle, read Applicant his Miranda rights, and then took Applicant to the hospital for a possible ankle injury. (R. 241). Guyett further stated that he did not conduct any standard field sobriety tests on Applicant because of Applicant's apparent ankle injury. (R. 242). While at the hospital, law enforcement obtained a search warrant for Applicant's blood and two blood samples were collected. (R. 248-51). Applicant was found to have an average blood alcohol content of .239. R. 400).

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Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of:

1. Ineffective assistance of counsel for failing to properly object to the State's introduction of several traumatic photographs of car crash victim, while the State's police officer witness detailed the sight of "fat [contents] coming out of his stomach" and only a piece of skin holding his foot to his leg, clearly calculated to improperly arouse sympathy and/or was irrelevant to the determination of whether defendant was guilty of driving under the influence.

2. Ineffective assistance of counsel for failing to supplement the directed verdict motion with the key testimonial evidence of witness Olivia Mallee, who was present with the car crash victim immediately prior to the collision, that as they walked towards a crosswalk the victim spontaneously decided not to use the crosswalk acknowledging he "decided to go across the traffic" where he was struck.

3. Ineffective assistance of trial counsel for failing to request a continuance when the State presented evidence – in violation of Rule 5 – not turned over to the defense in time to incorporate exculpatory evidence in proper preparation of defense.

4. Ineffective assistance of trial counsel for failure to call witness Mike Marshall of progressive insurance – despite Petitioner's plea that they do so – who could have testified to Petitioner's plea that they do so – who could have testified to the findings

of their independent investigation that car crash victim was contributory negligent for the crash. Alternatively, failure of counsel to introduce the Investigative Report into evidence at trial which was highly probative to key element of felony DUI and to the defense theory that victim's decision to violate traffic law (foregoing the crosswalks) and spontaneously run across highway into path of Petitioner's vehicle initiated/ proximately caused the crash.

5. Ineffective assistance of counsel for failure to move for full disclosure of exculpatory information in the possession of the State and/or it's expert witnesses.

6. Denial of due process of law during the jury trial because of prosecutorial misconduct.

At the PCR hearing, Applicant proceeded forward on the following allegations:

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1. Ineffective assistance of counsel:
   a. Failure to present contributary negligence argument.
   b. Failure to object to photos of the deceased victim.
   c. Failure to argue that the State had no evidence that Applicant was speeding when he struck the victim.
   d. Failure to call Olivia Mallee.
   e. Failure to secure a continuance for failure to timely disclose speed coordinates.
   f. Failure to object to officer stating he was not arrested for leaving the scene.
   g. Failure to move to suppress *Miranda* statements.
   h. Failure to cross-examine witnesses.
   i. Inadequate trial preparation.
   j. Failure to develop a trial strategy.
   k. Failure to use case law in *Jackson v. Denno* hearing.
   l. Failure to use Olivia Mallee testimony in directed verdict motion.
2. Prosecutorial Misconduct:
   a. Failure to timely disclose speed, coordinates, and toxicology report.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant's testimony was primarily focused on trial counsels' ineffective assistance and the prosecutorial misconduct which he alleges. To that end, his testimony consisted of the following statements. Applicant met with his PCR attorney multiple times in preparation for this hearing. He felt that his trial attorneys were deficient in numerous ways including failing to present

a contributory negligence defense, failing to call witnesses from Progressive Insurance, failing to object to photographs of the victim, failing to call Mallee as a witness, failing to present the proper caselaw on a directed verdict motion, failing to present additional caselaw during the *Jackson v. Denno* hearing, failing to adequately prepare, and effectively giving up after counsels' pretrial motions were denied. Additionally, Applicant felt that his counsel should have objected when an officer claimed that Applicant was arrested for something other than leaving the scene of an accident and that counsel should have spent more time discussing the victim's autopsy report. Lastly, Applicant believed that there should have been a recording of his *Miranda* rights being read to him.

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Applicant also felt that his trial was impacted by prosecutorial misconduct as shown by the State's alleged failure to produce speed coordinates data and a toxicology report. Applicant wanted a continuance once this evidence was introduced. He had not talked to counsel about this evidence and was, effectively, blindsided. He felt that this was a violation of his due process rights. Applicant emphasized that, prior to trial, he did not think the State had any evidence to show he was speeding.

On cross examination, Applicant summed up his qualms as follows: (1) during the course of trial, he felt that the accident was partially or ultimately the victim's fault; (2) he believes the photographs improperly enflamed the passions of the jurors; (3) the State made many improper or false statements including that he was speeding; being reckless, that he left the scene, came back, and got in a fight; and that he was not the victim; (4) and that his attorneys did not have a trial strategy.

Stanko Testimony

Counsel Stanko testified credibly regarding many of the same events leading up to and during trial, indicating the following. Counsel met with Applicant over five times in preparation for trial. During those meetings, he discussed the charges and potential sentences with the Applicant. Applicant indicated that he did not want to plead to any charges. Essentially, Applicant believed that he should not be liable since the victim was in the middle of the road. Counsel advised him that such an argument was not likely to be a viable trial strategy, nor would arguments regarding contributory negligence. In light of the Applicant's BAC of .239, the strategy counsel discussed with Applicant, instead, was to emphasize that he returned to the scene and had not initially realized that he'd hit anyone. Additionally, he prepared a list of mitigating factors including that the victim had a .187 BAC, that the victim ran across the street in dark clothes in the middle of the night, and that the victim was not in a crosswalk. All of these factors were then brought up during the trial.

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While he knew Applicant wanted a continuance, Counsel never felt that he was given a good reason to ask for a continuance. It seemed that Applicant's request would only serve to delay the trial. Counsel could not base a continuance request on a need to process discovery because all the relevant discovery, including the items Applicant complained of, had been turned over before trial.

Regarding Applicant's complaints of his performance, Counsel testified that he discussed the pictures with co-counsel and they collectively determined there was no objection to make. Even if they had objected, Counsel does not believe the photographs impacted the outcome of the trial. Additionally, Counsel has never seen an attorney present additional caselaw during a *Jackson v. Denno* hearing. Counsel did not speak with Mallee but did read her statement and recalls that

she was called during the State's case-in-chief. Lastly, although there was no recording, the State produced an affidavit of *Miranda*. Based on that, Counsel's pre-trial motion regarding *Miranda* was denied.

Pinkerton Testimony

Counsel Pinkerton testified that he only became involved in the case in the final two or three months before trial as second chair. He recalled that all testimony was produced before trial. He felt that the photographs were admissible. Additionally, he felt that an argument regarding contributory negligence would not work in a criminal case. Moreover, he was concerned that such an argument would be prohibited if it was calculated to encourage jury nullification. Although Counsel could not speak to the *Denno* complaints since he did not handle that aspect of the trial, he did recall conducting Mallee's cross-examination. He felt that her testimony was not favorable to the defense, however.

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Holford Testimony

Holford was the primary prosecutor handling the case. He credibly testified that he produced all discovery to the defense, including all documents which the Applicant complains of. Furthermore, he claims that such production is evidenced by a letter from the Applicant. While Holford does not recall objections to the photographs, he felt that they were important to corroborate speed, coordinates, the elements of the crime, and the testimony of other witnesses. To that end, he did not believe the photographs were cumulative.

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 and arguments presented at the PCR hearing. Before this Court are the Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial

transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Present Contributory Negligence Argument

Applicant claims Counsel was ineffective for failure to present a contributory negligence argument. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If

there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

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Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

Applicant alleges ineffective assistance of counsel based upon failure to assert a defense when the defense notated is not available in a criminal trial. Both Counsels acknowledged this on the stand. Further, the implication that this defense could be used to reach a result of jury nullification is entirely inappropriate. Counsel is not deficient for failure to assert a defense not

available in a criminal trial and no prejudice can be found flowing therefrom. Accordingly, relief is denied on this ground.

Failure to Object to Pictures

Applicant claims Counsel was ineffective for failure to object to pictures of the deceased victim. Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are not . . . not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). "The evaluation of probative value cannot be made be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case." *Gray*, 408 S.C. at 610, 759 S.E.2d at 165.

This Court finds that Counsels were not deficient because the probative value outweighed the prejudice, which undermines any chance of success the defense would have had with an objection. Specifically, Prosecutor testified that these photographs were a crucial piece of evidence used to substantiate claims of speeding, the elements of the crime, and the witnesses' narratives of

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what happened. This Court agrees. Specifically, the photographs showed exactly how hard of an impact Applicant had on the victim in causing his death and the photographs were the only visual available to the jury in assessing impact and consequent culpability. Both Counsels substantiated the Prosecutor's claim that there was not a reason to object to the photographs. Accordingly, Counsels were not deficient because there was not a legitimate basis to object and any objection would have been overruled.

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This Court finds that any alleged deficiency on Counsels' part for failure to object did not prejudice Applicant. There was overwhelming evidence of Applicant's guilt presented at trial. Surveillance footage was presented at trial. (R. 172). Multiple eyewitnesses testified at trial. (R. 175-223). Applicant was subject to a blood draw, which revealed a BAC of .239. (R. 400). GPS monitoring clocked Applicant speeding as fast as 80 MPH. (R. 317-24). Applicant returned to the scene, where he was apprehended by police. (R. 237-41). Thus, because the admission of the pictures could not have undermined the overwhelming evidence of guilt, no prejudice is established by any alleged deficiency and relief is denied as a result.

Failure to Argue State had No Evidence of Speeding

Applicant claims Counsel was ineffective for failure to object to the lack of evidence that Applicant was speeding. This is patently untrue. Richard Loskill testified at trial that Applicant was wearing a GPS monitor at the time and that monitor clocked him speeding at the time of the accident. (R. 318-20). Applicant was clocked driving as fast as 80 MPH around the time of the incident. (R. 323-24). A report was entered at trial addressing the speed. (R. 320). Thus, evidence of speed was shown at trial, Counsel is not unreasonable for failing to make a dishonest argument to the contrary, and no prejudice flows as a result. Accordingly, relief is denied on this ground.

Failure to Call Witness Mallee

Applicant claims Counsel was ineffective for failure to call Olivia Mallee at trial. However, this witness was called in the State's case-in-chief. (R. 175-82). Counsel is not ineffective for failure to call a witness already called and who the defense had the opportunity to cross-examine. Additionally, this Court fails to find anything that Counsel could have questioned her about but did not that would have impacted the trial proceedings. Accordingly, relief is denied.

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Failure to Secure a Continuance

Applicant claims Counsel was ineffective for failure to secure a continuance. Counsel Stanko credibly testified that Applicant never provided him with a reason for a continuance, beyond a desire to avoid the inevitable. Counsel is not deficient for failure to make a frivolous continuance request. Additionally, even if requested, this Court finds the continuance request would not have been granted on account of there being no reason for one. Accordingly, relief is denied.

Failure to Use Mallee Testimony in Directed Verdict Motion

Applicant claims Counsel was ineffective for failure to utilize Mallee's testimony in a directed verdict motion. Mallee's testimony consisted of the fact that she was with the victim at the time, he had a bit to drink, she heard the victim get hit, she saw a shoe fly, and heard her friend scream. (R. 175-83). Nothing about that testimony would have led to a different outcome on the directed verdict motion, as it was more favorable to the State than the defense. Accordingly, Counsel did not act unreasonably in concluding that a State's witness would not be helpful in securing a directed verdict and, even if Counsel could have raised this, a different outcome would not have been reached. Thus, relief is denied.

***Failure to use Case Law in Jackson v. Denno* Hearing**

Applicant claims Counsel was ineffective for failure to use case law in the *Jackson v. Denno*. Applicant failed to state what case law should have been cited, how Counsel acted unreasonably in asserting it, or how it would have impacted the results of the proceedings. Further, Counsel Stanko credibly testified that he did not think case law was needed in the hearing because the hearing was held pursuant to a case itself and he never witnessed any attorney citing additional case law when pursuing this motion. This Court finds Counsel was not unreasonable in failing to cite additional case law, no prejudice is found flowing therefrom, and Applicant has failed to meet his burden of proof as a result. Accordingly, relief is denied.

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JERRY COUNTY
21 PM 5
CLERK OF COURT

Failure to Object to Officer Saying he was not Arrested for Leaving the Scene

Applicant claims Counsel was ineffective for failure to object to an officer stating he was not arrested for leaving the scene. This Court fails to find how this was objectionable, how Counsel was deficient for failure to object, or how an objection would have been both successful and led to a different outcome. Accordingly, relief is denied.

Failure to Move to Suppress Miranda Statements

Applicant claims Counsel was ineffective for failure to move to suppress Applicant's police statement. However, Counsels did pursue a *Jackson v. Denno* hearing in this case. (R. 63-79). Thus, Counsels did pursue this motion and it was denied. Thus, there is no deficiency and can be no prejudice. Accordingly, relief is denied.

Failure to Cross-Examine Witnesses

Applicant claims Counsel was ineffective for failure to cross-examine all witnesses. "Where trial counsel articulates a valid reason for employing a certain trial strategy, counsel will not be deemed ineffective." *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing

Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). Counsel can be deficient when examining witnesses if they fail to elicit testimony key to a petitioner's defense. *Miller v. State*, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (finding counsel was deficient in failing to elicit testimony about similarities between armed robberies from a witness who could corroborate where the applicant's key defense was third party guilt).

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2023 APR 21 P 5
RENEE ELVIS
CLERK OF COURT
HORRY CO. SC

Applicant has failed to state what witnesses should have been cross-examined and on what grounds they should have been cross-examined on. Instead, Applicant is seemingly fixated on the idea that Counsels should have cross-examined every single witness, regardless of whether there was a ground to do so. Without more, Counsel cannot be found deficient for failure to cross-examine. Applicant has also failed to establish prejudice on this issue. Accordingly, relief is denied.

Inadequate Trial Preparation

Applicant claims Counsel was ineffective for failure to properly prepare for trial. However, Applicant failed to state with any specificity how this was the case. Thus, Applicant has failed to meet his burden of proof by failing to show any deficiency or how any deficiency could have led to prejudice. Accordingly, relief is denied on this ground.

Failure to Develop Trial Strategy

Applicant claims Counsel was ineffective for failure to develop a trial strategy. However, Counsel Stanko credibly testified that the strategy was to show that the victim was intoxicated, crossed the street outside the crosswalk in dark clothing at nighttime, and that Applicant returned to the scene immediately after he left. This Court finds a valid trial strategy was used and no alternative strategy could have been presented that would have led to a favorable outcome.

Accordingly, relief is denied on this ground.

***Brady* Violation**

Applicant claims various documents in discovery were not handed over by the State. *Brady*[1] violations occur if four conditions are met: "the evidence was favorable to the accused", "it was in the possession of or known to the prosecution", "it was suppressed by the prosecution", and "it was material to guilt or punishment." *Gibson v. State,* 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Whether a *Brady* violation is material and, thus, sufficient to warrant relief, is contingent on where there is a "reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." *Id.* at 325. Further, whether a mistrial is warranted remains contingent on "'(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the court.'" *State v. Inman,* 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (quoting *United States v. Anwar,* 428 F.3d 1102, 1112 (8th Cir. 2005)).

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HORRY, S

This Court finds the claim is without merit. Specifically, this Court finds that Applicant knew about the discovery, as evidence by the letter he personally wrote the prosecutor discussing the documents he now claims he never knew about or received. Additionally, Counsel Pinkerton credibly testified that all discovery was handed over to the defense before trial. Counsel Stanko credibly testified that the discovery in question was handed over pursuant to a supplemental discovery request before trial. Accordingly, this Court finds Applicant received the discovery in question and no prosecutorial misconduct occurred.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not

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[1] *Brady v. Maryland,* 373 U.S. 83 (1963).

established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to 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 Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 12 day of April, 2023.

DEBRA R. MCCASLIN
Presiding Judge
Fifteenth Judicial Circuit

Horry, South Carolina.

FILED
HORRY COUNTY
2023 APR 21 P 12:54
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

WITNESSES

Dale Long Conway Police Department

ARREST WARRANT NUMBER

2016A2620400922
CDR: 2463 56-05-1210(A)(3)
DOA: 11/1/2016

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: FEB 24 2017

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO: 2017-GS-26-010169

The State of South Carolina

County of Horry

Martin D. Spratlin 16H05454

COURT OF GENERAL SESSIONS

FEBRUARY, 2017 TERM

THE STATE

vs.

Edward Lee Joseph Washington
B/M
[redacted] **Pittman St**
Conway, SC 29527-5591
DOB [redacted]
SSN

ATTORNEY: James Stanko & Clay Pinkerton

Indictment for

LEAVING SCENE OF ACCIDENT RESULTING IN DEATH

Jimmy A. Richardson, II, Solicitor

ORIGINAL

FILED
HORRY COUNTY
2017 MAR -1 AM 8:52
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

DATE RECEIVED FROM
GRAND JURY

Trial Not Guilty
6/5/2019
Judge Steven H. John
CR: Kay Richardson

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF HORRY)

At a Court of General Sessions, convened on February 23, 2017, the Grand Jurors of Horry County present upon their oath:

LEAVING SCENE OF ACCIDENT RESULTING IN DEATH

CDR: 2463 56-05-1210

That Edward Lee Joseph Washington did in Horry County on or about October 29, 2016, while operating a motor vehicle become involved in an accident which resulted in the death of Ryan Bielawa, and did leave the scene of the accident without first rendering aid and/or information, in violation of Section 56-05-1210(A)(3), S. C. Code of Laws, 1976, as amended.

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

JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Glen Guyett Conway Police Department

D. Long

ARREST WARRANT NUMBER

20160620024681
CDR: 0395 56-05-2945(A)(2)
DOA: 10/29/2016

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: FEB 24 2017

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2017-GS-26-01670

The State of South Carolina

County of Horry

Martin D. Spratlin 16H05454

COURT OF GENERAL SESSIONS

FEBRUARY, 2017 TERM

THE STATE

vs.

Edward Lee Joseph Washington
B/M
[redacted]ittman St
Conway, SC 29527-5591
DOB
SSN [redacted]

ATTORNEY: James Stanko & Clay Pinkerton

Indictment for

FELONY DRIVING UNDER THE INFLUENCE – DEATH RESULTS

Jimmy A. Richardson, II, Solicitor

ORIGINAL

FILED
HORRY COUNTY
2017 MAR -1 AM 8:52
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC
DATE RECEIVED FROM
GRAND JURY

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on February 23, 2017, the Grand Jurors of Horry County present upon their oath:

FELONY DRIVING UNDER THE INFLUENCE – DEATH RESULTS

CDR: 0395 56-05-2945

That Edward Lee Joseph Washington did in Horry County on or about October 29, 2016 drive a motor vehicle while under the influence of alcohol, drugs, or a combination of both, and did an act forbidden by law, and/or neglected a duty imposed by law in the driving of the vehicle, to wit: defendant did travel in excess of the posted speed limit and/or failed to yield to a pedestrian and/or failed to keep a proper lookout, which act or neglect proximately caused the death of another, to wit: Ryan Bielawa in violation of Section 56-05-2945, S. C. Code of Laws, 1976, as amended.

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

JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)
STATE VS.)
Edward Lee Joseph Washington)
AKA:)
Race: BLACK Sex: M Age: 33)
DOB: [redacted] SS#: [redacted])
Address:)
City,State,Zip:)
DL#: SID#: SC01519913)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2017GS2601070
A/W#: 20160620024681
Date of Offense: 10/29/2016
S.C. Code §: 56-05-2945(A)(2)
CDR Code #: 0395

RECEIVED
JUN 12 2019
SC Court of Appeals

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒CONVICTED OF or ☒PLEADS
TO: DUI / Felony driving under the influence, death results 11-25 [illegible] and $10,000 - $25,100.
in violation of § 56-05-2945(A)(2) of the S.C. Code of Laws, bearing CDR Code # 0395
☐NON-VIOLENT ☒VIOLENT ☒SERIOUS ☐MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45
No Parole"

The charge is: ☒As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐Without Negotiations or Recommendation, ☐Negotiated Sentence, ☒Recommendation by the State.

ATTEST: _____
Holford, Joshua D. | SCB80071 SC Bar# | Defendant | Stanko, James Attorney for Defendant | SCB101376 SC Bar#

WHEREFORE, the Defendant is committed to the ☒State Department of Corrections, ☐County Detention Center,
for a determinate term of 20 [redacted]/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment
of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
which are incorporated by reference.

☐CONCURRENT or ☐CONSECUTIVE to sentence on: _____

☒The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SCDOC.
☐The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

FILED
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC
2019 JUN -5 PM 4:53

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐Deferred ☐Def. Waives Hearing ☐Ordered PTUP _____

Total: $ _____ plus 20% fee: _____ $ _____

_____ days/hours Public Service Employment

Payment Terms: _____
☐ Set by SCDPPPS _____

Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ 25.00 beginning 7/5/2019
$ _____ paid to Public Defender Fund
Other: _____

Recipient: _____

*Fine:		$
§14-1-206 (Assessments 107.5 %)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$
§14-1-211(A)(2) (DUI Surcharge)	$100	$ 100.00
§56-5-2995 (DUI Assessment)	$12	$ 12.00
§56-1-286 (DUI Breath Test)	$25	$ 25.00
Proviso (Public Def/Probation)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114(DUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 4.11
TOTAL		$ 141.11

☐ Appointed PD or appointed other counsel, Proviso requires $500 be paid to Clerk during probation and shall be collected before any other fees.

Clerk of Court/ Deputy Clerk Renee N. Elvis
Court Reporter Kay Richardson

Presiding Judge [signature]
Judge Code: 129
Sentence Date: 6/5/19

SCCA/217 (04/2018)